The Self-Defense Cases:

How the United States Supreme Court Confronted a Hanging Judge in the Nineteenth Century and Taught Some Lessons for Jurisprudence in the Twenty-First

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27 *American Journal of Criminal Law* 293 (2000). More by Kopel on the Second Amendment in the 19th century.

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I. Introduction

From 1893 to 1896, the United States Supreme Court handed down a series of decisions involving self-defense and the carrying and use of firearms for self- defense. These cases laid the foundation for a 1921 opinion, authored by Justice Oliver Wendell Holmes, that became the most important armed self-defense case in American legal history, upholding and extending the right to armed self-defense. In these Self-Defense Cases, the Supreme Court fought out a bitter confrontation with Federal District Judge Isaac Parker, the presiding judge in all but one of the cases, and a judge who is much admired today by Chief Justice William Rehnquist. [FN1]

Until the 1960s, the 1893-96 period was the Supreme Court's greatest period of activism against capital sentences. The Self-Defense Cases raise the issues that are still important as our judiciary enters the Twenty-First Century: accusations that appellate judges who reverse capital convictions are "soft on crime" and use "technicalities" to mask their personal opposition to the death penalty, the limits of how far appellate judges can go in restraining a zealous trial judge, whether ethnic minorities or uneducated people can receive a fair trial or a fair appeal, and the scope of the right to use deadly force for protection. An additional issue is whether *295 narrowing the right of self-defense is an advance for civilization or an assault on civil liberty. As we wrestle with all of these issues today, it would be wise for us to study how an earlier generation of judges dealt with these questions.

Today, the Supreme Court of 1893-96 is remembered principally for their unprincipled political decision in Plessy v. Ferguson, [FN2] which claimed that state-imposed racial segregation was not intended to be insulting to blacks. [FN3] It may be startling then, to modern readers, to discover a string of cases in which the Court stood up again and again for the rights of blacks, American Indians, and other outsiders. What made the Court so energetic in its desire to vindicate the rights of certain criminal defendants? Do the Court's decisions from that era offer any guidance for modern judges who confront issues in capital cases very similar to what the 1893-96 Court faced?

The Self-Defense Cases have received almost no scholarly attention, even from specialists in the Supreme Court's historical treatment of death penalty or criminal law. Chief Justice Rehnquist's tribute essay on Judge Parker criticizes the Supreme Court for reversing Parker so often on "legal technicalities," [FN4] but the essay does not address the particular issues in the Self-Defense Cases. The most recent biographies of Chief Justice Fuller [FN5] and Justice Harlan [FN6] ignore the cases, while an earlier Harlan biography devotes only two pages to all of the Court's criminal law

work for this period. [FN7] A biography of Justice David Brewer provides a similarly brusque treatment, [FN8] and none of the biographies examine the Self-Defense Cases apart from the rest of the Court's criminal jurisprudence. This article aims to bring some needed attention to the Self-Defense Cases, and to use them to develop some lessons for modern jurisprudence.

Part II of this article details the jurisdictional developments that, for the first time in the Supreme Court's history, suddenly forced the justices to begin reviewing ordinary capital convictions. Part III examines each of the Self-Defense Cases from the 1890s, in turn, as well as a 1921 case, Brown v. United States, [FN9] that resolved one issue on which the Self-Defense Cases had created some ambiguity. Responding to Chief Justice Rehnquist's article praising Judge Parker, Part IV offers some suggestions for what the Self-Defense Cases teach about good judging and about how to think about judges.

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II. Jurisdiction and Background

Before discussing the individual cases, a key part of the factual background is needed. Of the Self-Defense Cases the Court heard in 1893-96, all but one came from a single federal district court, the Western District of Arkansas. [FN10] This court was located in Fort Smith, Arkansas, near the Oklahoma state line. At the time, Oklahoma was Indian Territory. [FN11] The jurisdiction of the Western District of Arkansas did not include the western part of the state of Arkansas, but it did include 74,000 square miles of Indian Territory, stretching all the way west to Colorado. [FN12] As Indian Territory, Oklahoma was under the jurisdiction of the federal courts for all crimes committed there, except for crimes committed against Indians by Indians. [FN13] Thus, many of the Self-Defense Cases contain introductory paragraphs establishing that the alleged crime occurred on Indian Territory, and that either the perpetrator or the victim was not Indian. [FN14] The Fort Smith court had been established because of concerns that juries within the Indian Territory would not be willing to hand down convictions.[FN15]

The federal district judge for the Western District of Arkansas, the court with jurisdiction over Indian Territory in Oklahoma, was Judge Isaac C. Parker. Despite Chief Justice Rehnquist's praises, [FN16] the titles of Judge Parker's biographies say it all: Hanging Judge; [FN17] He Hanged Them High: An Authentic Account of the Fanatical Judge Who Hanged Eighty-Eight *297Men; [FN18] and Hell on the Border; He Hanged Eighty-Eight Men. [FN19] Parker sentenced 88 men to be hanged by the neck until dead. [FN20] Judge Parker's court was nationally famous, and he presided over trials of notorious outlaws such as Belle Starr. [FN21] President Theodore Roosevelt's Attorney General, Philander C. Knox, observed: "Judge

Parker. . . tried and sentenced to death more murderers than any judge who ever sat within the limits of the United States." [FN22]

Due to a drafting error in an 1877 statute, defendants in Judge Parker's court could not appeal to a Circuit Court of Appeals. [FN23] The Fort Smith court was granted the powers of a Circuit Court of Appeal, which inadvertently made Judge Smith the appellate judge of his own cases. [FN24] The error was corrected in 1889 by a statute which created a distinct federal circuit for the Western District of Arkansas. [FN25] More significantly, for purposes of this article, all federal defendants sentenced to death were given a right of direct appeal to the United States Supreme Court, via a writ of error. [FN26] The statute was apparently enacted because of congressional concerns about Judge Parker's arbitrariness. [FN27] Two years later, Congress followed up with the Judiciary Act of 1891 (also known as the Evarts Act, or the Circuit Court of Appeals Act). [FN28] This Act created the modern Circuit Courts of Appeals, with final appellate authority, except for capital or other infamous crimes. [FN29] Before 1891, the Supreme Court had no general appellate jurisdiction for federal criminal cases. [FN30]

In 1896, the Congress stripped Parker's Western District of Arkansas of its jurisdiction of cases in the Indian Territory, [FN31] and Parker retired from the bench. [FN32] In 1897 Congress enacted a bill titled "An Act To Reduce The Cases In Which The Death Penalty May Be Inflicted." [FN33] The new law cut *298 the number of federal capital offenses to only five and made the death penalty discretionary even for those cases. [FN34] By the time that Parker retired, the Supreme Court had reviewed forty-four of Parker's capital sentences, and reversed thirty-one of them. [FN35] In the appeals of Parker's death sentences, a defendant's chances before the Supreme Court had a great deal to do with whether he was invoking his right to self-defense. Nine defendants from Parker's court raised appeals involving self-defense; eight of them won reversals. [FN36] One of them won a reversal again, after a second trial. [FN37] Thus, when the Supreme Court reviewed a Parker capital case which did not involve self-defense, the Supreme Court reversed in twenty-two out of thirty-five cases.

The late Nineteenth Century was a period when the death penalty was widely accepted, especially for use against outlaws, such as those who often fled other parts of America to take up residence in Oklahoma. But Judge Parker's zeal for hanging went too far, as he repeatedly forced juries to bring in guilty verdicts against people who were defending themselves against criminal attack. Today, Judge Parker's most notable fan appears to be Chief Justice Rehnquist. Besides writing a tribute law review essay to the Judge, [FN38] Justice Rehnquist in his opinions has cited Parker's expertise in Indian law, and has approvingly quoted the Hanging Judge's statement, "I never hanged a man. It is the law." [FN39] But according to the Supreme

Court of the 1890s, too much what Judge Parker did was not the law - Parker infringed on the right to self-defense.

I refer to these cases collectively as the Self-Defense Cases, since they form a coherent group of cases involving common issues, like the Passenger Cases, [FN40] the Selective Draft Law Cases, [FN41] or the Head Money *299 Cases. [FN42] Although a group of cases which becomes known as a set of "Cases" is often decided on the same day, [FN43] sometimes the group may span several years. For example, the Insular Cases, dealing with the application of the Constitution to newly-acquired territories, involved cases decided from 1901 to 1922. [FN44] The Self-Defense Cases involve a dozen cases regarding the use of deadly force, all decided between 1893 and 1896, plus one more case from 1921, and can properly be considered part of a coherent set. [FN45]

III. The Cases

A. Gourko v. United States: Carrying a Gun is an Innocent Act

The defendant in Gourko v. United States, [FN46] John Gourko, was a 19-year-old Polish immigrant. [FN47] He lived with his brother, Mike, in a mining camp in the Choctaw Nation. [FN48]Peter Carbo, another Polish immigrant aged 40-45, had a dispute with them over certain loads of coal, which he claimed the Gourko brothers had filched. [FN49] According to a witness, Carbo threatened "to shoot John like a dog." [FN50] Carbo was easily capable of violence - he weighed 200 pounds, was very strong, and was considered dangerous. [FN51] John Gourko, weighing only 135 pounds, was considered delicate "and was deemed a quiet, peaceable boy." [FN52]

*300 One holiday, Carbo confronted John Gourko near a post office, shaking a fist in his face and screaming at him. [FN53] Witnesses feared that Carbo would kill John on the spot. [FN54]About half an hour later, there was a confrontation between Carbo and John Gourko in a billiard hall. [FN55] They argued and then went outside. [FN56] Gourko fired his pistol once over Carbo's head, then twice to the body, killing him. [FN57]

The Supreme Court's opinion was written by Justice John Marshall Harlan. [FN58] It is only natural that the Court's first decision vindicating a fundamental right would be written by Justice Harlan. Today, Harlan is best remembered for his dissent in Plessy v. Ferguson, [FN59] and is one of only twelve Supreme Court Justices to be rated "great." [FN60] Too often, Harlan's human-rights opinions came in the form of a dissent, as in the case of O'Neil v. Vermont, [FN61] where Harlan failed to convince the Court to determine whether a sentence of fifty-four years at hard labor for liquor law violations constituted cruel and unusual punishment in violation of the Eighth Amendment. [FN62] But in Gourko, Harlan enjoyed the rare pleasure of authoring a human-rights opinion for a unanimous Court. [FN63]

Justice Harlan noted that Gourko's act might have been lawful self-defense, but that was not the precise issue that had come to the Supreme Court. [FN64] Instead, the question was the validity of Judge Parker's instructions to the jury about the difference between premeditated murder and manslaughter. [FN65] Judge Parker had told the jury that Gourko's carrying *301 of a handgun could be considered evidence of premeditated intent to kill, even if the carrying was purely for self-defense. [FN66]

Justice Harlan, writing for a unanimous Court, disagreed, stating that

"the jury were not authorized to find him guilty of murder because of his having deliberately armed himself, provided he rightfully so armed himself for purposes of self-defence, and if, independently of the fact of arming himself, the case tested by what occurred on the occasion of the killing was one of manslaughter only." [FN67]

Justice Harlan's sympathy for Gourko may have had some basis in Harlan's own life. When Harlan was a young man, his cousin (also named John Harlan) was prosecuted for killing a local character who, Justice Harlan later recalled, "advanced upon John as if to attack him." [FN68] John Harlan (the cousin, not the future Justice) drew a pistol and killed the attacker. [FN69]During and after the trial (which resulted in an acquittal on grounds of self- defense), the deceased's "gang" had well-known intentions to kill cousin John Harlan at the first opportunity.[FN70] Thus, John Harlan (the future Justice) and two other men kept a constant guard on their cousin. During this time, the two men and the future Justice "were heavily armed." [FN71]Justice John Harlan was also personally familiar with non-criminal reasons for carrying firearms. [FN72]

Gourko's conviction and death sentence were reversed and he was granted a new trial. [FN73] He pled guilty to manslaughter, and was sentenced to four years in prison. [FN74]

B. Starr v. United States: Even Criminals May Use Deadly Force in Resisting Attacks by Law Enforcement Officers

May a citizen use deadly force to resist an assault by a peace officer who has not announced that he is a peace officer? In Starr v. United States, [FN75] the Supreme Court answered affirmatively.

