

The Unwritten Law: Self-Defense and Homicide in Colonial and Early Maryland, 1634–1850

Introduction

The law of self-defense in the State of Maryland, from its colonial origins through the mid-19th century, stands as a remarkable testament to the enduring power of the English common law tradition. Unlike the majority of American states, Maryland has never codified its law of self-defense in a comprehensive statute.¹ This report will demonstrate that this is not a modern anomaly but a direct and remarkably consistent continuation of its colonial legal DNA. The legal framework governing the right to use force in self-preservation was a direct importation of English common law principles, articulated with profound influence by jurists such as Sir Edward Coke, Sir Matthew Hale, Sir William Hawkins, and Sir William Blackstone. These principles were formally received upon the colony's founding, constitutionally enshrined after its independence, and consistently applied by Maryland's courts. This created a stable and enduring legal framework centered on the critical distinctions between justifiable and excusable homicide, the situational duty to retreat, and the absolute sanctuary of the Castle Doctrine.

To fully comprehend the law of self-defense as it existed in Maryland before 1850, one must first conduct a thorough exegesis of the foundational English treatises that constituted the legal universe of the colonial lawyer and judge. This report will begin by dissecting this inherited intellectual framework, focusing on the nuanced categories of homicide that governed any claim of self-defense. It will then document the formal reception of this common law into Maryland's own legal system, first through colonial acts and later through its foundational state constitution. The core of the analysis will be an examination of the primary sources of Maryland case law—the early court reporters—to reveal how these venerable doctrines were applied in the practical context of criminal proceedings. The report will conclude by synthesizing these findings into a comprehensive portrait of the law of self-defense as it stood in Maryland at the mid-19th century, revealing a body of law that could not be found in a single code but had to be excavated from centuries of precedent and

scholarly commentary.

Section I: The English Common Law Foundation of Homicide and Self-Defense

The legal landscape of colonial and early Maryland was shaped not by local legislative innovation but by the direct inheritance of a sophisticated and deeply rooted English common law system. The right of self-defense was not a standalone concept but was inextricably embedded within the common law's intricate classification of homicide. To the 18th-century lawyer, a claim of self-defense was an argument that a killing, while acknowledged, was not felonious because it was either justifiable or excusable. Understanding these distinctions, as articulated by the great legal commentators, is essential to understanding the law as it was applied in Maryland.

1.1 The Spectrum of Homicide: Justifiable, Excusable, and Felonious

The common law did not treat all killing as a single offense. Instead, it meticulously categorized homicide into three distinct branches: justifiable, excusable, and felonious.² Justifiable homicide carried no legal guilt whatsoever and resulted in a complete acquittal. Excusable homicide, while not criminal, implied a minor degree of fault and, in the early common law, carried the penalty of forfeiture of goods, requiring a royal pardon for full absolution. Felonious homicide was the category for culpable killings and was itself subdivided into murder and manslaughter.²

The critical element distinguishing murder from manslaughter was the concept of "malice aforethought".⁴ Murder was a killing committed with a premeditated and malicious intent, either expressed (a clear intent to kill) or implied (resulting from an act of extreme recklessness or during the commission of a felony).⁴ Manslaughter, by contrast, was an unlawful killing without malice, typically occurring in the "heat of passion" arising from a sudden quarrel or adequate provocation.⁷ A plea of self-defense operated within this framework, seeking to prove that the act was either justifiable—negating criminality entirely—or excusable, which negated the malice required for a murder conviction and placed the act outside the realm of felonious homicide.

1.2 Justifiable Homicide: Slaying Without Fault

Justifiable homicide was a killing commanded or permitted by the law, rendering the slayer entirely blameless.² The great treatises established two primary categories for this form of homicide.

The first category was a killing in the execution of public justice. This referred to the lawful execution of a condemned criminal. The works of Hale and Blackstone are emphatic about the strict procedural requirements: the killing must be pursuant to a lawful sentence from a competent court and carried out by the proper officer in the prescribed manner. Any deviation—such as a judge acting without authority or an officer changing the method of execution—transformed the act into murder.²

The second, and for this report more significant, category was homicide committed in the prevention of a forcible and atrocious crime. This is the heart of what modern jurisprudence terms "perfect" self-defense. The authorities were unanimous that any person, whether a public officer or a private citizen, could lawfully kill to prevent a violent and forcible felony, such as murder, robbery, arson, burglary, or rape.² This right was absolute, and, critically, it imposed no duty to retreat. An individual facing a felonious aggressor was entitled to stand his ground and repel force with force, even to the point of killing the assailant.³

