

Florida State University Law Review

Volume 11 | Issue 2

Article 8

Summer 1983

State v. Bobbitt, 415 So. 2d 724 (Fla. 1982)

Thomas Katheder

Follow this and additional works at: <http://ir.law.fsu.edu/lr>



Part of the [Criminal Law Commons](#)

Recommended Citation

Thomas Katheder, *State v. Bobbitt*, 415 So. 2d 724 (Fla. 1982), 11 Fla. St. U. L. Rev. 465 (2017).
<http://ir.law.fsu.edu/lr/vol11/iss2/8>

This Note is brought to you for free and open access by Scholarship Repository. It has been accepted for inclusion in Florida State University Law Review by an authorized editor of Scholarship Repository. For more information, please contact bkaplan@law.fsu.edu.

Criminal Law—LOVERS AND OTHER STRANGERS: OR, WHEN IS A HOUSE A CASTLE?—PRIVILEGE OF NON-RETREAT IN THE HOME HELD INAPPLICABLE TO LEGAL CO-OCCUPANTS—*State v. Bobbitt*, 415 So. 2d 724 (Fla. 1982)

I. INTRODUCTION

One summer evening in Jacksonville, Florida, James William Bobbitt, erupting with drunken fury, violently attacked his wife, Elsie Virginia Bobbitt, in their home and beat her without provocation, as he had often done before.¹ On this particular occasion, Mr. Bobbitt broke his wife's left cheekbone and inflicted serious injuries upon her leg. Mrs. Bobbitt twisted and struggled out of his frenzied hold and limped away from him into the kitchen.² As Mr. Bobbitt moved toward her, she pulled a small revolver from her purse and fatally shot him.³

Elsie Bobbitt was charged with second degree murder of her husband and the jury found her guilty of manslaughter.⁴ Initially, the trial court refused Mrs. Bobbitt's request to instruct the jury that, according to the "castle doctrine,"⁵ she had no duty to retreat from her home before justifiably using deadly force in self-defense.⁶ Instead, the trial court charged the jury on the general duty to retreat in the face of an unlawful attack.⁷ At a hearing on Mrs.

1. *State v. Bobbitt*, 389 So. 2d 1094, 1096 (Fla. 1st DCA 1980).

2. *Id.*

3. *Id.* The gun which Mrs. Bobbitt pulled from her purse was a pistol which her husband had given her some two years before the incident for her protection while she attended night classes. *Id.*

4. *Id.*

5. Under Florida law:

[A] person's dwelling house is a castle of defense for himself and his family; and an assault upon it with intent to injure him, or any of them, may be met in the same way as an assault upon himself, or any of them, and he may meet the assailant at the threshold and use of force necessary for his or their protection against threatened invasion and harm.

Peele v. State, 20 So. 2d 120, 121 (Fla. 1944).

6. The jury instruction requested by Mrs. Bobbitt states: "One lawfully attacked in his own home or on his own premises has no duty to retreat and may lawfully stand his ground and meet force with force, if necessary to prevent imminent death or great bodily harm to himself or another." THE SUPREME COURT COMMITTEE ON STANDARD JURY INSTRUCTIONS IN CRIMINAL CASES, FLORIDA STANDARD JURY INSTRUCTIONS IN CRIMINAL CASES 2.11(d) [hereinafter cited as STANDARD JURY INSTRUCTIONS].

7. STANDARD JURY INSTRUCTION 2.11(d):

If [a person is] attacked by another, even though the attack is wrongful, he has the legal duty to retreat if by doing so he can avoid the necessity of using deadly force without increasing his own danger, but a person placed in a position of imminent danger of death or great bodily harm to himself by the wrongful attack of another has no duty to retreat if to do so would increase his own danger of death or great bodily harm.

Bobbitt's motion for new trial, however, the trial judge changed his mind and agreed with the defendant that under Florida case law, he should have given the proffered jury instruction on the privilege of non-retreat in the home.⁸ Thus, finding reversible error, the trial judge granted the motion for new trial.⁹

The First District Court of Appeal upheld the trial court's decision to grant the motion for new trial,¹⁰ but the Florida Supreme Court reversed.¹¹ Specifically, the supreme court found the castle doctrine, or the privilege of non-retreat in the home, inapplicable to situations where one legal co-occupant of a dwelling attacks another.¹²

The castle doctrine has been the subject of a great deal of confusion and misinterpretation in American case law. Accordingly, in evaluating the Florida Supreme Court's decision in *State v. Bobbitt*, this note shall first consider the history of the castle doctrine at English common law and in America. Then, the focus will shift to the development of the doctrine in Florida, including an analysis of the *Bobbitt* decision, and finally, to a consideration of whether the virtual disappearance in America of a pioneer society subsisting on the edge of a harsh wilderness has rendered the doctrine as obsolete as, for instance, the stone hearth and timbered cabin.

II. ORIGIN OF THE CASTLE DOCTRINE

A. *Defense of Habitation in England*

Judicial recognition of the use of deadly force in self-defense, as a matter of absolute personal privilege, did not become apparent in England until almost two centuries after the Norman Conquest.¹³

8. Brief of Petitioner at 3-4.

9. *Bobbitt*, 389 So. 2d at 1095.

10. *Id.* at 1096.

11. *State v. Bobbitt*, 415 So. 2d 724 (Fla. 1982).

12. *Id.*

13. See Beale, *Retreat From A Murderous Assault*, 16 HARV. L. REV. 567 (1903).

Even by 1258, the killing of another was justified only when it occurred in the lawful prosecution of the King's Writ, in the attempt to apprehend a fleeing felon, or in the attempt to protect oneself from robbery. *Id.* at 567-68. One who took the life of another in self-defense was guilty of homicide. But if the members of the jury were of the opinion that the killing occurred as a necessary feat of self-defense, a "special" verdict of guilty was rendered, upon which the King might grant a pardon if it suited him. 2 F. POLLOCK & F. MAITLAND, *THE HISTORY OF THE ENGLISH LAW* 479 (2d ed. 1968). Eventually the application to the English King for pardon eroded into a mere formality, and the Chancellor, the keeper of the King's seal, signed the pardons perfunctorily. The notion of self-defense then became

Once finally established at English common law, the privilege of self-defense was limited from the beginning by the requirement of "necessity."¹⁴ The doctrine of necessity mandated that one would be allowed to justifiably kill in self-defense only as a means of last resort. Thus, in the face of an assault, the degree of force used could not surpass the real or reasonably apprehended threat at hand, and the victim of an unprovoked attack had a duty to retreat "to the wall" before using deadly force against an aggressor.¹⁵

At least as old as judicial recognition of the privilege to defend oneself when necessary, and perhaps far older,¹⁶ was the English feudal maxim: "A man's house is his castle."¹⁷ The right of an Englishman to defend his dwelling and family therein was considered so compelling at common law that the usual duty to retreat became subordinate to the preservation of the sanctity of the home.¹⁸ Indeed, the defense of habitation, as distinguished from its descendant, the modern castle doctrine, was so paramount that *entirely apart* from killing in self-defense to protect the occupants of a home from death or imminent serious bodily harm, one was justified in standing his or her ground and killing an intruder if necessary merely to protect his or her proprietary and dignitary interests in the home, even if the assault or intrusion upon the home amounted to only a misdemeanor and there was no apparent threat to the safety of its inhabitants.¹⁹ Blackstone, who spoke of

an affirmative defense in the courts of equity, and was afterwards codified into law. See Beale, *Retreat From A Murderous Assault*, 16 HARV. L. REV. 567, 570-71.