*302 After an arrest warrant was issued for Henry Starr, a Cherokee Indian, and others, for forfeiting bond regarding an alleged larceny, Deputy U.S. Marshall Henry E. Dickey summoned Floyd Wilson, an ordinary citizen, to join Dickey as his posse. [FN76] Marshall Dickey and Wilson went to Starr's neighborhood, where they hid inside a house. [FN77] When Starr rode by on horseback, Dickey and Wilson pursued him. [FN78] According to

eyewitness testimony, Starr eventually stopped and dismounted, holding a gun in his hand with the muzzle facing down.[FN79] Wilson yelled, "Hold up; I have a warrant for you." [FN80] Starr yelled back, "You hold up." [FN81]

Wilson jumped from his horse, raised his gun to his shoulder, and fired at Starr. [FN82] Starr then shot back and hit Wilson. [FN83] Wilson drew his revolver, firing it four times at Starr.[FN84] Starr then ran up to Wilson and shot him dead at point-blank range. [FN85] Starr picked up Wilson's lever-action rifle, but found that it was not working. [FN86] Marshall Dickey then fired at Starr and missed. [FN87] The Marshall's horse ran away, as did Starr's. [FN88] Starr eventually grabbed Wilson's horse and fled. [FN89]

At common law, it was well-settled that if a person was attacked by a peace officer, and the person did not know that the attacker was a peace officer acting with a proper warrant, the person could resist the attack. [FN90] If necessary, deadly force was permitted. [FN91] Whether, in the particular facts of the case, Starr thought that he was being lawfully arrested, or thought that he was being criminally attacked was, of course, a question for a jury to resolve. [FN92]

At trial, Judge Parker instructed the jury that since Starr was a bond-jumper, he could not claim self-defense. [FN93] Chief Justice Melville Fuller, writing for a unanimous Supreme Court, disagreed:

The motive of the accused in being where he was had nothing to do with the question of his right of self-defense in itself; and the unlawfulness of his previous conduct formed, in itself, no element in the solution of that question, but was to be considered *303 only in so far as it threw light on his belief that his arrest was sought by the officer. [FN94]

The Court concluded by pointing out the importance of the trial judge not favoring one side or another in jury instructions. [FN95] Following a new trial, Starr was convicted and sentenced to fifteen years. [FN96]

Today, violence in effecting arrests is common. This trend is in part the result of militarized police-units effecting nighttime "dynamic entries" (violent break-ins) to serve drug warrants, as well as similarly militarized street-crime units. [FN97] The Starr case reminds us that even scurrilous characters retain their right to use deadly force in self-defense against attackers who do not properly announce themselves as law enforcement officers.

C. Thompson v. United States: There is Nothing Wrong with Carrying a Rifle for Protection

The Gourko decision was announced in April of 1894, [FN98] and the Starr case in May of that same year. [FN99] Seven months later, in Thompson v. United States, [FN100] the Supreme Court again emphasized its

determination not to let Judge Parker draw adverse inferences about an individual because of his exercising the right to bear arms.

Thomas Thompson was a seventeen-year-old farmboy. [FN101] Half a mile away lived Charles Hermes, who made threats to kill Thompson if he came near the Hermes farm. [FN102] One afternoon, Thompson was sent to deliver a bundle to a woman who lived a few miles away. [FN103] The only road to the woman's house went by the Hermes farm. [FN104] Passing by the farm, Thompson got into a heated argument with Hermes, who repeated his threats to kill Thompson. [FN105] After delivering the bundle, Thompson, realizing that the only road home was the road that ran by the Hermes property, borrowed a Winchester rifle. [FN106]

*304 As Thompson rode home, Hermes's sons called out to Thompson. [FN107] One of the sons, Charles Hermes, started towards a gun that was propped on a fence. [FN108] Thompson, believing that Hermes intended to kill him, shot Hermes first, and then fled on horseback. [FN109] Charged with murder, Thompson pleaded self-defense. [FN110]

In the Thompson trial, Judge Parker instructed the jury that they were free to conclude that Thompson had provoked the trouble, and therefore lost his right to self-defense. [FN111]According to Judge Parker, Thompson could be viewed as the instigator of the confrontation because he had armed himself and returned to a place where he knew Hermes would be.[FN112] Similarly, the judge instructed the jurors to the effect that they should not convict Thompson of manslaughter, rather than murder. [FN113] By arming himself, Thompson had shown the kind of deliberation and premeditation which amounts to murder. [FN114]

Quoting at length from the Gourko case, the Supreme Court unanimously reversed Thompson's conviction because of the defective jury instructions. [FN115] Merely being armed and traveling by the only road available could not possibly be considered evidence that Thompson wanted to provoke trouble or that he intended to kill Hermes. [FN116]

The Court concluded that the trial court's error "is in the assumption that the act of the defendant in arming himself showed a purpose to kill formed before the actual affray." [FN117] That same error was found in the instructions regarding the right of self-defense in Gourko. [FN118] Thompson was freed, and was not retried. [FN119]

The Court's unanimous opinion was written by Justice George Shiras, Jr. [FN120] The next year, Justice Shiras joined a dissent which highlighted his concerns about the abusive power of judges - concerns which had perhaps been exacerbated by the cases coming from Arkansas. In Sparf v. United States, [FN121] the Court considered another set of abusive jury instructions. The majority of the Court held that juries do not need to be told that they

have a legal right to vote their conscience in order to acquit a defendant who is technically guilty. [FN122] Justice Horace Gray dissented with Justice Shiras *305 joining. [FN123] The Gray dissent observed: "[b]ut, as the experience of history shows, it cannot be assumed that judges will always be just and impartial...." [FN124] In a comment certainly reflective of the Court's view of Judge Parker, Gray and Shiras noted that many judges "occupied in the administration of criminal justice are apt, not only to grow severe in their sentences, but to decide questions of law too unfavorably to the accused." [FN125]

In support of juries being told about their right to vote their conscience, Gray and Shiras affirmed the right of armed resistance to abusive government and extolled the jury as an institution that could prevent the need for armed resistance. [FN126] Gray and Shiras quoted Theophilus Parsons, whom they described as "a leading supporter of the constitution of the United States in the convention of 1788, by which Massachusetts ratified the constitution, appointed by President Adams, in 1801, attorney general of the United States, but declining that office, and becoming chief justice of Massachusetts in 1806." [FN127] Arguing in favor of the proposed federal Constitution, Parsons had explained that jury rights would prevent the people from having to use force against a potentially oppressive federal government:

'The people themselves have it in their power effectually to resist usurpation, without being driven to an appeal to arms. An act of usurpation is not obligatory; it is not law; and any man may be justified in his resistance. Let him be considered as a criminal by the general government; yet only his fellow-citizens can convict him. They are his jury, and, if they pronounce him innocent, not all the powers of congress can hurt him; and innocent they certainly will pronounce him if the supposed law he resisted was an act of usurpation.' [FN128]

As Justice Shiras understood, restraints on trial judges - whether the restraints are imposed by appellate courts or by juries - are not contrary to law and order. Indeed, such restrictions help assure the peaceful continuation of constitutional government by protecting the fairness of criminal trials.

D. Beard v. United States: There is No Duty to Retreat Before Using Deadly Force

In Beard v. United States, [FN129] the Supreme Court took up an issue which would reach its culmination in a 1921 case [FN130] - victims of a criminal attack *306 have no duty to retreat before using lawful deadly force. In that case, three brothers - Will Jones, John Jones, and Edward Jones - went to the farm of their uncle, Mr. Beard, to retrieve a cow that he possessed.[FN131] One of the Jones brothers carried a shotgun. [FN132] Beard drove them away from his farm, telling them that

they could have the cow (which used to belong to their long-dead mother) if a court said that the cow belonged to them. [FN133]

Will Jones made public statements that he would either get the cow from the Beard farm, or he would kill Beard. [FN134] Beard was informed of the threats. [FN135] The Jones brothers returned to the Beard farm, armed with pistols. [FN136] At about the same time, Beard returned from town to his farm, bearing the shotgun he always carried when away from his farm. [FN137] The three brothers attacked Beard, but in the struggle Beard disarmed them all without firing a shot. [FN138] In the course of the struggle, Beard hit Will Jones on the head with the shotgun, inflicting a wound from which he later died. [FN139]

When Beard was tried for murder, the trial judge, Parker, correctly instructed the jury that Beard could not lawfully kill someone just to prevent the person from stealing a cow. [FN140] But then Judge Parker offered several instructions that Justice Harlan, writing for a unanimous Supreme Court, found to be incorrect. Judge Parker told the jury that a person cannot claim self-defense if he goes out looking for trouble. [FN141] The Court agreed with that general statement, but found the instruction improper in the case at hand. [FN142] Beard had merely carried a gun on his own property, and gone out to confront thieves who had illegally entered his property to tell them to leave. [FN143] The Court found that Beard's conduct could not possibly be considered provocative. [FN144]

But the trial court made an even worse error. Judge Parker told the jury that even if Beard had the right to use self-defense against an attack by the Jones brothers, Beard could not defend himself if Beard had the ability to retreat safely. [FN145]

The law was clear that people did not have to retreat from their own homes when attacked. [FN146] Beard, though, was on his farmland, not in his *307 home. [FN147] The Supreme Court rejected the trial court's distinction between the home and the rest of a person's land. [FN148] The Court reviewed various decisions from state courts, and from British and American legal commentators, all of which said that victims have no duty to retreat. [FN149] Thus, the Court stated:

[Beard] was not obliged to retreat, nor to consider whether he could safely retreat, but was entitled to stand his ground, and meet any attack upon him with a deadly weapon, in such a way and with such force as, under all the circumstances, he, at the moment, honestly believed, and had reasonable grounds to believe, were necessary to save his own life, or to protect himself from great bodily injury. [FN150]

Quoting from leading state supreme court cases, Justice Harlan explained that a man is not obliged to flee from an assailant. [FN151] Indeed, "the tendency of the American mind seems to be very strongly against the

enforcement of any rule which requires a person to flee when assailed." [FN152]

In rejecting a duty to retreat, the Supreme Court was following a very strong trend from Nineteenth Century American state courts - a trend which rejected the medieval English doctrine requiring "retreat to the wall." [FN153] Several years later, the Minnesota Supreme Court suggested that one reason for the abandonment of the retreat doctrine had been the spread of firearms:

The doctrine of 'retreat to the wall' had its origin before the general introduction of guns. . . . It would be good sense for the law to require in many cases, an attempt to escape from hand to hand encounter with fists, clubs, and even knives. . .while it would be rank folly to so require when experienced men, armed with repeating rifles, face each other in an open space, removed from shelter, with intent to kill or do great bodily harm. [FN154]

Of course, technological changes were not the only issue. A bold, young nation, sure of its rising power, thought, as the Wisconsin Supreme Court wrote, that self-defense was no mere privilege, but rather a "divine right." [FN155] The doctrine of retreat "may have been all right in the days of chivalry, so called," but it had nothing to do with American legal principles. [FN156]

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E. Allison v. United States: Self-Defense is for Juries to Evaluate, Not for Judges to Exclude

The decedent in Allison v. United States, [FN157] William Allison, was a divorced and viciously abusive father who had repeatedly threatened to kill his ex-wife and her children. [FN158] He had just been released from prison after serving a one-year sentence for attempting to shoot one of his sons. [FN159] Allison was known to carry a pistol and threaten others with it.[FN160]