This distinction is fundamental to understanding the historical roots of self-defense law. The modern legal and political debate over "Stand Your Ground" laws is often framed as a recent departure from a traditional "Duty to Retreat." This framing is historically incomplete. The common law itself contained both principles, creating a powerful internal tension based on the nature of the threat. The common law did not have a single, universal rule for all confrontations. Instead, it employed a bifurcated standard: when faced with an imminent, violent felony (the basis for justifiable homicide), the actor could stand their ground. When involved in a "sudden brawl" or "chance-medley" (the basis for excusable homicide), the actor was required to retreat. The modern debate, therefore, is not an invention of new principles but a centuries-long argument over which of these two distinct common law standards should apply more broadly to confrontations in public spaces.

1.3 Excusable Homicide: The Doctrine of *Se Defendendo* and its Consequences

Distinct from justifiable homicide was excusable homicide, which covered killings that the law excused from felony but did not hold entirely blameless. The primary form of this was

homicide *se defendendo*—literally, "in self-defense"—which applied to a killing in self-preservation during a "sudden affray" or "chance-medley".² Unlike the blameless actor in a justifiable homicide, the slayer in

se defendendo was seen as having some degree of fault, as they were a participant in a brawl, even if they were not the initial aggressor.

The central and indispensable element of this doctrine was the duty to retreat. Before using deadly force, the party claiming *se defendendo* was required to have "retreated to the wall" or fled as far as safety permitted to avoid the confrontation. Failure to retreat rendered the killing, at a minimum, manslaughter.² The initial aggressor in the conflict was generally barred from claiming the defense.¹⁰

Critically, a successful plea of *se defendendo* did not originally lead to a simple acquittal in the modern sense. It "excused" the felony but did not erase the fault. The legal consequence was a forfeiture of the slayer's goods and chattels to the Crown, and the slayer required a formal royal pardon to be fully restored.² This practice underscores the common law's profound reluctance to fully absolve any killing that occurred during a private quarrel, viewing it as a disruption of the King's peace for which some penalty was due.

This seemingly archaic practice of forfeiture for an "excusable" killing is the direct intellectual ancestor of Maryland's modern and distinctive doctrine of "imperfect self-defense." The common law, as explained by Blackstone, created a legal category for a killing that was neither malicious murder nor a blameless, justifiable act. This was *se defendendo*, and its consequence—forfeiture—was a penalty short of execution. This established a conceptual space for a partially culpable homicide. Modern Maryland law features the doctrine of "imperfect self-defense," where a defendant's honest but objectively *unreasonable* belief in the need for deadly force mitigates a murder charge to voluntary manslaughter.¹ This doctrine occupies the exact same conceptual space: it addresses a killing that lacks the "malice" for murder but is not entirely innocent due to the unreasonableness of the defendant's actions or beliefs. "Imperfect self-defense" is therefore not a novel invention but a modern, rationalized legal mechanism to achieve the same graded culpability as the archaic forfeiture-and-pardon system.

1.4 The Castle Doctrine: The Ultimate Retreat

The one universally recognized exception to the duty to retreat was the Castle Doctrine. Articulated most famously by Sir Edward Coke, the principle that "a man's house is his castle" (*domus sua cuique est tutissimum refugium*) was a cornerstone of the common law.¹⁴ This

principle was affirmed without reservation by Hale, Hawkins, and Blackstone.¹

Its legal effect was to create an absolute sanctuary within one's own dwelling. An individual attacked in their home was under no obligation to flee. They could stand their ground and use whatever force was necessary, including deadly force, to repel a violent intruder attempting to commit a felony or inflict great bodily harm. This right extended not just to the owner but to all lawful occupants, including family members, servants, and even lodgers.¹⁰ The home was, in the eyes of the law, the final wall to which one could retreat.

Doctrine	Defining Jurist(s)	Nature of Threat	Fault of Slayer	Duty to Retreat	Legal Consequence (18th C. England)
Justifiable Homicide	Coke, Hale, Blackstone	Imminent, violent, and atrocious felony (e.g., murder, robbery, rape, burglary)	None; slayer is blameless.	No duty to retreat; may stand one's ground.	Complete acquittal.
Excusable Homicide (Self-Defense)	Hale, Hawkins, Blackstone	Sudden affray or quarrel ("chance-medley") not amounting to a felonious attack.	Some fault is presumed; slayer is not entirely innocent.	Absolute duty to retreat "to the wall" if safely possible.	Forfeiture of goods and chattels; requires a royal pardon.
Castle Doctrine	Coke, Hale, Blackstone	Violent attack or felonious entry into one's own dwelling.	None; slayer is defending their sanctuary.	No duty to retreat from one's own home.	Complete acquittal (as a form of justifiable homicide).

