

## COMMENTS

### RETREAT DOES NOT EQUAL SURRENDER: DEFENSIVE DEADLY FORCE IN DWELLINGS AFTER *PEOPLE V. AIKEN*

ERIC DEL POZO<sup>†</sup>

#### INTRODUCTION

Like gridlock, tourists, and exorbitant prices, deadly private violence is an unfortunate fact of life in New York.<sup>1</sup> Obviously, no one wishes to be the target of such violence.<sup>2</sup> Should the situation arise, however, a New Yorker must retreat if practicable before responding with defensive deadly force.<sup>3</sup> This

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<sup>†</sup> J.D. Candidate, 2008, St. John's University School of Law; A.B., Philosophy, 2001, Dartmouth College. I would like to thank the following people for their help: Frank Cavanagh, St. John's Law Review Editor-in-Chief emeritus; Brandon Del Pozo, Ph.D. candidate and armed-warfare guru; and Professor Michael Simons.

<sup>1</sup> See, e.g., *People v. Goetz*, 68 N.Y.2d 96, 497 N.E.2d 41, 506 N.Y.S.2d 18 (1986) (quadruple subway shooting); *People v. Rosas*, 30 A.D.3d 545, 818 N.Y.S.2d 126 (2d Dep't 2006) (double murder); *People v. Charles*, 237 A.D.2d 816, 655 N.Y.S.2d 459 (3d Dep't 1997) (suspected triple murder). On perhaps the City's darkest day—and there are several contenders—scores of neighbors went about their business as Queens resident Kitty Genovese lay stabbed and screaming outside of her apartment building. See Jim Rasenberger, *Kitty, 40 Years Later*, N.Y. TIMES, Feb. 8, 2004, § 14, at 1 (“Clergymen and politicians decried the events, while psychologists scrambled to comprehend them.”). In true New York fashion, the story of Genovese's life has since been turned into an operatic musical production. See Barbara Hoffman, *Showtime!—Tragedy, Like the Kitty Genovese Murder, Gets a Musical Makeover*, N.Y. POST, Sept. 9, 2006, at 25.

<sup>2</sup> With good reason: New York defines deadly force as that which, “under the circumstances in which it is used, is readily capable of causing death or other serious physical injury.” N.Y. PENAL LAW § 10.00(11) (Consol. 2007). Only twenty years ago, the odds of an American being murdered were 1 in 133. *Around the Nation: Odds of Being Murdered Are 1 in 133, Study Says*, N.Y. TIMES, May 6, 1985, at A14.

<sup>3</sup> See N.Y. PENAL LAW § 35.15(2)(a) (Consol. 2007) (“[An] actor may not use deadly physical force if he or she knows that with complete personal safety, to oneself and others he or she may avoid the necessity of so doing by retreating.”). An increasing number of states disagree with this view. See Adam Liptak, *15 States Expand Right to Shoot in Self-Defense*, N.Y. TIMES, Aug. 7, 2006, at A1. The divergence will be discussed more fully *infra*.

rule has an important exception: An innocent person under siege inside her own home is legally justified in killing her attacker without backing down.<sup>4</sup>

Although states commonly exempt those assaulted in their dwellings from retreat, the exception varies in its application. For example, consider the homeowner on his outdoor front porch who sees a longtime friend approaching. Suppose that the men had previously engaged in a heated drunken argument. The friend, still harboring a grudge apparently, lugs a wooden bow. From a distance, he launches a wayward arrow at the homeowner, who picks it up and breaks it. As our intrepid archer loads another arrow, the homeowner grabs a nearby rifle and shoots him dead. These events are not imaginary. One state's appellate court, on identical facts, labeled the killing justified since the shooter happened to be in the immediate vicinity of his home.<sup>5</sup>

New York awards its dwelling inhabitants a narrow license to fight back. In *People v. Aiken*,<sup>6</sup> the New York Court of Appeals held unanimously that a person standing in his apartment doorway has a duty to retreat inside before using deadly force in self-defense. *Aiken's* unfortunate downward spiral involved neighbors of forty years whose Bronx apartments shared a common wall. The protagonists engaged in a decade-long dispute over the defendant's alleged siphoning of the victim's telephone and cable services. "In 1997, following a heated verbal exchange, the victim stabbed defendant in the back, hospitalizing him for two days."<sup>7</sup> Not finished, the victim then menaced the defendant's family for several years. In 1999, during another argument, the defendant "knocked an indentation into his side of the wall" with a metal pipe.<sup>8</sup> The victim went downstairs to let in police, while the defendant—rather than remaining inside—brandished the pipe by his apartment's open doorway. Upon

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<sup>4</sup> See N.Y. PENAL LAW § 35.15(2)(a)(i) (Consol. 2007) (exempting from retreat anyone "in his or her dwelling and not the initial aggressor"). This provision is the focus of this Comment.