14. 2 BRACTON ON THE LAWS AND CUSTOMS OF ENGLAND 372 (S. Thorne trans. 1968).

15. *Id.*

16. The "plainly . . . ancient doctrine" of the defense of habitation was noted by Britton in his Appeals on Homicide: "[The defendant] may say that although he committed the act, yet he did not do it by felony prepnese, but by necessity in defending himself, or his wife, or his house, or his family, or his lord, or his lady, from death." 1 F.M. NICHOLS'S TRANSLATION OF BRITTON 113 (1865, 1st ed. pub. 1530 ca.), *quoted in* 1 J. BISHOP, NEW COMMENTARIES ON THE CRIMINAL LAW 517 n.1 (8th ed. 1892). According to one authoritative work, Britton's treatise on English law was written about 1290 in "law-French", and it "purports to be a direct codification and enactment of the law by Edward I." D. WALKER, THE OXFORD COMPANION TO LAW 154 (1980).

17. Thus it was stated that "the house of everyone is to him as his . . . castle and fortress, as well as for his defense against injury and violence, as for his repose." Semayne's Case, 77 Eng. Rep. 194, 195 (K.B. 1604).

18. If a man be "assailed in his own house, he need not flee as far as he can, as in other cases of se defendendo, for he hath the protection of his house to excuse him from flying, as that would be to give up the protection of the house to his adversary in flight." 1 M. HALE PLEAS OF THE CROWN 486 (1736), *quoted in* People v. Tomlins, 107 N.E. 496, 497 (N.Y. 1914) (Cardozo, J.).

19. See, e.g., 1 J. BISHOP, NEW COMMENTARIES ON THE CRIMINAL LAW 517 (8th ed. 1892) (footnote omitted):

the defense of habitation privilege to defend the hearth as a natural right, summed up the sentiment well: "[T]he law of England has so particular and tender a regard to the immunity of a man's house, that it stiles it his castle, and will *never* suffer it to be violated with impunity."²⁰

B. *Self-Defense and the Emerging Castle Doctrine in America*

When the English common law migrated to the American Colonies, the doctrine of self-defense, along with its corollary, the duty to retreat, was embraced immediately. But, in time, certain jurisdictions in the new republic questioned the duty to retreat in the face of a violent or felonious assault,²¹ particularly in the South and West. In the South, it was considered a violation of an unwritten, chivalristic code of honor to "seek dishonor in flight."²² In the

Defence of the Castle.—In the early times, our forefathers were compelled to protect themselves in their habitations by converting them into holds of defence; and so the dwelling-house was called a castle. To this condition of things the law has conformed, resulting in the familiar doctrine that while a man keeps the doors of his house closed, no other may break and enter it, except in particular circumstances to make an arrest or the like, — cases not within the line of our present expositions. From this doctrine is derived another; namely, that the persons within the house may exercise all needful force to keep aggressors out even, to the taking of life.

20. 4 W. BLACKSTONE, COMMENTARIES * 223 (emphasis supplied).

Blackstone's natural right of habitation was also reflected in other aspects of English law. For instance, arson and burglary were two crimes against the habitations of individuals, and as such, they were punishable by death because they were a fundamental interference with "that right of habitation, which every individual might acquire, even in a state of nature." *Id.* In the state of nature, reasoned Blackstone, an invasion of the habitation was "sure to be punished with death" by a stronger inhabitant. *Id.* Hence, the civil laws of England took their cue from the natural law and punished the violator of the home if its inhabitant was too feeble to do so.

21. Two notorious state court decisions of the period were often cited in support of what became known as the "true man" rule. The Ohio Supreme Court, in *Erwin v. State*, 29 Ohio St. 95 (1876), addressed the issue of retreat in the following manner:

Does the law hold a man who is violently and feloniously assaulted responsible for having brought such necessity upon himself, on the sole ground that he failed to fly from his assailant when he might have safely done so? [A] true man, who is without fault, is not obliged to fly from an assailant, who by violence or surprise, maliciously seeks to take his life or do him enormous bodily harm. *Id.* at 103.

Similarly, in *Runyan v. State*, 57 Ind. 80 (1877), the Indiana Supreme Court took judicial notice of what it perceived public opinion to be regarding the duty to retreat: "[T]he tendency of the American mind seems to be very strongly against the enforcement of any rule which requires a person to flee when assailed, to avoid chastisement or even to save human life." *Id.* at 84.

22. Beale *supra* note 13, at 577. An excellent rationalization of the southern belief in standing one's ground in the face of an assault is found in *State v. Bartlett*, 71 S.W. 148 (Mo. 1902). In *Bartlett*, an elderly gentleman was accosted on a public street by a young

West, not only was it cowardly and dishonorable to turn and run from an aggressor, but with the immense popularity of "six shooters" on the American frontier, it was also foolish.²³

Like the duty to retreat, the English defense of habitation was met with differing and eventually muddled judicial constructions in America. It appears that a major source of difficulty for nineteenth century American courts in the area of self-defense was the situation of an individual who was attacked in his or her home. The fact that the individual was murderously assaulted, regardless of the place of the attack, meant that the local court had to apply whatever the rule of self-defense of the person was in that particular jurisdiction to the circumstances of the case. But the fact that the individual was assaulted in the home, suddenly invoked the defense of habitation as well. It will be recalled that the defense of habitation granted the privilege to kill even a misdemeanor assailant, while self-defense could not be justifiably posed absent a life-threatening attack. If the attack upon the individual in his or her home was serious enough to endanger life, putting aside for a moment whether or not retreat was required, then in most jurisdictions the victim of the attack had a case *both* for self-defense and for defense of habitation. Presented with such a factual situation, the local court thus could apply either the law of self-defense or of defense of habitation.

It seems that a considerable majority of the cases before nineteenth century American criminal courts involving an attack upon the home were also cases where the attack was serious enough to fall under both the self-defense justification and the defense of

man toting a lead tipped horse whip. When his entreaties failed to convince the bellicose young "whipper-snapper" to cease flogging him, the defendant drew his revolver and mortally wounded his assailant. The court held that the elderly man had no duty to retreat and stated:

It is true, human *life* is sacred, but so is human *liberty*; [o]ne is as dear in the eye of the law as the other, and neither is to give way and surrender its legal status in order that the other may exclusively exist. . . . We hold it a *necessary self-defense* to resist, resent and prevent such a *humiliating indignity*; such a violation of the sacredness of one's person.