Five or six days after Allison had come by his former family's home, brandishing a pistol and threatening to murder them all, he encountered his twenty-year-old son, John Allison, at a barn.[FN161] John Allison stepped aside to let his father pass by, but the father walked straight at his son. [FN162] Only a few steps away, William Allison reached into his pocket as if to draw a pistol. [FN163] The son promptly drew his Winchester, and killed William Allison with three shots. [FN164]

At trial, John Allison testified in his own defense, explaining why he had been afraid that William Allison was about to kill him. [FN165] Trial judge Isaac Parker instructed the jury that John Allison's testimony about his fear of a deadly attack was not "tangible" or "real," since anyone who was accused

of murder would claim self-defense. [FN166] Chief Justice Melville Fuller's opinion for the unanimous Supreme Court found the instruction clearly erroneous. [FN167]

Another error, said the Court, was similar to Parker's error in Beard. [FN168] Judge Parker had instructed the jury that if the defendant carried a gun with the intent to find and kill a particular person, the defendant was guilty of murder, and could not claim self-defense. [FN169] Chief Justice Fuller found this instruction to be erroneous for the same reason as in Beard: there was no evidence that the defendant was looking for someone to kill - the encounter with the man who attacked the defendant had been purely by chance. [FN170] Chief Justice Fuller noted that John Allison had not even been *309 carrying the gun for self-defense, but had been returning from a hunting expedition. [FN171]

Judge Parker had told the jury that the earlier threats made by William Allison could be considered evidence that John Allison harbored a grudge against William Allison, and was planning to stalk him and murder him. [FN172] Chief Justice Fuller found this instruction also to be outrageous and unsupported by the evidence. [FN173] Fuller noted that a similar issue had arisen in the Thompson case. [FN174] Granted a new trial, John Allison entered a plea bargain for manslaughter, [FN175] and was sentenced to seven years, five months in prison. [FN176]

For the first time, in one of the Self-Defense Cases, the Supreme Court began to express some irritation with "the hanging judge." The penultimate paragraph of the Court's opinion condemned Judge Parker's tendency of "animated argument" and "digression," and the judge's "forensic ardor," which combined to leave the jury "without proper instructions" and which invaded the "appropriate province" of jury fact-finding. [FN177]

Typically, Supreme Court holdings which reverse the action of a lower court critique the lower court's reasoning; it is very rare for the Court to criticize a trial judge personally. The Supreme Court's sharp and direct concluding remarks in Allison indicate just how strongly the Court was dissatisfied with Parker's hostile attitude towards self-defense.

F. Wallace v. United States: Prior Threats by an Attacker are Relevant to a Defendant's Use of Deadly Force

Of the Self-Defense Cases from the 1893-96 period, Wallace v. United States [FN178] is the only one not arising from the Western District of Arkansas. [FN179]

Wallace involves a killing that took place on the Wyandotte Indian Reservation in Kansas. [FN180] Jerry Wallace, the defendant, lived on the *310 Wyandotte Reservation with his wife, Jane. [FN181] There was an on-going boundary dispute between Wallace and the owner of the neighboring

farm, Alexander Zane, who also happened to be Wallace's father-in-law. [FN182]

One morning, Zane, along with his fifteen-year-old son and three other men, trespassed onto the Wallace farm, noisy and drunk, and began erecting fence posts on the property. [FN183]Wallace told them to leave, but they did not. [FN184] Half an hour later, Wallace - carrying a double-barreled shotgun - and his wife came out and again told the trespassers to leave. [FN185] "Damn you, I will kill you," answered Alexander Zane. [FN186] What happened next was disputed, but when it was over, Jerry Wallace had a serious stab wound inflicted by fifteen-year-old Noah Zane, and Noah Zane was dead from Wallace's shotgun. [FN187]

When Wallace was prosecuted for murder, the trial court refused to allow him to call several witnesses who had heard Alexander Zane, a notoriously violent and dangerous man, threaten to kill Wallace, including on the day before the incident. [FN188] Wallace was likewise prevented from testifying about what he had thought and feared during the confrontation with Zane. [FN189]

Writing for a unanimous Supreme Court, Chief Justice Fuller reversed the conviction. [FN190] The jury should have been allowed to hear the evidence about Zane's prior threats, said the Chief Justice, since the evidence was related to whether Wallace reasonably feared that Zane was about to attack him. [FN191]

Explicating the law of self-defense, Chief Justice Fuller explained that even if Wallace had been legally wrong in using a gun to threaten Zane and his gang into leaving the Wallace farm, Wallace still had a right to defend himself against a deadly attack by the gang. [FN192] "Nor was the mere fact that Wallace procured the gun," the Chief Justice continued, to be considered a reason not to consider the threats made against Wallace. [FN193] Citing the Gourko, Allison, and Beard decisions, Chief Justice Fuller explained that carrying a gun was a reasonable response to threats. [FN194]

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G. Alberty v. United States: No Duty to Retreat when Confronting a Spouse's Paramour

Alberty v. United States [FN195] returned the Supreme Court to reviewing capital convictions from the Western District of Arkansas.

After a long analysis about whether the federal court properly had jurisdiction in this case, Justice Henry Billings Brown's opinion for the unanimous Supreme Court got to the factual heart of the case. Alberty, the defendant, was separated from his wife, and she had moved into a boarding house. [FN196] One night, Alberty saw a teenager named Phil Duncan trying to climb a ladder into Mrs. Alberty's bedroom window. [FN197] When Alberty

called out to Duncan, Duncan attacked Alberty with a knife, and Alberty then killed Duncan in self-defense. [FN198]

One or two days after the killing, Alberty moved to Kansas City, then to St. Louis, and began living under a different name. [FN199] Years passed before a former prisoner who recognized Alberty turned him in to the police. [FN200]

At trial, Judge Parker told the jury that Alberty's "flight" should be considered virtually conclusive proof of guilt. [FN201] Judge Parker told the jury that Alberty could only engage in self-defense if Alberty could not retreat safely. [FN202] Citing the Beard case, the Supreme Court ruled that Alberty was "not bound to retreat, but may use such force as necessary to repeal the assault." [FN203]

The Supreme Court reversed. [FN204] While the evidence of flight could be considered, flight by itself was hardly sufficient to prove guilt, wrote Justice Brown. [FN205] Innocent people also may want to avoid the humiliation and expense of a criminal trial, or may flee for other reasons unrelated to guilt. [FN206] In a new trial, Alberty was acquitted. [FN207] He moved back to St. Louis for good. [FN208]

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The 1963 case of Wong Sun v. United States, [FN209] which established that arrests require just as much probable cause as is necessary to obtain a search warrant, [FN210] relied in part on Alberty. [FN211] In Wong Sun, a police officer tried to gain admittance to a Chinese laundry at 6 a.m., first by claiming to be a customer trying to pick up clothes, and then changing his story and saying he was with the police. [FN212] The laundry owner ran away, and the government claimed that the owner's flight helped establish the probable cause that allowed the officer to arrest the owner. [FN213] Not so, replied Justice William Brennan's majority opinion. Quoting Alberty, Justice Brennan observed "men who are entirely innocent do sometimes fly from the scene." [FN214]

H. Acers v. United States: Judge Parker is Affirmed

In Acers v. United States, [FN215] the defendant Acers was charged with assault with intent to kill after he hit Joseph Owens on the head with a stone. [FN216] Acers claimed that he was acting in self-defense after an argument and was afraid that Owens was about to kill him. [FN217]

The Supreme Court reviewed Judge Parker's instructions on four issues and found them all to be correct: intent can be inferred from actions, a rock can be a "deadly weapon" depending on how it is used, self-defense must be based on a "present danger," and self-defense must be based on a "reasonable" belief in a present danger. [FN218]

Defense counsel had also complained that Judge Parker's instructions might have created the mistaken belief in the jury that deadly force in self- defense could only be used against a deadly attack. [FN219] Reviewing the jury instructions, the Court found that the instructions, taken as a whole, did not limit self-defense only to cases involving a danger to life. [FN220]

This is the first of the Self-Defense Cases to be non-unanimous. [FN221] Justice Shiras, author of the Thompson opinion, [FN222] dissented without *313 explanation. [FN223] Judge Parker complained bitterly that the Supreme Court was out to reverse him no matter what, but the Acers case shows that when Judge Parker behaved properly, the High Court affirmed him.

I. Allen v. United States: Self-Defense Decisions Can be Made in a Hurry; There is a Duty to Retreat on Public Property

In Allen v. United States, [FN224] fourteen-year-old Alexander Allen killed eighteen-year-old Phillip Henson. [FN225] The killing took place on Cherokee Territory, thus bringing the case before Judge Parker's court. [FN226] The facts of the encounter between Allen and his friend, and Henson and his two friends, were disputed. [FN227] Allen claimed that Henson and Henson's two friends attacked Allen and his friend with sticks, intending to kill them. [FN228] Henson's two surviving friends claimed that Allen had attacked them with a pistol. [FN229]

At trial, Judge Parker instructed the jury:

When can a man slay another? When can he sit as a judge passing upon the law, and a jury passing on the facts, and then as a jury applying the law to those facts, and finding a verdict, and then acting again as the court and entering up judgment, and then going out as a marshal or sheriff and executing that judgment, all at the same time - determining the law - determining the facts as a judge, jury, and executioner all at the same time? This is a mighty power in the hands of the citizen. [FN230]

When the Allen case came to the Supreme Court in 1893, an opinion by Chief Justice Fuller reversed the conviction because of Judge Parker's implication that someone making a spur-of-the-moment decision to defend his life against immediate peril "must be regarded as exercising the deliberation of a judge in passing upon the law and of a jury in passing upon the facts, in arriving at a determination as to the existence of the danger." [FN231] In other words, a person who has to make an instant life-or-death decision should not be held to the same standard as a judge or jury, who have limitless time to consider the facts.

Judge Brewer dissented from the reversal. [FN232] He thought that Judge Parker's reference to acting as judge and jury "all at the same time" *314 adequately informed the jury that self-defense decisions had to be made in a hurry. [FN233]

The first conviction having been reversed, Allen was tried again, and convicted again. [FN234] At the second trial, Judge Parker told the jurors that even if they believed Allen's version of the facts (the three white boys had attacked him with willow sticks, intending to kill him), Allen could not claim self-defense since sticks were not "deadly weapons." [FN235] The Supreme Court, in an opinion written by Justice Shiras, reversed because "when a fight is actually going on, sticks and clubs may become weapons of a very deadly character." [FN236] The jury should have been allowed to consider whether, in the facts of the particular case, the attack with sticks was a deadly attack. [FN237]

In addition, wrote the Supreme Court, Judge Parker had made the same error for which he had been reversed in Gourko [FN238] and Thompson [FN239] - telling the jury that Allen's decision to carry a gun for protection was evidence of premeditated intent to murder. [FN240]

Justice Brewer dissented from the decision of the other eight Justices without explanation. [FN241] That Justice Brewer dissented in the two Allen cases is perhaps less surprising than the fact that he joined the Court's opinions in all the prior Self-Defense Cases. As a state judge, a federal court of appeals judge, and then Supreme Court Justice, Brewer "remained rigid to the point of harshness on matters of lawbreaking." [FN242] Indeed, Brewer advocated that the right of criminal appeal be abolished entirely. [FN243] As a judge on the Eighth Circuit, Brewer had become familiar with Judge Parker and the wildness of the Indian Territory. [FN244] When Brewer was under consideration for promotion to the High Court, Judge Parker wrote a letter to President Harrison recommending Brewer's appointment. [FN245] Brewer was hardly shy about dissenting - of all the justices on the Fuller Court, only Harlan dissented more often than Brewer. [FN246] Thus, in the forty-four capital cases from the Parker court that the Supreme Court reviewed from 1890 to 1896, "Brewer proved to be Parker's only consistent friend on the Supreme Court. In case after case he voted to uphold the 'hanging *315 judge's' verdicts and usually found himself dissenting from the reversals ordered by his brethren." [FN247] It is interesting, then, to note that while Brewer was Parker's consistent defender, in the Self-Defense Cases, even Brewer usually voted with the Court majority against Parker. [FN248]