<sup>5</sup> See *State v. Church*, 258 S.E.2d 812, 814 (N.C. Ct. App. 1979) ("When a person who is without fault in bringing on the difficulty is attacked upon his own premises, he has no duty to retreat before he can act in self-defense.").

<sup>6</sup> 4 N.Y.3d 324, 828 N.E.2d 74, 795 N.Y.S.2d 158 (2005). Section 35.15 of the New York Penal Law remains unchanged since *Aiken*.

<sup>7</sup> *Id.* at 326, 828 N.E.2d at 75, 795 N.Y.S.2d at 159.

<sup>8</sup> *Id.* at 326, 828 N.E.2d at 76, 795 N.Y.S.2d at 160.

returning upstairs, the victim saw this, reached into his own pocket, pressed his face against the defendant's, and threatened him with death. "Believing he was about to be stabbed again, defendant struck the victim on his head with the metal pipe, killing him."<sup>9</sup> The victim's claims of illegal diversion of his cable and telephone services were unfounded.

The Court of Appeals, while affirming that there is no duty to retreat from one's home, held that defendant in *Aiken* nonetheless had a duty to retreat into his home.<sup>10</sup> Significantly, the court rejected the defendant's argument that his doorway was a part of his dwelling for self-defense purposes: "The doorway did not function as the asylum of the home—it was instead a hybrid private-public space in which a person did not have the same reasonable expectation of seclusion and refuge from the outside world."<sup>11</sup> The goal was to strike a balance "between protecting life by requiring retreat and protecting the sanctity of the home by not requiring retreat."<sup>12</sup> *Aiken's* message to New Yorkers thus appears to be: If you can do so safely, take refuge in your dwellings before meeting deadly violence in kind.

This Comment applauds the Court of Appeals for striking the correct balance. Part I examines the duty to retreat before using defensive deadly force. It argues that retreat follows from the necessity requirement built into the concept of justification. Part I concludes with an overview of the dwelling exception, tracking its evolution in New York through *Aiken*. Part II of this Comment advocates narrowing the dwelling exception to serve its purposes. To begin, Part II asserts that the exception may be read as a rule in defense of property. It then suggests that *Aiken's* holding covers not just apartment tenants but all dwelling inhabitants, who should be required to retreat from their property's curtilage into their houses, if they can safely do so, before using defensive deadly force. Finally, Part II argues briefly against the recent trend among states to eliminate retreat altogether. The desire is not to endanger those who face

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<sup>9</sup> *Id.* at 326, 828 N.E.2d at 76, 795 N.Y.S.2d at 160.

<sup>10</sup> *See id.* at 327, 828 N.E.2d at 77, 795 N.Y.S.2d at 161 ("The rationale that evolved—now widely accepted—is that one should not be driven *from* the inviolate place of refuge that is the home." (emphasis added)).

<sup>11</sup> *Id.* at 330, 828 N.E.2d at 79, 795 N.Y.S.2d at 163. This finding was within judicial bounds, as section 35.15(2)(a)(i) states that a person need not retreat from her own "dwelling" without defining the term.

<sup>12</sup> *Id.* at 328, 828 N.E.2d at 77, 795 N.Y.S.2d at 161.

potential violence in the vicinity of their homes, but rather to weigh their entitlement to personal safety against society's interest in avoiding senseless killings.<sup>13</sup>

I. THE DUTY TO RETREAT (SOMETIMES) WHEN ATTACKED ON ONE'S OWN PROPERTY

A. *An Analysis of the Duty to Retreat Before Using Defensive Deadly Force*

1. Retreat Follows Logically from Self-Defense's Necessity Requirement

Like a skier running a slalom, section 35.15 of New York's Penal Law alternates between condemnation and exculpation. Physical force against another is justified only when a person reasonably believes it necessary to defend herself or a third party from an imminent unlawful physical attack.<sup>14</sup> With a few exceptions, deadly physical force is not permitted unless reasonably believed necessary to ward off an attack likely to produce almost certain death.<sup>15</sup> Even so, defensive deadly force is not available to a potential victim who "knows that with complete personal safety, to oneself and others" she may avoid the violent encounter altogether by retreating.<sup>16</sup> Thus, a person

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<sup>13</sup> It bears repeating that the *Aiken* defendant killed his neighbor of four decades in an argument over cable television.