Bartlett, 71 S.W. at 151-52 (emphasis added).

Apropos of the unwritten, chivalristic code of honor mentioned above, the Old South has aptly been described as a "feudal society without a feudal religion," and as a "squirearchy." Tate, *Remarks on Southern Religion*, in I'LL TAKE MY STAND 166 (1930); Ransom, *Reconstructed but Unregenerate* in I'LL TAKE MY STAND 14 (1930). See also Brown, *Southern Violence—Regional Problem or National Nemesis?: Legal Attitudes Toward Southern Homicide in Historical Perspective*, 32 VAND. L. REV. 232-35 (1979).

23. *State v. Gardner*, 104 N.W. 971, 975 (Minn. 1905).

habitation.²⁴ Confronted with such a situation, most courts responded by utilizing the doctrine of defense of habitation.²⁵

Reliance by American courts on the ancient defense of habitation in situations where there was not only some threatening intrusion upon the home, but also a life-endangering attack upon its occupants, led to confusion regarding the doctrines of self-defense and the medieval English defense of habitation.²⁶ It is apparent that the eventual result of this confusion was that the duty to retreat, with its manifest interest in the preservation of life even at the expense of physical injury and personal humiliation, and the competing defense of habitation, which emphasized the sanctity of the home above almost all else, merged into what may be characterized as the modern castle doctrine.²⁷ Thus, it came to be recognized that an occupant of a home could not use deadly force against an intruder unless the inhabitant had a reasonable fear that the intruder meant to kill or seriously injure any and all of the persons in the home.²⁸ However, once the confrontation was severe enough to entitle the occupant to use deadly force against an invader, he or she was not required to retreat as if the attack occurred on a public street.

The modern castle doctrine, then, was no different than the law of self-defense generally except for the privilege of non-retreat in the home. Eventually the merger of the duty to retreat and the defense of habitation became so complete and so firmly established

24. See Comment, *Is A House A Castle?*, 9 CONN. L. REV. 110 (1976).

25. *Id.* at 110-27.

26. *Id.*

27. The case law of at least one state has not succumbed to the confusion regarding the doctrines of self-defense and the defense of habitation. In fact, the North Carolina courts still refer to the doctrines as distinct: "In North Carolina, the courts have recognized a substantive right of an individual to defend his home from attack that is a separate right from that of an individual to defend himself or his family." *State v. Jones*, 255 S.E.2d 232, 235 (N.C. App. 1979), *rev'd on other grounds*, 261 S.E.2d 1 (N.C. 1980).

28. The United States Supreme Court recognized the modern castle doctrine in *Beard v. United States*, 158 U.S. 550 (1895), wherein the Court noted that a homeowner in his dwelling could justifiably kill an intruder only if the intruder expressed an intention to take life or to inflict grievous bodily injury. There was no justification for killing simply "because of the unlawful entry of the house." *Horton v. State*, 35 S.E. 659, 662 (Ga. 1900).

Other authorities also recognized the important distinction between the proprietary and dignitary interests in the home and the interest of personal safety: "[T]he doctrine that a man when assailed in his own house, rather than flee, may kill to save his life, is probably not based on the theory that the homicide is justifiable as preventing an attack on the property, but that it is excusable because committed in self-defense." Note, *Is a Man's Illegal Place of Business His Castle?*, 29 HARV. L. REV. 544 (1916).

among many of the several states,²⁹ that most courts spoke of the changed rule as if it always had been so:

The idea that is embodied in the expression that, a man's house is his castle, is not that it is his property, and, as such, he has the right to defend and protect it by other and more extreme means than he might lawfully use to defend and protect his shop, his office, or his barn. The sense in which the house has a peculiar immunity is, that it is sacred for the protection of his person and of his family.³⁰

The modern castle doctrine, like the defense of habitation, also extended to the "curtilage,"³¹ that is, the area surrounding the home.³² But quite unlike the defense of habitation, the modern

29. Despite the move by high state courts away from the law of defense of habitation into the modern castle doctrine, a considerable number of states persisted in maintaining the old doctrine, allowing the use of deadly force against non-life threatening intrusions into the home. See *State v. Couch*, 193 P.2d 405 (N.M. 1948); *State v. Bradley*, 120 S.E. 240 (S.C. 1923) (dicta); *Collegenia v. State*, 132 P. 375 (Okla. Crim. App. 1913). In part, this was almost certainly attributable to the tremendous confusion over the general duty to retreat, the much revered defense of habitation, and the emerging castle doctrine. For instance, two high state courts refer to *State v. Patterson*, 45 Vt. 308 (1873), as authority for the defense of habitation rule, although the *Patterson* case firmly rejects the defense of habitation rule in favor of the modern castle doctrine. *Couch*, 193 P.2d at 411; *Collegenia*, 132 P. at 379. The holdings in *Couch* and *Collegenia* may also be explained by the fact that both New Mexico and Oklahoma were two states in which the true man rule of self-defense reigned. See *supra* notes 21-22 and accompanying text.

30. *Patterson*, 45 Vt. at 320-21.

31. Curtilage is defined as "[a] small piece of land, not necessarily inclosed, around the dwelling house, and generally includes the buildings used for domestic purposes in the conduct of family affairs." BLACK'S LAW DICTIONARY 346 (rev. 5th ed. 1979).

32. In *Beard v. United States*, 158 U.S. 550 (1895), the United States Supreme Court held that an assault, whether 50 or 60 yards from defendant's dwelling, was within the castle's curtilage. See, e.g., *State v. Bonano*, 284 A.2d 345 (N.J. 1971), noted in Note, *State v. Bonano*, 3 SETON HALL 532 (1972) (curtilage includes front porch); *State v. Browning*, 221 S.E.2d 375 (N.C. App. 1976), noted in Note, *A Further Erosion of the Retreat Rule in North Carolina*, 12 WAKE FOREST L. REV. 1093 (1976) (curtilage includes backyard); but see *Danford v. State*, 43 So. 593 (Fla. 1907) (curtilage does not extend to field surrounding defendant's house).

