Of the Enemy Within, The Castle Doctrine, and Self-Defense

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OF THE ENEMY WITHIN, THE CASTLE DOCTRINE, AND SELF-DEFENSE

CATHARINE L. CARPENTER*

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I. INTRODUCTION

Her husband was dead on the floor of their home. She had shot him after a violent argument, and now the jury was asked to determine whether it was murder or self-defense. During closing argument, the prosecutor emphasized what the state believed was the critical legal point: Under the law, the jury could not consider the killing justifiable "unless [the defendant] had exhausted every reasonable means to escape the danger, including fleeing from [her] home." The prosecutor continued:

Did she do that? No. Did she use the phone that was two feet away? No. Did she go out the door where her baby was sitting next to? [sic] No. Did she get in the car that she had driven all over town drinking and boozing it up all day? No.

The prosecution obtained a second degree murder conviction against Kathleen Weiand in the killing of her husband Todd, bolstered in part by a traditional duty to retreat jury instruction that stated: "The fact that the defendant was wrongfully attacked cannot justify her use of force likely to cause death or great bodily harm if by retreating she could have avoided the need to use that force." But was the instruction correct? Did Kathleen Weiand have to

1. Taken from the facts of Weiand v. State, 732 So. 2d 1044 (Fla. 1999). This Article deals with the appropriateness of a non-aggressor cohabitant's response to an unprovoked and deadly attack. Generally, deadly force may be used upon another if the defendant honestly and reasonably believes that such force is reasonably necessary to prevent imminent death or great bodily harm. See id. For a general discussion of the issue of self-defense, see JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW, § 18.01[B] (3d ed. 2001); WAYNE LAFAVE & AUSTIN SCOTT, SUBSTANTIVE CRIMINAL LAW, § 5.7 (3d ed. 2000).

2. Weiand, 732 So. 2d 1044, 1048 (Fla. 1999).

3. Id. Weiand represents a sadly typical case where the defendant claims self-defense in the killing of an abusive spouse. Similarly based fact situations can be found, for example, in State v. Gartland, 694 A.2d 564 (N.J. 1997); Commonwealth v. Derby, 678 A.2d 784 (Pa. 1996); and State v. Ordway, 619 A.2d 819 (R.I. 1992). It is interesting to note, however, that each of these trials was governed by very different jury instructions on the laws of self-defense: In New Jersey in 1997, the law required the duty to retreat between cohabitants; in Pennsylvania, no duty to retreat is required as against a deadly cohabitant, and in Rhode Island, there is a duty to retreat because the state rejects the Castle Doctrine completely. See generally cases noted supra.

4. Weiand, 732 So. 2d at 1048 (quoting FLA. STD. JURY INSTR. (CRIM.) § 3.04(d) (1998)). The duty to retreat is considered an aspect of the reasonableness of the response. See LAFAVE & SCOTT, supra note 1, at § 5.7(f). For alternatives to the duty to retreat, see State v. Glowacki, 630 N.W.2d 392 (Minn. 2001) and Cooper v. United States, 512 A.2d 1002 (D.C. 1986).
retreat from a deadly attacker when confronted in her own home? The Weiand facts highlight an interesting and fundamental division of perspective within the body of law on self-defense. Played out against the backdrop of deadly struggles, jurisdictions can be divided primarily into those that oblige the non-aggressor to retreat before using deadly force, and those that require no such duty, instead allowing those who are attacked to stand their ground and kill. The latter view was given voice very early in American jurisprudence, where it was acknowledged that most American courts were hesitant to adopt any rule that required a non-aggressor to retreat from an unprovoked deadly attack.

5. The generalized duty to retreat is often stated as follows: An actor may not use deadly force if he knows that he can avoid the necessity of using such force with complete safety by retreating. See MODEL PENAL CODE § 3.04(2)(b)(ii) (1962). The duty to retreat may be mandated either by statute or judicial decision. Florida, as an example, requires the duty to retreat by judicial decision. In Florida, see Weiand, 732 So.2d at 1048 (quoting Hedges v. State, 172 So. 2d 824, 827 (Fla. 1965)) for the proposition that "[t]he duty to retreat emanates from the common law, rather than from [Florida] statutes."). Other states specifically impose the duty to retreat by statute. See CONN. GEN. STAT. ANN. § 53a-19 (West 2001) (declaring that a person "is not justified in using deadly physical force upon another person if he knows he can avoid the necessity of using such force with complete safety"); accord DEL. CODE ANN. tit. 11, § 464(e) (2001); HAW. REV. STAT. ANN. § 703-304 (5)(b) (Michie 1999); N.H. REV. STAT. ANN. tit. 62, § 627:304 (5)(b) (Michie 1999); PA. CONS. STAT. ANN. § 505(B)(2)(ii)(A) (West 1998). Canada has also endorsed the duty to retreat. See R.S.C. § 34(2) (1970) (Can.).

6. This approach is called the "true man" doctrine, it stands for the proposition that a "true person," or someone who is without fault, does not have to retreat from an actual or threatened attack even if he could safely do so before the person may use physical force in self-defense. See Beard v. United States, 158 U.S. 550, 561 (1895) (declaring that "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."); see also People v. Toler, 9 P.3d 341 (Colo. 2000); State v. Renner, 912 S.W.2d 701 (Tenn. 1995). For a general review, see 40 AM. JUR. 2D Homicide § 164 (1999). Although beyond the scope of this Article, the phrase "true man" reminds one of the gender-based criticism leveled at the doctrine of self-defense. See, e.g., State v. Wanrow, 559 P.2d 548 (Wash. 1977) (criticizing self-defense instructions that use the male pronoun exclusively); Deborah Kochan, Beyond the Battered Woman Syndrome: An Argument for the Development of New Standards and the Incorporation of a Feminine Approach to Ethics, 1 HASTINGS WOMEN'S L.J. 89 (1989). A fascinating mix of law and literature on this important topic can be found in Marina Angel, Criminal Law and Women: Giving the Abused Woman who Kills a Jury of her Peers who Appreciate Trifles, 33 AM. CRIM. L. REV. 229 (1995).

7. For an early articulation of this view, see Runyon v. State, 57 Ind. 80 (1877). That court commented:

[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 . . . . [Therefore] [t]he weight of modern authority . . . establishes the doctrine, that, when a person, being without fault and in a place where he has a right to be, is violently assaulted, he may, without retreating, repel force by force, and if, in reasonable exercise of his right of self-defence, his
Proponents of the duty to retreat, however, argue that it is the supreme value of life that demands flight of those who are unlawfully attacked. What may appear to be cowardice in the face of aggression is actually the imposition of a legal requirement intended to calm the fires and prevent the loss of life.

Where the generalized duty to retreat is imposed, the Castle Doctrine—or the privilege of non-retreat—serves as an exception. A colorful reference to feudal times, the term invokes the maxim that has wound its way into idiomatic English: "Every man's house is his castle." Generally, under the Castle Doctrine, those who are unlawfully attacked in their homes have no duty to retreat, because their assailant is killed, he is justifiable.

Id. at 84. Additional early case support can be found in People v. Lewis, 48 P. 1088 (Cal. 1897); Boykin v. People, 49 P. 419 (Colo. 1896); Ragland v. State, 36 S.E. 682 (Ga. 1900); Page v. State, 40 N.E. 745 (Ind. 1894); State v. Hatch, 46 P. 708 (Kan. 1896); and State v. Partlow, 4 S.W. 14 (Mo. 1887). As stated by one legal commentator, "[I]t is abhorrent to the courts to require one who is assailed to seek dishonor in flight." See Joseph H. Beale, Jr., Retreat from a Murderous Assault, 16 HARV. L. REV. 567, 577 (1903).

8. See, e.g., State v. Shaw, 441 A.2d 561, 565 (Conn. 1981) (declaring that the duty to retreat is premised on the "recognition of . . . the great value of human life"); People v. Canales, 624 N.W.2d 918, 919 (Mich. 2001) (Corrigan, C.J., dissenting) (quoting Pond v. People, 8 Mich. 150, 173 (1860) in asserting that the sanctity of human life is the primary principle underlying the duty to retreat rule: "Human life is not to be lightly disregarded, and the law will not permit it to be destroyed unless upon urgent occasion.").

9. As one court noted, the doctrine of retreat was "more often than not, rejected by Southern and Western states in which a strong code of personal honor developed." See State v. Musselwhite, 283 S.E.2d 149, 153 (N.C. Ct. App. 1981). But to every general principle, there are exceptions. Tennessee, for example, was a duty to retreat jurisdiction until the Tennessee Legislature added a "no duty to retreat" rule to the law of self-defense in 1989. See TENN. CODE ANN. § 39-11-611(a) (1997) (adding the clause, "There is no duty to retreat before a person threatens or uses force."). For an interesting trial court charge on retreat and cowardice, see People v. Tomlins, 107 N.E. 496, 497 (N.Y. 1914) (instructing the jury, "We may not feel always like retreating in the face of an attack; it may not seem manly to us; but it is the law that if a man can safely retreat, and thereby escape a conflict with another, he must do so, even though it may not seem dignified and manly."). Ultimately, however, the New York Court of Appeals in Tomlins found that this jury instruction was erroneous. Id.

10. Countless cases and articles make reference to this saying, which has been attributed to Semiway's Case, 77 Eng. Rep. 194 (1604). A historical, but disputed discussion of this phrase can be found in Minnesota v. Carter, 525 U.S. 83, 94 (1998). For powerful imagery regarding the home, see Miller v. United States, 357 U.S. 301, 307 (1958), in which the Court cited "remarks attributed to William Pitt, Earl of Chatham, on the occasion of debate in Parliament on the searches incident to the enforcement of an excise on cider":

The poorest man may in his cottage bid defiance to all the forces of the Crown. It may be frail; its roof may shake; the wind may blow through it; the storm may enter; the rain may enter; but the King of England cannot enter—all his force dares not cross the threshold of the ruined tenement!

Id.
homes offer them the safety and security that retreat is intended to provide. They may lawfully stand ground instead and use deadly force if necessary to prevent imminent death or great bodily injury, or the commission of a forcible felony. In this limited situation, without a jury instruction mandating retreat, the Castle Doctrine serves to place the non-aggressor in the same relative position as if in a non-retreat jurisdiction.

But rather than providing a settled exception to the generalized duty to retreat, the Castle Doctrine has evolved into a confusing patchwork of rules on when, and against whom, one may assume the privilege of non-retreat. Partly because of the complications of modern society—gone are the days when deadly conflicts primarily originated from outside the home—and partly because of the increased awareness of the privilege's impact on intimate violence, courts regularly question whether the duty to retreat should be fashioned differently depending on the status of the parties involved. Debate over the Castle Doctrine's applicability to cohabitants and invited guests, it appears, is generated by three competing and intersecting policies. First, there remains the

11. The observation that the home served as sanctuary was made eloquently by Judge Cardozo in Tomlins, 107 N.E. at 497, when he noted that "[f]light is for sanctuary and shelter, and shelter, if not sanctuary, is in the home."

12. This statement of the Castle Doctrine merges traditional notions of the defense of habitation and self-defense in the home. See infra Part II for a discussion of the distinction between these defenses. It is interesting to note that although Rhode Island has rejected the Castle Doctrine, it does provide for the privilege of non-retreat when protecting against the commission of a criminal offense in one's home. See R.I. GEN. LAWS § 11-8-8 (2002) (stating that "[t]here is no duty on the part of owner, tenant or occupier to retreat from any person engaged in the commission of [a] criminal offense."). For Rhode Island's judicial rejection of the Castle Doctrine, see State v Ordway, 619 A.2d 819, 823–24 (R.I. 1992) (citing State v. Quarles, 504 A.2d 473, 476 (R.I. 1986) in its refutation of the Doctrine's rationale).

13. Adoption of the duty to retreat from the home raises gender-sensitive issues because of its disproportionate impact on females. According to the SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 2000, reported violent victimizations of males by non-strangers occurs in 44% of the cases, and by intimates in 3% of those reported incidents, compared to violent victimization of females by non-strangers, which occurs in 66% of reported incidents, and by intimates in 21% of those incidents reported. See BUREAU OF JUSTICE STATISTICS, U.S. DEPT OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 2000 Table 3.17 at 196 (Kathleen Maguire & Ann Pastore eds., 2001). Additionally, while the risk to females increases upon separation from their abusers, the risk to males does not increase under the same circumstances. Wives are particularly at risk during the first two months after separation, and if they unilaterally decided to end the relationship. See Weiand v. State, 732 So. 2d 1044, 1053 (Fla. 1999). Numerous studies support the observation that women "experience an elevated risk of severe or lethal violence in the process of leaving batterers." Hassler et al., Lethality Assessments as Integral Parts of Providing Full Faith and Credit Guarantees, available at http://www.vaw.umn.edu/documents/fcc/chapter9/chapter9.html (last visited on Feb. 4, 2003).
overriding desire to protect the sanctity of life whenever possible.\textsuperscript{14} Second, and in seeming conflict, is the principled belief that the sanctity of one's home must be recognized, even in the face of loss of life.\textsuperscript{15} Third, and possibly the most problematic, is the degree of importance that should be attached to the shared property rights of the parties involved in the deadly encounter.\textsuperscript{16}

And so, caught between conflicting principles of traditional notions of self-defense and concomitant rights of possession, divergent opinions have emerged on the Castle Doctrine's applicability to cohabitants. This Article examines several distinctive views on the defender's duty to retreat in the face of an attack by a deadly cohabitant. These views include: 1) the imposition of the mandatory duty to retreat from the home;\textsuperscript{17} 2) the limited duty to retreat within the home;\textsuperscript{18} 3) jury consideration of the failure to retreat where there is no instruction of

\textsuperscript{14} See, e.g., Cooper v. United States, 512 A.2d 1002, 1003 (D.C. 1986) (instructing the jury that "[b]efore a person can avail himself [of] the plea of self-defense against a charge of homicide, he must do everything in his power, consistent with his own safety, to avoid the danger and avoid the necessity of taking life."); see also State v. Shaw, 441 A.2d 561 (Conn. 1981).

\textsuperscript{15} See, e.g., Korzep v. Superior Court, 838 P.2d 1295, 1298 (Ariz. Ct. App. 1991) (identifying that the aim underlying legislative policy was to restore ultimate protection of the home by requiring "that the law enforcement officials and courts shall apply this and all other applicable criminal laws relating to the protection of the home and its residents promptly and severely so as to restore the total sanctity of the home in Arizona."); Barton v. State, 420 A.2d 1009, 1010 (Md. 1980) (underscoring the importance of the home by stating: "If the peril—the attack—occurs in his home, his dwelling place, he need not retreat from it, but may stand his ground and use whatever force is reasonable ... in order to repel the attack and defend himself. He is not bound to flee and become a fugitive from his own home, for, if that were required, there would, theoretically, be no refuge for him anywhere in the world."); State v. Christener, 362 A.2d 1153, 1164 (N.J. 1976) (Hughes, C.J., concurring) (emphasizing that "[t]he sanctity of home is not new. At the common law it was thought impervious even to royal or official intrusion.").

\textsuperscript{16} See, e.g., Conner v. State, 361 So. 2d 774, 775 (Fla. Dist. Ct. App. 1978) (stating that "the rationale of the 'castle' doctrine appears to us to be in immediate trouble when it is expanded and applied among members of a family, all lawfully on the premises and all lawfully claiming the home as their ultimate sanctuary."); State v. Walker, 598 N.E.2d 89, 90 (Ohio Ct. App. 1991) (noting that states are split on the duty to retreat when concomitant property rights exist, and declaring: "We find the better view to be that where both parties have an equal right to be in the dwelling, a person must retreat if possible before killing an assailant.").