After a second win in the Supreme Court, Allen was given a new trial, convicted again, and sentenced to life in prison. [FN249] The third time around, the Supreme Court upheld the conviction. [FN250]

The instructions upheld by the high Court retread some of the same ground as the Acers jury instructions. [FN251] In regards to self-defense, the Court upheld the instruction that "[t]he law of self-defense is a law of proportions," and therefore deadly force can only be used to repel an attack that endangers life or could cause "great bodily harm." [FN252]

During the trial, Judge Parker told the jury that defendant Allen had a duty to retreat if he could safely, rather than using deadly force. [FN253] The Supreme Court upheld this instruction. The Court distinguished the prior "no duty to retreat" cases based on the circumstances of the case. In Beard, the defendant was on his own land, and in Alberty, the defendant was exercising his legal right to stop another man from having sex with his wife. [FN254] In contrast, Allen was on someone else's property and was not defending any special legal interest.[FN255] Thus, the Allen case blurred the bright- line "no duty to retreat" rule enunciated in Beard. Twenty-five years later, Justice Oliver Wendell Holmes would restore the bright line.[FN256]

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After the killing, Allen had fled. [FN257] Judge Parker told the jury that they could consider Allen's flight, if not properly explained, as evidence against Allen. [FN258] The Supreme Court upheld this instruction since, unlike in Alberty, Judge Parker had not said that flight was virtually conclusive proof of guilt; only one element of evidence to be considered. [FN259]

Justice Stephen Field joined the majority opinion, as he did in all the Self-Defense Cases. Justice Field's strong support for the armed defendants is especially notable in light of his own personal experience. In 1889, an armed man had attempted to assassinate Justice Field. [FN260] As a young state court judge in California during the Gold Rush, Field had carried a handgun openly and made it clear to everyone that he would defend himself under all circumstances. [FN261] For the rest of his life, Field believed that his public display of the ability and intent to use deadly force had saved his life and made any actual resort to force unnecessary. [FN262]

The Allen case has become an important part of modern legal vocabulary, although not for reasons related to self-defense. In the third trial, the jury had told the judge that they were deadlocked. [FN263] Judge Parker instructed the jurors to candidly re-examine their opinions - jurors in favor of conviction should consider whether the pro-acquittal jurors might be right, while jurors in favor of acquittal should consider whether the pro-conviction jurors might be right. [FN264] Today, similar instructions are often given to deadlocked juries and the instruction is known as the "Allen charge." [FN265]

J. Rowe v. United States: Withdrawal from a Fight Revives the Right to Self-Defense

Rowe v. United States [FN266] is the last of the Self-Defense Cases from the 1893-96 period. It too came on appeal from the Western District of Arkansas. [FN267]

Defendant David Rowe, a Cherokee Indian, met Frank Bozeman, a white man, at a hotel supper table. [FN268] Rowe bragged about carrying a gun. [FN269] Later, Rowe and Bozeman met in the hotel lobby, where Bozeman *317 continued to refuse to talk to Rowe, and instead remarked to

someone else (in Rowe's hearing) that Rowe had "too damn much nigger blood" to talk to. [FN270] Rowe kicked Bozeman on the leg and then stepped back to the hotel counter. [FN271] Bozeman responded by attacking Rowe with a knife, cutting him twice on the face.[FN272] Rowe drew his gun and killed Bozeman. [FN273]

Tried and convicted before Judge Parker, [FN274] who gave his usual extremely long jury instructions, [FN275] Rowe appealed to the Supreme Court. The Supreme Court opinion, written by Justice Harlan, called the instructions "well calculated to mislead the jury." [FN276]

At trial, Judge Parker instructed the jury that since Rowe had started the fight, his actions could not be considered self-defense. [FN277] At best, Rowe's crime of murder might be lowered to manslaughter. [FN278] Justice Harlan disagreed. It would have been reasonable for the jury to find that the "first real provocation" had come from Bozeman's "offensive words." [FN279]More significantly, after the kick, Rowe had withdrawn from the fight "in good faith." [FN280] When Rowe left the fight, his right to self-defense was restored. [FN281]

As the Rowe decision details, many state courts had already held that a person who starts a fight may invoke self-defense, if he withdraws from the fight, and the other combatant then attacks him. [FN282] Justice Harlan explained that the jury was not required, but should have been allowed, to find that Rowe's retreat to the hotel front desk amounted to a good-faith withdrawal. [FN283] Evaluating the facts of the particular case was up to the jury, and Judge Parker's instructions had improperly told the jury what conclusion to reach. [FN284]

Judge Parker had also told the jury that Rowe had a duty to avoid the attack "by stepping to one side" or by "paralyz[ing] the arm of his assailant," rather than killing him. [FN285] Justice Harlan found these instructions also erroneous: "[t]he accused was where he had a right to be, and the law did not require him to step aside when his assailant was rapidly advancing with a deadly weapon." [FN286] Additionally, it "was error to make *318 the case depend" on whether Rowe "could have so carefully aimed his pistol as to paralyze the arm of his assailant."[FN287] Justices Brown and Peckham dissented without opinion.

K. Brown v. United States: Detached Reflection Cannot be Demanded in the Presence of an Uplifted Knife

After Judge Parker's retirement, the Supreme Court moved on to other issues. [FN288] The next, and last, time the Court heard one of the major Self-Defense Cases was in 1921, in the case of Brown v. United States. [FN289] The decision for the seven-justice majority was written by Justice Oliver Wendell Holmes, Jr. [FN290]

The Brown case began at a federal naval yard in Texas. [FN291] A man named Hermes had twice assaulted Brown with a knife, and warned that the next time, either Hermes or Brown "would go off in a black box." [FN292] One day, Hermes again attacked Brown with a knife; Brown ran to get his coat, which contained a pistol. [FN293] Hermes pursued Brown, and Brown shot him four times, killing him. [FN294] At trial, the judge instructed the jury that Brown had a duty to retreat if he could do so safely, and Brown was convicted. [FN295]

Justice Holmes, a legal historian, traced the duty to retreat rule to an earlier period in English history, when the law did not even recognize a legal right of self-defense. [FN296] "The law has grown," Holmes wrote, "in the *319 direction of rules consistent with human nature." [FN297] This echoed Holmes's observation in The Common Law that "[t]he life of the law has not been logic: it has been experience." [FN298]

As a practical matter, "[d]etached reflection cannot be demanded in the presence of an uplifted knife." [FN299] And, also for practical reasons, declared Holmes, there is no duty to retreat from anywhere that a victim has a right to be. [FN300]

The Brown decision helps explain Holmes's reputation. In contrast to the Self-Defense Cases from 1893-96, the Holmes opinion is brief, even terse, [FN301] and powerfully written. The "detached reflection" sentence has become part of American folk wisdom, further influencing the tendency of the American mind against retreat. [FN302] Holmes was particularly proud of his opinion in Brown. [FN303]

Justice Holmes' opinion in Brown provided a link between the Supreme Court's two greatest civil libertarians of the late Nineteenth and early Twentieth Centuries. Holmes' opinion quoted Justice Harlan's opinion from Beard, and in private correspondence, Holmes wrote approvingly of the anti-retreat view of "old Harlan." [FN304]

Joining the Holmes opinion in Beard was a young new Justice, Louis Brandeis, who later wrote: "[w]e shall have lost something vital and beyond price on the day when the state denies us the right to resort to force.. . ." [FN305] "Holmes scholars have generally ignored Brown v. United States" because the opinion is seen as contradictory to Holmes's "supposedly more enlightened opinions" in free speech and other civil liberty cases. [FN306] Yet as Brown (the leading historian of American violence) recognizes, "to Holmes - as to so many other Americans - the right to stand one's ground and kill in self- defense was as great a civil liberty as, for example, freedom of speech." [FN307] In the early Twenty-First Century, *320 there are still many millions of Americans who cherish their freedom of speech, but who value much more deeply their right to use a firearm or other weapon to defend themselves and their families against predators like Hermes. Justices such as Harlan, Holmes, and Brandeis understood these

Americans and this tendency of the American mind. To the extent that some modern judges do not, the law is delegitimated in the eyes of tens of millions of American citizens.

IV. The Significance of the Self-Defense Cases

A. Judge Parker Fires Back

Judge Parker did not take the Supreme Court reversals with good grace. In a July 1895 interview with the St. Louis Globe-Democrat, he claimed that the Supreme Court was secretly opposed to the death penalty, that the Court used "the flimsiest technicalities" to reverse capital convictions, and that the Supreme Court cases had led directly to increased murders in the Indian Territory:

While crime, in a general way, has decreased very much in the last twenty years, I have no hesitation in saying that murders are largely on the increase. This has been noticeable, chiefly the last two years. I attribute the increase to the reversals of the Supreme Court. These reversals have contributed to the number of murders in the Indian Territory. First of all, the convicted murderer has a long breathing spell before his case comes before the Supreme Court. Then, when it does come before that body, the conviction may be quashed. And wherever it is quashed, it is always upon the flimsiest technicalities. The Supreme Court never touches the merits of the case. As far as I can see, the court must be opposed to capital punishment, and, therefore, tries to reason the effect of the law away. [FN308]

Justice Rehnquist's article on Judge Parker begins with an excerpt from the above quotation and apparently reflects Justice Rehnquist's belief, detailed in the article, that Parker's quote is an accurate summary of modern circumstances. [FN309]

The week after the St. Louis Globe-Democrat interview, Judge Parker convened a grand jury, and, as part of the grand jury charge, inveighed once more against appellate judges and their requirement that trial courts strictly follow the law:

Crime is gaining strength, especially those crimes affecting human life. This is not caused entirely by the failure of the people to enforce the laws. There are other causes and sources. One of our leading newspapers, in commenting upon the trial of Dr. Buchanan, printed an editorial under the head of 'The Laxity *321 of the Law.' The article went on to say that technical pleas of cunning lawyers often defeat justice; that the appellate courts consider alleged flaws and encourage a system of practice of the law entirely in favor of the criminal and against the cause of right; that they never look to the merits of the case, but seem to be co-operating with the unscrupulous attorneys whose object is to circumvent the law. This is as true as the words of Holy Writ. However honest and fair the trial court may be, it is impossible

to bring assassins to merited punishment when appellate courts allow the cases to linger along, and give these murderers an opportunity to take other innocent life in cold blood. [FN310]

A few months later, Judge Parker released a public letter, condemning the Supreme Court's "mania for reversing murder cases" because the "numerous and unwarranted reversals" worked to "embolden the man of blood, thus increasing murder." [FN311] According to Judge Parker, "[t]he appellate court exists mainly to stab the trial judge in the back. . . and enable the criminal to go free." [FN312] Looking back at his career, Judge Parker said that he had given every defendant an opportunity to prove his innocence. [FN313] That the Constitution requires the prosecution to prove guilt, rather than the defendant to prove innocence, was apparently one of the "hair splitting distinctions in favor of the criminal at the expense of life" which Judge Parker so disdained. [FN314] On his deathbed, Parker proposed stripping the Supreme Court of criminal appellate jurisdiction, and giving the cases to a special criminal appellate court, with the new court forbidden to reverse convictions "unless innocence was manifest." [FN315]

Judge Parker's harsh feelings about the supposedly pro-criminal appellate courts were not unique. In 1895, the President of the Illinois State Bar Association delivered a scathing denunciation of criminal justice in Illinois as almost entirely biased in favor of criminals, in part because of appellate judges who were unconcerned about actual guilt or innocence. [FN316]

These claims from 1895 could easily have come from 1995 or any other recent year, including 1983, the year that the Rehnquist essay in honor of Judge Parker was published. [FN317] The complaints that vigilant appellate courts are more concerned with criminals than with victims, that the courts let defendants go on technicalities, and that appellate courts are secretly opposed to the death penalty have a depressingly modern ring. The Self-Defense Cases should remind us how baseless these charges can be. Several of the defendants that the Supreme Court saved from execution were actually innocent; other defendants were later found to be guilty only *322 of manslaughter and not of a capital offense. And the Supreme Court unanimously affirmed capital sentences in other cases during the same period. [FN318]

Nor were the Supreme Court's reversals in the Self-Defense Cases based on technicalities. They were based on issues which went to the core of guilt or innocence, such as the right of self-defense, the implications which could be drawn from carrying a firearm, the "duty" to retreat, and the conclusions to be drawn from flight. These self-defense issues also went to the heart of civil liberty, as civil liberty was understood by the Court and the American public.