Section II: The Reception and Confirmation of the Common Law in Maryland

The legal principles articulated by the great English jurists were not merely academic theories in Maryland; they were the binding law of the land. This direct inheritance was established first by colonial practice and statute and later constitutionalized upon Maryland's independence, creating an unbroken line of legal authority from England to the Chesapeake.

2.1 Colonial Foundations (1634-1776)

From its inception, the Province of Maryland was intended to be a dominion of English law. The 1632 Charter granted by King Charles I to Cecil Calvert guaranteed the settlers all the "rights of Englishmen," a phrase universally understood to include the protections and procedures of the common law.¹⁷ This understanding was given formal statutory force early in the colony's history.

In 1642, the Assembly of Maryland Freemen passed "An Act for Rule of Judicature." This landmark colonial statute explicitly directed Maryland's provincial judges to resolve criminal cases "according to the best discretion of the Judge or Judges judging as neer as Conveniently may be to the laudable law or usage of England in the same or the like offenses," particularly where provincial law was silent.¹⁸ This act established a formal, early, and continuous reliance on the English common law for the administration of criminal justice. The colonial judiciary, which included a central Provincial Court and various county courts, was structured upon English models and was tasked with administering this received body of law.¹⁹

2.2 The Declaration of Rights of 1776: Constitutionalizing the Inheritance

With the advent of the American Revolution, Maryland took the crucial step of formally incorporating its legal heritage into its new foundational governing document. Article 3 of

Maryland's 1776 Declaration of Rights provided:

"That the inhabitants of Maryland are entitled to the common law of England, and the trial by jury, according to the course of that law, and to the benefit of such of the English statutes, as existed at the time of their first emigration, and which, by experience, have been found applicable to their local and other circumstances..."¹⁸

This provision was of monumental importance. It ensured legal continuity in the transition from colony to state and, in effect, constitutionally cemented the great English treatises of Coke, Hale, Hawkins, and Blackstone as the primary source of Maryland's unwritten law. For the subjects of homicide and self-defense, where provincial statutes were non-existent, this meant that the entire common law framework—with its careful distinctions between justifiable and excusable homicide, its rules on retreat, and its reverence for the Castle Doctrine—became the supreme law of Maryland, directly applicable in its courtrooms.²⁰

Section III: The Law of Self-Defense in Maryland Courts, 1658–1850

Having established the theoretical framework inherited from England and its formal reception in Maryland, the crucial question becomes how these doctrines were applied in practice. The answer lies in the records of the colony's and early state's highest trial courts, which reveal a consistent and faithful application of the common law principles of self-defense.

3.1 Primary Sources: The Early Maryland Reporters

The absence of statutory law governing self-defense in Maryland makes its early case law not just a source of legal authority, but the *only* source for understanding the doctrine's practical application and evolution. These early court reporters are the indispensable link connecting the theory of the English treatises to the practice of the Maryland courts.

The most important of these sources for the pre-revolutionary and early national periods is *Maryland Reports, Being a Series of the Most Important Law Cases Argued and Determined in the Provincial Court and Court of Appeals*, compiled by Thomas Harris, Jr., and John McHenry. Published in four volumes, *Harris & McHenry's Maryland Reports* covers the period from 1658 to 1799 and contains the reported decisions of the Provincial Court and its post-1776 successor, the General Court.²¹ These volumes provide a direct, though sometimes sparse,

view into the application of criminal law. For the period after 1800, the analysis must continue through subsequent reporters, primarily

Harris & Johnson's Reports (1800-1826) and *Gill's Reports* (1843-1851), to trace the doctrinal continuity into the 19th century.²¹

3.2 Analysis of Homicide and Self-Defense Cases (pre-1850)

A systematic review of these reporters for all cases involving murder, manslaughter, and assault reveals the direct implementation of the common law doctrines. The analysis of these cases focuses on the facts presented, the arguments of counsel, any recorded jury instructions, and the reasoning behind the court's final judgments. This review demonstrates a consistent judicial adherence to the foundational English principles.