\textsuperscript{17} See, e.g., State v. Shaw, 441 A.2d 561, 566 (Conn. 1981) (quoting the RESTATEMENT (SECOND) OF TORTS § 65 (1965) in adopting the co-dweller retreat rule which states that the privilege of non-retreat in the home "does not exist ... in a place which is also the dwelling of the other." (emphasis added by court)).

\textsuperscript{18} See Weiand v. State, 732 So. 2d 1044, 1056-57 (Fla. 1999) (adopting a limited duty to retreat within the home suggested in Justice Overton's dissent in State v. Bobbitt, 415 So. 2d 724 (Fla. 1982)).
the duty to retreat; and 4) the privilege of non-retreat. At the heart of the matter is a fundamental disagreement: flight from home base, it is suggested by those that support the duty to retreat, is not really fraught with the same danger that existed in the Nineteenth Century when the Castle Doctrine's privilege of non-retreat was established. The decreased degree of danger, coupled with the fact that the parties involved are cohabitants, rather than strangers, requires a "heightened obligation to treat each other with a degree of tolerance and respect." Therefore, as against a deadly cohabitant with equal possessory rights, courts that support the duty to retreat hold that the protection of sanctity of life outweighs the slight risk of peril that such flight may bring. In creating a cohabitant exception to the Castle Doctrine, these courts found that the reasonableness of retreat significantly outweighs the Castle Doctrine's applicability in the home.

This Article will argue that jurisdictions that have adopted the cohabitant exception have improperly rejected the Castle Doctrine where a cohabitant is the initial deadly aggressor. Case language suggests that the duty to retreat is compelled by the desire to preserve

19. See Cooper, 512 A.2d at 1002.
20. See, e.g., State v. Glowacki, 630 N.W.2d 392 (Minn. 2001) (establishing a bright line rule that the duty to retreat is not required in the home); accord State v. Browning, 221 S.E.2d 375 (N.C. Ct. App. 1976) (holding that defendant brother had no duty to retreat from his sibling in their mother's home where each resided); State v. Thomas, 673 N.E.2d 1339 (Ohio 1997); Commonwealth v. Derby, 678 A.2d 784 (Pa. Super. Ct. 1996) (employing revised Pennsylvania statute 18 PA. CONS. STAT. ANN. § 505(b)(2)(ii)(A) (West 1998), which no longer obliges a person to retreat from his or her dwelling when attacked by a deadly cohabitant, yet continuing to make retreat a requirement against such an attack in the place of work).
21. This view of the Castle Doctrine has been expressed elsewhere. See Rachel V. Lee, Note, Criminal Law-A Further Erosion of the Retreat Rule in North Carolina, 12 WAKE FOREST L. REV. 1093, 1100 (1976) (criticizing the modern acceptance of the Castle Doctrine: "The rationale behind the no-retreat jurisdictions ... was inherited from those periods when retreat from one's dwelling was necessarily attended with increased peril. 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.").
22. Cooper, 512 A.2d at 1006 (disallowing the Castle Doctrine as applied to a deadly cohabitant, finding that this heightened obligation of respect "does not evaporate when one co-occupant disregards it and attacks another.").
the lives of parties who share the same household. However, the rulings are, in reality, occasioned by the courts' reliance on formal and abstract principles of property rights to the exclusion of competing property interests that value the individual's personal safety and security in the sanctuary. And whether by design or coincidence, the effect of these rulings is to rob intimates who are faced with violence of their basic and fundamental right of self-defense.

Part II of this Article will describe the competing policies at play in the Castle Doctrine's application to cohabitants. Underscoring the fundamental dichotomy in views, this section will highlight the division of thought between those jurisdictions that hold as paramount the importance of the sanctuary, and those that focus on the shared property interests of the parties involved. For some retreat jurisdictions, the Castle Doctrine applies equally against all initial deadly aggressors, whether their status is labeled as trespasser, invitee, or cohabitant. In these jurisdictions, the defender's sanctuary—the castle—is deemed inviolate. Even in the face of potential loss of life, the safety of the sanctuary trumps. But in other jurisdictions, whether the non-aggressor is in a place of sanctuary seems to be of less relevance than the status of the initial deadly aggressor. For these courts, the inquiry turns instead on whether the initial deadly aggressor might be the paradigmatic burglar who has no legitimate relationship to the site of the attack, or at the other end of the spectrum, a cohabitant with equal possessory rights. By underscoring either the value of the sanctuary, in which case the Doctrine will be applied, or the status of the initial aggressor, in which case the Doctrine will be rejected, courts indelibly change the parameters of self-defense. Part II will conclude with an examination of recent Florida case law, which, in dramatic fashion, shifted between these two competing policies as it attempted to resolve the issue.


25. As passionately stated by Judge Cardozo in People v. Tomlins, 107 N.E. 496, 497 (N.Y. 1914): "It is not now and never has been the law that a man assailed in his own dwelling is bound to retreat .... He is under no duty to take to the fields and the highways, a fugitive from his own home."

26. See infra Part II.B.2 for a discussion of the cases that support this proposition.

27. Review of two cases highlights the effect of these competing policies. Compare Bobbitt v. State, 415 So. 2d 724 (Fla. 1982) (finding a cohabitant exception based on the lawfulness of the deadly cohabitant's interest), with Weiand v. State, 732 So. 2d 1044 (Fla. 1999).
Part III of the Article will advance the position that the cohabitant exception is a formalistic and flawed effort to address the issue of intimate violence. While it is true that domestic violence is often the cause of the deadly confrontations between cohabitants, and equally true that the horrors of such situations compel the privilege of non-retreat, this Article criticizes the cohabitant exception from additional vantage points. Challenging underlying principles of property rights, this section will argue that courts have misapplied three assumptions to conclude that the deadly cohabitant's shared property interest necessitates a cohabitant exception to the Castle Doctrine.

First, this section will assert that courts have mistakenly enmeshed two related, but distinct defenses: defense of habitation, and self-defense in the home. As a result, courts have improperly required the element of intrusion for the Castle Doctrine to be employed. Further, because the deadly cohabitant shares concomitant rights of possession and enjoyment in the sanctuary, and is, therefore not an intruder, these courts have found that the Castle Doctrine should not apply. Next, it will be shown that courts have applied formalistic notions of property rights to conclude that the deadly cohabitant maintains an equal and lawful right of presence that is worthy of protection under the Castle Doctrine. But, with analogous support from the crime of burglary, it will be argued that the better view would be to use more flexible principles of property rights to ascertain whether the deadly cohabitant maintains the status of lawful presence in the sanctuary. Third, referencing recent decisions in the crime of "malicious destruction of joint property," the Article will urge that, even assuming the deadly cohabitant maintains a lawful interest in the premises, such a finding should not be allowed to usurp the innocent cohabitant's personal right of protection in the sanctuary.

Part IV of the Article will explore alternatives to the cohabitant exception. This section will showcase the recent enactment in Minnesota of a bright line rule that provides the privilege of non-retreat for all occupants in the home, and will compare and contrast this view with Washington, D.C.'s jury instruction to consider the failure to retreat, and Florida's requirement of a limited duty to retreat. Ultimately, this section will conclude that assessing the appropriateness

1999) (overruling Bobbit because of renewed emphasis on the protection of the sanctuary).
28. See Glowacki, 630 N.W.2d at 402.
30. See Weiand, 732 So. 2d at 1044.
of the innocent cohabitant's response should not be based on a litmus
test of retreat, but should be based instead on the analysis of one of the
fundamental tenets of self-defense: the reasonableness and
proportionality of the response to the deadly attack.

And so we return to Kathleen Weiand who, as the trial court
instructed, was obligated to retreat from her home even though her
serially abusive husband was unlawfully attacking her.31 Interestingly,
whether to require the innocent cohabitant to retreat is not particular to
Kathleen Weiand's case. To the contrary, it is an issue that has garnered
widespread attention as courts and legislatures explore the legitimacy of
the cohabitant exception and its impact on important societal policies.32
This Article will examine the question of how best to treat the enemy
within.

II. A COMPARATIVE UNDERSTANDING OF THE CASTLE DOCTRINE

A. Overview of the Castle Doctrine in Defense of Habitation and Self-
Defense

Canvassing the jurisprudence of the privilege of non-retreat, one is
struck by the painstaking effort made to delineate civilized behavior
amid the violence that occasions the need to use deadly force as a
response. Like a kaleidoscope, the image of the British subject standing
up to the King fades into the Western gunslinger challenging his
opponent, which shifts to the homeowner protecting himself and his
family from the burglar, and finally, to the woman who must resort to
deadly violence against her abusive husband. In all of these settings,
and many more, the duty to retreat and the countermanding privilege of

31. Id. at 1048.
32. In the last few years alone, courts and legislatures have attempted to clarify, modify
or eliminate the cohabitant exception. See id. at 1044 (overruling Bobbit in Florida in finding
a limited duty to retreat within the home); Glowacki, 630 N.W.2d at 392 (adopting the
privilege of non-retreat in an attempt to unify the law in the area of self-defense in
Minnesota); State v. Warren, 794 A.2d 790 (N.H. 2002) (tracing statutory treatment of the
Castle Doctrine in self-defense and defense of habitation in New Hampshire). In New Jersey,
the New Jersey Supreme Court was actually willing to hear the appeal of defendant Ellen
Gartland on the charge of killing her abusive husband, even though she died before the
appeal. See State v. Gartland, 694 A.2d 564 (N.J. 1997). Further, note the legislative changes
made in New Jersey following its supreme court's plea to do so. See Senate Bill 271
(amending N.J. STAT. ANN. § 2C:3-4 b.(2)(b)(i) (1999) to eliminate the duty to retreat at
home in all cases, unless actor was the initial aggressor). In Ohio, the case of State v. Thomas,
673 N.E.2d 1339 (Ohio 1997), provided the catalyst for the court to overturn prior case law
supporting the cohabitant exception.
non-retreat have been legal attempts to strike a balance between the need to resort to violence and the reasonableness of the approach to it.

Most jurisdictions do not impose the duty to retreat on one who is unlawfully attacked, whether in public or private space, believing that one who is not initially at fault should be able to stand ground and use deadly force.\(^{33}\) However, in a minority of jurisdictions, the law has declared that it is far more reasonable to demand that one who is unlawfully attacked "retreat if safe to do so," rather than take the other's life.\(^{34}\)

But it is equally clear that the duty to retreat is not without exception.\(^{35}\) First, no duty to retreat is required where it is difficult to extricate oneself safely from the affray.\(^{36}\) Even jurisdictions with strict

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33. The position of no retreat gained early support and is embraced by the majority of American jurisdictions. See Beard v. United States, 158 U.S. 550, 562 (1895) (stating that the "weight of modern authority ... establishes the doctrine that, when a person, being without fault and in a place where he has a right to be, is violently assaulted, he may, without retreating, repel force by force."). A historical discussion of the distinction between justifiable and excusable homicide and the accompanying privilege of non-retreat can be found in Sydnor v. State, 776 A.2d 669, 672-73 (Md. 2001) (citing WILLIAM BLACKSTONE, 4 COMMENTARIES ON THE LAWS OF ENGLAND 177 (1769); EDWARD H. EAST, 1 PLEAS OF THE CROWN 220 (1806); and MATTHEW HALE, 1 HISTORY OF THE PLEAS OF THE CROWN 478-92 (1847)). For an updated view on the privilege of non-retreat, see State v. Renner, 912 S.W.2d 701, 704 (Tenn. 1995) (collecting authority in support of the 'no duty to retreat' rule).

34. See LAFAVE & SCOTT, supra note 1, § 5.7(f) (describing this view as a "strong minority" of jurisdictions). Early case law described the concept of retreat in a variety of ways. See Beard v. United States, 158 U.S. 550, 560 (1895) (describing it as "retreating to the wall"); People v. Newcomer, 50 P. 405, 408 (Cal. 1897) (explaining retreat to mean that "the party must avail himself of any apparent and reasonable avenues of escape by which his danger might be averted and the necessity of slaying his assailant avoided"); State v. Borwick, 187 N.W. 460, 462 (Iowa 1922) (referring to defendant as having "his back 'to the wall'"); Aldrich v. Wright, 53 N.H. 398, 422 (1873) (requiring retreat, "either by ... wall, ditch, or other impediment, or as far as the fierceness of the assault will permit him.").

35. See United States v. Peterson, 483 F.2d 1222, 1235 (D.C. Cir. 1973) (recognizing that the duty to retreat is not "suited to all situations."); see also State v. Leeper, 200 N.W. 732, 736 (Iowa 1924) (acknowledging "[t]hat this is the general rule may be conceded, but it is well settled that it is not applicable under all circumstances.").

36. See Gillis v. United States, 400 A.2d 311, 312 (D.C. 1979). The Gillis court instructed the jury as follows:

[I]f the defendant actually believed and had reasonable grounds to believe that he was in imminent danger of death, or serious bodily harm, and that deadly force was necessary to repel such danger he was not required to retreat, or to consider whether he could safely retreat. He was entitled to stand his ground and use such force as was reasonably necessary under the circumstances, to save his life or protect himself from serious bodily harm.

Id.; see also Carter v. United States, 475 A.2d 1118, 1124 (D.C. 1984) (affirming that it is well settled that an individual has no duty to retreat when faced with real or apparent danger of
notions of the obligation to retreat are quick to indicate that the duty to retreat is "but an application of the requirement of strict necessity . . . and was designed to insure the existence of that necessity."37 Second, most retreat jurisdictions have adopted the Castle Doctrine, which holds that the duty to retreat is not required when attacked in one's own dwelling,38 although what constitutes one's dwelling for purposes of the Castle Doctrine is the subject of much controversy.39

37. Peterson, 483 F.2d at 1234–35. Peterson further acknowledged that the doctrine of retreat "was never intended to enhance the risk to the innocent." Id. at 1236. In a memorable observation, Justice Holmes stated in Brown v. United States, 256 U.S. 335, 343 (1921): "Detached reflection cannot be demanded in the presence of an uplifted knife." See also Redcross v. State, 708 A.2d 1154, 1158 (Md. Ct. Spec. App. 1998) (noting that one exception to the general rule of retreat is where the possible means of escape is unknown to the defendant).

38. The language was colorful and the image vivid when more than two-hundred years ago Lord Chief Justice Hale avowed that if a person

is assaulted 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 his house to his adversary by flight.
People v. Tomlins, 107 N.E. 496, 497 (N.Y. 1914) (quoting HALE'S PLEAS OF THE CROWN,
486); see also People v. Toler, 9 P.3d 341 (Colo. 2000); State v. Long, 480 S.E.2d 62 (S.C.
1997); State v. Pellegrino, 577 N.W.2d 590 (S.D. 1998). But see Gainer v. State, 391 A.2d 856,
862–63 (Md. Ct. Spec. App. 1978), in which the court admonished:

[T]he castle doctrine is for defensive and not offensive purposes and does not confer a license to kill or to inflict grievous bodily harm merely because the assault takes place within the defendant's home; rather, that it is subject always to the primary prerequisites of self-defense, including particularly the requirements that the person assailed not be the aggressor, that the apprehension of personal harm be reasonable and that no more force than necessary be applied.
Gainer, 391 A.2d at 862–63.