Of the twenty-three capital defendants from Judge Parker's court (not just the Self-Defense Cases defendants) who were given a new trial by the Supreme Court, nine were acquitted, thirteen were convicted on lesser

charges, and one was turned over to the Choctaw Indian nation. [FN319] In other words, not one of the cases which the Supreme Court reversed could, under a fair trial, support a conviction with the original capital sentence. One can only shudder at how many of the 7,419 criminal convictions in Judge Parker's court [FN320] (only a few of which, as post-1889 capital sentences, were reviewed by the Supreme Court) were likewise erroneous.

Although Parker and his supporters framed their arguments to appeal to constitutional values, by claiming that appellate reversals "usurp the jury's functions," [FN321] it was Parker, with his three-hour jury instructions which amounted to instructions to convict [FN322] who had usurped the role of the jury.

Why was Judge Parker so hostile to self-defense? One reason is that he considered self-defense, like other justifications, to be too often invoked by wrong-doers who were trying to fool the jury. Perhaps Judge Parker also believed that the territory under his jurisdiction - like England in the Twelfth Century - was too wild to afford the "indulgence" of allowing justification for homicide. Claire Oakes Finkelstein observes that "[a] State lacking in normative authority must rule to a great extent by coercion and force, rather than by persuasion and appeal." [FN323]But "a State that has preserved its normative authority can legislate in a way that gives maximum scope to the liberties of its citizens." [FN324]

The Indian Territory of Judge Parker was known as "Robber's Roost" because criminals from all over the nation fled there, as extradition was nearly impossible. [FN325] The "normative authority" of the federal government *323 was nearly non-existent. In contrast, the normative authority of the federal government in the rest of the United States in the 1890s was not subject to serious questioning. While Judge Parker appears to have viewed the self-defense issue as a luxury which could not be afforded, the Supreme Court (reflecting the views of most of the public) felt secure enough to treat self-defense as a fundamental liberty.

To most Americans in the late Nineteenth or early Twenty-First Centuries, a homicide law which did not recognize a justification or excuse for self-defense was inconceivable. But the common law of England under the early Norman Kings did not recognize self-defense. [FN326] Nor, as a practical matter, does the law of England today - an Englishman who uses a lawfully-owned firearm to protect his family from a violent felon invading his home will find himself prosecuted for attempted murder; [FN327] an Englishwoman who carries a pen- knife in her purse with the intent to use it against a murderer or rapist will be prosecuted for the "offensive carrying" of a weapon. [FN328] Here in America, it is not at all uncommon to hear district attorneys lobbying state legislatures in favor of restrictions on the legal scope or the practical means to self-defense. In respected law journals, one can read Garrett Epps calling for abolishing the self-defense right because self-defense is invoked in court

by criminals at least as often as it is used as a defense by the innocent, and because Epps believes that self-defense is merely socially constructed, and not a natural right. [FN329] The Self-Defense Cases remind us that the civil liberty of being able to raise a self-defense justification in a criminal case is, like all other civil liberties, contingent on the determination of the public and the judiciary to protect that liberty.

B. What Made the Defendants in the Self-Defense Cases so Sympathetic to the Supreme Court?

What made these defendants so unusually sympathetic to the Court? Why did all but one of the self-defense defendants win a Supreme Court reversal, whereas only about half of the rest of the capital appellants from Judge Parker's court did?

The personal background of the defendants in the Self-Defense Cases certainly did not endear them to the Court. The 1890s were the most *324 racially oppressive decade in American history since the abolition of slavery. White supremacy was the legal or de facto rule almost everywhere, including at the Supreme Court. In 1896, the Supreme Court upheld government-required racial segregation in public transportation in the infamous case of Plessy v. Ferguson. [FN330] Justice Harlan was the only dissenter. [FN331] Justice Henry Billings Brown, author of Plessy, also wrote the first of the Insular Cases, which denied constitutional protections to newly acquired overseas American territories. [FN332] The Insular Cases were explicitly premised on racism, for the Constitution was not suitable for governing "alien races, differing from us in religion, customs, laws, methods of taxation and modes of thought." [FN333] In 1897, the utopian novelist Henry O. Morris complained, "[i]t is not possible for a poor man to get into the Supreme Court." [FN334] Likewise, black novelist Sutton E. Griggs wrote in 1899 that "[t]he Supreme Court of the United States may be relied upon to sustain any law born of prejudice against the Negro, and to demolish any law constructed in his interest." [FN335]

Yet in a time when everyone except native-born white males were very much second-class citizens, the Supreme Court reached out to protect the rights of outsiders: the Gourkos were Poles who did not speak English, [FN336] Wallace was a "half-breed" Cherokee, [FN337] Thompson was a Cherokee who did not speak English, [FN338] Beard was a poor white, [FN339]Allen a black teenager, [FN340] and Rowe an argumentative Indian. [FN341]

All of the defendants whose convictions were reversed had been carrying guns. [FN342] The United States in the 1890s had virtually no gun controls aimed at whites, but there were extensive controls aimed at people of color. [FN343] Much of the South had gun licensing and registration statutes *325 which were never enforced against whites, but were rigorously applied

against blacks. [FN344] But the Supreme Court went out of its way to take up cases of the poor and minorities carrying guns for self-defense, even when the "victims" of the self-defense were white people. The Court's willingness to transcend racial, class, language, and ethnic barriers says a great deal about the Court's intense attachment to the right of armed self-defense. When victims shot attackers, the Court's sympathies were aroused, again and again, and usually unanimously.

C. Do the Self-Defense Cases Have Any Modern Application?

Today, "federal common law is an important part of our tradition of case-by-case adjudication, allowing the judiciary to resolve unforeseen issues fairly; federal common law shows no sign of diminishing in importance." [FN345] Thus, The Self-Defense Cases, like any other Supreme Court interpretations of the common law, remain available as persuasive, if not necessarily binding, precedents for any court which must consider common law self-defense issues.

As shown by Chief Justice Rehnquist's article praising Judge Parker and criticizing the Supreme Court's reversals of so many of his capital sentences, the issues raised in the Self-Defense Cases are with us today. [FN346] Do appellate courts prevent the swift administration of justice? Do they free defendants (especially capital defendants) on technicalities and thereby undermine respect for the law? [FN347] As long as the fundamentals of due process (such as the right to counsel and to a jury) are respected, should *326 appellate courts second-guess what happened at trial? Chief Justice Rehnquist argues that swift punishment - especially capital punishment for murder - is the only true alternative to the vigilantism and mob violence that results when frustrated citizens see criminals getting away with murder. [FN348]

Stated at a high level of generality, Chief Justice Rehnquist's point is hard to dispute. Yet in this article's examination of the Self-Defense Cases, we have seen case after case in which a man sentenced to death was not properly convicted. In not one of the Self-Defense Cases did re-trial result in a capital sentence. In several cases, the defendant turned out to be entirely innocent.

Near the end of Chief Justice Rehnquist's article, he argues:

[t]he principle that moral imperatives embodied in enacted criminal laws must be obeyed, and their transgressors be apprehended and punished. While this principle extends to all enacted laws, it has particular force with respect to the laws punishing murder. Such laws have an authority all their own; they reflect more than the transient view of a particular legislature. [FN349]

The principle is indisputable, but Chief Justice Rehnquist's mode for implementing the principle is wrong. Judge Parker's preferred mode of swift punishment, following a trial with a defense attorney and a jury, did not properly implement the moral imperatives embodied in the law against

murder. Several of the people whom Judge Parker sentenced to die were, in fact, people who had been protecting themselves against murder. Had the Supreme Court not intervened, the federal government would have been the perpetrator, not the punisher, of murder.

The same moral imperative which is reflected in laws against murder requires that victims be able to use whatever force is necessary to defend themselves and their families from murder attempts. If the state ignores the moral imperative of self-defense, the state loses its moral authority. While Judge Parker did not respect the moral right to self-defense, I do not believe that Chief Justice Rehnquist intended any similar disrespect in principle. But in practice - as the Self-Defense Cases illustrate - to shield capital convictions from thorough appellate review is to undermine the moral imperative of the protection of innocent human life.

The Fuller Court in the 1890s was perhaps the intellectually strongest Supreme Court in history. "There has never been a quadumvirate that has surpassed in ability that of Stephen Field, Samuel F. Miller, Joseph P. Bradley, and John Marshall Harlan," observes the Oxford History of the *327 Supreme Court. [FN350] The Court's Self-Defense Cases form an important part of the legacy of these brilliant judges.

Today, Judge Parker's courtroom has been restored and is part of the Fort Smith National Historic Site. But the best part of Judge Parker's legacy is not found in his courtroom. The legacy instead comes from the decisions of the United States Supreme Court to intervene on behalf of minorities and the poor, to thwart Judge Parker time and again, to save from execution innocent men who had lawfully defended themselves against violent attack, and to vindicate the fundamental human right of self-defense and the auxiliary right of carrying arms for defense. [FN351] As appellate courts today face criticism from commentators who claim that enforcing constitutional and common-law rights is "soft on crime" and inappropriately "liberal," Americans would do well to remember the Self-Defense Cases - in which one of the most brilliant, and most conservative [FN352] Supreme Courts in American history refused to let itself be frightened by similar criticism.

Footnotes

[FNa1]. Research Director, Independence Institute, Golden, Colorado, http://i2i.org. Adjunct Professor, New York University School of Law, 1998-1999. J.D. 1985, University of Michigan; B.A. in History 1982, Brown University. I would like to thank Nelson Lund, Tim Lynch, Andrew McClurg, and Eugene Volokh for their helpful comments.

[FN1]. See generally William H. Rehnquist, 'Isaac Parker, Bill Sykes and the Rule of Law,' 6 U. Ark. Little Rock L.J. 485 (1983) (defending Parker against contemporary criticisms of his administration of justice).

[FN2]. 163 U.S. 537 (1896).

[FN3]. See id. at 548-49. See also generally Nelson Lund, The Constitution, the Supreme Court, and Racial Politics, 12 Ga. St. U. L. Rev. 1129 (1996) (describing Plessy as unprincipled and result-oriented).

[FN4]. Rehnquist, supra note 1, at 489.

[FN5]. See James W. Ely, Jr., The Chief Justiceship of Melville W. Fuller, 1888-1910 (1995).

[FN6]. See Tinsley E. Yarbrough, Judicial Enigma: The First Justice Harlan (1995).

[FN7]. See Loren P. Beth, John Marshall Harlan: The Last Whig Justice 258-59 (1992).

[FN8]. See Michael J. Brodhead, David J Brewer: The Life of a Supreme Court Justice, 1837-1910, at 111-12, 164 (1994).

[FN9]. 256 U.S. 335 (1921).

[FN10]. Nine of the Self-Defense Cases were appeals from the Western District of Arkansas. See Allen v. United States, 150 U.S. 551 (1893); Starr v. United States, 153 U.S. 614 (1894); Thompson v. United States, 155 U.S. 271 (1894); Allison v. United States, 160 U.S. 203 (1895); Beard v. United States, 158 U.S. 550 (1895); Acers v. United States, 164 U.S. 388 (1896);Alberty v. United States, 162 U.S. 499 (1896); Gourko v. United States, 153 U.S. 183 (1896); Rowe v. United States, 164 U.S. 546 (1896). Only one of the Self-Defense Cases from 1893-96 was from another district, the District of Kansas. See Wallace v. United States, 162 U.S. 466 (1896).