In a case which soon followed its decision in *Bobbitt*, the Florida Supreme Court may have rejected the curtilage concept. In *State v. Page*, 418 So. 2d 254 (Fla. 1982), the court considered a situation where a defendant and his victim occupied adjoining apartments which shared a common walkway. During a violent altercation, the defendant fatally shot the victim on the common walkway. At trial the defendant claimed self-defense and sought a jury instruction on the privilege of non-retreat, alleging that he had one foot in the door when the shooting occurred. Without mentioning curtilage in its opinion, the court relegated a previous Florida case dealing with curtilage in self-defense, *Danford v. State*, 43 So. 593 (Fla. 1907), to a footnote as inapposite. *State v. Page* 418 So. 2d at 255 n.3. Instead, the court applied the rationale behind its *Bobbitt* decision, holding that since both defendant and victim had equal rights to use the walkway, analogous to the equal rights of legal co-

castle doctrine has been applied to hotels, boarding rooms, offices and businesses,³³ and even to an automobile.³⁴

Perhaps the most important ongoing dispute regarding the modern castle doctrine is whether it is applicable when the assailant is not some intruder, but rather a guest or legal co-occupant, such as a spouse, sibling, roommate or paramour. At English common law, the defense of habitation was waived if the potential aggressor, before he or she became an apparent threat, was allowed to enter as an invitee or licensee.³⁵ Once this privilege was waived, the self-defense rights of the occupant to use deadly force reverted to essentially the same permissible range of action as the modern castle doctrine, that is, the occupant was entitled to stand his ground and use deadly force, but only in the face of an unprovoked, life-threat-

occupants in the same dwelling, neither had a privilege of non-retreat against the other. The court invoked a policy justification for its decision and stated: "[A]s our society moves more and more toward communal-type dwellings the rule herein becomes a critical issue in the proper enforcement of the criminal law. . . . To rule otherwise would, in effect, allow shoot-outs between persons with equal rights to be in a common area." *State v. Page*, 418 So. 2d at 255. *But see State v. Preece*, 179 S.E. 524 (W. Va. 1935) (hallway outside apartment was within the curtilage).

33. *See e.g.*, *Evans v. Hughes*, 135 F. Supp. 555 (M.D.N.C. 1955) (trailer); *Askew v. State*, 10 So. 657 (Ala. 1892) (livery stable); *Jones v. State*, 76 Ala. 8 (1884) (store); *People v. Eatman*, 91 N.E.2d 387 (Ill. 1950) (apartment rented on weekly basis); *Pond v. People*, 8 Mich. 150 (1860) (servant's dormitory 36 feet from house); *Young v. State*, 104 N.W. 867 (Neb. 1905) (box stall on fairground which served as office and sleeping apartment); *Willis v. State*, 61 N.W. 254 (Neb. 1894) (saloon); *State v. Marlowe*, 112 S.E. 921 (S.C. 1922) (club room); *State v. Smith*, 376 So. 2d 261 (Fla. 3d DCA 1979) (cafe); *Bean v. State*, 8 S.W. 278 (Tex. App. 1888) (cotton gin); *Sargent v. State*, 33 S.W. 364 (Tex. Crim. 1895) (hotel).

But see Hill v. State, 69 So. 941 (Ala. 1915), *noted in Note, supra* note 28, at 544 (illegal still held not defensible); *State v. Dyer*, 124 N.W. 629 (Iowa 1910) (boarder's castle does not extend to the house dining room where owner of house was victim); *People v. Sullivan*, 7 N.Y. 396 (1852) (stairway landing outside boarding house rooms not within purview of castle doctrine).

34. *State v. Borwick*, 187 N.W. 460 (Iowa 1922). *But see State v. Bashor*, 614 P.2d 470 (Mont. 1980), where state statute which codified self-defense privilege vis-a-vis an "occupied structure" was held not to include an ordinary vehicle, not "suitable for human occupancy or night lodging." *Bashor*, 614 P.2d at 485.

35. *See* 1 J. BISHOP, *NEW COMMENTARIES ON THE CRIMINAL LAW* 518 (8th ed. 1892).

The terms "invitee" and "licensee" have been defined respectively as a person who enters by invitation, express or implied, whose entry is connected with an activity the owner conducts or permits to be conducted on his land, where there is mutuality of benefit or benefit to the owner, and, a person who has a privilege to enter upon land from the permission or consent, express or implied, of the possessor of land but who goes on the land for his own purpose rather than for any purpose of the landowner. *BLACK'S LAW DICTIONARY* 742, 830 (rev. 5th ed. 1979). Although there is an important conceptual distinction between an invitee and licensee in cases dealing with the duty owed by a landowner or occupant for the safety of another person on the premises, for purposes of waiver of the defense of habitation the distinction is not nearly so crucial. This note will recognize an invitee or licensee as any non-intruder, or guest, as that term is commonly used.

ening attack by the invitee or licensee.³⁶ Today, with almost all jurisdictions in America recognizing the modern castle doctrine,³⁷ the issue is not a choice between the old defense of habitation and some lesser standard of castle rights resembling the modern doctrine, but rather the question is merely whether or not one is required to retreat before using deadly force when the aggressor is either a guest or a legal co-occupant. Some states have drawn the line cutting off the privilege of non-retreat at the invitee or licensee level, finding that in situations involving an attack by any non-intruder, whether a momentary guest or permanent legal co-occupant, the inhabitant who is assailed has a duty to retreat.³⁸ Such decisions may have been influenced by the waiver of the defense of habitation mentioned above. Since the defense of habitation accorded an inhabitant an incredible power over life or death, it made great sense to abate this unbridled authority as soon as a person outside the home was recognized not as an intruder but as a guest. The same need to sharply curtail the self-defense privileges of the homeowner as soon as an outsider becomes an invitee or licensee is arguably not present with respect to the castle doctrine, which *already* embodies far less self-defense power than the defense of habitation.

Most states that have directly addressed the issue,³⁹ however, draw the line not at invitee or licensee levels, but rather at legal co-occupancy status, with a preponderance of them finding the privilege of non-retreat available regardless of whether the assailant and the victim are legal co-occupants of the same home.⁴⁰ A

36. See *supra* note 35 and accompanying text.

37. "It is universally recognized that one assailed in his own dwelling . . . is not bound to retreat before killing his assailant." *State v. Leeper*, 200 N.W. 732, 736 (Iowa 1924).

Massachusetts is one of the few American jurisdictions which does not recognize the doctrine. *Commonwealth v. Barton*, 326 N.E.2d 885, 887 (Mass. 1975), (quoting *Commonwealth v. Shaffer*, 326 N.E.2d 880, 884 (Mass. 1975)) states: "One assaulted in his own home does not have the unlimited right to react with deadly force without any attempt to retreat."

38. *State v. Grierson*, 69 A.2d 851 (N.H. 1949) (retreat from paramour/guest required); *Oney v. Commonwealth*, 9 S.W.2d 723 (Ky. 1928) (retreat from brother-in-law/guest required).

39. The Supreme Court of Rhode Island recently expressed a desire to reserve consideration on the issue of the applicability of the castle doctrine where legal co-occupants are involved until "such time as the appropriate case arises." *State v. Guillemet*, 430 A.2d 1066, 1069 n.2 (R.I. 1981).