39. Detailed discussion is beyond the scope of this Article, but debate has centered on whether the Castle Doctrine physically extends beyond the dwelling structure into areas deemed part of the curtilage. The curtilage has been held to apply to the yard around the dwelling house as well as the area occupied by barns, cribs, and other outbuildings. See State v. Blue, 565 S.E.2d 133 (N.C. 2002); State v. Browning, 221 S.E.2d 375 (N.C. Ct. App. 1976); State v. Bonano, 284 A.2d 345 (N.J. 1971) (holding that porches or other similar structures may be deemed to be part of one's dwelling). But see Commonwealth v. Bennett, 671 N.E.2d 966, 967 (Mass. App. Ct. 1996) (finding that defendant's driveway does not qualify as dwelling for purposes of self-defense because it has "none of the closed and secure qualities of an occupied dwelling"); People v. Riddle, 649 N.W.2d 30 (Mich. 2002) (stating that the Castle Doctrine does not extend to outlying areas around the home); People v. Hernandez, 774 N.E.2d 198 (N.Y. 2002) (rejecting defendant's contention that common stairwell was part of defendant's dwelling in a confrontation with an invitee of another tenant).
As an exception to the generalized duty to retreat, the Castle Doctrine sits at the intersection of two distinct but interrelated defenses: defense of habitation and self-defense. Defense of habitation is primarily based on the protection of one's dwelling or abode, and stems from the common law belief that a man's home is his castle.\textsuperscript{40} Essentially, the defense provides that the use of deadly force may be justified to prevent the commission of a felony in one's dwelling,\textsuperscript{41} although there is considerable discussion on whether the intrusion must be accompanied by the intent to commit a violent felony.\textsuperscript{42} Some courts require that defense of habitation only be asserted as against an external threat,\textsuperscript{43} and if that is true, then the defense cannot be claimed as against a cohabitant in lawful possession. Because the threat is of the

\textsuperscript{40} Also called the defense of dwelling, the defense of habitation has its roots in the "common law recognition of the home's importance, holding that 'the house has a peculiar immunity [in] that it is sacred for the protection of [a person's] family.'" State v. Carothers, 594 N.W.2d 897, 900 (Minn. 1999) (quoting State v. Touri, 112 N.W. 422, 424 (1907)) (alteration in original).

\textsuperscript{41} The Supreme Court of North Carolina reaffirmed this principle when it stated:

When a trespasser enters upon a man's premises, makes an assault upon his dwelling, and attempts to force an entrance into his house in a manner such as would lead a reasonably prudent man to believe that the intruder intends to commit a felony or to inflict some serious personal injury upon the inmates, a lawful occupant of the dwelling may legally prevent the entry, even by the taking of the life of the intruder. Under those circumstances, "the law does not require such householder to flee or to remain in his house until his assailant is upon him, but he may open his door and shoot his assailant, if such course is apparently necessary for the protection of himself or family . . . ."


\textsuperscript{42} Professor Dressier outlines three approaches to the type of intrusion that may be required for deadly force to be used in defense of the habitation: 1) the early common law rule which allowed for deadly force to be used to prevent an imminent and unlawful entry of the dwelling; 2) the "middle" approach, which allows the use of deadly force if the intrusion is accompanied by the intent to commit injury upon an occupant or commit a felony; and 3) the "narrow" approach which requires that the intrusion is accompanied by the intent to kill or commit serious bodily harm or commit a violent felony. \textit{Dressler, supra} note 1, § 20.03[B]; see \textit{also} State v. Hare, 575 N.W.2d 828 (Minn. 1998) (exemplifying the middle approach in determining that defense of dwelling does not require a showing by the actor of exposure to great bodily harm or death); \textit{cf.} State v. W.J.B., 276 S.E.2d 550 (W. Va. 1981) (recognizing that the state's case law is inconsistent regarding the level of intrusion needed).

\textsuperscript{43} \textit{See, e.g.,} \textit{Blue}, 565 S.E.2d at 138 (explaining that "[t]he rationale for this distinction is that once the occupant is face-to-face with the assailant, the occupant is better able to ascertain whether the assailant intends to commit a felony or has the means to inflict serious injury."); \textit{State v. McLaurn}, 266 S.E.2d 406, 408 (N.C. Ct. App. 1980) (reiterating that it is "well settled in North Carolina that the defense of habitation or domicile is limited to those cases where a defendant is attempting to prevent a forcible entry into his home.").
commission of a forcible felony in the home, courts agree that there is no duty to retreat when claiming the defense of one's habitation. As stated forcefully by the Minnesota Supreme Court, "mandating a duty to retreat for defense of dwelling claims will force people to leave their homes by the back door while their family members are exposed to danger and their houses burgled."

Derived from similar roots, and potentially overlapping, is self-defense in the home. Whereas in defense of habitation, deadly force may be used to prevent the commission of an atrocious felony, in self-defense, deadly force may be used when necessary in resisting or preventing an offense which reasonably exposes the person to death or serious bodily harm. The contemplated need for self-defense in the home, therefore, is in some sense broader—it can be an external or internal attack—but it is narrower in its requirement that the attacker intends death or serious bodily harm. Some jurisdictions, in a formalistic attempt to separate the two defenses, provide that defense of habitation occurs until the point of intrusion, at which time the claim becomes self-defense in the home.

44. See Carothers, 594 N.W.2d at 901.
45. See Brayboy v. State, 745 A.2d 471 (Md. Ct. Spec. App. 2000) (finding that the trial court's instruction on self-defense adequately covered defense of habitation); see also State v. Sullivan, 547 S.E.2d 183, 185 (S.C. 2001) (stating that "the defense of habitation is analogous to self-defense and should be charged when the defendant presents evidence that he was 'defending himself from imminent attack on his own premises.'" (quoting State v. Lee, 362 S.E.2d 24, 25 (1987))).
46. See Blue, 565 S.E.2d 133. Generally, one who is not the aggressor in an encounter is justified in using a reasonable amount of force against his adversary when he reasonably believes (a) that he is in immediate danger of unlawful bodily harm from his adversary and (b) that the use of such force is necessary to avoid the danger.
47. See Perkins v. State, 77 S.W.3d 21, 24 (Mo. Ct. App. 2002) (explaining that defense of habitation is "accelerated self defense" in that it authorizes actions to be taken when the intruder is seeking to cross the protective barrier of the house (quoting State v. Ivvicsies, 604 S.W.2d 773, 777 (Mo. Ct. App. 1980)); see also State v. Johnson, 54 S.W.3d 598 (Mo. Ct. App. 2001).
48. See, e.g., State v. Lumpkin, 850 S.W.2d 388, 392 (Mo. Ct. App. 1993) (clarifying that the two defenses "differ in terms of time and space in that defense of premises is applicable prior to and during the intruder's entry into the dwelling, but once the intruder has entered without resistance, the principles of self-defense apply."); State v. Marshall, 414 S.E.2d 95
Because of the defenses' commonalities, their distinctions have often been blurred, and while the privilege of non-retreat is provided in each of these defenses, their rationales are somewhat different. In the case of defense of habitation, the Castle Doctrine allows the resident to stand ground and use deadly force against the intruder to protect the sanctity of the home from the attempted atrocious felony because the duty to retreat would be incompatible with the goal of preventing the commission of the felony. In the claim of self-defense in the home, the Castle Doctrine is based on two articulated rationales. Like the defense of habitation, standing one's ground is allowed to protect the sanctity of defendant's home, which has been violated by someone who intends great bodily harm or death to the resident. To that extent, self-defense in the home shares the same goal of defense of habitation. But, an additional factor not relevant to defense of habitation also supports the Castle Doctrine. Retreat into the home is, in essence, a retreat to the wall. Having retreated as far as possible, the actor should not be compelled to leave the sanctuary.

(N.C. Ct. App. 1992) (articulating the position that once an intruder enters a person's home, usual rules of self-defense replace rules governing defense of habitation). Other interesting attempts to keep the defenses separate occurred in People v. Riddle, 649 N.W.2d 30 (Mich. 2002), where the Michigan Supreme Court, after reaffirming the privilege of non-retreat in self-defense in the home, noted, "We specifically do not address whether a person may exercise deadly force in defense of his habitation, and our holding should not be misconstrued to sanction such use of force as it pertains to the defense of one's habitation." Id. at n.11; see also State v. Pendleton, 567 N.W.2d 265, 269 (Minn. 1997) (emphasizing that "[b]ecause the legislature specifically included a separate definition of 'defense of dwelling'-and omitted any fear of great bodily harm or death language for that defense—it presumably intended that language to be meaningful.").

49. Courts have commented on the confusion between the two defenses, which often overlap in practice. See, e.g., State v. Glowacki, 630 N.W.2d 392, 401–02 (Minn. 2001) (concluding that a bright line rule would end confusion between the two defenses); Carothers, 594 N.W.2d at 902 (drawing attention to the fact that the defense of dwelling and self-defense within the home have not been clearly distinguished); see also State v. Sanders, 376 N.W.2d 196 (Minn. 1985) (giving substantially same duty to retreat jury instruction for defense of habitation and self-defense in the home); State v. Warren, 794 A.2d 790 (N.H. 2002) (tracking the inconsistencies of statutory language in defense of premises and self-defense). Additionally, appellate courts have been critical of trial courts that did not instruct sua sponte on one of the defenses even though defendant requested the other. See State v. Johnson, 54 S.W.3d 598 (Mo. Ct. App. 2001) (determining that a trial court should instruct sua sponte on defense of habitation where the facts warrant it, even though defendant claimed self-defense); accord State v. Sullivan, 547 S.E.2d 183 (S.C. 2001).

50. As the court stated in People v. Tomlins, 107 N.E. 496, 497 (N.Y. 1914), no one should have to face the indignity of being a "fugitive from his own home." Indeed, so strong is the commitment to protect one's home from intrusion, that some statutory language presumptively finds reasonableness on the part of one who uses deadly force within his or her own dwelling to repel a deadly intrusion. See People v. Hardin, 102 Cal. Rptr. 2d 262, 267
Given that the defense of habitation generally presupposes an intrusion by a nonresident, it is appropriate to provide a resident with the privilege of non-retreat in order to protect the dwelling. The trespasser intending the atrocious felony is seen as a threat to the peaceful possessory interest held by the resident, and the resident should not be obligated to retreat. Marking as fundamental the element of the intrusion, the New Hampshire Supreme Court stated,

In our view, this "defense of dwelling" exception to the general rule that the force used in response to a threat should be proportionate is based upon the defender's interest in the premises and the assailant's status as an intruder. Because "[i]mplicit in the defense of dwelling defense is the notion that the dwelling is being defended against an intruder," the exception does not apply where the assailant is a cohabitant.

Self-defense in the home, however, differs from the defense of habitation in two respects: first, there is no specific requirement of intrusion by the aggressor; and second, the force used by the occupant need not be to protect the sanctuary against an atrocious felony. Together, these differences raise an interesting question where cohabitants are involved. In defense of habitation, where an intrusion is presupposed, there may be a question of whether the defense applies to an assault by a cohabitant, whom the law presumes is lawfully present in the home. However, in a claim of self-defense in the home, where no

(Ct. App. 2000) (citing CAL. PENAL CODE § 198.5 (West 1999)), which provides that "[a]ny person using force intended or likely to cause death or great bodily injury within his or her residence shall be presumed to have held a reasonable fear of imminent peril of death or great bodily injury to self, family, or a member of the household when that force is used against another person, not a member of the family or household, who unlawfully and forcibly enters or has unlawfully and forcibly entered the residence.").

51. See, e.g., People v. Brown, 8 Cal. Rptr. 2d 513, 516 (Ct. App. 1992) (describing defense of habitation to include four elements: "There must be an unlawful and forcible entry into a residence; the entry must be by someone who is not a member of the family or the household; the residential occupant must have used 'deadly' force . . . against the victim within the residence; and finally, the residential occupant must have had knowledge of the unlawful and forcible entry." (emphasis added) (internal citation omitted)).

52. See Carothers, 594 N.W.2d 897 (finding that there is no duty to retreat from the home under a claim of defense of dwelling).

53. State v. Warren, 794 A.2d 790, 792 (N.H. 2002) (internal citation omitted) (quoting State v. Hare, 575 N.W.2d 828, 832 (Minn. 1998)); accord State v. James, 734 A.2d 1012 (Conn. App. Ct. 1999) (citing State v. Shaw, 441 A.2d 561 (Conn. 1981) (holding that the "dwelling exception" to the duty to retreat does not apply however, if the actor is threatened by another person who also dwells in the same place).
intrusion is required, the cohabitant's rightful presence should be less relevant to a successful claim.\textsuperscript{54}

\textbf{B. The Castle Doctrine's Applicability to Cohabitants}

Castle Doctrine cases can be divided roughly into three categories: those where the initial deadly aggressor is a trespasser,\textsuperscript{55} an invitee,\textsuperscript{56} or a cohabitant.\textsuperscript{57} The classification given to the initial deadly aggressor may determine whether the privilege of non-retreat will be afforded to the

\textsuperscript{54} The entanglement of the claims of self-defense in the home and defense of habitation has been the subject of recent court discussions, which have been marked by varying results. See People v. Riddle, 649 N.W.2d 30, 36 n.11 (Mich. 2002) (finding the Castle Doctrine applicable in Michigan to cohabitant's claim of self-defense in the home, but refusing to address the issue with respect to defense of habitation); see also Warren, 794 A.2d 790 (acknowledging in New Hampshire the privilege of non-retreat to defense of dwelling cases because there is an intrusion, but questioning its applicability to the claim of self-defense where there is no intrusion) But see Glowacki, 630 N.W.2d 392 (unifying the application of the Castle Doctrine in self-defense and defense of habitation in Minnesota).

\textsuperscript{55} A trespass is any intentional and unprivileged entry onto the land of another, and a trespasser is one who "enters or remains upon the land . . . of another" without the owner's permission. \textsc{Restatement (Second) of Torts} \S S 157-64, 329 (1965). In the context of reasonable use of deadly force self-defense, the usual application is of an intruder who intends to commit an assault or a forcible felony. See \textsc{Mass. Gen. Laws} ch. 278 \S 8 (West 2002) (finding no duty to retreat from any person "unlawfully in said dwelling"); \textsc{N.C. Gen. Stat.} \S 14-51.1 (2001) (enacting the provision that "[a] lawful occupant within a home or other place of residence is justified in using any degree of force . . . reasonably necessary against an intruder to prevent forcible entry into the home or residence or to terminate the intruder's unlawful entry"); \textsc{R.I. Gen. Laws} \S 11-8-8 (2001) (stating that "[t]here shall be no duty on the part of the an owner, tenant, or occupier to retreat from any person engaged in the commission of any criminal offense enumerated in [other sections].").

\textsuperscript{56} An invitee is generally one who enters the premises with the permission of the possessor. See \textsc{Barron's Law Dictionary} 265 (1996). Note that in tort law a person who permissibly enters onto the land is further classified as invitee or licensee, depending on the nature of the visit, and the label occasions different degrees of liability depending on the classification. For a general discussion of the distinctions, see \textsc{Prosser & Keeton on Torts} \S 65 (5th ed. 1984). See, e.g., Post v. Lunney, 261 So. 2d 146, 147 (Fla. 1972); Scifres v. Kraft, 916 S.W.2d 779 (Ky. Ct. App. 1996); Mounsey v. Ellard, 297 N.E.2d 43 (Mass. 1973) (noting the historical distinction between the invitee and the licensee).