[FN11]. The Cherokee and other Indian nations from the Southeastern United States had been forced to move to Oklahoma during the presidency of Andrew Jackson. The arduous march on the forced relocation was known as 'The Trail of Tears.' See William G. McLoughlin, After The Trail Of Tears 1-10 (1993).

[FN12]. See Samuel W. Harman, Hell on the Border; He Hanged Eighty-Eight Men 88 (1898). In 1883, part of the court's Indian jurisdiction was reassigned to federal courts in Texas and Kansas due to the heavy caseload at Fort Smith. See Fred Harvey Harrington, Hanging Judge (1951) (examining Judge Issac Charles Parker of the Old West's Indian Territory who was infamous for his merciless sentences on bandits and outlaws).

[FN13]. These crimes were tried in Indian Tribal Courts. The Indian Major Crimes Act of 1885 addressed Indian-Indian offenses in Indian Territory. See Act of March 3, 1885, ch. 341, § 9, 23 Stat. 482 (codified as amended at 18 U.S.C. § 1153 (2000)).

[FN14]. See, e.g., Starr, 153 U.S. at 615 (noting that the victim was 'a white man and not an Indian'); Beard, 158 U.S. at 550 (same); Gourko, 153 U.S. at 183 (same); Rowe, 164 U.S. at 547 (same).

[FN15]. See Harman, supra note 12, at 88.

[FN16]. Chief Justice Rehnquist argues that sensational biography titles mischaracterize Judge Parker. See Rehnquist, supra note 1, at 486. This article will argue that Chief Justice Rehnquist is wrong to defend Parker's reputation.

[FN17]. See Harrington, supra note 12.

[FN18]. See Homer Croy, He Hanged Them High: An Authentic Account of the Fanatical Judge Who Hanged Eighty-Eight Men (1952).

[FN19]. See Harman, supra note 12.

[FN20]. See Henry Sinclair Drago, Outlaws on Horseback 114 (1964).

[FN21]. See Croy, supra note 18, at 156.

[FN22]. Harrington, supra note 12, at 7.

[FN23]. See Harman, supra note 12, at xxiv.

[FN24]. See id.

[FN25]. See id.

[FN26]. See Act of Feb. 6, 1889, ch. 113, § 6, 25 Stat. 656-57. The first case came to the Court in 1891. See Erwin C. Surrency, History of the Federal Courts 219 (1987). The right of direct appeal was abolished in 1911. See Act of Mar. 3, 1911, ch. 240, § 128, 36 Stat. 1133, 1157.

[FN27]. See Surrency, supra note 26, at 219-20.

[FN28]. Act of March 3, 1891, ch. 517, § 5, 26 Stat. 827.

[FN29]. See id.

[FN30]. See id.

[FN31]. See Act of March 1, 1895, ch. 145, § 9, 28 Stat. 693, 697 (giving criminal jurisdiction for remaining portions of Oklahoma to selected federal courts). The 1896 law completed a stripping of the court's Indian jurisdiction that Congress had begun several years earlier. See, e.g., Act of March 1, 1889, ch. 333, 25 Stat. 783 (giving federal court in Oklahoma jurisdiction over minor criminal offenses).

[FN32]. Judge Parker died on November 17, 1896, only a few weeks after Congress had finished destroying his court. See Harrington, supra note 12, at 194.

[FN33]. Act of Jan. 15, 1897, ch. 29, 29 Stat. 487 (1898).

[FN34]. See id. at § 3.

[FN35]. See Brodhead, supra note 8, at 111. Of these reversals, sixteen resulted in no subsequent prosecution, or in an acquittal at re-trial; seven resulted in manslaughter convictions; seven in murder convictions. See Harrington, supra note 12, at 180 n.1 (considering only thirty of the thirty-one reversals).

[FN36]. See Allen v. United States, 165 U.S. 373 (1893) (reversing defendant's conviction); Brown v. United States, 150 U.S. 93 (1894) (same); Gourko v. United States, 153 U.S. 183 (1894) (same); Hickory v. United States, 160 U.S. 408 (1894) (same); Starr v. United States, 153 U.S. 614 (1894) (same); Thompson v. United States, 155 U.S. 27 (1894) (same); Allison v. United States, 160 U.S. 203 (1895) (same); Smith v. United States, 161 U.S. 85 (1896) (same). Only one defendant's conviction was affirmed. See Acers v. United States, 164 U.S. 388 (1896).

[FN37]. See Allen v. United States, 157 U.S. 675 (1894) (reversing Allen's second conviction).

[FN38]. See Rehnquist, supra note 1, at 490-98 (admiring Parker's firm approach to executing justice as compared to vigilantism and to the lengthy modern appeals process).

[FN39]. Coleman v. Balkcom, 451 U.S. 949, 962 (1980) (Rehnquist, J., dissenting in denial of certiorari) (quoting Samuel W. Harman, Hell on the Border 91 (Jack Gregory & Rennard Strictland eds., 1971)); Oliphant v. Suqamish Indian Tribe, 435 U.S. 191, 199-200 (1978) (citing Ex parte Kenyon, 14 F. Cas. 353 (W.D. Ark. 1878) (No. 7,720)).

[FN40]. See Smith v. Turner, 48 U.S. 283 (1849) (holding state tax on alien passengers arriving from foreign ports invalid).

[FN41]. Arver v. United States, 245 U.S. 366 (1918) (regarding the ability of the government to subject certain male citizens to selective military service). For criticism of these cases on Second Amendment grounds, see Akhil Reed Amar, The Bill of Rights as a Constitution, 100 Yale L.J. 1131, 1173 (1991).

[FN42]. Edye v. Robertson, 112 U.S. 580 (1884) (regarding Congressional power over immigration).

[FN43]. The License Cases is an example of a group of cases decided on a single day. See Thurlow v. Massachusetts, 46 U.S. 504 (1847) (sustaining state requirement for license to import liquor; states are sovereign within their spheres); see also License Tax Cases, 72 U.S. 462 (1866) (involving a federal internal revenue act requiring a license to engage in certain trades and businesses).

[FN44]. See Balzac v. People of Puerto Rico, 258 U.S. 298 (1922) (involving a Sixth Amendment jury trial in Puerto Rico); Ocampo v. United States, 234 U.S. 91 (1914) (involving a Fifth Amendment grand jury in the Philippines); Dorr v. United States, 195 U.S. 138 (1904) (reconsidering jury trial as a

necessary procedure in the Philippines); Hawaii v. Mankichi, 190 U.S. 197 (1903) (discussing grand jury and jury trial in Hawaii); De Lima v. Bidwell, 182 U.S. 1 (1901) (reevaluating action in New York under Customs Administration Act of 1890); Dooley v. United States, 183 U.S. 151 (1901) (discussing constitutionality of Foraker Act); Downes v. Bidwell, 182 U.S. 244 (1901) (reversing application of the Revenue Clauses of the Constitution to Puerto Rico).
Further, the three Legal Tender Cases spanned 1869-71. See Legal Tender Cases, 79 U.S. 457 (1870) (addressing whether notes were valid before the Legal Tender Acts); Hepburn v. Griswold, 75 U.S. 603 (1870) (concerning the validity of U.S. notes). Similarly, the Reapportionment Decisions span two years. See Wesberry v. Sanders, 376 U.S. 1 (1964) (affirming 1931Georgia apportionment statute; Baker v. Carr, 369 U.S. 186 (1962) (reviewing a Fourteenth Amendment case in Tennessee).

[FN45]. Fred Inbau, at the beginning of his long career as a criminal law scholar, authored an article which grouped together and discussed the doctrinal evolution in a subset of the cases involving the lack of a duty to retreat before using deadly force in a situation involving a firearm. See Fred E. Inbau, Firearms and Legal Doctrine, 7 Tulane L. Rev. 529, 534-37 (1932-33) (discussing self-defense cases Beard, Rowe, Allen, and Brown.)

[FN46]. 153 U.S. 183 (1894).

[FN47]. See id. at 183.

[FN48]. See id.

[FN49]. See id. at 184-85.

[FN50]. Id. at 183.

[FN51]. See id. at 184.

[FN52]. Id.

[FN53]. See id.

[FN54]. See id.

[FN55]. See id. at 185.

[FN56]. See id. at 186.

[FN57]. See id. at 187.

[FN58]. See id. at 189.

[FN59]. 163 U.S. 537 (1896).

[FN60]. See Albert P. Blaustein & Roy M. Mersky, Rating Supreme Court Justices, 58 A.B.A. J. 1183, 1183 (1972) (presenting the results of a survey of 65 law school deans and professors of law, history, and political science evaluating United States Supreme Court justices).

[FN61]. 144 U.S. 323 (1892).

[FN62]. See id. at 370-71 (Harlan, J., dissenting). Justice Field dissented separately in that case. See id. at 337 (Field, J., dissenting). Among Harlan's other notable human-rights dissents are: Twining v. New Jersey, 211 U.S. 78, 114 (1908) (Harlan, J., dissenting) (arguing for incorporation of Fifth Amendment's prohibition on compulsory self- incrimination); Patterson v. Colorado ex rel. Attorney General of Colorado, 205 U.S. 454, 463 (1907) (Harlan, J., dissenting) (arguing for application of the First Amendment to the states, and that the First Amendment bans more than just prior restraints); Maxwell v. Dow, 176 U.S. 581, 605 (1900) (Harlan, J., dissenting) (arguing for incorporation of grand juries and prohibition of criminal juries of less than twelve through the Fourteenth Amendment). In a dissent (joined by Justice William B. Woods) arguing that nontribal Indians were citizens and had a right to vote, Harlan pointed out that nontribal Indians were required to perform the duties of citizenship: paying taxes and serving the militia. See Elk v. Wilkins, 112 U.S. 94, 110-11 (1884) (Harlan, J., dissenting). Accordingly, it was unjust to deprive nontribal Indians of the benefits of citizenship. See id. (Harlan, J., dissenting).

[FN63]. See Gourko, 153 U.S. at 189. The next time Harlan would get to write a human-rights majority opinion was in 1897. See Chicago B. & Q. Ry. Co. v. City of Chicago, 166 U.S. 226, 258 (1897) (holding that the Fourteenth Amendment due process clause bans uncompensated takings by states).

[FN64]. See Gourko, 153 U.S. at 190.

[FN65]. See id. at 191.

[FN66]. See id.

[FN67]. Id.

[FN68]. Beth, supra note 7, at 20.

[FN69]. See id.

[FN70]. See id.

[FN71]. Id.

[FN72]. During Harlan's childhood, he 'learned to shoot and hunted such game as there was.... everybody in Kentucky could shoot, generally with a rifle. ' Id. at 10. As a Supreme Court Justice, Harlan was a popular and frequent guest at the annual 'Shad Bake River Excursion' put on by the Bar Association of the District of Columbia. Id. at 171. There, Justice Harlan played baseball, bowled, and 'shot at the mark in the shooting gallery.... [H]e hit the bull's eye in the shooting gallery practically every time he tried and this with the greatest ease.' Id. at 171 (footnotes omitted). During the Mexican War, Harlan, age 13, joined the Kentucky militia, although the unit never left the state. See id. at 16. Harlan joined the militia again during the

Civil War, this time serving as a captain, where he organized a regiment of the Union Army and saw extensive combat duty as the commander of the regiment. See id. at 45-46, 51-67. While pursuing Morgan's Raiders, Harlan and his men nearly shot one of Morgan's officers, Horace H. Lurton, who would join Harlan on the Supreme Court in 1909. See id. at 176.

[FN73]. See Gourko, 153 U.S. at 192.