40. See, e.g., *Thomas v. State*, 583 S.W.2d 32 (Ark. 1979); *State v. Jacoby*, 260 N.W.2d 828, 835 (Iowa 1977) following *State v. Leeper*, 200 N.W. 732 (Iowa 1924); *People v. Lenkevich*, 229 N.W.2d 298 (Mich. 1975); *State v. Grantham*, 77 S.E.2d 291 (S.C. 1953); *State v. Phillips*, 187 A. 721 (Del. 1936); *People v. Tomlins*, 107 N.E. 496 (N.Y. 1914); *State v. McPherson*, 131 N.W. 645 (Minn. 1911); *State v. Bissonnette*, 76 A. 288 (Conn. 1910);

minority hold that a legal co-occupant who is attacked in his or her home by another legal co-occupant must retreat if it is reasonably safe to do so.⁴¹ With the decision in *State v. Bobbitt*, Florida has joined the latter category of states.

III. DEVELOPMENT OF THE CASTLE DOCTRINE IN FLORIDA

The first apparent mention of the castle doctrine in Florida was *Wilson v. State*.⁴² The *Wilson* court spoke not of the defense of habitation, but rather of the modern castle doctrine:

[O]ne's home is the castle of defense for himself and his family, and . . . an assault upon it with an intent to injure him, or any of them, may be met in the same way as an assault upon himself, or any of them, and . . . he may meet the assailant at the threshold, and use the necessary force for his and their protection against the threatened invasion and harm.⁴³

The decision in *Wilson* dealt with an unprovoked, armed attack by a trespasser upon a homeowner in his dwelling. The issue of the applicability of the privilege of non-retreat in the home vis-a-vis an attack by a guest or legal co-occupant, rather than a trespasser, did not come up in Florida until more than seventy years after the *Wilson* decision, in *Hedges v. State*.⁴⁴ In *Hedges*, the Florida Supreme Court noted that an earlier Florida case decided by the same court had only considered the castle doctrine in an affray involving a trespasser,⁴⁵ but nonetheless the *Hedges* court went on to hold the doctrine applicable in the case before it, wherein the defendant had cut down her paramour's menacing movements towards her in her home by shooting him.⁴⁶ The state had argued in *Hedges* that the privilege of non-retreat should be applicable only to attacks upon an inhabitant by an intruder, but the supreme court explicitly refused to accept this contention.⁴⁷ Thus, it was clear by the decision in *Hedges* that the supreme court would not

Haynes v. State, 12 Ga. 465 (1855); *State v. Browning*, 221 S.E.2d 375 (N.C. App. 1976); *Davis v. State*, 261 So. 2d 783 (Ala. App. 1972), cert. denied, 261 So. 2d 785 (Ala. 1972).

41. See e.g., *Commonwealth v. Walker*, 288 A.2d 741 (Pa. 1972); *State v. Lamb*, 342 A.2d 553 (N.J. Super. 1975); *State v. Boggs*, 42 S.E.2d 1 (W. Va. App. 1946).

42. 11 So. 556 (Fla. 1892).

43. *Id.* at 561.

44. 172 So. 2d 824 (Fla. 1965).

45. *Pell v. State*, 122 So. 110 (Fla. 1929).

46. *Hedges*, 172 So. 2d at 827.

47. *Id.*

draw the line removing the availability of the castle doctrine at the invitee or guest level. But the question remained whether the high court would go so far as to hold the doctrine applicable to legal co-occupants of the same home.

Relying on the authority of *Hedges*, the Fourth District Court of Appeal in *Watkins v. State*,⁴⁸ decided that a defendant who shot and killed her common-law husband was likewise entitled to stand her ground in their shared home and use deadly force against his violent advance.⁴⁹ Having lost its argument in *Hedges*, the state took the next step and posited that because both the defendant and her common-law husband controlled their premises with equal authority, neither had a privilege of non-retreat against the other.⁵⁰ The *Watkins* court rejected this proposition and ruled that the concept, "a person's home is his or her ultimate sanctuary," applies regardless of whether or not legal co-occupants are involved.⁵¹

Just eleven years later, however, a unanimous Fourth District Court of Appeal completely receded from its position in *Watkins*. In *Conner v. State*,⁵² the defendant was a mother who shared living quarters with her mentally defective son. At her trial for second degree murder, the mother claimed that her son pushed her down and threatened to kill her, and that she fired a gun, but did not intend for the shot to strike him.⁵³ The trial court gave jury instructions on self-defense and the duty to retreat absent increased danger of death or great bodily injury, but refused an instruction on the castle doctrine. Citing an Alabama case for the proposition that the castle doctrine originally applied only to attacks by *external aggressors*,⁵⁴ the Fourth District Court then took

48. 197 So. 2d 312 (Fla. 4th DCA 1967).

49. *Id.* at 313.

50. *Id.*

51. *Id.*

52. 361 So. 2d 774 (Fla. 4th DCA 1978), *cert. denied*, 368 So. 2d 1364 (Fla. 1979).

53. *Conner*, 361 So. 2d at 775.

54. *Id.* at 776, *citing* *Watts v. State* 59 So. 270, 273 (Ala. 1912). It is interesting to note that the Fourth District Court in *Conner* also quoted a portion of another Alabama Supreme Court decision, *Jones v. State*, 76 Ala. 8 (1884), regarding the situation of one who is assaulted in his or her own home: "Whither shall he [the occupant] flee and how far, and when may he be permitted to return[?]" *Conner*, 361 So. 2d at 775. Ironically the decision in *Jones v. State* is utterly inapposite to the court's own holding in *Conner*, since the Alabama Supreme Court in *Jones* held the privilege of non-retreat applicable to legal co-occupants. The *Conner* court failed to quote the rhetorical question immediately preceding the line it did quote. The *full* passage states: "Why . . . should one retreat from his own house, when assailed by a partner or cotenant, any more than when assailed by a stranger who is lawfully upon the premises? Whither shall he flee, and how far, and when may he be permit-

judicial notice that "a majority of all homicides are committed by close relatives and friends, many of these killings occurring in the home."⁵⁵ Thus, regretting that it had expanded the castle doctrine beyond what it perceived to be the doctrine's initial purpose, and recognizing the problem of killings in the home, the Fourth District Court held that due regard for life impels the conclusion that the privilege of non-retreat is inapplicable "where both the antagonist and the assailed are legal occupants of the same 'castle.'"⁵⁶

The First District Court of Appeal, in *State v. Bobbitt*,⁵⁷ disagreed with the Fourth District Court's *Conner* decision and found the privilege of non-retreat applicable to legal co-occupants.⁵⁸ The court in *Bobbitt* pointed out that even though the Florida Supreme Court in *Hedges* settled the question as to attacks by guests, it also cited a South Carolina decision in support of its holding.⁵⁹ Since that South Carolina decision held that the privilege of non-retreat was applicable to a husband who claimed he killed his wife in self-defense,⁶⁰ the *Bobbitt* court reasoned that the Florida Supreme Court in *Hedges* approved the notion that an inhabitant was entitled to the privilege of non-retreat when confronted with either a guest or legal co-occupant assailant.⁶¹

Once the court determined that Mrs. Bobbitt was entitled to a jury instruction on the castle doctrine, it considered whether the evidence at trial was legally sufficient to support her manslaughter conviction in view of Mrs. Bobbitt's uncontroverted presentation of self-defense.⁶² Concluding that the verdict was insufficient as a matter of law, the court reversed and remanded with an order to discharge Mrs. Bobbitt.⁶³

The Florida Supreme Court, which had declined to review the Fourth District Court's decision in *Conner*, granted certiorari on the state's petition to resolve the conflict between the holdings in *Conner* and *Bobbitt*. Finally confronted with the issue of whether a legal co-occupant was entitled to stand his or her ground against

ted to return?" *Jones*, 76 Ala. at 14.