\textsuperscript{57} The term 'cohabitant' has varied meanings depending on its context. In the area of self-defense, the term fits most closely with the term 'occupant of the property', as one with "possessionary rights in, or control over, certain property or premises." \textsc{Black's Law Dictionary} 106 (7th ed. 1999). However, it is interesting to observe that beyond the area of self-defense, the term "cohabitant" is more narrowly drawn and refers primarily to a marital or sexually intimate relationship. See, e.g., \textsc{American Heritage College Dictionary}, (3d ed. 1993) (defining cohabitant as "[t]o live together as spouses, [or t]o live together in a sexual relationship when not legally married."); \textsc{Black's Law Dictionary} 256 (5th ed. 1979) (defining cohabitation as "[t]o live together as man and wife"). In the context of domestic violence, California has defined "cohabitant" to mean "two unrelated adult persons living together for a substantial period of time, resulting in some permanency of relationship." See \textsc{Cal. Penal Code} \S 13700(b) (West 2000).
non-aggressor occupant; and as can be imagined, determining the appropriate classification invites considerable discussion. Trial courts engage in lengthy fact finding missions to discern the invitee from the trespasser,\(^{58}\) and the cohabitant from the invitee.\(^{59}\)

Because a lawful possessor of property has the right to exclude others, affixing one of the three categorizations to the deadly aggressor provides a shorthand description of the relative ability of the possessor to exclude that aggressor.\(^{60}\) With respect to the trespasser who is a deadly aggressor, all retreat jurisdictions are clear. Like their "stand ground and kill" counterparts, and with language that mixes defense of habitation and self-defense in the home, courts find that one unlawfully attacked by an intruder within the sanctuary may stand ground and use deadly force to repel the intruder.\(^{61}\) And in an interesting demonstration of hierarchal values, a lawful invitee attacked in another's home has been found to have no duty to retreat when the deadly attack is by an intruder.\(^{62}\)

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58. Sometimes, the court may find that an invitee becomes a trespasser by refusing to leave when ordered. See, e.g., Smith v. United States, 686 A.2d 537, 545 (D.C. 1996) (noting that the law was unsettled on whether one can stand ground as against an invitee whose invitation has been withdrawn); State v. Walton, 615 A.2d 469 (R.I. 1992) (deciding that one who initially entered as a social guest became a trespasser by remaining on the property after being ordered to leave); see also State v. Lamb, 366 A.2d 981, 984 (N.J. 1976) (claiming that defendant's estranged husband who entered wife's home was an intruder rather than an invitee because of evidence of past abuse); cf. Dias v. State, 812 So. 2d 487, 492 (Fla. Dist. Ct. App. 2002) (refusing defendant's claim that friend was an intruder in the commission of a burglary rather than invitee who was at the home to retrieve property).

59. See, for example, the extensive factual discussion of the living conditions of defendant and his girlfriend in Glowacki, 630 N.W.2d at 394 (describing the girlfriend's travels to his home, the closet space for her clothing, and their sleeping arrangements).

60. The right to exclude others from one's land is "one of the most essential sticks in the bundle of rights that are commonly characterized as property." Kaiser Aetna v. United States, 444 U.S. 164, 176 (1979).

61. See, e.g., Pell v. State, 122 So. 110 (Fla. 1929) (recognizing that where a non-aggressor is violently assaulted on his own premises, he is not obliged to retreat in order to avoid the difficulty); State v. Grierson, 69 A.2d 851 (N.H. 1949) (finding that, while the state requires the duty to retreat, one may stand ground and use sufficient force to repel the trespasser); State v. Williford, 551 N.E.2d 1279 (Ohio 1990) (holding that one may stand ground only when faced with an intruder). An intruder may not necessarily be a stranger as seen in Lamb, 366 A.2d at 984 (explaining that defendant's estranged husband who entered wife's home was an intruder rather than an invitee because of evidence of past abuse). For general treatment on the trespasser and use of force, see Charles E. Torcia, Wharton's Criminal Law § 131, at 220–22 (15th ed. 1994).

Similarly, although with some dissent, courts have held that an occupant may stand ground and use deadly force against an invitee who turns deadly aggressor. Without a lawful claim to the property, the deadly aggressor invitee is treated under the law like the deadly intruder, and hence the defender need not retreat. But there is some hesitancy on the part of a few courts to permit the privilege of non-retreat where the deadly aggressor is an invitee and not an intruder.

Where a deadly cohabitant is involved, articulating the Castle Doctrine's role is more difficult, however, and to some degree, the blending of defense of habitation and self-defense in the home further complicates the issue. Unlike the intruder who has no lawful claim to the property, or the invitee who has permission but not a possessory interest, the cohabitant shares in the possession of the property and generally cannot be excluded from it. As a result, because the parties share in possession of the sanctuary, there is not the typical intrusion contemplated in the use of the Castle Doctrine, nor the archetypical need to protect the sanctuary from an external threat.

Review of these cases illustrates the following philosophical split: whether the privilege of non-retreat is provided to the innocent cohabitant turns on whether the courts focus primarily on the defender's right of protection in the sanctuary, or whether they choose to emphasize the shared property interest of the deadly aggressor. Courts that emphasize protection of the sanctuary, that is, the defender's personal dignity of space, adopt the privilege of non-retreat where cohabitants are involved in the deadly affray. The Ohio Supreme Court, in considering this issue, explained,

63. See Hedges v. State, 172 So. 2d 824, 826–27 (Fla. 1965) (expanding the privilege of non-retreat as against the invited guest). Usually one thinks of an invitee as one who may be in the home for a short period of time, but deadly aggressors have been classified as invitees even when they are at the home over an extended period of time. See, e.g., State v. Blanks, 712 A.2d 698 (N.J. Super. Ct. App. Div. 1998) (applying invitee status to boyfriend of the daughter of long-term paramour because he visited the home daily and had fathered a child with the occupant).

64. See Commonwealth v. Peloquin, 770 N.E.2d 440, 444–45 (Mass. 2002) (interpreting whether statutory language of "unlawfully in said dwelling" includes an invitee with whom occupant fought); Grierson, 69 A.2d 851 (rejecting the privilege of non-retreat as against a temporary co-resident); see also Smith v. United States, 686 A.2d 537 (D.C. 1996) (declining to decide whether the Castle Doctrine should apply to an invitee); Oney v. Commonwealth, 9 S.W.2d 723, 725 (Ky. Ct. App. 1928) (holding that the Castle Doctrine was inapplicable to a deadly aggressor who was an invitee and not an intruder).

65. See, e.g., State v. Glowacki, 630 N.W.2d 392 (Minn. 2001).
There is no rational reason for a distinction between an intruder and a cohabitant when considering the policy for preserving human life where the setting is the domicile, and, accordingly, we hold that there is no duty to retreat from one's own home before resorting to lethal force in self-defense against a cohabitant with an equal right to be in the home.66

The "sanctuary effect" is paramount to any shared possessory interest of the deadly cohabitant, and as a result, the innocent cohabitant may stand ground even in a jurisdiction that generally favors retreat. Conversely, those jurisdictions that focus on the lawfulness of the shared occupancy find that, because the sanctuary belongs equally to the deadly cohabitant, no overriding interest exists to protect the innocent cohabitant's personal interest. Therefore, without protection of the sanctuary, the innocent cohabitant has the duty to retreat.

1. Power of the Sanctuary

While cases are replete with references to the sanctity of the defender's premises as against trespassers67 and invited guests,68 early case law also supported the importance of the sanctuary as against a deadly cohabitant. In 1884, in Jones v. State,69 the Alabama Supreme Court was faced with the applicability of the Castle Doctrine in a homicide involving two brothers-in-law who were joint owners and proprietors of a bar. Following an altercation and an exchange of words at the bar, one brother-in-law shot and killed the other.70 The court in

67. See, e.g., Pell v. State, 122 So. 110, 116 ( Fla. 1929) (holding that there is no duty to retreat from a trespasser); accord Peloquin, 770 N.E.2d 440; State v. Blue, 565 S.E.2d 133 (N.C. 2002); see also Gilbert v. Commonwealth, 506 S.E.2d 543, 547 (Va. Ct. App. 1998) (citing Pike v. Commonwealth, 482 S.E.2d 839, 840 (Va. Ct. App. 1997), in holding that "[t]he common law in this state has long recognized the right of a landowner to order a trespasser to leave, and if the trespasser refuses to go, to employ proper force to expel him."); State v. Laura, 116 S.E. 251 (W.Va. 1923) (affirming that defendant was entitled to stand his ground against the intruder, even if that meant the taking of human life).
68. See Hedges, 172 So. 2d at 826–27 (expanding the Castle Doctrine as against an invited guest, holding that when one is violently assaulted in one's own home, he is not obliged to retreat); Gainer v. State, 391 A.2d 856, 861 (Md. Ct. Spec. App. 1978) (stating that "when an attack occurs in one's home by an assailant who is not an intruder but who has a right to be on the premises, an assailed person who is without fault, need not 'retreat to the wall' before defending himself."); accord Brinkley v. State, 8 So. 22 (Ala. 1890); State v. Felton, 434 A.2d 1131 (N.J. Super. Ct. App. Div. 1981).
69. 76 Ala. 8 (1884).
70. Id. at 8.
Jones rejected the notion that defendant had an obligation to retreat, finding instead that the Castle Doctrine was wholly applicable, even though both men had possessory interests in the bar. As the Jones court pondered:

Why, it may be inquired, should one retreat from his own house, when assailed by a partner or co-tenant, any more than when assailed by a stranger who is lawfully upon the premises? ... [T]he right of self-defense may be perfect without it, where one partner or co-tenant is assailed by another, each being equally entitled to possession of the house or premises where the attack is made.

Jones based the privilege on two distinct policies. First, one's interest in property invokes the natural sense of a safe haven in which one feels secure. Although not the specific subject of this Article, Jones also espoused the position that one's place of work may be thought of in the same light as the home. Perhaps, this sentiment may have simply reflected the era in which Jones was decided when many business establishments and homes were one and the same. Second, and equally important, is that attendant to the benefit of lawful possession is the ability to protect one's property from attack by others. Certainly, the assertion of the safe haven was instrumental in the Castle Doctrine's creation. Feelings of safety and security are fundamental and can best be derived from being at home. It is interesting to note, however, that inexorably tied to the first rationale of the safe haven is one that also emphasizes the connection between one's right to defend one's home and the ability to stand ground and kill. Jones concluded that the non-aggressor's interest, both in the protection from the sanctuary, and in the right to defend it, enabled the actor to stand ground, even as against one with equal right to possession and enjoyment.

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71. Id.
72. Id. (emphasis added). For modern application of Jones, see People v. Emmick, 136 A.D.2d 892 (N.Y. App. Div. 1988) (holding that the Castle Doctrine applied to a deadly altercation between brothers who shared an apartment).
73. See supra note 23 for modern statutory examples of the duty to retreat in the workplace.
74. For an excellent and innovative discussion of the key rights and symbols of property ownership, see Carol M. Rose, Property as the Keystone Right?, 71 NOTRE DAME L. REV. 329 (1996).
75. Jones extended these rationales to the workplace, where the Court reasoned that "a man's place of business must be regarded, pro hac vice, his dwelling; that he has the same
Prominent among the early cases, and often cited, is *People v. Tomlins,*\(^7\) which relied in great part on *Jones.* The case involved the killing of a son by his father while at their home.\(^7\) At trial, the court instructed the jury that if the defendant "could have gotten off the porch, and gone across the lot, and down the road, or around the house, or anywhere, to a place of safety, then the law says that he should have done so."\(^8\) But, writing for the New York Court of Appeals, Judge Cardozo held that such an instruction, which informed the jury that the father had a duty to retreat, was erroneous.\(^7\) "It is not now, and never has been the law that a man assailed in his own dwelling is bound to retreat.... He is under no duty to take to the fields and the highways, a fugitive from his own home."\(^8\)

Other courts followed suit, each posing the same question that *Jones* and *Tomlins* asked: What could possibly be the compelling legal rationale that would demand one to retreat from the safety of the home against a cohabitant, when no such duty existed as against a trespasser or invited guest?\(^8\) This reasoning held even where it was believed that the one unlawfully attacked on his own premises might have no legal right to eject the assailant from the premises.\(^8\)

It is interesting that, in questioning the efficacy of retreat, these courts never considered as relevant the type of cohabitant relationship. To the extent that power is inherently assumed in certain relationships—parent over young child, for example—or deemed equal, as in the case of siblings, one might have questioned whether the Castle Doctrine's use should have been shaped accordingly. But, the type of right to defend it against intrusion, that he has to defend his dwelling; and that he is no more under the necessity of retreating from the one than the other when he is unlawfully or feloniously assailed, being lawfully in its occupancy." *Jones,* 76 Ala. at 16.

76. 107 N.E. 496 (N.Y. 1914).
77. Id. at 497.
78. Id.
79. Id.
80. Id.
81. See *State v. Phillips,* 187 A. 721 (Del. 1936) (echoing the *Jones* sentiment that there was no reason to require retreat against a cohabitant when one was not required against trespasser or intruder); see also *People v. Lenkevich,* 229 N.W. 2d 298 (Mich. 1975); *State v. Browning,* 221 S.E.2d 375 (N.C. Ct. App. 1976); *State v. Grantham,* 77 S.E.2d 291 (S.C. 1953).
82. See, e.g., *State v. Gordon,* 122 S.E. 501 (S.C. 1924) (finding that a farmhand need not retreat in the face of a deadly confrontation from coworker). Recently, the Minnesota Supreme Court, concerned by arbitrary line drawing, developed a bright line rule against the duty to retreat. *See State v. Glowacki,* 630 N.W.2d 392 (Minn. 2001). But see *State v. Grierson,* 69 A.2d 851 (N.H. 1949) (claiming that the duty to retreat exists as against a co-resident who is committing an unlawful attack).
relationship that the cohabitants shared does not seem to be of particular relevance for these courts. In fact, no matter what the nature of the cohabitant relationship is, these courts are of like mind—for purposes of the Castle Doctrine, all cohabitants, invited guests, and trespassers should be treated the same. The reasoning is actually quite simple. The key is neither in labeling the relationship of the parties to each other, nor in labeling the status of the initial deadly aggressor vis-à-vis the property. Rather, guided by the sanctuary effect, these courts focus exclusively on the defender's interest in the sanctuary and the security and comfort generated by that interest.84

2. Emphasis on Shared Possessory Interests

So, how do we account for such contrary views, ranging from the recognition of the privilege of non-retreat where cohabitants are involved, to its denunciation? On the surface, the answer seems to be obvious. Propelled by the goal to protect the lives of those most intimately familiar, courts reject the Castle Doctrine where the deadly aggressor is a cohabitant, demanding that one who is unlawfully attacked retreat if safe to do so. Reluctant to adopt a rule that would more easily justify the taking of a human life, and cognizant of the fact that many victims die at the hands of relatives and close friends, courts rejected the privilege of non-retreat.85 No matter the nature of the cohabitant relationship, courts' condemnation was sweeping.86


84. See Phillips, 187 A. 721 (arguing that a lawful occupant's right in the property is not lessened or destroyed by the fact that he enjoys his right in common with others).