[FN74]. See Harman, supra note 12, at 179.

[FN75]. 153 U.S. 614 (1894).

[FN76]. See id. at 615.

[FN77]. See id.

[FN78]. See id.

[FN79]. See id. at 616.

[FN80]. Id.

[FN81]. Id.

[FN82]. See id. at 615.

[FN83]. See id. at 615-16.

[FN84]. See id. at 616.

[FN85]. See id.

[FN86]. See id.

[FN87]. See id.

[FN88]. See id.

[FN89]. See id.

[FN90]. See id. at 619-20.

[FN91]. See id.

[FN92]. See id.

[FN93]. See id. at 623-24.

[FN94]. Id. at 624

[FN95]. See id. at 625.

[FN96]. See Harman, supra note 12, at 172.

[FN97]. Much of the militarization of local law enforcement is the result of federal subsidies for militarization, including grants for 'community policing.' See generally David B. Kopel,Militarized Law Enforcement: The Drug War's Deadly Fruit, in After Prohibition: An Adult Approach to Drug Policy 61 (Timothy Lynch ed., 2000).

[FN98]. See Gourko v. United States, 153 U.S. 183 (1894).
[FN99]. See Starr, 153 U.S. at 614.
[FN100]. 155 U.S. 271 (1894).
[FN101]. See id. at 274.
[FN102]. See id. at 274-75.
[FN103]. See id. at 275.
[FN104]. See id.
[FN105]. See id.
[FN106]. See id.
[FN107]. See id.
[FN108]. See id.
[FN109]. See id. at 275-76.
[FN110]. See id. at 276.
[FN111]. See id.
[FN112]. See id.
[FN113]. See id. at 278.
[FN114]. See id.
[FN115]. See id. at 278-83.

[FN116]. See id.
[FN117]. Id. at 283.
[FN118]. See id.
[FN119]. See Harman, supra note 12, at 179.
[FN120]. See Thompson, 155 U.S. at 273.
[FN121]. 156 U.S. 51 (1895).
[FN122]. See id. at 106.
[FN123]. See id. at 110 (Gray, J., dissenting).
[FN124]. Id. at 176 (Gray, J., dissenting).
[FN125]. Id. at 174 (Gray, J., dissenting).
[FN126]. See id. at 144 (Gray, J., dissenting).
[FN127]. Id. at 143 (Gray, J., dissenting).
[FN128]. Id. at 144 (Gray, J. dissenting) (citations omitted).
[FN129]. 158 U.S. 550 (1895).
[FN130]. See infra notes 287-305 and accompanying text.

[FN131]. See id. at 551.

[FN132]. See id.

[FN133]. See id. at 552.

[FN134]. See id.

[FN135]. See id.

[FN136]. See id.

[FN137]. See id.

[FN138]. See id. at 552-53.

[FN139]. See id. at 553.

[FN140]. See id. at 554-55.

[FN141]. See id. at 555-58.

[FN142]. See id. at 558.

[FN143]. See id.

[FN144]. See id.

[FN145]. See id. at 555, 559.

[FN146]. See id. at 559-60.

[FN147]. See id. at 552.

[FN148]. See id. at 559-60.

[FN149]. See id. at 560-61.

[FN150]. Id. at 564.

[FN151]. See id. at 560-61 (citing Erwin v. State, 29 Ohio St. 186, 199 (Ohio 1876) (holding that there is no obligation to retreat in order to claim self defense).

[FN152]. Id. at 561-62 (quoting Runyan v. State, 57 Ind. 80, 84 (Ind. 1877) (finding no reason for the jury to consider the doctrine of retreat when defendant backed into wall and approached by threatening persons)).

[FN153]. Id. at 563.

[FN154]. State v. Gardner, 104 N.W. 971 (Minn. 1905) (holding that retreat is not required if it would expose defendant to danger of being shot).

[FN155]. Miller v. State, 119 N.W. 850, 857 (Wis. 1909).

[FN156]. Id. at 857-58.

[FN157]. 160 U.S. 203 (1895).

[FN158]. See id. at 203.

[FN159]. See id.

[FN160]. See id. at 205.

[FN161]. See id. at 204.

[FN162]. See id.

[FN163]. See id. at 205.

[FN164]. See id.

[FN165]. See id.

[FN166]. Id. at 209.

[FN167]. See id. at 212. Chief Justice Fuller ought to be beloved by law review editors everywhere, since he wrote the first Supreme Court majority opinion to cite a law review article. See Chicago, Milwaukee & St. Paul Ry. Co. v. Clark, 178 U.S. 353, 365 (1899) (citing James Ames, Two Theories of Consideration, 12 Harv. L. Rev. 515, 521 (1899)).

[FN168]. See supra notes 129-56 and accompanying text.

[FN169]. See Allison, 160 U.S. at 211.

[FN170]. See id. at 212.

[FN171]. See Allison, 160 U.S. at 212.

[FN172]. See id. at 213-14.

[FN173]. See id. at 215-16.

[FN174]. See id. at 216.

[FN175]. See Harman, supra note 12, at 362-63.

[FN176]. See id. at 179.

[FN177]. Allison, 160 U.S. at 217. Parker's instructions in capital cases sometimes consumed three hours. 'This gave him a chance to show the strength of the prosecution's case and to suggest that it would be fitting and proper to order the defendant hanged.' Harrington, supra note 12, at 130. He encouraged juries to believe government witnesses, no matter how scurrilous their character, and to disbelieve defense witnesses. See id. at 134. For a Supreme Court reversal of a Parker conviction based on such instructions, see Hicks v. United States, 150 U.S. 442 (1893).

[FN178]. 162 U.S. 466 (1896).

[FN179]. The Wallace case arises out of the District Court of the United States for the District of Kansas. See id. at 466.

[FN180]. See id. at 467.

[FN181]. See id.

[FN182]. See id.

[FN183]. See id.

[FN184]. See id. at 468.

[FN185]. See id.

[FN186]. Id.

[FN187]. See id.

[FN188]. See id. at 469-70.

[FN189]. See id.

[FN190]. See id. at 478.

[FN191]. See id. at 477.

[FN192]. See id. at 474.

[FN193]. Id.

[FN194]. See id. at 474-75.

[FN195]. 162 U.S. 499 (1896).

[FN196]. See id. at 506.

[FN197]. See id. Duncan had threatened Alberty's life several times before, had driven him out of a barber shop once with a weapon, and had shot a bullet into the door of a house where Alberty was staying. See Harman, supra note 12, at 459.

[FN198]. See Alberty, 162 U.S. at 506-07.

[FN199]. See Harman, supra note 12, at 459-60. While working as a porter at the St. Louis train station, Alberty once carried bags for Judge Parker! See id. at 460.

[FN200]. See id. While Alberty was gone, his daughter grew up, and his wife remarried. See id. at 460-61. One of Judge Parker's biographers notes the parallels between Alberty's life and the Irish epic poem 'Enoch Arden.' Id. at 461. "Well, well,' said Alberty, 'Here I am after so many years to find my child grown out of my recollection and married; my wife is now another man's wife and the only thing remaining the same, through changes of friends and enemies, is that old charge of murder." Id. at 461.

[FN201]. See Alberty, 162 U.S. at 509.

[FN202]. See id. at 507.

[FN203]. Id. at 508.

[FN204]. See id. at 510-11.

[FN205]. See id.

[FN206]. See id. at 511. Amazingly, Wigmore's treatise on evidence quoted Judge Parker's flight instruction in Allen as a model statement of

well- settled principles; Wigmore did not even mention that the Judge Parker's instructions had been found defective by the Supreme Court. See 2 John Henry Wigmore, A Treatise on the Anglo-American System of Evidence 112-13 (3d ed. 1940).

[FN207]. See Harman, supra note 12, at 180.

[FN208]. See id. at 462.

[FN209]. 371 U.S. 471 (1963).

[FN210]. See id. at 482.

[FN211]. See id. at 484.

[FN212]. See id. at 474.

[FN213]. See id. at 482.

[FN214]. Id. at 483 n.10 (citations omitted).

[FN215]. 164 U.S. 388 (1896).

[FN216]. See id. at 389.

[FN217]. See id.

[FN218]. Id. at 390-93.

[FN219]. See id. at 392.

[FN220]. See id. at 392-93.

[FN221]. See id. at 393.

[FN222]. See supra notes 100-28 and accompanying text.

[FN223]. Acers, 164 U.S. at 393.

[FN224]. 150 U.S. 551 (1893).

[FN225]. See id. at 551.

[FN226]. See id.

[FN227]. See id. at 552-54.

[FN228]. See id. at 552-53.

[FN229]. See id.

[FN230]. Id. at 555.

[FN231]. Id. at 561.

[FN232]. See id. at 562 (Brewer, J., dissenting).

[FN233]. Id. at 565-66 (Brewer, J., dissenting).

[FN234]. See Allen v. United States, 157 U.S. 675 (1895).

[FN235]. Id. at 679.

[FN236]. Id. at 675.

[FN237]. See id. at 680.

[FN238]. See supra notes 46-74 and accompanying text.

[FN239]. See supra notes 100-28 and accompanying text.

[FN240]. See Allen, 157 U.S. at 680-81.

[FN241]. See id. at 681 (Brewer, J., dissenting). Justice Brewer often dissented without opinion. See Ely, supra note 5, at 39 n.60.

[FN242]. Brodhead, supra note 8, at 11.

[FN243]. See id. at 178-79.

[FN244]. See id. at 53-54.

[FN245]. See id. at 111.

[FN246]. See id. at 80 (noting that Harlan entered the most dissents, at 283; Brewer was second with 219).

[FN247]. Id. at 111-12.

[FN248]. Of the Self-Defense Cases from Arkansas, Brewer only dissented from anti-Parker majorities two times. See Allen v. United States, 150 U.S. 551, 562 (1893) (Brewer, J., dissenting) (dissenting from the Court's majority opinion); Allen, 157 U.S. at 681 (Brewer, J., dissenting) (same).
Brewer personally seemed to have no objections to using guns. As a Kansas state judge during the Civil War, Brewer was exempt from military service, but he voluntarily joined a local militia company, the 'Lane Rifles,' in which he served as a lieutenant. See Brodhead, supra note 8, at 9. He loved to go hunting in the Far West. See id. at 134. During one trip to Wyoming, Brewer, with 'a straggling growth of chin whiskers, wearing high topped boots, a blue flannel shirt, a broad-brimmed hat and a cartridge belt' was nearly arrested by the local sheriff, who mistook Brewer for a desperado in a recent 'wanted' poster, and who scoffed at the claims of Brewer's companions that Brewer was a Supreme Court Justice. Id. at 135. Brewer's companions saved the Justice from arrest by supplying the sheriff with 'liberal drafts of our camp supply of snake bite antidote,' until the sheriff teetered away on horseback. Id.

[FN249]. See Harman, supra note 12, at 179. Allen's life had been unremittingly harsh, and he became the most difficult prisoner ever housed at Fort Smith, having to be kept in chains most of the time. See id. at 354-57. Cf. generally Fox Butterfield, All God's Children: The Bosket Family and the American Tradition of Violence (1995) (discussing the life of Willie Bosket,

the most difficult prisoner currently in New York State prison, and providing an account of the origin and growth of violence in the United States).

[FN250]. See Allen v. United States, 164 U.S. 493, 502 (1896).

[FN251]. See supra notes 215-23 and accompanying text.

[FN252]. Allen, 164 U.S. at 497.

[FN253]. See id.

[FN254]. See id. at 498.

[FN255]. See id.

[FN256]. See Richard Maxwell Brown, No Duty to Retreat: Violence and Values in American History and Society 30 (1991) (discussing Holmes' decision in Brown v. United States, 256 U.S. 335 (1921), holding that the defendant need not retreat before killing in self-defense).

[FN257]. See Allen, 164 U.S. at 498.

[FN258]. See id.