55. *Conner*, 361 So. 2d at 776, citing *Edwards, Murder & Gun Control*, 18 WAYNE L. REV. 1335 (1972).

56. *Conner*, 361 So. 2d at 776.

57. 389 So. 2d 1094 (Fla. 1st DCA 1980).

58. *Id.* at 1097.

59. *Id.*

60. *State v. Grantham*, 77 S.E.2d 291, 293 (S.C. 1953).

61. *Bobbitt*, 389 So. 2d at 1097.

62. *Id.*

63. *Id.* at 1098.

the deadly assault of another, the Florida Supreme Court essentially adopted the opinion of the Fourth District in *Conner*, and thus rejected the First District Court's view that the privilege of non-retreat was applicable in situations involving legal co-occupants.⁶⁴ In support of this holding, the supreme court emphasized that its earlier decision in *Hedges* did not pass judgment on the castle doctrine with respect to legal co-occupants. The high court accepted the Fourth District's interpretation of the extent of the castle doctrine "in its original applications" as historically accurate.⁶⁵ Furthermore, the court noted that its decision did not leave an occupant of a home defenseless against an assault by another legal co-occupant of the premises, because in all events "a person placed in imminent danger of death or great bodily harm to himself by the wrongful attack of another has no duty to retreat if to do so would increase his own danger of death or great bodily harm."⁶⁶

Justice Overton dissented with an opinion in which Justice Boyd concurred. To hold that a woman who kills her paramour in self-defense is entitled to the privilege of non-retreat in her home, while a woman who kills her husband for the same reason in the home is not similarly entitled to stand her ground, simply because of a property distinction between invitee/legal co-occupant status, struck Justice Overton as absurd.⁶⁷ The supreme court's holding, Justice Overton noted, placed Mrs. Bobbitt "in the same position as if the altercation had occurred in a public place," since she had the duty to retreat.⁶⁸

As an alternative to the majority's holding, Justice Overton proposed a *limited* duty to retreat, as suggested by an earlier decision of the Second District Court of Appeal,⁶⁹ that would apply in situ-

64. *Bobbitt*, 415 So. 2d 724.

65. *Id.* at 726.

66. *Id.* Though neither the state in its brief nor the Florida Supreme Court in its opinion cited them, there are early American cases which support the notion of the right to occupy certain premises as controlling on the question of whether a privilege of non-retreat arises. Thus, in *Hill v. State*, 69 So. 941 (1915), the Alabama Supreme Court refused to allow a defendant to claim the privilege of non-retreat in defending his still, because the still was illegal and therefore he did not have a right to be there. Conversely, where a saloon employee killed a patron in the bar in which he worked, he was not entitled to allege a privilege of non-retreat because the saloon was a public place, and any customer who was there to drink had a right to be there equal to that of the employee's right to occupy the saloon. *Wilson v. State*, 69 Ga. 224 (1882).

67. *Bobbitt*, 415 So.2d at 727.

68. *Id.*

69. Justice Overton borrowed the idea of a limited duty to retreat from *Rippie v. State*,

ations involving an attack upon an inhabitant either by an invitee or by a legal co-occupant. A jury charge embodying this limited duty to retreat would provide:

If the defendant was attacked in [his/her] own home, or on [his/her] own premises, by a cotenant, family member, or invitee, [he/she] has a duty to retreat to the extent reasonably possible but is not required to flee [his/her] home and has the lawful right to stand [his/her] ground and meet force with force even to the extent of using force likely to cause death or great bodily harm if it was necessary to prevent death or great bodily harm to [himself/herself] or another.⁷⁰

Thus, Justice Overton would distinguish only between attacks by intruders or non-intruders. In the case of an attack by the former, an inhabitant would be entitled to the full privilege of non-retreat under the castle doctrine. In the case of the latter, the assailed inhabitant would have a limited duty to retreat, as a middle ground between the full privilege of non-retreat and the duty to retreat otherwise applicable outside the home.⁷¹

IV. ANALYSIS

In evaluating the Florida Supreme Court's decision in *State v. Bobbitt*, it should be noted that its historical premise is misleading. The court echoed the Fourth District Court of Appeal in announcing that the original purpose of the castle doctrine applied only to attacks upon the home by external aggressors. It will be recalled that the ancient defense of habitation did in fact apply only to an assault perpetrated by an intruder, but that antiquated doctrine also embodied much more than the simple privilege of non-retreat in the home. If the supreme court purports to hold Floridians to the original application of the castle doctrine, then it should be prepared to grant to all inhabitants of a dwelling the absolute privilege to use deadly force to repel even misdemeanor assaults upon the home, as was the case with the defense of habitation, the original castle doctrine. Furthermore, if the supreme

404 So. 2d 160, 162 (Fla. 2d DCA 1981). The holding in *Rippie* was quashed after the *Bobbitt* decision, and Justice Overton again expressed his dissent "emphatically." He noted that the "majority opinion in *Bobbitt*, as reaffirmed in this case [*Rippie*], clearly penalizes spouses, and particularly wives, in defending themselves from an aggressor spouse." *Rippie v. State*, 419 So. 2d 1087 (Fla. 1982).

70. *Bobbitt*, 415 So. 2d at 728.

71. *Id.*

court really meant to apply the castle doctrine only to situations involving attacks by intruders, it would be compelled to overrule its decision in *Hedges*, which allowed the defendant therein to stand her ground against her paramour invitee.

Thus, although the supreme court may have believed it had a correct historical basis for its holding, the court actually made a public policy decision attempting to balance the self-defense privileges of an individual in his or her home with the need to preserve the sanctity of human life. Arguably, even without historical support, the problem of killings in the home by members of the same household, and the fact that the duty to retreat for legal co-occupants is mitigated by the rule that such duty ceases if it would result in increased danger of death or serious bodily injury, are two valid reasons to sustain the decision in *State v. Bobbitt* as sound. But the supreme court's decision meets with tremendous difficulties outside the juristic vacuum of the court's conference room and chambers. For instance, suppose Ms. X is confronted inside her twentieth floor condominium with her knife wielding "kept man" whom she had ordered that same morning to pack his bags and leave. He has lived with Ms. X for the past year or so, rent free of course. Assume further that Ms. X cannot quickly decide whether her murderous man is an invitee or a legal co-occupant. Should she make a dash for the elevator, or should she leap for a hornbook on her bookshelf? If Ms. X chooses to flee, at precisely what point does she reach the threshold where her duty to retreat vanishes because the jury would find that she was "at the wall?" Is she "at the wall" if the elevator stalls?