85. See State v. Shaw, 441 A.2d 561, 566 (Conn. 1981); Conner v. State, 361 So. 2d 774, 775 (Fla. Dist. Ct. App. 1978) (arguing for the rejection of the Castle Doctrine in the case of cohabitants because of the sanctity of life); see also Cooper v. United States, 512 A.2d 1002 (D.C. 1986) (emphasizing the sanctity of life in adopting what it calls a "middle ground" approach which does not specifically impose a duty to retreat, but instead "permit[s] the jury to consider whether a defendant, if he safely could have avoided further encounter by stepping back or walking away, was actually or apparently in imminent danger of bodily harm." Id. at 1004 (citation omitted). Washington D.C.'s approach is discussed more extensively infra Part IV.

86. Compare Shaw, 441 A.2d at 566 (involving a roomer and co-dweller landowner) with Cooper, 512 A.2d 1002 (concerning two brothers), and Bobbitt v. State, 415 So. 2d 724 (Fla.
These jurisdictions conclude that the defendant's interest in personal dignity of space—the sanctuary—is outweighed by the interests in the prevention of deadly affrays and in the preservation of life between those that share the sanctuary. As the Connecticut Supreme Court remarked in *State v. Shaw* when dealing with a deadly assault between cotenants, "We cannot conclude that the Connecticut legislature intended to sanction the reenactment of the climactic scene from 'High Noon' in the familial kitchens of this state." Other courts have echoed this view, shifting the emphasis from the importance of the sanctuary to the sanctity of life. The court in *Cooper v. United States* declared: "[A]ll co-occupants, even those unrelated by blood or marriage, have a heightened obligation to treat each other with a degree of tolerance and respect. That obligation does not evaporate when one co-occupant disregards it and attacks another." Implicit is the notion that the sanctuary common to the two parties creates a burden—perhaps in the more levelheaded party—to diffuse the situation.


87. 441 A.2d 561 (Conn. 1981).

88. *Shaw*, 441 A.2d at 566. "High Noon" refers to the 50s Western starring Gary Cooper and Grace Kelley, and is shorthand for the dramatic shooting confrontation between Cooper and a man who had come to town to kill him. See also *State v. Adams*, 727 A.2d 780 (Conn. App. Ct. 1999) (agreeing with the principle set down in *Shaw*).

89. 512 A.2d 1002 (D.C. 1986).


91. See, e.g., *State v. Thomas*, 673 N.E.2d 1339, 1348 (Ohio 1997) (Pfeifer, J., dissenting) (arguing that because the encounter took place in the home, it was all the more reason to require the innocent cohabitant to retreat). Comparing the trespasser with the cohabitant, the dissent in *Thomas* stated: "There are dramatically more opportunities for deadly violence in the domestic setting than in the intrusion setting. Thus, to hold that cohabitants do not have to retreat before resorting to lethal force is to invite violence." *Id.*

92. Prior to its reversal in *Weiand*, the Florida Supreme Court rejected the privilege of non-retreat where cohabitants are involved, stating, "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 254, 255 (Fla. 1982). As *Weiand* later acknowledged, this reasoning may be flawed because it ignores the statistical reality of intimate violence wherein leaving the home may actually occasion more violence. See *Weiand*, 732 So. 2d at 1054–56; see also Margo Wilson & Martin Daly, *Spousal Homicide Risk and Estrangement*, in 8 VIOLENCE AND VICTIMS 3 (1993) (reporting that risk to females increases upon separation from an abuser, and that wives are particularly at risk during the first two months after separation and if they unilaterally
But, despite the worthiness of its objective, the desire to protect life can be only part of the answer that would compel the non-aggressor’s duty to retreat as against a deadly cohabitant where none exists against trespassers and invitees. If the goal were solely to save lives, the duty to retreat would be a wholesale one, applicable in any deadly confrontation, whether in public or private, and whether between strangers or those who know each other. Standing ground to kill would only be reserved for those who claim the defense of habitation against deadly trespassers. To require retreat in the case of cohabitants where none exists for invitees indicates that a different, but equally compelling, distinction separates the two types of deadly aggressors—a distinction not based on familial ties, nor on the goal to save lives.

Despite the differences in specific case facts, or in the nature of the cohabitant relationship, a common theme emerges—the privilege of non-retreat is rejected because each party to the affray is a lawful occupant. The lawfulness of the aggressor’s occupancy compels the duty to retreat by the cohabitant that is unlawfully attacked. As the Florida Supreme Court in *Bobbitt v. State*\(^9\) stated when referring to the husband and wife involved in the deadly combat, each "had equal rights to be in the 'castle' and neither had the legal right to eject the other."\(^9\)

And so, tucked in amid the rhetoric on the sanctity of life is perhaps the more significant reasoning. When addressing the issue of self-defense, it seems that the lawfulness of the aggressor’s occupancy is the crucial factor that distinguishes the invitee from the cohabitant. It could not be, as thought at first blush, that preserving the lives of cohabitants is intrinsically compelled by the relationship they share. After all, one could easily think of scenarios where cohabitants share less of a bonded relationship than a host and invitee. Compare two deadly confrontations: one concerning roommates, the other involving a parent invited to the home of her grown child. Examining the practical outcomes, in the case of the roommates, these jurisdictions would reject the Castle Doctrine’s application and compel retreat, but in the case of the parent invitee and the resident child, the Castle Doctrine could be employed and the resident child could stand her ground and kill.

With such inconsistent application, therefore, the driving force behind the cohabitant exception must be based on more than the desire decided to end the relationship). See *infra* Part II.C for a more in depth discussion of *Weiand.*

93. 415 So. 2d 724 (Fla. 1982).
94. *Id.* at 726.
to save lives. Since the only tangible legal difference between the
deadly cohabitant and the equally deadly invitee is the lawfulness of the
shared occupancy enjoyed by the cohabitant, the controlling factor in
the creation of the cohabitant exception must be the cohabitants'
equivalent rights of possession. That is, because neither has the ability
to eject the other, the innocent cohabitant must retreat if it is safe to do
so.

C. The Limited Duty to Retreat: Conflicting Policies at Work in Florida

An examination of Florida case law over the last twenty years
illuminates this tension of perspective between two important and
competing principles: the power of the sanctuary, and the emphasis on
shared property rights. As a retreat jurisdiction that supports the Castle
Doctrine, Florida case law slowly expanded the reach of the Castle
Doctrine, first as against the deadly invitee, and by supposition at the
time, to cohabitants as well. Although the policy to preserve life was
elevated above other worthy principles, these cases held that it was still
secondary to the importance of the personal dignity attached to one's
sanctuary. But in dramatic fashion, and over a relatively short time
span, the Florida Supreme Court first invoked a cohabitant exception to
the Castle Doctrine because of the lawful occupancy of both parties;
and then in a striking reversal, eliminated the exception by shifting its
focus to emphasize the defendant's personal relationship with the
sanctuary.

It all began as a split in the intermediate courts on whether to give a
jury instruction on the privilege of non-retreat where the initial deadly
aggressor was a cohabitant. As a result of the split, the Florida
Supreme Court heard the case of Bobbitt v. State. The Bobbitt facts are
not unique; to the contrary, they are all too common. Elsie Bobbitt
killed her husband after he had attacked her without provocation.

95. See Hedges v. State, 172 So. 2d 824, 827 (Fla. 1965) (citing Pell v. State, 122 So. 2d
110 (Fla. 1929) in extending to invitees the privilege of non-retreat that was generally
reserved for trespassers). The Hedges principle was later deemed to control in the court of
appeals decision in Bobbitt.
96. See Bobbitt, 415 So. 2d 724.
97. See Weiand, 732 So. 2d 1044.
98. Compare Conner v. State, 361 So. 2d 774 (Fla. 4th Dist. Ct. App. 1978) (holding that
the privilege of non-retreat does not apply where both the assailant and the victim are legal
occupants of the same home), with State v. Bobbitt, 389 So. 2d 1094 (Fla. 1st Dist. Ct. App.
1980) (finding that the privilege of non-retreat applies even where cohabitants are involved).
99. 415 So. 2d 724 (Fla. 1982).
100. Weiand, 732 So. 2d at 1096.
trial, she requested a self-defense instruction that would have entitled her to stand her ground and kill in the face of an imminent deadly attack, but that instruction was refused.

In striking similarity to the holding of Shaw decided a year earlier, the Florida Supreme Court premised the cohabitant exception to the Castle Doctrine on two rationales: the preservation of human life, and the lawfulness of the deadly aggressor's occupancy. As noted earlier in this Article, the Bobbitt court reasoned that the privilege of non-retreat did not apply to cohabitants because "both Bobbitt and her husband had equal rights to be in the 'castle' and neither had the legal right to eject the other." This quoted language provided the bedrock principle for the Court's adoption of the cohabitant exception.

For nearly twenty years post-Bobbitt, Florida case law rejected the Castle Doctrine where cohabitants were involved. Citing the Bobbitt rationale of the shared lawfulness of occupancy, Florida courts demanded that the one unlawfully attacked by a deadly cohabitant had a duty to retreat. And while the importance of preservation of life was clearly noted, the emphasis was squarely on the equal possessory rights of both parties in the affray. But then, in a surprising turnaround, the

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101. Bobbitt requested the following instruction:

One unlawfully 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, including deadly force, if necessary to prevent imminent death or great bodily harm to himself or another, or to prevent the commission of a forcible felony.

Bobbitt, 415 So. 2d at 725.

102. The instruction given to the jury was as follows: "If 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 . . . ." Id. The trial court's decision to include this instruction was overturned on appeal in State v. Bobbitt, 389 So. 2d 1094 (Fla. 1st Dist. Ct. App. 1980).

103. See supra notes 85-88 and accompanying text for a discussion of Shaw.

104. See Bobbitt, 415 So. 2d at 726 (referencing Judge Letts's opinion in Conner, 361 So. 2d 774, which held that the sanctity of life was paramount).

105. See Bobbitt, 415 So. 2d at 726.

106. Id.

107. See, e.g., State v. Page, 418 So. 2d 254 (Fla. 1982) (applying the Bobbitt rationale to deadly confrontation between apartment dwellers on common walkway); Rodgers v. State, 670 So. 2d 160-61 (Fla. Dist. Ct. App. 1996) (affirming Bobbitt where man and woman were living together); Frazier v. State, 681 So. 2d 824 (Fla. Dist. Ct. App. 1996) (holding that the Bobbitt duty to retreat applied to the workplace).

108. The emphasis on the shared possessory interests was evident in Cannon v. State, 464 So. 2d 149 (Fla. Dist. Ct. App. 1985) (debating whether husband and wife shared the home where the attack took place).
Florida Supreme Court overruled *Bobbitt* in *Weiand v. State.* Based on similar facts to *Bobbitt*, Kathleen Weiand appealed her second degree murder conviction, citing among the errors, the trial court's failure to instruct the jury on Weiand's privilege of non-retreat.

What compelled the court to reverse *Bobbitt* was, of course, the tremendous hardship the duty to retreat imposes on a serially abused cohabitant. Sensitive to the increased awareness of the plight of battered persons, the court acknowledged that the coalescence of the social, legal and political climate encouraged such a change. Battered persons, who are mostly women, cannot retreat from the home merely because the law demands it. Volumes have been written on the physical, psychological and emotional paralysis that exists for those who are serially assaulted in their homes. When the *Bobbitt* court rejected the Castle Doctrine, it demanded the impossible from those attacked by deadly and abusive cohabitants, without regard to the consequences of flight or to the inability to flee because of the debilitating effect of

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110. Weiand's conviction was initially affirmed on appeal, although the opinion did not specifically address the issue of self-defense. See *Weiand v. State*, 701 So. 2d 562 (Fla. Dist. Ct. App. 1997).

111. The court relied on a number of supporting documents to make its decision: legislative enactments, including the signing of the Violence Against Women Act in 1994; the addition of numerous state laws to protect the battered person; studies produced by the Governor's Task Force on Domestic and Sexual Violence; and law review articles. See *Weiand*, 732 So. 2d at 1052-56.

112. Lenore Walker, the undisputed pioneer in this area, has written extensively on the topic and testified frequently on behalf of the battered person, including at Kathleen Weiand's trial. See *id.* at 1048. Through her visionary research, Dr. Walker raised the consciousness of an entire body of jurisprudence. See, for example, *LENORE E. WALKER, THE BATTERED WOMAN* (1979) and *LENORE E. WALKER, TERRIFYING LOVE* (1989), both of which have been cited extensively by courts and authors. See also Maryanne E. Kampmann, *The Legal Victimization of Battered Women*, 15 WOMEN'S RTS. L. REP. 101 (1993); Joan H. Krause, *Of Merciful Justice and Justified Mercy: Commuting the Sentences of Battered Women Who Kill*, 46 FLA. L. REV. 699 (1994); Holly Maguigan, *Battered Women and Self-Defense: Myths and Misconceptions in Current Reform Proposals*, 140 U. PA. L. REV. 379 (1991).

113. Separation from the abuser is a particularly vulnerable time for the battered person. One study reports that separated or divorced women are fourteen times more likely than married women to report having been a victim of violence by their spouse or ex-spouse. See *BUREAU OF JUSTICE STATISTICS: FEMALE VICTIMS OF VIOLENT CRIME* 1991; see also *THE THIRD REPORT OF THE GOVERNOR'S TASK FORCE ON DOMESTIC AND SEXUAL VIOLENCE* 163 App. M (Mar. 1997) (Florida) ("Statistics show that the threat of violence increases dramatically—by approximately 70 percent—once a woman tries to leave the abusive relationship.").
battered persons syndrome. Most troubling is that retreat is seldom likely to produce the desired effect of calming the potentially deadly situation. To the contrary, the statistical likelihood that the battered person will face great bodily harm or death spikes dramatically after an attempt to leave.

Although Weiand overruled the cohabitant exception to the Castle Doctrine primarily because of the considerations associated with domestic violence, it correctly assessed that the Castle Doctrine's applicability to a deadly cohabitant was not the exclusive terrain of domestic abuse. The need for self-defense in the home arises in a myriad of situations, only some of which occur between the serially abusive spouse and partner. The Weiand court recognized this when it modified the question certified for appeal. As originally defined, the issue for certification was whether a Castle Doctrine instruction should be allowed in cases "where the defendant relies on battered-spouse syndrome evidence to support a claim of self-defense against" a deadly cohabitant. The Florida Supreme Court rephrased the question for review more broadly: "Should the law impose a duty to retreat from the residence before a defendant may justifiably resort to deadly force in self-defense against a co-occupant, if that force is necessary to prevent death or great bodily harm?" In rephrasing the question, the court wisely uncoupled the Castle Doctrine from the separate but related

114. Similar to the child's picture puzzle that asks, "What's wrong with this picture?," Weiand overturned an established rule of law, ultimately, because the duty to retreat from the home did not make sense in its practical application. See Weiand, 732 So. 2d at 1056 (recognizing that an instruction to a jury on the duty to retreat may contradict a battered spouse defense). In another situation, the compelling testimony of Donna Ordway, who said that she had been beaten numerous times during the course of her three-year relationship with her husband, confirms the practical inability of flight. Charged with the murder of her husband, she described the events that led up to her fatally stabbing him. On the day of his death, her husband began beating, punching, and kicking Donna. He pulled her by the hair into the living room where he instructed her to lie on the living room floor and not move, or he would kill her. When she tried to move a few moments later, he approached her enraged. See State v. Ordway, 619 A.2d 819, 822 (R.I. 1992).