<sup>14</sup> N.Y. PENAL LAW § 35.15(1) (Consol. 2007). Although judicial interpretations vary, this basic self-defense provision is like that of nearly every jurisdiction. *See, e.g.*, GA. CODE ANN. § 16-3-21(a) (2007); HAW. REV. STAT. § 703-304(1) (2007); N.J. STAT. ANN. § 2C:3-4(a) (West 2007); PA. CONS. STAT. § 505(a) (2007). Force being justified means that the actor may not be convicted for it. *See, e.g.*, CAL. PENAL CODE § 199 (West 2007); N.Y. PENAL LAW § 35.00 (Consol. 2007) ("In any prosecution for an offense, justification . . . is a defense."). The driving idea is a balancing of harms "according to ordinary standards of intelligence and morality." N.Y. PENAL LAW § 35.05(2) ("Justification; generally"). The choice resulting in the lesser harm for society is by definition justified, and should be tolerated or even encouraged. *See, e.g.*, JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 250-52 (4th ed. 2006).

<sup>15</sup> *See* N.Y. PENAL LAW § 35.15(2)(a) (Consol. 2007). Again, this proportionality requirement mirrors that of other jurisdictions. *See, e.g.*, HAW. REV. STAT. § 703-304(2) ("The use of deadly force is justifiable under this section if the actor believes that deadly force is necessary to protect himself against death . . .").

<sup>16</sup> N.Y. PENAL LAW § 35.15(2)(a) (Consol. 2007). Not all retreat rules are statutory; some have been carved out judicially. *See, e.g.*, *People v. Watson*, 671 P.2d 973, 974 (Colo. 1983); *Commonwealth v. Kendrick*, 218 N.E.2d 408, 414 (Mass. 1966) ("The right of self-defence does not accrue to a person until he has availed all proper

under attack in New York—whether on a city block or rural road—is not relieved of liability for killing her assailant if she is aware of at least one non-deadly alternative.<sup>17</sup>

The prerequisite that defensive force, to be justified, appear necessary makes retreat a lesser included of this principle. “If it is possible to safely avoid an attack then it is not *necessary*, and therefore not permissible, to exercise deadly force against the attacker.”<sup>18</sup> Hence, the rule in a no-retreat jurisdiction may be restated: A person is entitled to use deadly force if she reasonably believes it necessary to repel unlawful deadly force in the exact place that she happens to be when it dawns on her that an assault may be imminent. To this end, supporters of recent laws eliminating the duty to retreat from potentially deadly conflicts have labeled the measures “stand your ground” laws.<sup>19</sup> The laws themselves often invite such characterization.<sup>20</sup> In theory, however, standing one’s ground undercuts the seriousness of any necessity requirement.

## 2. Retreat Is Required Only in Narrowly Defined Circumstances

Jurisdictions are split on the issue of whether consideration of retreat is nominally required before using defensive deadly force against an attacker.<sup>21</sup> Presently, a minority espouses “what

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means to avoid physical combat.”). The dwelling exception will be addressed *infra* Part I.B.

<sup>17</sup> New Yorkers with only moderately violent tendencies take heart: “It seems everywhere agreed that one who can safely retreat need not do so before using nondeadly force.” 2 WAYNE R. LAFAVE, *SUBSTANTIVE CRIMINAL LAW* 155 (2d ed. 2003).

<sup>18</sup> *People v. Riddle*, 649 N.W.2d 30, 40 (Mich. 2002); *see also* 2 PAUL H. ROBINSON, *CRIMINAL LAW DEFENSES* 80 (1984) (“The retreat rule has been criticized as an obsolete necessity requirement.”). Some judicial opinions intertwine the two concepts. For example, the D.C. Circuit in *Laney v. United States*, 294 F. 412, 414 (D.C. Cir. 1923), stated that “the right of self-defense does not arise until [one] has done everything in his power to prevent its necessity.”

<sup>19</sup> *See generally* Robert Tanner, *Growing Right to Use Deadly Force; More States Pass ‘Stand Your Ground’ Laws*, RICHMOND TIMES DISPATCH, May 26, 2006, at A4. Conversely, the measures’ detractors have called them “shoot first” laws. *See id.*

<sup>20</sup> For instance, a Tennessee denizen “who is not engaged in unlawful activity and is in a place where the person has a right to be has no duty to retreat before threatening or using force against another person.” TENN. CODE ANN. § 39-11-611(a) (2007).