[FN259]. See id. at 499.

[FN260]. See Cunningham v. Neagle, 135 U.S. 1, 5 (1890) (discussing the attempted murderous assault on Justice Field).

[FN261]. See Brown, supra note 255, at 108 (footnotes omitted).

[FN262]. See id.

[FN263]. See Allen, 164 U.S. at 500.

[FN264]. See id.

[FN265]. See Black's Law Dictionary Pocket Edition 27 (Bryan A. Garner ed., 1996).

[FN266]. 164 U.S 546 (1896).

[FN267]. See id.

[FN268]. See id. at 547.

[FN269]. See id.

[FN270]. Id.

[FN271]. See id.

[FN272]. See id.

[FN273]. See id. at 548.

[FN274]. See id. at 547.

[FN275]. See id. at 549 (noting that the oral charge occupied 27 pages of printed record).

[FN276]. Id. at 554.

[FN277]. See id. at 549

[FN278]. See id.

[FN279]. Id. at 554.

[FN280]. Id. at 555.

[FN281]. See id.

[FN282]. See id. at 546.

[FN283]. See id. at 557.

[FN284]. See id.

[FN285]. Id. at 558.

[FN286]. Id.

[FN287]. Id.

[FN288]. The Court overruled Judge Parker in another important case not involving a capital defendant. A federal statute barred the sale of 'spirituous liquors or wine' to Indians. See Sarlls v. United States, 152 U.S. 570, 571 (1894). Parker held that the prohibition extended to beer, but his decision was reversed by the Supreme Court, which adhered to the plain language of the statute. See id. at 576. 'Spirituous liquors' were, by dictionary definition, distilled (such as rum), and 'wine' was made from grapes. Id. at 572. Beer was neither distilled nor made from grapes. See id. at 576.

[FN289]. 256 U.S. 335 (1921). See generally Fred E. Inbau, Firearms and Legal Doctrine, 7 Tulane L. Rev. 529 (1932-33) (discussing Brown).

[FN290]. See Brown, 256 U.S. at 341. Holmes' ideas on constitutional law were similar to Chief Justice Fuller's. See Sheldon M. Novick, Justice Holmes And The Art Of Biography, 33 Wm. & Mary L. Rev. 1219, 1234 (1992).

[FN291]. See Brown, 256 U.S. at 341.

[FN292]. Id. at 342.

[FN293]. See id.

[FN294]. See id.

[FN295]. See id.

[FN296]. Holmes' views were likely influenced by his extensive combat experience, and the great personal bravery he displayed as a volunteer officer of the Massachusetts Infantry during the Civil War. See Brown, supra note 255, at 31. Holmes was very proud that his own unit 'never ran.' Id. at 35. On May 29, 1864, while Holmes was carrying an important message through Virginia, Holmes and his soldiers suddenly found themselves outnumbered and surrounded by Confederates. See id. at 35. Ordered to surrender,

Holmes instead drew his pistol, and pulled the trigger. See id. Holmes missed, but evaded the rebel soldiers and delivered the message to the Union Army. See id. In an 1884 speech, Holmes recalled the incident as one of the peaks of his life, in which his 'life and freedom' were in peril as he was 'nearly surrounded by the enemy' and had to rely on 'swift and cunning' action (not 'detached reflection') to decide 'can I kill him first?' Oliver Wendell Holmes, 'Memorial Day' Speech (1884), reprinted in The Essential Holmes 82 (Richard A. Posner ed., 1992). Richard Maxwell Brown observes the important parallels between the situation faced by Holmes in 1864, and the situation faced by defendant Brown when Hermes attacked him decades later. See Brown, supra note 255, at 35-36.

[FN297]. Id. at 34.

[FN298]. Oliver Wendell Holmes, Jr., The Common Law 1 (1881).

[FN299]. Brown, 256 U.S. at 343.

[FN300]. See id. at 344.

[FN301]. A study of Supreme Court opinions from 1895 to 1905 found that Holmes' opinions were much shorter than those of any other Justice. See Walter F. Pratt, Rhetorical Style on the Fuller Court, 24 Am. J. Legal Hist. 189, 190 n.5 (1980).

[FN302]. See generally Joseph H. Beale, Jr., Retreat from a Murderous Assault, 16 Harv. L. Rev. 567 (1903) (reviewing English and American doctrine on the duty to retreat in the Nineteenth Century and before)

[FN303]. See Brown, supra note 255, at 32, (citing 1 Holmes-Laski Letters: The Correspondence of Mr. Justice Holmes and Harold J. Laski, 1916- 1935, at 331 (Mark DeWolfe Howe ed., 1953)).

[FN304]. Holmes-Laksi Letters, supra note 303, at 335. '[A] man is not born to run away. [The law] must consider human nature and make some allowances for the fighting instinct at critical moments.' Id. at 335.

[FN305]. The Brandeis Guide to the Modern World 212 (Alfred Lief ed., 1941).

[FN306]. Brown, supra note 255, at 36.

[FN307]. Id. at 36-37.

[FN308]. St. Louis Globe-Democrat, July 1895, reprinted in Harman, supra note 12, at 411-12.

[FN309]. See Rehnquist, supra note 1, at 485.

[FN310]. Harman, supra note 12, at 469-70.

[FN311]. Harrington, supra note 12, at 186.

[FN312]. Id. at 62.

[FN313]. See id. at 63.

[FN314]. Id. at 63, 186.

[FN315]. Id. at 187.

[FN316]. See Harman, supra note 12, at 488-90.

[FN317]. See Rehnquist, supra note 1.

[FN318]. See, e.g., Miller v. Texas, 153 U.S. 535 (1897) (dismissing writ of error for improperly presenting federal question).

[FN319]. See Harman, supra note 12, at 47. This does not include cases in which the defendant was not even re-tried.

[FN320]. See id.

[FN321]. Harrington, supra note 12, at 189.

[FN322]. See id.

[FN323]. Claire Oakes Finkelstein, On the Obligation of the State to Extend a Right of Self-Defense to its Citizens, 147 U. Pa. L. Rev. 1361, 1398 (1999).

[FN324]. Id.

[FN325]. Rehnquist, supra note 1, at 489.

[FN326]. See 2 Frederick Pollock & Frederic William Maitland, The History of English Law 479 (2d ed. 1899).

[FN327]. See Andrew Pierce, Tories to Propose Action in Intruders, The Times, Jan. 1, 2001, http://www.thetimes.co.uk/article/0,,2-60623,00.html (visited Jan. 9. 2001) (discussing the opposition party proposal to allow use of reasonable force against home invaders).

[FN328]. See Gail Tabor, British Justice a Travesty; Arizonan Won't Visit Again, Ariz. Republic, Nov. 10, 1991, at B1, B6 (discussing the suspended prison sentence of an American woman tourist accused of 'possession of an offensive weapon,' who used a penknife to defend herself against a gang attack in a London subway).

[FN329]. See Garrett Epps, Any Which Way But Loose: Interpretive Strategies and Attitudes Toward Violence in the Evolution of the Anglo-American 'Retreat Rule,' 55 Law & Contemp. Probs. 303, 331 (1992).

[FN330]. 163 U.S. 537 (1896).

[FN331]. See id. at 552 (Harlan, J., dissenting). Justice Brewer did not participate in the case, due to his daughter's death. See id. See also J. Gordon Hylton, The Judge Who Abstained in Plessy v. Ferguson: Justice David Brewer and the Problem of Race, 61 Miss. L.J. 315, 315 (1991) (noting that the death of his daughter was the reason for Justice Brewer's absence from Plessy v. Ferguson). If Brewer had participated, he probably would have

joined Harlan's dissent. See Hylton, supra, at 315 (noting that a general familiarity with Brewer's views suggest that he would have joined Harlan).

[FN332]. See Downes v. Bidwell, 182 U.S. 244 (1901).

[FN333]. Id. at 287. Cf. Talton v. Mayes, 163 U.S. 376 (1896) (stating that the Fifth Amendment is not applicable in tribal courts, due to Indian sovereignty; opinion was later modified by the Indian Bill of Rights of 1968).

[FN334]. Henry O. Morris, Waiting for the Signal 228 (1897).

[FN335]. Sutton E. Griggs, Imperium in Imperio 237 (1899).

[FN336]. See Gourko v. United States, 153 U.S. 183, 183 (1894).

[FN337]. Wallace v. United States, 162 U.S. 466, 467 (1896).

[FN338]. See Thompson v. United States, 155 U.S. 271, 273 (1894).

[FN339]. See Beard v. United States, 158 U.S. 550, 550-51 (1895).

[FN340]. See Allen v. United States, 150 U.S. 551, 552 (1893).

[FN341]. See Rowe v. United States, 164 U.S. 546, 547 (1896).

[FN342]. See Rowe, 164 U.S. at 547; Wallace, 162 U.S. at 468; Beard, 158 U.S. at 552; Gourko v. United States, 153 U.S. 183, 187 (1894); Thompson, 155 U.S. at 275; Allen, 150 U.S. at 552.

[FN343]. See Robert J. Cottrol & Raymond T. Diamond 'Never Intended to Be Applied to the White Population': Firearms Regulation And Racial Disparity - The Redeemed South's Legacy to a National Jurisprudence?, 70 Chi. Kent L. Rev. 1307, 1316-18 (1995) (discussing several states' gun laws in the Eighteenth and Nineteenth Centuries).

[FN344]. See id.; Watson v. Stone, 450 So.2d 700, 703 (1941) (Buford, J., concurring specially) (stating that Florida gun control laws were 'passed for the purpose of disarming the negro laborers... [and] never intended to be applied to the white population.'); see also generally Clayton Cramer, The Racist Roots of Gun Control, 4 Kan. J.L. & Pub. Pol'y. 17 (1995) (stating that the historical record shows that racism underlies gun control laws).

[FN345]. Martha Field, Federal Common Law, in The Oxford Companion to the Supreme Court of the United States 278 (Kermit L. Hall et al. eds., 1992).

[FN346]. See Rehnquist, supra note 1, at 488, 497-98.

[FN347]. Although this article suggests that criticism of modern judges for reversing capital convictions on 'technicalities' is often misplaced, I do not mean to imply that such criticism is never justified. For example, California Supreme Court Justice Rose Bird was justifiably removed from office by the state's voters, because of her obvious determination to prevent the state's death penalty from functioning. See Charles Cooper, Panel Five: Term Limits for Judges?, 13 J.L. & Pol. 669, 676 (1997):

Rose Bird, and some of her colleagues, had voted to reverse sixty-one of the sixty-one death penalties that had come before them. Californians came to the conclusion that that record could not be explained as the neutral application of the rule of law but, rather, had to be understood as the application of the rule of the judge, and so, they called upon the authority that they had reserved to themselves in the Constitution and they threw off a tyrant.
See also John Kurzweil, Rose Bird, Not Quite Ready for Canonization, Cal. Pol. Rev., Jan.-Feb. 2000, at 27.
For a sympathetic portrayal of Bird, see generally John C. Culver, The Transformation of the California Supreme Court: 1977-1997, 61 Albany L. Rev. 1461 (1998).

[FN348]. See Rehnquist, supra note 1, at 492-96.

[FN349]. Id. at 498-99.

[FN350]. Loren P. Beth, Field, Stephen Johnson, in The Oxford Companion to the Supreme Court of the United States, supra note 345, at 289, 290. See Brown, supra note 255, at 108.

[FN351]. Blackstone described 'the right of having and using arms for self-preservation and defence' as one of three rights which were necessary to preserve liberty and free institutions. St. George Tucker, Blackstone's Commentaries with Notes of Reference to the Constitution and Law of the Federal Government 144 (1803).

[FN352]. See Robert E. Gamer, Justice Brewer and Substantive Due Process: A Conservative Court Revisited, 18 Vand. L. Rev. 615, 615 (1965) (describing the 1893-96 Court as 'the most conservative Supreme Court in the history of the land').