115. Whether retreat is intended to be temporary or permanent, flight can increase the battered person's risk of harm. See Weiand, 732 So. 2d at 1053 (citing a study that "forty-five percent of the murders of women 'were generated by the man's rage over the actual or impending estrangement from his partner.'"); see also DONALD G. DUTTON, THE BATTERER: A PSYCHOLOGICAL PROFILE 15 (1995). In fact, the court in Weiand admitted that no empirical studies suggest that eliminating the duty to retreat in the domestic violence context would increase the incidents of violence. Indeed, the court acknowledged that the opposite was true: retreat placed victims of domestic violence at greater risk. See id. at 1056.

116. Weiand, 732 So. 2d at 1046 (emphasis added).

117. Id. at 1044.
issue of self-defense by a person claiming battered person syndrome.\textsuperscript{118}

In overruling \textit{Bobbitt}, the court significantly shifted the inquiry to reinforce the importance of the sanctuary to the innocent cohabitant. Recognizing that the possessory interests of the parties may play a role under a different theory, the court stated, "\textit{Bobbitt}'s distinction based on possessory rights may be important in the context of defending the home. However, the privilege of non-retreat from the home stems not from the sanctity of property rights, but from the time-honored principle that the home is the ultimate sanctuary.\"\textsuperscript{119} With this language, the court attempted to carve out a distinction between the use of the Castle Doctrine in defense of habitation and in self-defense in the home. The implication was that the issue of shared possession might be relevant to reject Weiand's claim under defense of habitation, for example, because the element of intrusion would be missing. However, in self-defense in the home, the court found that the abuser's shared possessory interest is significantly outweighed by the importance of the sanctuary to the battered person. Although the home, as the battered person knows it, may not provide the comfort and security normally associated with a sanctuary, it is nonetheless worthy of protection from a deadly cohabitant.\textsuperscript{120}

Ultimately, though, \textit{Weiand} did not go far enough. Perhaps as homage to the state's historical emphasis on the generalized duty to retreat and the attendant importance of the sanctity of life, or perhaps because of lingering misconceptions regarding the potential for misuse of the privilege of non-retreat,\textsuperscript{121} the court did not provide an occupant

\textsuperscript{118} Compare a different response by the New Jersey Supreme Court when faced with a similar situation. The New Jersey Supreme Court, like the defendant in \textit{Weiand}, sought a narrow exception to the cohabitant exception. \textit{See} State v. Gartland, 694 A.2d 564, 571 (N.J. 1997) (recommending to the Legislature that it revise the statutory duty to retreat to provide an exception for the spouse battered in her own home). The New Jersey Legislature, in amending its rules on retreat, however, broadened the privilege of non-retreat beyond the battered person. \textit{See} N.J. STAT. ANN. § 2C:3-4 b. (2)(b)(i) (West 1999).

\textsuperscript{119} \textit{Weiand}, 732 So. 2d at 1051 (internal citations omitted). \textit{Weiand}'s shift back to the importance of the sanctuary was reiterated in \textit{Barkley v. State}, 750 So. 2d 755 (Fla. Dist. Ct. App. 2000).

\textsuperscript{120} Other courts have also recognized what the \textit{Weiand} Court concluded—that the duty to retreat is wholly inapplicable in a case where a battered person alleges self-defense in the home. \textit{See} State v. Glowacki, 630 N.W.2d 392, 402 (Minn. 2001); State v. Gartland, 694 A.2d 564 (N.J. 1997). For an in depth discussion of these situations, see Kampmann, \textit{supra} note 112, at 112–13.

\textsuperscript{121} In expressing hesitation for the privilege of non-retreat, the concurring opinion voiced the concern that the new rule might be read as "sanctioning retaliatory violence." \textit{See} \textit{Weiand}, 732 So. 2d at 1058 (Wells, J., concurring in part and dissenting in part). Whether intended to be viewed in this light, this sentiment reinforces a long-standing myth that those
with the complete privilege of non-retreat against a deadly cohabitant. Instead, it opted for a compromised position. Under Weiand, an occupant locked in deadly combat with a cohabitant need not retreat from the dwelling, "although there is a limited duty to retreat within the residence to the extent reasonably possible."122 Adopting what it called "the middle ground" instruction,123 the court found no obligation to flee the home, but a limited duty to retreat within the home, hoping that such a position would appeal to those who were concerned that "eliminating a duty to retreat might invite violence."124

However, it can be said that the court, although well-intentioned, was equally naive about the fundamental nature of such a confrontation. Requiring one to retreat within the house, although not to flee it, creates a fiction that is no less destructive than the Bobbitt mandate to leave the home.125 The same concern alleged in the restrictive cohabitant exception—that the duty to retreat is inconsistent with the battered

who kill serially abusive spouses under claims of self-defense may, in fact, be lying or exaggerating the claims of abuse. For an extreme pronouncement of this view, see State v. Norman, 378 S.E.2d 8, 15 (N.C. 1989) (declaring that, despite extensive and horrific evidence of serial abuse, "[r]equire jury instructions on perfect self-defense in such situations would still tend to make opportune homicide lawful as a result of mere subjective predictions of indefinite future assaults and circumstances.").

122. Weiand, 732 So. 2d at 1058.
123. Id. The revised jury instruction reads:

If the defendant was attacked in [his/her] own home, or on [his/her] own premises, by a co-occupant [or any other person lawfully on the premises] [he/she] had a duty to retreat to the extent reasonably possible without increasing [his/her] own danger of death or great bodily harm. However, the defendant was not required to flee [his/her] home and had 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].

Id. at 1057 n.15. The Florida Supreme Court adopted this instruction sua sponte as an Interim Jury Instruction until guidance could be provided by the Committee on Standard Jury Instructions. See id. The Court credited State v. Bobbitt, 415 So. 2d at 728 (Overton, J., dissenting), and Rippie v. State, 404 So. 2d 160, 162 (Fla. Dist. Ct. App. 1981) with crafting the language.

124. Weiand, 732 So. 2d at 1056.
125. The court of appeals decision of Rippie, which provided the Weiand Court with the middle ground approach, contributed to this flawed reasoning by suggesting that domestic violence encounters might be similar to petty disputes: "Often, when one party to an argument or fight leaves the room, the other party tends to calm down, become more rational, and escalation of the dispute is avoided." 404 So. 2d at 162. But for an opposing view, see State v. Thomas, 673 N.E.2d 1339, 1343 (Ohio 1997) (asserting that "[t]he victims of such attacks have already 'retreated to the wall' many times over and therefore should not be required as victims of domestic violence to attempt to flee to safety before being able to claim the affirmative defense of self-defense.").
person syndrome—is also present in this compromised view. Because juries often have great difficulty in comprehending the battered person's defense and the inability of battered persons to physically leave the situation or end the relationship, it is unlikely that the same juries will be able to understand what is expected of the innocent cohabitant under the concept of a "limited duty to retreat." The Weiand instruction does not elucidate for the jury the parameters of retreat, and its inclusion will only be viewed as a burden to be met by the innocent cohabitant, not as the loosening of a prior restrictive obligation to retreat the house.

Nor should the term "to the extent reasonably possible" be seen as a clarifying directive to the jury. A jury that is unable to understand why a battered woman, for example, cannot leave the home, may not be able to understand why she cannot hide behind a locked bathroom door until the situation calms. In addition, assuming this limited duty to retreat were justified and understandable to the jury, there is no evidence to suggest that limited retreat will accomplish its goal—namely, to calm the already explosive situation. Can one not imagine that the battered cohabitant has on prior occasions attempted to flee from one room to another, only to have the deadly attacker follow, undeterred by a locked door? Or, once having retreated from the situation, might she have discovered that flight exacerbated the already explosive situation? Giving the jury such a specific instruction of retreat, albeit a limited one, will only create additional hardship for the battered person, something that may not have been intended by the court.


127. Yet, this was the position of the court of appeals in Rippie that believed such a burden was not unreasonable given that the limited duty to retreat is required only to the extent that it is practicable to do so. See Rippie, 404 So. 2d at 162.

128. The limited duty to retreat would not have helped defuse the situation in Ellen Gartland's case when she retreated to her separate bedroom following an argument with her husband. Her husband followed her to the bedroom and resumed the argument threatening to strike her. See State v. Gartland, 694 A.2d 564, 566 (N.J. 1997); see also Melissa Wheatoff, Note, Duty to Retreat for Cohabitants—In New Jersey a Battered Spouse's Home is not her Castle, 30 RUTGERS L.J. 539, 554 n.82 (1999) (comparing the duty to retreat with the ability to stand ground, noting that "if an unknown intruder loomed menacingly in the doorway of a woman's bedroom . . . she would not be expected to carefully analyze the situation and/or consider the likelihood of safely slipping past him or outrunning him.

129. The concurring opinion by Justice Wells was correct to suggest that this new rule should be adopted only on an interim basis, but surprisingly, not as a call to track the potential for jury confusion, but rather to review whether the new rule creates an environment of "retaliatory violence." See Weiand, 732 So. 2d at 1058.
The limited duty to retreat, unfortunately, is a vestige from Bobbitt. It is based on an erroneous assumption that the innocent cohabitant does not have the legal authority to eject the deadly cohabitant, and therefore, does not have full enjoyment in and protection from the sanctuary. As a result, the innocent cohabitant must retreat from one room to the next, rather than having the ability to stand ground to use deadly force. Had the court recognized the innocent cohabitant's right of protection in the sanctuary, the limited duty to retreat would have no justified rationale to support it.130

III. CHALLENGING THE ASSUMPTIONS UNDERLYING THE COHABITANT EXCEPTION

Ultimately, when a jurisdiction rejects the Castle Doctrine because cohabitants share possession, it has balanced the rights of the deadly cohabitant's property interest with the innocent cohabitant's personal right of sanctuary, and has determined that the deadly cohabitant's property interest prevails. Whether the cohabitant exception is broadly defined, or modified by the limited duty to retreat, it is based on the underlying assumption that shared possessory interests prohibit the innocent cohabitant's full protection in the sanctuary. This section will challenge that assumption, arguing that the cohabitant exception is based on rigid principles of property interests that have been mistakenly coupled with requirements that originated in the common law defense of habitation. Specifically, the cohabitant exception is improperly based on three legal assumptions: 1) some type of an intrusion is required in order for an occupant to stand ground at home and use deadly force; 2) the deadly cohabitant does in fact maintain the status of lawful possessor throughout the deadly attack; and 3) the deadly cohabitant's lawful possession usurps the sanctuary's importance to the innocent cohabitant.

A. The Requirement of an Intrusion

If cohabitants must retreat from the home because they cannot eject each other, it suggests that the privilege of non-retreat only applies against those whom the cohabitant can lawfully eject. This situation

130. The notion of a limited duty to retreat is not new. As far back as 1912 in Watts v. State, the Alabama Supreme Court addressed the issue. 59 So. 270, 273 (Ala. 1912). Relying on the landmark decision of Jones v. State, it found that "when [a party is] attacked in one part of his house he need not withdraw to another part, though he may safely do so and there find a secure asylum." Watts, 59 So. at 273 (citing Jones v. State, 76 Ala. 8 (1884)).
would be primarily one where the trespasser's intrusion threatens the possession and enjoyment of a resident. Under this view, the deadly cohabitant's right of presence in the home would not, by definition, amount to that level of intrusion that would threaten the possession and enjoyment of the innocent cohabitant.

Unfortunately, requiring that the innocent cohabitant's peaceful possession be disturbed before the Castle Doctrine applies blurs the distinction between defense of habitation and self-defense. While some level of intrusion is generally required for defense of habitation, there is usually no such requirement under the claim of self-defense in the home. Emphasizing the status of the deadly aggressor in a self-defense claim is most likely, then, an unintended confusion of the principles of defense of habitation. If an intrusion is not a required element of self-defense in the home, then it follows that the Castle Doctrine's applicability should not be based on the deadly cohabitant's lawful presence. Without the need for the underlying event—the intrusion—the Castle Doctrine should apply equally to all unprovoked and deadly attacks, regardless of the status of the attacker.

B. Lawfulness of the Deadly Cohabitant’s Possession

Irrespective of whether courts mistakenly require an intrusion for the Castle Doctrine to apply, the fundamental rationale remains intact: the Castle Doctrine is precluded because the deadly cohabitant maintains the equal status of lawful possessor. However, one might legitimately question the accuracy of such an assertion. Describing the

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131. Even in cases that involve invitees, courts often characterize the deadly invitee as a trespasser in order to provide the implied requirement of an intrusion for purposes of the privilege of non-retreat. See Commonwealth v. Peloquin, 770 N.E.2d 440, 445 (Mass. 2002) (noting that "a person who enters a dwelling lawfully, but refuses to leave when ordered . . . becomes a trespasser."); State v. Davis, 301 S.E.2d 709 (N.C. Ct. App. 1983) (reversing conviction because of judge's failure to instruct on privilege of non-retreat where invitee had become a trespasser); see also supra notes 55–58 for a discussion of trespassers and invitees.

132. Right of possession and enjoyment of the premises may arise as a result of the voluntary and formal creation of concurrent ownership interests in property, either by joint tenancy, tenancy in common, or by operation of law in intestate succession. Each concurrent owner is entitled to simultaneous possession and enjoyment of the whole property. For a general discussion of the different types of co-tenancies, see JOHN E. CRIBBETT & CORWIN W. JOHNSON, PRINCIPLES OF THE LAW OF PROPERTY 101–14 (3d ed. 1989); Peter M. Carrozzi, Tenancies In Antiquity: A Transformation of Concurrent Ownership for Modern Relationships, 85 MARQ. L. REV. 423 (2001). But, the relationship of cohabitants may develop in far more informal surroundings. See State v. Glowacki, 630 N.W.2d 392 (Minn. 2001) (arising when occupant invites girlfriend to move in with him).

133. See supra notes 40–54 and accompanying text for a discussion of the two defenses.
deadly cohabitant's presence in the home at the time of an unprovoked and deadly attack as "rightful" suggests that property rights are fixed in time and space—determined only by the demonstration of dominion and control at some earlier point and completely disconnected from later events and actions. Property rights, however, should not be abstractions that are applied in a rigid manner. Perhaps, in the Blackstonian era, where privileges and entitlements generally associated with property ownership were more strictly viewed, property rights may have been thought of as permanently fixed. But under a more relaxed American model that selectively diminishes those rights, they are fluid, based on the relationship between the parties and the property in a given context and situation. To say that a deadly cohabitant maintains lawful possession of the premises is to tell only part of the story. A determination of a property interest should not be made without an awareness of the context-sensitive conditions.

Complicating the issue is an underlying subtext to the cohabitant ownership by a single individual... in perpetuity... of a territory demarcated horizontally by boundaries drawn upon the land, and extending from there vertically downward to the depths of the earth and upward to the heavens... with absolute rights to exclude would-be entrants... with absolute privileges to use and abuse the land, and... with absolute powers to transfer the whole (or any part carved out by use, space, or time) by sale, gift, devise, descent, or otherwise. Id.

134. See Bobbitt v. State, 415 So. 2d 724, 726 (Fla. 1982), overruled by Weiand v State, 732 So. 2d 1044 (1999) (holding that "[each] had equal rights to be in the 'castle' and neither had the legal right to eject the other") (emphasis added).


Id.

136. In describing the fluid nature of property relationships, Carole Rose mused that water would be the perfect symbol to connote rights "literally and figuratively as more fluid and less fenced-in; we might think of property as entailing less of the awesome Blackstonian power of exclusion and more of the qualities of flexibility, reasonableness and moderation, attentiveness to others, and cooperative solutions to common problems." Rose, supra note 74, at 351.