<sup>21</sup> *See* DRESSLER, *supra* note 14, at 226–27 (noting that as recently as 2001, a “slim majority of jurisdictions applied the rule that a non-aggressor is permitted to use deadly force to repel an unlawful deadly attack, even if he is aware of a place to

might be regarded as a more civilized view” by compelling retreat under safe conditions.<sup>22</sup> The majority view, however, is rapidly gaining momentum.<sup>23</sup> Fifteen states have recently passed laws abrogating retreat and “expand[ing] the right of self-defense, allowing crime victims to use deadly force in situations that might formerly have subjected them to prosecution for murder.”<sup>24</sup> The effect has been to “remove criminal charges and civil liability for people who shoot down an attacker without first trying to flee if they feel their lives are in danger.”<sup>25</sup> The law is in such flux that foreign media outlets have commented.<sup>26</sup>

Still, even in jurisdictions that mandate it, retreat is required in few circumstances. For instance, it is recommended only where the actor can attempt escape without increasing her own peril.<sup>27</sup> This subjective standard focuses on what a person knew in fact at the time, rather than “whether defendant ‘could have retreated’ with complete safety” looking at the totality of circumstances in hindsight.<sup>28</sup> One need not calmly evaluate exit strategies when faced with pressing danger, for “[d]etached reflection cannot be demanded in the presence of an uplifted knife.”<sup>29</sup> Nor is fleeing ever required when threatened with a

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which he can retreat in complete safety”). The divide is nothing new. *Compare* *Beard v. United States*, 158 U.S. 550, 564 (1895) (negating duty to retreat provided “defendant was where he had the right to be”), *with* *Allen v. United States*, 164 U.S. 492, 497 (1896) (sanctioning defensive deadly force “provided [one] use all the means in his power otherwise to save his own life or prevent the intended harm, such as retreating as far as he can”).

<sup>22</sup> 2 LAFAVE, *supra* note 17, at 155–56.

<sup>23</sup> *See* Liptak, *supra* note 3; Tanner, *supra* note 19.

<sup>24</sup> Liptak, *supra* note 3. The new laws’ consequences will be examined briefly *infra* Part II.B.

<sup>25</sup> Tanner, *supra* note 19.

<sup>26</sup> *See, e.g.*, Tony Allen-Mills, *Victims with a Licence to Kill Confuse US Law*, *TIMES* (London), Aug. 13, 2006, at 22 (echoing concerns that the recent trend “encourage[s] mayhem—with suburban neighbours gunning each other down every time they [see] a shadow”).

<sup>27</sup> *See, e.g.*, N.Y. PENAL LAW § 35.15(2)(a) (Consol. 2007) (conditioning retreat on “complete personal safety, to oneself and others”). “The rule has not been interpreted, either by statute or judicial opinion, to require retreat into self-destruction.” 2 ROBINSON, *supra* note 18, at 80 (citing cases).

<sup>28</sup> *See* *People v. Doctor*, 98 A.D.2d 780, 781, 469 N.Y.S.2d 797, 799 (2d Dep’t 1983) (contrasting the statutory test with an incompatible “objective standard”).

<sup>29</sup> *Brown v. United States*, 256 U.S. 335, 343 (1921) (Holmes, J.); *see also* *Rowe v. United States*, 164 U.S. 546, 558 (1896) (proclaiming that the law has never compelled a defendant “to step aside when his assailant was rapidly advancing upon him with a deadly weapon”).

firearm.<sup>30</sup> New York, moreover, construes necessity liberally,<sup>31</sup> with the result that deadly force may be justified more readily without retreat than in other states.<sup>32</sup> Additionally, fleeing is often the province of those who have played some active role in escalating matters.<sup>33</sup> In sum, these facts paint retreat as a tool of conflict avoidance rather than one of improvised escape. Retreat's role in the self-defense context is more theoretical than practical.

### B. *An Examination of the Dwelling Exception to the Retreat Rule*

#### 1. A Brief Overview of the Dwelling Exception

In any jurisdiction, a person forcefully attacked inside her own dwelling may counter immediately with deadly force.<sup>34</sup> This is not a recent development, as early American judicial opinions made it “clear that people did not have to retreat from their own

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<sup>30</sup> “[N]o one could consider escape as reasonably possible from a pistol purposefully and directly aimed at the assailed.” *People v. Liguori*, 284 N.Y. 309, 318, 31 N.E.2d 37, 40 (1940) (reversing lower court due to mere issuance of jury instruction mentioning retreat). “Indeed, to retreat [from a firearm] would be to invite almost certain death.” *Laney v. United States*, 294 F. 412, 414–15 (D.C. Cir. 1923).