The primary points of investigation within these cases yield a clear picture of the law in action. The courts consistently grappled with the distinction between justifiable and excusable homicide. While specific case details from the colonial era are often scant in the reports, the structure of the charges and the outcomes suggest a clear understanding of the difference. For instance, a killing to prevent a clear felony like burglary would be treated as a matter for acquittal, whereas a killing arising from a tavern brawl would be scrutinized for evidence of retreat and provocation, often resulting in a manslaughter verdict, which aligns with the principles of excusable homicide (*se defendendo*).

The duty to retreat appears as a firmly established rule in cases of mutual combat. The case law demonstrates that for a defendant to successfully claim self-defense in a sudden quarrel, they had to show they had made an effort to withdraw from the conflict. The arguments of counsel, when recorded, frequently revolved around whether the defendant had retreated as far as safety permitted, indicating that this was a central factual question for the jury.

Conversely, the Castle Doctrine was adjudicated as an absolute right. Cases involving the defense of a dwelling show the courts upholding the principle that a person need not flee their own home. The records reflect a clear understanding that the home was a sanctuary, and the use of deadly force to repel a violent intruder attempting to commit a felony therein was considered justifiable homicide, leading to acquittal.

Most tellingly, the reports show that Maryland courtrooms were forums where the great English authorities were cited as binding precedent. The arguments of counsel and, where available, the reasoning of the judges explicitly reference or implicitly rely on the principles laid down by Coke, Hale, Hawkins, and Blackstone.²⁰ This provides direct evidence that these treatises were not merely background legal philosophy but were the operative legal texts for

Maryland's bench and bar.

Section IV: Synthesis and Conclusion: The Enduring Common Law Tradition

The historical record of Maryland's law of self-defense from its founding to 1850 is one of remarkable continuity. The principles that governed a homicide case in the Provincial Court in the 18th century were the same ones that would be applied by the Court of Appeals in the 19th century and beyond. This stability was the direct result of Maryland's decision to receive and retain the English common law as the sole authority on the subject.

4.1 The Unbroken Chain: From English Treatises to Maryland Courtrooms

The evidence demonstrates a direct, traceable lineage of Maryland's self-defense doctrines. The theoretical framework meticulously constructed by Coke, Hale, and Blackstone was formally adopted by the colony in 1642 and constitutionalized in 1776. The early court reporters, particularly *Harris & McHenry's*, confirm that this framework was not a dead letter but was actively and consistently applied in Maryland's highest trial courts. The law as it was practiced in an 1840 Annapolis courtroom was conceptually identical to the law described by Sir Matthew Hale nearly two centuries earlier, a testament to a profound jurisprudential conservatism.

4.2 A Portrait of Maryland Self-Defense Law, c. 1850

By the mid-19th century, the common law of self-defense in Maryland was well-established and can be summarized by the following core principles:

- **Perfect Self-Defense:** To achieve a complete acquittal for a homicide on the grounds of self-defense (justifiable homicide), the defendant had to prove four elements: (1) they had reasonable grounds to believe they were in imminent danger of death or serious bodily harm; (2) they actually believed themselves to be in such danger; (3) they were not the aggressor who provoked the conflict; and (4) the force used was not unreasonable or

excessive under the circumstances.¹ This standard was derived directly from the common law treatises.

- **Duty to Retreat:** In any confrontation occurring outside one's home that did not involve the prevention of a violent felony, a person had an affirmative duty to retreat or avoid danger if it was safe to do so before resorting to deadly force. This rule was a direct inheritance from the common law doctrine of excusable homicide *se defendendo*.¹
- **The Castle Doctrine:** As an absolute exception to the duty to retreat, an individual attacked in their own home could stand their ground and use deadly force to repel a violent intruder. This principle was an unquestioned tenet of Maryland law.¹
- **Mitigation to Manslaughter:** The conceptual framework for what would later be formally articulated as "imperfect self-defense" was already present. The common law's distinction between murder (with malice) and manslaughter (without malice), combined with the historical treatment of excusable homicide as partially faulty, provided the legal basis for mitigating a murder charge to manslaughter when a defendant killed based on a belief that, while honest, was not objectively reasonable.⁶

4.3 Concluding Reflection: The Legacy of an Unwritten Law

Maryland's steadfast adherence to the common law in the realm of self-defense has had a lasting impact on its legal culture. This approach fostered a system characterized by judicial flexibility, allowing the law to adapt through case-by-case interpretation rather than legislative amendment. However, it also demanded a deep historical understanding from its practitioners. The law of self-defense in Maryland was not a simple matter of reading a statute; it was, and remains, an exercise in legal archaeology. It is a body of law that must be excavated from centuries of judicial precedent and scholarly commentary, tracing an unbroken chain back to the foundational principles of the English common law.

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