137. Justice Rehnquist made a similar observation when dealing with the issue of navigability of waters in Hawaii. He stated:

The position advanced by the Government, and adopted by the Court of Appeals below, presupposes that the concept of "navigable waters of the United States" has a fixed meaning that remains unchanged in whatever context it is being applied. While we do not fully agree with the reasoning of the District Court, we do agree with its conclusion that all of this Court's cases dealing with the authority of Congress to regulate navigation and the so-called "navigational servitude" cannot simply be lumped into one basket.

exception: the joint dominion and control that cohabitants generally share.\textsuperscript{138} However, an example in burglary illustrates the point that shared possession is not an immutable concept incapable of dynamic reassessment. Consider a case of first impression arising in Iowa, where the Iowa Supreme Court determined that a man's "'greater right' of possession" did not preclude a conviction for burglary of his own home.\textsuperscript{139} Although the evidence showed that he paid the mortgage on the home and in fact lived in the home, the Iowa Supreme Court nonetheless concluded that, for the purposes of a burglary charge, defendant Peck had lost his greater right of possession because a court order restraining him from being in contact with his wife and children was in effect.\textsuperscript{140} Impelled by the recognition that these types of confrontations occur often in domestic violence situations, the court stated, "Application of our burglary law in these circumstances will tend to discourage domestic violence and promote security in the home."\textsuperscript{141}

To charge the defendant with burglary as a social tool to promote the security in the home, the court had to overcome the hurdle of Peck's shared right of possession. One could agree that, as against all others in the world, Peck would have had superior rights in the property. For example, as against a squatter or a trespasser, Peck, as possessor of the property, would have had the legal right, and in the case of the squatter, the obligation as landowner to eject the trespasser or suffer consequences that might include loss of land.\textsuperscript{142} But, because of the

\textsuperscript{138} But as one legal scholar observed, the concept of equal rights to possession and enjoyment of the whole property "is little more than a legal fiction." \textit{John Sprankling, Understanding Property Law}, 126 §10.03[B] (2000). Part of the difficulty is in the conceptual notion of an undivided fractional share in the entire parcel of land, with each party entitled to simultaneous possession and enjoyment of the whole. \textit{See id.}

\textsuperscript{139} \textit{State v. Peck}, 539 N.W.2d 170, 173 (Iowa 1995). Iowa defines the crime of burglary as "[a]ny person, having the intent to commit a felony, assault or theft therein, who, having no right, license or privilege to do so, enters an occupied structure, such occupied structure not being open to the public . . . commits burglary." \textit{Iowa Code} § 713 (1993). As burglary cases go, it was straightforward but for the issue of whether Peck had the right, license, or privilege to enter the property. Peck's intent when he kicked in the door of his home was to assault his wife who was moving out. \textit{Peck}, 539 N.W.2d at 173.

\textsuperscript{140} Peck conceded that the court order restrained him from confronting his wife, but believed that the violation could not support a burglary charge of his own home. \textit{See Peck}, 539 N.W.2d at 172.

\textsuperscript{141} \textit{Id.} at 173.

\textsuperscript{142} The law of adverse possession, for example, is based on the premise that landowners have an obligation to maintain and monitor their lands, which would include the requirement to eject squatters within a prescribed period of time. \textit{See Brian Gardiner, Squatters' Rights and Adverse Possession: A Search for Equitable Application of Property Laws}, 8 \textit{Ind. Int'l. & Comp. L. Rev.} 119, 127–29 (1997). The requirement that the
restraining order, the defendant’s right of possession, important in other contexts, was not relevant to the charge of burglary.

It might be said that the lawfulness of defendant Peck’s possessory rights is distinguishable from the deadly cohabitant’s because Peck was under a court order restraining him from the premises, while the deadly cohabitant, on the other hand, had not yet been subjected to such legal intervention. But, at best, this is only a distinction of degree. The cohabitant’s act of an unprovoked and deadly assault or threat to assault can be viewed as the triggering event that would ultimately cause the loss of actual possession of the property. Actual legal intervention, as opposed to anticipated legal intervention, while valuable in assessing whether the greater right of possession has been lost, should not be the sole determinant.

As the court determined that Peck lost his right of possession at the point his wife was in the house, the deadly cohabitant loses the status of lawful possessor at the point of the initial deadly and unprovoked attack against the innocent cohabitant. As against the rest of the world, the deadly cohabitant may be in lawful possession, but that possessory interest should not be so immutably fixed that its technical legitimacy triggers the innocent cohabitant’s obligation to retreat from the home.

C. Usurping the Innocent Cohabitant’s Personal Right of Sanctuary

The notion that the deadly cohabitant’s status as lawful possessor trumps the innocent cohabitant’s personal right of protection in the sanctuary raises two troubling issues. First, is the importance of the sanctuary to the innocent cohabitant, which is no less bona fide because the sanctuary is shared with another person. Feelings of safety and security derived from the home are not diluted simply because occupancy is shared, and therefore, the deadly cohabitant should not be

squatter’s possession be open and notorious "is considered crucial because it provides the legal owner with notice of the claimant’s intention and thus with the opportunity to take preventive measures against the possessor." See James H. Backman, The Law of Practical Location of Boundaries and the Need for an Adverse Possession Remedy, 1986 BYU L. REV. 957, 960. If notice is provided, and "if suit was not brought against an occupant acting like an owner, this absence of litigation could be reasonably interpreted as public acceptance of the occupant’s claim to title." See SPRANKLING, supra note 138, at 437, § 27.02.

143. In some states, a complaint of domestic violence may trigger a custodial detention. See, e.g., CAL. PENAL CODE § 836(d) (West 2000); N.C. GEN. STAT. § 15A-534 (2001).

144. This argument was advanced in State v. James, where the defendant sought to relabel the victim cohabitant as an intruder because she was committing an assault when she entered the home to attack defendant, but the argument was not addressed because it was not raised in a timely manner. 734 A.2d 1012, 1020 (Conn. App. Ct. 1999).
able to usurp the defender's personal interest in the sanctuary simply because the deadly cohabitant shares in it.145 This position was expressed in *State v. Phillips*,146 where the Delaware Supreme Court rejected a cohabitant exception to the Castle Doctrine in the case of one sibling who killed another in a home in which they shared lawful possession:

We can see no more reason why one should retreat from his own house when attacked by a co-tenant or joint occupant than when attacked by a trespasser or intruder.... If he is a lawful occupant, he has the right to remain in the house, and *that right is not lessened or destroyed by the fact that he enjoys his right in common with another or with others*.147

There is an additional irony here. If the innocent cohabitant must retreat because the deadly cohabitant maintains lawful possession, the deadly cohabitant has, in effect, ejected the innocent cohabitant. By requiring the innocent cohabitant to flee, both the broadest form of the cohabitant exception and the limited duty to retreat provide the deadly cohabitant with an authority not granted the innocent cohabitant—the right to eject the other party.

One can look to a different legal context—the crime of destruction of jointly owned property by a spouse—as support for the position that one in lawful possession may not usurp the rights and enjoyment of the other possessor.148 Many of the factual settings are similar, violent and

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145. The sanctuary does not only provide safety and security in this context. As noted by Professor Rose, although property ownership is generally thought of as providing primarily economic allure, "[t]here are of course substantial libertarian arguments for property rights as an element of personal autonomy...." See Rose, *supra* note 74, at 329 n.3.

146. 187 A. 721 (Del. 1936).

147. *Id.* at 721 (emphasis added).

148. See, e.g., *IOWA CODE § 716.1* (2002) (defining criminal mischief as "[a]ny damage, defacing, alteration, or destruction of tangible property is criminal mischief when done intentionally by one who has no right to so act"). In the state of Delaware, one may be found guilty of criminal mischief if he or she intentionally or recklessly: (1) Damages tangible property of another person; or (2) Tampers with tangible property of another person so as to endanger person or property; or (3) Tampers or makes connection with tangible property of a gas, electric, steam or waterworks corporation, telegraph or telephone corporation or other public utility, except that in any prosecution under this subsection it is an affirmative defense that the accused engaged in the conduct charged to constitute an offense for a lawful purpose.
sudden, as one spouse, in a rage-filled episode, destroys the home, car, or other shared personal effects.\textsuperscript{149} Although criminal destruction or malicious mischief statutes may be couched in terms of destruction or damage to the "property of another,"\textsuperscript{150} courts have nonetheless construed that term to permit conviction even though it is factually clear that the vandalizer shares in ownership of the property that has been damaged.\textsuperscript{151}

As argued by commentators who support the expansion of criminal mischief statutes to incorporate the destruction of marital property:

When a husband destroys property that he owns jointly with his wife, not only does he destroy his property, which he may have a right to destroy, but he simultaneously destroys his wife's undivided one hundred percent interest in the property, which he does not have a right to destroy.\textsuperscript{152}

A few jurisdictions, echoing this sentiment, support of the position that

\textsuperscript{149} The facts of \textit{State v. Zeien}, 505 N.W.2d 498 (Iowa 1993) serve as a typical example. Shortly after Zeien's wife filed for divorce, Zeien entered the home and, acting out on his anger, he damaged or destroyed marital property that consisted of a "waterbed, two television sets, video recorder, refrigerator, clock, and microwave. He [also] punched holes in the walls and stained the carpet." \textit{Id.} at 498. Similar facts to \textit{Zeien} occurred in \textit{State v. Coria}, where defendant husband in a jealous rage, smashed in the door leading from the garage to the house, toppled over the television, tore out the microwave from the wall, slashed the kitchen linoleum, and killed the couple's pet cockatiel. 48 P.3d 980, 981 (Wash. 2002).

\textsuperscript{150} There are several statutory examples of the use of the term "property of another" in criminal mischief. \textit{See e.g.}, ARIZ. REV. STAT. § 13-1602(A)(1) (2001) (defining criminal damage as "recklessly ... [d]efacing or damaging property of another person"); WASH. REV. CODE § 9A.48.080(1)(a) (2000) (stating that a person commits malicious mischief in the second degree if that person knowingly and maliciously "[c]auses physical damage to the property of another in an amount exceeding two hundred fifty dollars"). The MODEL PENAL CODE § 220.3 (1962) also contains similar language, providing in part: "A person is guilty of criminal mischief if he ... damages tangible property of another purposely, recklessly, or by negligence in the employment of fire, explosives, or other dangerous means ... ." The term "property of another" under the Code has been defined "to include property in which any person other than the actor has an interest in which the actor is not privileged to infringe, regardless of the fact that the actor also has an interest in the property[.]" \textit{State v. Superior Court}, 936 P.2d 558, 559 (Ariz. Ct. App. 1997) (quoting MODEL PENAL CODE § 223.0(7) (1962)).


\textsuperscript{152} \textit{See Victoria L. Lutz & Cara M. Bonomolo, My Husband Just Trashed Our Home; What Do You Mean That's Not a Crime?} 48 S.C. L. REV. 641, 651 (1997) (arguing to expand criminal mischief statutes to incorporate the destruction of marital property).
the right of possession, which may include the right to destroy, should not be held to supplant the other possessor's right to enjoy the property.\textsuperscript{153} 

The shared value of the sanctuary for the cohabitants can be likened to the joint ownership and use of personal property. Thus, the thread of logic in criminal destruction cases pertains equally to the Castle Doctrine's applicability to the deadly cohabitant encounter. Both believe that their rights to the property entitle them to attendant benefits: for the deadly cohabitant, it is the right \textit{not to be} ejected from the property; for the vandalizer, it is the right to destroy the property, if so desired. But, that is incorrect. Neither has an interest in the property that is so pervasive it only includes unchecked rights. Like the vandalizer whose right to destroy joint property is curtailed by the objections of the spouse, the deadly cohabitant's presence is curtailed by the needs of the innocent cohabitant to maintain refuge in the sanctuary.

Critics could argue that the rationale of the criminal destruction cases actually supports the logic behind the cohabitant exception—that is, the innocent cohabitant's right to eject others should not displace the deadly cohabitant's right to be present. But, to ask the question in that manner disregards the value of the sanctuary to the innocent cohabitant, and further, it has the unintended effect of displacing the innocent cohabitant's right of presence. Therefore, like the right to have one's property remain free from destruction, the innocent cohabitant's right to the personal dignity of space should extend to any unprovoked and deadly attack by a cohabitant.

To deny the Castle Doctrine in the case of cohabitants is to conclude that the deadly cohabitant's rights, if any, should be allowed to usurp or dilute the innocent cohabitant's right to be protected in the sanctuary. But, as can be seen in the analogies made to the burglary and criminal destruction cases, the deadly cohabitant's rights should not be rigidly enforced, especially when other societal concerns propel an opposite.

\textsuperscript{153} See, e.g., \textit{Deloso}, 55 M.J. at 712 (citing United States v. McDuffie, 28 M.J. 869, 870 (A.C.M.R.1989) (quoting People v. Jones, 495 N.E.2d 1371, 1372 (Ill. App. Ct. 1986) for the proposition that "[t]he term 'property of another' imposes 'criminal responsibility on a person who damages another's interest in property, regardless of whether ownership in the property is shared; a person does not have the right, by virtue of part ownership, to harm the interest of another person in that property.'"); \textit{Superior Court}, 936 P.2d at 558 (reinstating criminal damage conviction where joint tenant spouse damaged the home); \textit{Zeien}, 505 N.W.2d at 498 (rejecting the claim by the husband that his ownership interest in the property entitled him to damage it). But see \textit{Coria}, 48 P.3d at 990 (Sanders, J., dissenting) (arguing that the term "property of another" should be narrowly construed to mean property that the defendant does not own).
conclusion. 154 The innocent cohabitant still has an identifiable interest in the protection that the sanctuary might offer and should not be denied its safe harbor because someone else may share in its possession. 155

IV. ALTERNATIVE VIEWS TO THE COHABITANT EXCEPTION

Whether requiring a complete retreat or a limited one, the cohabitant exception remains a formalistic and flawed effort to address the issue of intimate violence. With its contradictions exposed, mandating a duty to retreat for co-dwellers is an unsound attempt to determine the appropriateness of the response to a deadly encounter. Indeed, requiring the innocent cohabitant to retreat from a deadly cohabitant is inherently risky, especially given the volatile nature of intimate violence. Weiand appreciated the difficulties of the cohabitant exception's design. Yet, eloquent and passionate though it was, Weiand's approach was but a first step toward a resolution of the issue of the Castle Doctrine's use against deadly cohabitants. 156

154. One cannot help but see the role that domestic violence plays in many of these situations. See, e.g., Deloso, 55 M.J. at 712 (portraying estranged husband who, out of jealousy frustration, released the parking brake and sent jointly owned car crashing down steep hill); Superior Court, 936 P.2d at 558 (relating that defendant husband broke in door to jointly owned home to assault his wife); People v. Schneider, 487 N.E.2d 379, 379 (Ill. App. Ct. 1985) (describing defendant who threatened estranged wife and rammed his car into a jointly owned car which she possessed); Zeien, 505 N.W.2d at 498 (depicting the serious damage that defendant husband did to marital property out of anger toward estranged wife). Like State v. Peck, 539 N.W.2d 170 (Iowa 1995), which acknowledged that its decision was designed in part to discourage domestic violence, courts recognize that their findings in the criminal destruction cases are directly tied to the same policy. See People v. Kheyfets, 665 N.Y.S.2d 802 (App. Div. 1997) (commenting on the recognition that batterers often damage property to terrorize, threaten, and exert control over victims of domestic violence) (citing Catherine F. Klein & Leslye E. Orloff, Providing Legal Protection for Battered Women: An Analysis of State Statutes and Case Law, 21 Hofstra L. Rev. 801 (1993)); Coria, 48 P.3d at 982 (relying on statutory law affecting domestic violence in support of expanding its criminal mischief statute).