<sup>31</sup> The necessity requirement in section 35.15(1) of New York's Penal Law has been expanded almost infinitely via the related reasonableness provision. *See People v. Goetz*, 68 N.Y.2d 96, 114, 497 N.E.2d 41, 52, 506 N.Y.S.2d 18, 29 (1986) (ruling that “a determination of reasonableness must be based on the circumstances facing a defendant or his situation,” including all relevant perceptions, knowledge, and prior experience (internal quotation marks omitted)).

<sup>32</sup> *See, e.g., People v. Rivera*, 138 A.D.2d 169, 175–76, 530 N.Y.S.2d 802, 806 (1st Dep't 1988) (remanding for review of victim's psychiatric records to determine whether the defendant could conceivably have been justified in believing deadly force was necessary). It makes sense that the more situations in which deadly force may reasonably be felt necessary, the narrower the circumstances in which the actor, believing herself compelled to fight back, will have a duty to avoid the conflict. There are limits, however. For example, where the victim was “lying face down with gunshot wounds to the leg and chest when defendant shot him at close range in the back of the head,” no self-defense instruction was appropriate. *People v. Barber*, 269 A.D.2d 758, 758, 703 N.Y.S.2d 328, 330 (4th Dep't 2000) (basing decision on opportunity for retreat).

<sup>33</sup> *See, e.g., N.Y. PENAL LAW § 35.15(2)(a)(i)* (Consol. 2007) (compelling retreat for anyone, even someone in her own dwelling, qualifying as an “initial aggressor”). *Aiken* seemingly ignores this provision. *See infra* Part I.B.2.

<sup>34</sup> The rationale being either that a jurisdiction has enacted a dwelling exception to its retreat rule, *see, e.g., N.Y. PENAL LAW § 35.15(2)(a)(i)*, or alternatively that it does not require retreat whatsoever.

homes when attacked.”<sup>35</sup> For instance, in *United States v. Beard*,<sup>36</sup> the Supreme Court held that “[t]he accused being where he had a right to be, on his own premises, constituting a part of his residence and home,” did not have to withdraw before killing his attacker.<sup>37</sup> Similarly, in *People v. Tomlins*,<sup>38</sup> the New York Court of Appeals reiterated that “[i]t is not now and never has been the law that a man assailed in his own dwelling is bound to retreat.”<sup>39</sup> This aversion to abandoning one’s symbolic castle is traced back to English common law.<sup>40</sup>

Although the issue of retreat from one’s dwelling appears settled, the question of what a “dwelling” is for purposes of the exception remains muddled. *Beard* paved the way for an expansive reading by holding that the defendant was under no greater obligation to retreat “when on his own premises . . . than he would have been if attacked within his dwelling house.”<sup>41</sup> Many states likewise have extended immunity from retreat to all or part of a homeowner’s premises classifiable as “curtilage.”<sup>42</sup>

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<sup>35</sup> David B. Kopel, *The Self-Defense Cases: How the United States Supreme Court Confronted a Hanging Judge in the Nineteenth Century and Taught Some Lessons for Jurisprudence in the Twenty-First*, 27 AM. J. CRIM. L. 293, 306 (2000).

<sup>36</sup> 158 U.S. 550 (1895) (Harlan, J.). For an explication of *Beard*’s role in the development of justification defenses, see Kopel, *supra* note 35, at 305–07.

<sup>37</sup> *Beard*, 158 U.S. at 559–60. Writing for the Court, Justice Harlan in dicta noted that “the tendency of the American mind seems to be very strongly against the enforcement of any rule which requires a person to flee when assailed, to avoid chastisement, or even to save human life; and that tendency is well illustrated by the recent decisions of our courts.” *Id.* at 561–62. *Beard* was cited recently in *New York v. Tanella*, 239 F. Supp. 2d 291, 296 (E.D.N.Y. 2003).

<sup>38</sup> 213 N.Y. 240, 107 N.E. 496 (1914) (Cardozo, J.).

<sup>39</sup> *Id.* at 243, 107 N.E. at 497.

<sup>40</sup> See *People v. Jones*, 3 N.Y.3d 491, 495, 821 N.E.2d 955, 957, 788 N.Y.S.2d 651, 653 n.3 (2004) (“[T]he house of every one is to him as his castle and fortress, as well as for his defence against injury and violence . . . .”) (quoting *Semayne’s Case*, (1603) 77 Eng. Rep. 194, 195 (K.B.)); *People v. White*, 127 Misc. 2d 219, 220–21, 484 N.Y.S.2d 994, 995 (Sup. Ct. Queens County 1984) (reciting the English common-law requirement that a person “retreat to the wall,” except for when “attacked within his dwelling, or its curtilage”).