Suppose that Ms. X, now defendant X, chose to stand her ground and killed her paramour in self-defense, and the trial court finds as a matter of law that he was not a mere invitee, but something more. Yet, the paramour could not have been a "legal" co-occupant, because his cohabitation with Ms. X was in clear violation of long-standing Florida law.⁷² What result?

It seems that Justice Overton's limited duty to retreat, which becomes operative in the face of an attack by any non-intruder, whether family member, co-tenant, or invitee, is far more practicable than the majority's invitee/legal co-occupant distinction. Again, if the majority of justices really believed the castle doctrine (as distinguished from the defense of habitation) initially applied only to attacks from *intruders*, regardless of their historical misinterpreta-

72. FLA. STAT. §§ 798.02-.03 (1981).

tion, why did they not adopt Justice Overton's standard? Were the members of the majority constrained by the precedent of *Hedges*, which would have to have been modified if they followed Overton's view?⁷³

Thus far, this note has dealt with the Florida castle doctrine as it exists purely through uncodified case law. Is there a statutory defense for a future Mrs. Bobbitt? Section 782.02, Florida Statutes declares: "The use of deadly force is justifiable when a person is resisting any attempt to murder such person or to commit *any* felony upon him or *upon or in any dwelling house* in which such person shall be."⁷⁴ This statute sounds like a codification to some extent of the castle doctrine, but arguably it is not. Legislative history is of no help, because the language above is virtually unchanged from the form in which it appeared in 1868,⁷⁵ and there appears to be no written documentation on whether the Florida legislature had the castle doctrine in mind when they drafted it. In a recent case, however, the Florida Supreme Court referred to the statutory codification of justifiable use of deadly force and the castle doctrine of Florida case law as separate and distinct.⁷⁶

Assuming then that section 782.02 is an available legal justification for killing in self-defense while in the home, completely apart from the castle doctrine, just what does the statute entitle the occupant to do? Suppose an armed homeowner is confronted with an unarmed, juvenile burglar in his home, and the homeowner entertains absolutely no fear for his life nor would a reasonable man in such a situation fear imminent death or serious bodily injury at the hand of the young thief. Under the plain language of the statute, which speaks in terms of using deadly force to prevent any felony,

73. Ironically, the student note to which the Fourth District Court in *Conner* made such grateful acknowledgement, and Alabama case law, which was cited by the *Conner* court and approved of in principle by the Florida Supreme Court, both affirmatively suggest the idea of limited retreat in accord with Justice Overton. That student note states: "In the instant case, the court could have limited the immunity from retreat from the home by requiring the defendant to retreat at least into the house before using deadly force." Note, *supra* note 32, at 1099. Similarly, the Alabama case law which the Florida Supreme Court holds out in support of its discussion regarding the original application of the castle doctrine, suggests that proper regard for life might require cotenants to retreat at least to their rooms before using deadly force in self-defense. *Watts v. State*, 59 So. 270, 273 (Ala. 1912) (dictum).

74. FLA. STAT. § 782.02 (1981) (emphasis added).

75. Ch. 1-13, 1868 Fla. Laws 637.

76. *Falco v. State*, 407 So. 2d 203, 208 (Fla. 1981). The Florida Supreme Court in *Falco* upheld the constitutionality of Florida's manslaughter statute as applied to a defendant-homeowner convicted of manslaughter for killing a juvenile burglar with a "trap gun," which went off while no one was home.

not just life-threatening felonies, the homeowner could kill the burglar with impunity, however unnecessary such an act would be. But enter section 782.11, Florida Statutes which states: "Whoever shall unnecessarily kill another, either while resisting an attempt by such other person to commit any felony, or to do any other unlawful act, or after such attempt shall have failed, shall be deemed guilty of manslaughter."⁷⁷

At first glance, section 782.11 seems to act as a limitation on section 782.02 by imposing a standard of necessity on the statutorily defined justifiable use of deadly force. The Florida Supreme Court has in fact interpreted section 782.11 to dictate such a reasonableness or necessity requirement: "[A] plainly unnecessary killing, even defending one's self against an unlawful personal attack being made by the person slain, may be deemed manslaughter, where a plea of justifiable homicide under [the statute] is interposed as justification, but such defense is not sufficiently supported to constitute an absolute bar to conviction."⁷⁸ Thus, putting aside whatever privilege may be inherent in the Florida castle doctrine, it appears indubitable under the statutory scheme reviewed above, that the most severe crime Mrs. Bobbitt could have been charged with was manslaughter. Recall that there was no question that a life-threatening felony was committed upon her by her husband. Therefore, under these two statutes, the only question regarding the legality of her act could be whether or not the killing of her husband was an unnecessary use of deadly force.⁷⁹ Yet, the state charged Mrs. Bobbitt with second degree murder. While it is true that the jury chose to convict Mrs. Bobbitt of manslaughter rather than murder, one wonders how often the state charges a defendant in a situation similar to that of Mrs. Bobbitt's with seemingly too harsh a crime, and is successful in convincing the jury to convict on that arguably inflated charge. The precise relationship between these statutes and the castle doctrine in the situation of an occupant who is assaulted in his or her dwelling has yet to be explored in Florida courts.

77. FLA. STAT. § 782.11 (1981).

78. *Popp v. State*, 162 So. 701, 702 (Fla. 1935).

79. In *Cobb v. State*, 376 So. 2d 230 (Fla. 1979), the Florida Supreme Court held that the words "unnecessarily kill" in section 782.11, when "considered together with the remainder of Chapter 782, . . . [were] sufficiently precise to meet the constitutional standard for definiteness in penal statutes." *Id.* at 231.