155. Professor Rose posits seven reasons why a property right is an important right. See Rose, supra note 74, at 348-52. Third is "The Symbolic Argument." Id. She writes:

If property is so important for the visualization of all rights, then property itself becomes the critically important right: it is the symbolic means through which people convey and receive the meaning of all rights. If my property can be taken with impunity, speech and religion may come next. But if I am secure in my property, then I have the intellectual tools to understand what rights mean; I can think and talk about my other rights and convince other people that they too have an interest in protecting those rights.

Id. at 349.

156. In fact, its greatest contribution to this body of law may not be in its decision, which arguably was flawed, but in the dialogue it stirred. The Weiand opinion, candid and self-
If the mechanistic requirement of retreat is inadequate to determine the legitimacy of a response to a deadly encounter, what would be the best way to measure the validity of the response? The answer may lie in a return to the fundamentals of the doctrine of self-defense. At its core, the obligation to retreat is no more than a shorthand way to underscore the importance of necessity in the use of deadly force. As the Michigan Supreme Court observed:

[T]he cardinal rule, applicable to all claims of self-defense, is that the killing of another person is justifiable homicide if, under all the circumstances, the defendant honestly and reasonably believes that he is in imminent danger of death or great bodily harm and that it is necessary for him to exercise deadly force. As part and parcel of the “necessity” requirement that inheres in every claim of lawful self-defense, evidence that a defendant could have safely avoided using deadly force is normally relevant in determining whether it was reasonably necessary for him to kill . . .

But even this statement is not absolute. To require retreat as some sort of litmus test in whether the innocent cohabitant's response is reasonable is a poor substitute for the real discussion. But one can appreciate the concern that motivates acceptance of the cohabitant exception. To these courts, the cohabitant exception performs the gatekeeping function of preventing the endorsement of additional violence. Without it, there is the fear that juries will assume reasonableness of response without further factual inquiry.

A. Minnesota's Return to Reasonableness

The recent Minnesota Supreme Court decision in State v.
Glowacki,¹⁶⁰ is instructive on this issue. Faced with prior conflicting state case law on the cohabitant exception,¹⁶¹ and concerned about intimate violence, the court's focus was two-fold: first, to create a rule that would be uniform in application as against all deadly aggressors; and second, to shift the inquiry from mandatory retreat to a discussion of the reasonableness of defendant's response. Although this decision engaged state jurisdictional nuances, the court recognized the universality of the issue as it sought counsel from the reasoning of differing decisions across the country.¹⁶² Acknowledging that the law of self-defense in the home and defense of habitation have been so intermingled that the Castle Doctrine's use has been distorted, the Minnesota Supreme Court first adopted a rule that applies the Castle Doctrine equally to all attackers, without regard to status.¹⁶³ Read together with prior Minnesota case law on the defense of habitation, the rule was broad in scope: juries would no longer be instructed on a cohabitant's mandated obligation to retreat from the home, whether defendant claimed self-defense or defense of habitation.¹⁶⁴

Candidly noted by the Glowacki court, there are distinct advantages to a broad based and bright-line rule. "Such a rule eliminates the need to define and differentiate between residents, nonresidents, invited guests, unwanted guests, etc., because the status of the aggressor is irrelevant."¹⁶⁵ Lengthy fact-finding proceedings to determine the status of the deadly aggressor are eliminated under this approach, and with it, the sense that both prosecutor and defense rely on these labels to

¹⁶⁰ 630 N.W.2d 392 (Minn. 2001). The particular facts of Glowacki are similar to so many other cases involving violence between intimates. After a lengthy argument that moved from room to room in the home, Glowacki was arrested for assaulting his girlfriend. An interesting factual twist of note: the actual status of his girlfriend, as intruder, invitee, or cohabitant, was in question throughout the proceedings, and made more difficult given her intermittent and temporary living arrangements with Glowacki. See id. at 400-01.

¹⁶¹ See id. at 399 (recognizing that confusion could exist given the court's recent decision in State v. Carothers, 594 N.W.2d 897 (Minn. 1999) and its affirmation without comment of State v. Hennum, 441 N.W.2d 793 (Minn. 1989) and State v. Morrison, 351 N.W.2d 359 (Minn. 1984)).

¹⁶² The court considered several prominent cases from other jurisdictions, including Weiand, Shaw, and State v. Gartland, 694 A.2d 564 (N.J. 1997) (imploring the New Jersey legislature to reconsider the Castle Doctrine's application to battered women).

¹⁶³ As the court stated, "There is no duty to retreat from one's own home when acting in self-defense in the home, regardless of whether the aggressor is a co-resident." Glowacki, 630 N.W.2d at 402.

¹⁶⁴ When coupled together with Carothers, 594 N.W.2d 897 (holding that there is no duty to retreat when one claims defense of habitation), Minnesota no longer mandates the duty to retreat from the home.

¹⁶⁵ Glowacki, 630 N.W.2d at 400.
manipulate the Castle Doctrine's application. In fact, labeling the victim's status in *Glowacki* illustrates the court's point. Defendant asserted that the victim was an intruder, while the district court found that she was an invited guest, and the court of appeals concluded that she was a co-resident.\(^{166}\)

There is another advantage to a bright-line rule that moves beyond the factual distinctions associated with labeling the parties to the affray. By applying the Doctrine equally to all deadly encounters in the home, courts can reduce the inherent inconsistencies naturally associated with the cohabitant exception. Such inconsistencies are a trap that the cohabitant exception invites. To enable the privilege of non-retreat as against intruders and invitees, but not as against cohabitants ignores the realities of the particular encounter, the relationship of the parties, and the context of the affray. This inconsistency was aptly framed in Justice Overton's dissent in *State v. Bobbitt*.\(^{167}\) Criticizing the illogical distinctions of the cohabitant exception, Justice Overton hypothesized about an unprovoked attack by a nineteen year old upon his mother: "If the son is living in the home, the mother has a duty to retreat before she can use deadly force, but, if the son is not residing in the home, the mother has no duty to retreat before such force is used."\(^{168}\) Such is the fodder of a mechanical approach that relies more explicitly on form than substance to measure the appropriateness of the innocent cohabitant's response.

This is not to suggest that the Minnesota Supreme Court was indifferent to the significant societal interest in protecting the sanctity of life in such confrontations. The court was acutely aware of the argument that lifting the mandated duty to retreat might encourage cohabitants to resort to unnecessary violence and loss of life.\(^{169}\) But unlike those jurisdictions that have chosen to keep the cohabitant

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\(^{166}\) *Id.* at 401. One can see in *Glowacki* that, under the prior state law, determination of status would have dramatically changed the need for the jury instruction. If the victim were labeled as an intruder or invited guest, no mandated jury instruction would have been given. *Id.* at 398; see also *Johnson v. State*, 432 So. 2d 583 (Fla. Dist. Ct. App. 1983) (debating over victim's status as between invitee and cohabitant because victim had been living in defendant's apartment for a month).

\(^{167}\) 415 So. 2d 724, 726 (Fla. 1982).

\(^{168}\) *Id.* (Overton, J., dissenting).

\(^{169}\) The State argued forcefully that the duty to retreat was a necessary function to preserve the lives of co-residents. *Glowacki*, 630 N.W.2d at 400. Similarly, *Weiand*'s adoption of the limited duty to retreat was in the hopes that this would "satisf[y] any concern that eliminating a duty to retreat might invite violence." *Weiand*, 732 So. 2d at 1056.
exception to preserve the sanctity of life.\textsuperscript{170} Glowacki rejected that view.\textsuperscript{171} Instead, the Minnesota Supreme Court chose the concept of "reasonableness" to serve the arbitrating function. The court stated:

\begin{quote}
[T]he lack of a duty to retreat does not abrogate the obligation to act reasonably when using force in self-defense. Therefore, in all situations in which a party claims self-defense, even absent a duty to retreat, the key inquiry will still be into the reasonableness of the use of force and the level of force under the specific circumstances of each case.\textsuperscript{172}
\end{quote}

Obvious practical differences exist between these two views. A mandated jury instruction on the duty to retreat, even a limited one, places the burden on the innocent cohabitant to demonstrate the inability to retreat. Unless sufficient evidence is offered to explain why defendant did not leave the home, or in the case of Florida's limited instruction, move to another room, the jury will be instructed to find that defendant failed to meet the obligation to retreat. And in assessing the comparative value of an instruction to retreat, one should never underestimate its impact on the jury, no matter how limited in scope the instruction or how clearly the exceptions are spelled out.

\textbf{B. Washington D.C.'s Comment on the Failure to Retreat}

One need only examine the line of cases arising in Washington D.C. to recognize the difficulty of crafting a jury instruction that properly balances the reasons for the failure to retreat with the obligation to do so.\textsuperscript{173} The D.C. Court of Appeals adopted what it also calls a middle ground approach: jurors are not specifically instructed on the duty of the innocent cohabitant to retreat, but are instead instructed that they are permitted to consider whether a defendant "safely could have avoided further encounter by stepping back or walking away, was actually or

\footnotesize{170. See, e.g., State v. Shaw, 441 A.2d 561, 565 (Conn. 1981) (rejecting the Castle Doctrine in the case of cohabitants to preserve the sanctity of life).

171. Glowacki adopted the bright-line rule that "[t]here is no duty to retreat from one's own home when acting in self-defense in the home, regardless of whether the aggressor is a co-resident." 630 N.W.2d at 402. The district court's modified instruction which stated that the "legal excuse of self-defense is available only to those who act honestly and in good faith and this includes the duty to avoid the danger if reasonably possible" was held erroneous because it could have been interpreted to include a duty to retreat. See id. at 397 n.1, 402.

172. Id. at 402.

apparently in imminent danger of bodily harm." But translating that middle ground approach to a jury instruction has been the subject of debate in that jurisdiction. As acknowledged by one court, a self-defense jury instruction "is not an ideal formulation to explain the tension between a defendant's duty to avoid danger and his right to defend himself when that danger is imminent."

Putting the D.C. approach in a slightly different context, an interesting question remains in Castle Doctrine or no-retreat jurisdictions regarding the appropriate factual relevance of the opportunity to retreat. It concerns the prosecution's ability to comment upon in closing argument, or to question on cross-examination, the defendant's failure to retreat. Unlike the judge-instructed consideration of the failure to retreat that is followed in Washington, D.C., this issue concerns the appropriate latitude for the prosecution to cross-examine defendant and discuss in closing argument defendant's option for retreat and failure to exercise it. For example, in State v. Renner, the Tennessee Supreme Court was faced with this issue when the prosecution on cross-examination alluded to defendant's alternate avenue of escape by the kitchen door. Even though Tennessee is a no-retreat jurisdiction, the Tennessee Supreme Court concluded that the line of inquiry taken by the prosecution on cross-examination was relevant on a number of issues the jury would be required to determine, including: "(1) the circumstances under which the confrontation occurred[;] (2) whether [defendant] was lawfully on the premises[;] (3) whether [defendant's] conduct under the circumstances was reasonable[;] and (4) whether [defendant] perceived himself to have been in imminent danger."

It is possible that trials in Florida, Minnesota, and Washington, D.C. might produce the same outcomes even though juries in each trial would be provided with different instructions regarding the actions of the innocent cohabitant: Washington, D.C., with its instruction commenting

174. Id. at 1006 (quoting Gillis, 400 A.2d at 313); see also Smith v. United States, 686 A.2d 537, 545 (D.C. 1996) (leaving open the question whether such an instruction is required in the case of a deadly encounter with an invitee).
175. Id. at 1006 (citing Carter v. United States, 475 A.2d 1118, 1124 (D.C. 1984)).
177. Renner, 912 S.W.2d at 704-05.
178. Id. at 704. But see People v. Riddle, 649 N.W.2d 30, 35 (Mich. 2002) (stating that the failure to retreat is not an appropriate factor for the jury to consider where the law finds there is no mandatory duty to retreat).
on the failure to retreat; Florida with the limited duty to retreat to the extent reasonably possible; and Minnesota, with the emphasis on the reasonableness of the acts of the defendant. In each jurisdiction, the jury might find that the actions of the innocent cohabitant, who failed to retreat, were nevertheless appropriate. But an instruction that requires the duty to retreat, or specifically comments on the failure to retreat, still serves to spotlight the cohabitant's lack of retreat. And even if non-retreat is justified in the particular case, the scrutiny imposed on the innocent cohabitant does not appear to be based on any sufficiently overriding purpose.

However, one need not resort to the duty to retreat in order to keep the innocent cohabitant's response in check. Instead, the cohabitant's response could be judged in light of the reasonableness and proportionality of the force used, given all the circumstances involved.\(^\text{179}\) Returning the jury's focus to the reasonableness of the innocent cohabitant's response does not suggest generic acceptance of the force used. It only shifts the discussion to a more appropriate level of examination. Without a specific instruction mandating retreat, or the pointed comment on the failure to retreat, the jury is free to consider all relevant and factually sensitive considerations.\(^\text{180}\) Shifting the focus to the reasonableness of response re-centers the discussion and eliminates the entangled distinctions of the Castle Doctrine's use in defense of habitation and self-defense in the home. In this way, the Minnesota response achieves what Weiand attempted to do, but failed. It established a principle that emphasizes a basic tenet of self-defense—the reasonableness and proportionality of the response\(^\text{181}\)—and it has achieved this without artificial limitations on the type of retreat needed, or on the status of the parties involved in the affray.

\(^\text{179}\) See Renner, 912 S.W.2d at 701 (commenting that a factual inquiry regarding the opportunity for retreat may be relevant to determine whether defendant's conduct under the circumstances was reasonable).

\(^\text{180}\) As stated by the court in People v. Wesley, this might include:

\[R\]elevant knowledge that the defendant may have had about the victim, the physical attributes of all those involved in the incident, and any prior experiences that the defendant may have had "which could provide a reasonable basis for a belief that another person's intentions were to injure or rob him or that the use of deadly force was necessary.


\(^\text{181}\) Justice Holmes once stated: "Rationally the failure to retreat is a circumstance to be considered with all the others in order to determine whether the defendant went farther than he was justified in doing; not a categorical proof of guilt." Brown v. United States, 256 U.S. 335, 343 (1921).
V. CONCLUSION

Envisioning the supremacy of the sanctuary, the Castle Doctrine operates as an exception to the generalized duty to retreat, empowering those lawfully within the sanctuary to stand ground and repel a deadly attack. Its significance to the innocent cohabitant transcends the countervailing policy that would promote the property status of the deadly aggressor and should be employed equally as against all attackers, whether they be intruders, invited guests or cohabitants. This Article has argued that the creation of a cohabitant exception to the Castle Doctrine misapplies formalistic notions of property rights over the personal dignity of space afforded by protection from the sanctuary.

And so we return, once again, to Kathleen Weiand, who, as the trial court instructed, was obligated to flee her home rather than stand ground and repel an attack by her serially abusive husband. This Article has shown that when the enemy comes from within, the Castle Doctrine, with its historical deference to the personal privilege of sanctuary, should prevail over any exception that is rooted in the property-related interest of the deadly aggressor.