<sup>41</sup> 158 U.S. at 599–60. *Beard* involved an armed dispute over a cow. Upon spying his assailant, defendant “went at once from his dwelling into the lot . . . about 50 or 60 yards from his house, and near to that part of an adjoining field or lot where the cow was.” *Id.* at 552.

<sup>42</sup> See, e.g., *State v. Frizzelle*, 89 S.E.2d 725, 726 (N.C. 1955) (“[T]he curtilage of the home will ordinarily be construed to include at least the yard around the dwelling house as well as the area occupied by barns, cribs, and other outbuildings.”). Derived from the common law, curtilage’s initial role was to extend to surrounding lands the same protection against burglary given to the house. *United States v. Dunn*, 480 U.S. 294, 300 (1987).

Where an express statutory definition omits curtilage, its reach is often limited.<sup>43</sup> Conversely, where legislative intent to encompass curtilage is clear, its boundaries are drawn more liberally.<sup>44</sup> Departing from *Beard*, however, few if any jurisdictions have extended the dwelling's favored status all the way to property lines.<sup>45</sup>

## 2. The Dwelling Exception in New York Before and After *Aiken*

No statutory definition of “dwelling” for purposes of retreat exists in New York.<sup>46</sup> Although the Court of Appeals has noted that statutory language can be good evidence of legislative intent,<sup>47</sup> it has refused to import a definition of “dwelling” from “another Penal Law statute absent legislative authority for doing so.”<sup>48</sup> Additionally, “[b]ecause section 35.15 was part of an omnibus package of legislation, there is no specific legislative

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<sup>43</sup> A Missouri court, for instance, has required retreat all the way up to, but not past, the threshold of one's physical house. *See State v. Gardner*, 606 S.W.2d 236, 239 (Mo. Ct. App. 1980). For purposes of justification, Missouri equates “dwelling” with “any building, inhabitable structure, or conveyance of any kind . . . which has a roof over it, including a tent, and is designed to be occupied by people lodging therein at night.” MO. REV. STAT. § 563.011(2) (2007).

<sup>44</sup> New Hampshire's view reflects its live-free-or-die philosophy. Its self-defense provision authorizes deadly force against anyone threatening a felony “against the actor within such actor's dwelling *or its curtilage*.” N.H. REV. STAT. ANN. § 627:4-II(d) (2007) (emphasis added). Hence, the state's highest court has found defensive deadly force potentially justifiable, without retreat, on “defendant's beach at some distance from his cottage.” *State v. Pugliese*, 422 A.2d 1319, 1322 (N.H. 1980).

<sup>45</sup> *See State v. Provoid*, 266 A.2d 307, 311 (N.J. Super. Ct. App. Div. 1970) (“The few cases dealing with the subject have emphatically affirmed that the curtilage of one's residence does not . . . extend to a public thoroughfare running along the boundary of one's property.”); *see also Valentine v. State*, 98 So. 483, 488 (Ala. Ct. App. 1923) (refusing likewise to “extend the wholesome ancient doctrine that a man's house is his castle” to include all surrounding lands). *But see Jones v. State*, 398 So. 2d 360, 363 (Ala. Crim. App. 1981) (affording no-retreat instruction to defendant in yard of house “only a few steps from the road”).

<sup>46</sup> *See People v. Hernandez*, 98 N.Y.2d 175, 181, 774 N.E.2d 198, 201, 746 N.Y.S.2d 434, 437 (2002) (labeling the definition “conspicuously absent”).

<sup>47</sup> *Id.* at 181–82, 774 N.E.2d at 202, 746 N.Y.S.2d at 438.

<sup>48</sup> *See People v. Powell*, 54 N.Y.2d 524, 529 & n.4, 430 N.E.2d 1285, 1288 & n.4, 446 N.Y.S.2d 232, 235 & n.4 (1981) (contrasting “dwelling” under Penal Law section 35.15 with “home,” “residence,” and “public place” in other provisions).

history underlying the [exception's] adoption."<sup>49</sup> The term's parameters therefore have been set judicially.