V. IS THE CASTLE DOCTRINE OBSOLETE?

Certain authors have recently suggested that the spread of civilization in America,⁸⁰ with its concomitant developments of modern law enforcement and "instantaneous communications," has rendered the castle doctrine obsolete.⁸¹ One author found the "lack of permanence, solidity and rootedness" in the American experience of the home and of home life to be so inconsistent with the fanciful metaphor of a castle, that she doubted whether the doctrine ever had any real significance in America outside of its incessant rhetoric in American case law.⁸² But such arguments may work in support of the castle doctrine as well, for civilization, at least in America, has also spawned at once a greater incidence of serious crimes and a readily accessible mass market of lethal weapons with which they may be perpetrated upon innocent inhabitants. And, as for the prevalence of "instantaneous communications," they were of no avail to Mrs. Bobbitt, for when her neighbor witnessed the altercation between Mrs. Bobbitt and her husband, her telephone call to local police resulted in an instantaneous "busy signal."⁸³

Even if it is conceded that the home in America has lost some of its sanctity as a castle for its occupants, the normative ethic surrounding the castle doctrine—the image of the home as the center of family life, a retreat, a sanctuary, a repository of an inhabitant's dreams and a manifestation of his or her sheer identity—is far too important and deeply rooted in American political and jurisprudential thought to easily dismiss the castle doctrine and all that it implies. Consider, for instance, the tender regard espoused for the home by both liberal and conservative majorities of the United States Supreme Court. In *Rowan v. United States Post Office Department*,⁸⁴ the Supreme Court, per Chief Justice Burger, upheld a federal enactment that required the Postmaster General to issue an order prohibiting mailings from any named sender upon the re-

80. "In a civilized country a person's leaving his dwelling does not automatically ordain that he is forsaking a place of safety for one wrought with danger. The ancient reason no longer sustains the rule." Note, *supra* note 32, at 1100.

81. "A man's 'castle' was more removed from the protection of the community in earlier times and police protection was not what it is today. Thus it could be argued that modern, instantaneous communications systems have made the castle doctrine obsolete." Note, *Self Defense—Retreat—Instruction on Self Defense of Home Need Not Be Given Where Victim and Accused are Members of Same Household*, Conner v. State, 7 FLA. ST. U. L. REV. 729, 732 (1979).

82. Comment, *supra* note 24, at 131.

83. *Bobbitt*, 389 So. 2d at 1096 n.2.

84. 397 U.S. 728 (1970).

quest of an addressee, who, in his or her sole discretion, found mailings from the named sender to be indecent or erotically arousing.⁸⁵ The *Rowan* Court rejected the petitioner's challenge to the constitutionality of the law under the first amendment to the United States Constitution and stated:

To make the householder the exclusive and final judge of what will cross his threshold undoubtedly has the effect of impeding the flow of ideas, information, and arguments that, ideally, he should receive and consider. . . . [But] [t]he ancient concept that "a man's home is his castle" into which "not even the king may enter" has lost none of its vitality, and none of the recognized exceptions includes any right to communicate offensively with another.⁸⁶

Conversely, if the homeowner wishes not to stop sexually offensive mailings but instead desires to accept and keep lewd matter in the privacy of his or her own home, such material which could otherwise be adjudged legally obscene, suddenly becomes constitutionally permissible merely because it rests in the special place of the home: "Whatever may be the justifications for other statutes regulating obscenity, we [the Court] do not think they reach into the privacy of one's own home."⁸⁷

The third amendment to the United States Constitution bears obvious respect for the privacy and sanctity of the American home in its prohibition of the involuntary quartering of soldiers within American homes in peacetime.⁸⁸ Similarly the history and development of the fourth amendment is replete with concern for the home as one's castle.⁸⁹ The United States Supreme Court again recently resurrected the ancient language that "a man's house is his castle" in *Steagald v. United States*,⁹⁰ which held that the fourth amendment, absent "exigent circumstances," prohibits law enforcement from searching for the subject of an arrest warrant in

85. *Id.* at 729, 730.

86. *Id.* at 736, 737.

87. *Stanley v. Georgia*, 394 U.S. 557, 565 (1969).

88. "No soldier shall, in time of peace be quartered in any house, without the consent of the Owner, nor in time of war, but in a manner to be prescribed by law." U.S. CONST. amend. III.

89. "Now, one of the most essential branches of English liberty is the freedom of one's house. A man's house is his castle; and whilst he is quiet, he is as well guarded as a prince in his castle." Address by James Otis (American patriot and pamphleteer). Boston Court, (February 24, 1791) (discussing the Writs of Assistance).

90. 451 U.S. 204, 213 (1981).

the home of a third party without first obtaining a search warrant, regardless of how reasonable the belief of law enforcement might be that the subject of the arrest warrant might be secluded in the home of the third person.⁹¹

The United States Supreme Court was not, of course, the first to recognize the significance of the "castle."⁹² Indeed, throughout history mankind has shared a fundamental physical and psychological need for some sort of shelter and sanctuary. To ignore the privilege to stand one's ground in the home in the face of a murderous assault is to tear down the walls of the victim's dwelling and expose him or her to the same self-defense standard as one confronted with a similar assault on a public way or common thoroughfare; it is to say to the victim that, as far as shelter from external violence is concerned, *you have no home*. At least for now, the Florida Supreme Court has clearly preserved the basic validity of the castle doctrine, and there are solid conceptual and practical reasons for altering the absolute privilege of non-retreat in the situation involving the non-intruder assailant. But unfortunately, the invitee/legal co-occupant property line the Florida Supreme Court has drawn in *State v. Bobbitt* is fraught with great potential for confusion and future litigation in view of the innumerable lifestyles and living arrangements possible in the Sunshine State, as elsewhere in this country.⁹³

THOMAS KATHEDER

91. *Id.*

92. "[T]he dwelling house was a substitute for the mother's womb, the first lodging, for which in all likelihood man still longs, and in which he was safe and felt at ease." SIGMUND FREUD, *CIVILIZATION AND ITS DISCONTENTS*, (J. Strachey trans. 1st Amer. ed. 1962).

93. On return of mandate following the Florida Supreme Court's decision in *Bobbitt*, the First District Court of Appeal noted that its own decision in *Bobbitt* featured two holdings: "(1) the castle doctrine instruction should have been given; and (2) that defendant's evidence as to self defense created a reasonable doubt as to her guilt, which doubt was not overcome by evidence adduced by the State." *State v. Bobbitt*, 420 So. 2d 362 (Fla. 1st DCA 1982) (hereinafter referred to as *Bobbitt II*). The State contended in *Bobbitt II* that the Florida Supreme Court overruled *both* holdings, not just the First District's view of the castle doctrine, while the defendant urged that the two holdings were independent of each other. The First District Court of Appeal compared language in the Florida Supreme Court's unpublished original opinion in *Bobbitt I*, with its official opinion published at 415 So. 2d 724 (Fla. 1982), and concluded that "the first holding [of the District Court] with regard to the 'castle doctrine' does not affect the continued validity of the second holding, which is supported by a substantial line of authority dealing with self-defense independent of the 'castle doctrine.'" *Bobbitt*, 420 So. 2d at 363 (citations omitted). The state, dissatisfied with the district court's holding in *Bobbitt II*, sought to convince the Florida Supreme Court that its remand for proceedings consistent with its opinion was intended to reverse both holdings of the First District Court. The Florida Supreme Court declined to review the

Bobbitt II decision. State v. Bobbitt, 429 So. 2d 7 (Fla. 1983).