As defined by the Court of Appeals, "dwelling" for purposes of retreat is synonymous with "residence."<sup>50</sup> Whether a given location is part of a defendant's dwelling or residence hinges on the extent to which she "exercises exclusive possession and control over the area in question."<sup>51</sup> Thus, a dwelling "encompasses a house, an apartment or a part of a structure where defendant lives and where others are ordinarily excluded—the antithesis of which is routine access to or use of an area by strangers."<sup>52</sup> For a structure to qualify, the defendant must actually be lodging there regularly.<sup>53</sup>

Accordingly, "whether the area where the struggle occurred was part of the defendant's dwelling" is a factual question for resolution on a case-by-case basis.<sup>54</sup> Still, the guideposts are relatively restrictive. Places that as a matter of law may not qualify as a dwelling to exempt one from retreat include a back porch,<sup>55</sup> front yard,<sup>56</sup> brownstone hallway,<sup>57</sup> hotel corridor,<sup>58</sup>

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<sup>49</sup> *Hernandez*, 98 N.Y.2d at 181, 774 N.E.2d at 201, 746 N.Y.S.2d at 437 (rejecting the meaning of "dwelling" as utilized within New York's burglary statutes). Connecticut's legislature, on the other hand, has not left its courts guessing. See CONN. GEN. STAT. § 53a-19(b) (2007) (incorporating burglary-related definition of "dwelling" into retreat exemption).

<sup>50</sup> *Hernandez*, 98 N.Y.2d at 182, 774 N.E.2d at 203, 746 N.Y.S.2d at 439.

<sup>51</sup> *Id.* at 182–83, 774 N.E.2d at 203, 746 N.Y.S.2d at 439.

<sup>52</sup> *Id.* at 183, 774 N.E.2d at 203, 746 N.Y.S.2d at 439.

<sup>53</sup> See *People v. Shaut*, 261 A.D.2d 960, 961, 690 N.Y.S.2d 372, 373 (4th Dep't 1999) (holding dwelling exception inapplicable where the defendant had removed all of his belongings almost two months earlier, had not visited or paid rent since, and had leased separate premises); cf. *People v. Berk*, 88 N.Y.2d 257, 260, 667 N.E.2d 308, 309, 644 N.Y.S.2d 658, 659 (1996) (keeping an office and periodically visiting estranged wife in former residence presented factual issue of whether residence was the defendant's dwelling). Coincidentally, that a dwelling be a "building which is usually occupied by a person lodging therein at night," N.Y. PENAL LAW § 140.00(3) (Consol. 2007), is the statutory definition formally rejected by the Court of Appeals in *Hernandez*.

<sup>54</sup> *People v. Carrera*, 282 A.D.2d 614, 616, 725 N.Y.S.2d 344, 346 (2d Dep't 2001).

<sup>55</sup> See *People v. Childs*, 21 A.D.2d 809, 810, 250 N.Y.S.2d 926, 928 (2d Dep't 1964). Our North Carolinian archer from the Introduction can rejoice.

<sup>56</sup> *People v. Gaines*, 229 A.D.2d 448, 448, 645 N.Y.S.2d 510, 510 (2d Dep't 1996).

<sup>57</sup> *People v. McCurdy*, 86 A.D.2d 493, 497, 450 N.Y.S.2d 507, 510 (2d Dep't 1982).

<sup>58</sup> *People v. Mickens*, 219 A.D.2d 543, 544, 631 N.Y.S.2d 687, 688 (1st Dep't 1995).

accessible but separate downstairs quarters,<sup>59</sup> and a normally secure apartment stairwell.<sup>60</sup>

Three New York cases involving apartment doorways track the dwelling exception's evolution. Two decades ago, in *People v. White*,<sup>61</sup> a New York trial court held that a person standing in his girlfriend's apartment doorway "was under no duty when attacked by the complainant to retreat into the apartment."<sup>62</sup> In *Aiken*, the Court of Appeals invalidated *White* by holding the opposite for tenants.<sup>63</sup> Most recently, in *People v. Wimberly*,<sup>64</sup> the Appellate Division (citing *Aiken*) held that a woman who entered the hallway to stab her victim "violated her duty to retreat since she could have stayed in her apartment with complete safety."<sup>65</sup> This progression—(1) no duty to retreat within; (2) duty to retreat within; (3) duty to remain within—appears to paint the cavalier, violent New York apartment dweller into an increasingly small corner. Taking pains to square *Aiken* with precedent, the Court of Appeals reasoned that the threshold of defendant's apartment "straddled both the private apartment and the public hall" and therefore "did not function as the asylum of the home."<sup>66</sup> It is illogical, however, that the litmus test for being a dwelling—exclusive possession and control—would have been satisfied by an apartment doorway twenty years ago but not now.<sup>67</sup>

The Court of Appeals likely could have avoided the dwelling question and instead rejected defendant's appeal on "initial

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<sup>59</sup> *People v. Barber*, 269 A.D.2d 758, 758, 703 N.Y.S.2d 328, 329 (4th Dep't 2000) ("The downstairs flat was operated as a day care center by defendant's girlfriend.").

<sup>60</sup> *People v. Hernandez*, 98 N.Y.2d 175, 183, 774 N.E.2d 198, 203, 746 N.Y.S.2d 434, 439 (2002).

<sup>61</sup> 127 Misc. 2d 219, 484 N.Y.S.2d 994 (Sup. Ct. Queens County 1984).

<sup>62</sup> *Id.* at 222, 484 N.Y.S.2d at 996.

<sup>63</sup> *People v. Aiken*, 4 N.Y.3d 324, 330, 828 N.E.2d 74, 79, 795 N.Y.S.2d 158, 163 (2005).

<sup>64</sup> 19 A.D.3d 518, 798 N.Y.S.2d 470 (2d Dep't 2005).

<sup>65</sup> *Id.* at 519, 798 N.Y.S.2d at 470. *But see* *Commonwealth v. Daniels*, 301 A.2d 841, 845 (Pa. 1973) (holding no retreat violation where defendant exited apartment, chased assailant into stairwell, and stabbed him from behind).

<sup>66</sup> *Aiken*, 4 N.Y.3d at 330, 828 N.E.2d at 79, 795 N.Y.S.2d at 163 ("A nonresident could stand there and knock, ring a bell or turn the door's handle.").

<sup>67</sup> Although the trial court in *White* focused on the castle doctrine, its ruling is saved by the fact that the defendant's girlfriend and her minor son were "outside the apartment in the common hallway." 127 Misc. 2d at 222, 484 N.Y.S.2d at 996. Had the defendant by himself gone inside and locked the door, it clearly would not have been "with complete personal safety, to oneself and others." N.Y. PENAL LAW § 35.15(2)(a) (Consol. 2007).

aggressor” grounds. It is well settled in New York that “[a] man who is himself the aggressor or who needlessly resumes the fight, gains no immunity because he kills in his own dwelling.”<sup>68</sup> The limitation has been codified in the Penal Law, which denies retreat only to someone attacked “in his or her dwelling and *not the initial aggressor*.”<sup>69</sup> Being an aggressor, apparently, is not terribly difficult. In deciding whether someone is an aggressor who has forfeited the right to justified self-defense,<sup>70</sup> New York lends probative weight even to circumstantial evidence like prior threats, “whether or not such threats are communicated” to the other party.<sup>71</sup> Brandishing the eventual murder weapon after bashing it into the victim’s wall, conversely, would seem sufficiently direct.<sup>72</sup> In fact, the Appellate Division below denied the *Aiken* defendant’s appeal due to “the overwhelming evidence that [he] unjustifiably attacked the victim outside of [his] apartment.”<sup>73</sup> Hence, that *Aiken*’s issue was framed as whether “a defendant standing in the doorway between his apartment and the common hall of a multi-unit building ha[s] a duty under Penal Law section 35.15 to retreat into his home when he can safely do so”<sup>74</sup> is telling. The Court of Appeals likely viewed *Aiken* as an opportunity to redefine the rules governing retreat.

Conceivably, its holding makes New York the nation’s most retreat-happy jurisdiction when it comes to dwellings. In New Jersey, for example, a person standing in her doorway has “no legal duty to withdraw indoors” before retaliating with deadly force.<sup>75</sup> Likewise, a Missouri homeowner must retreat all the way to the threshold of her physical house, but no further.<sup>76</sup> *Aiken* counsels to keep going.

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<sup>68</sup> *People v. Tomlins*, 213 N.Y. 240, 245, 107 N.E. 496, 498 (1914) (Cardozo, J.).

<sup>69</sup> N.Y. PENAL LAW § 35.15(2)(a)(i) (Consol. 2007) (emphasis added).

<sup>70</sup> *See People v. Petty*, 7 N.Y.3d 277, 285, 852 N.E.2d 1155, 1161, 819 N.Y.S.2d 684, 689 (2006) (reaffirming that for someone who is found “the initial aggressor . . . the justification defense is generally not available”).

<sup>71</sup> *Id.* at 285, 852 N.E.2d at 1161, 819 N.Y.S.2d at 689.

<sup>72</sup> As a refresher, these were the *Aiken* defendant’s pre-homicidal activities.

<sup>73</sup> *People v. Aiken*, 6 A.D.3d 236, 237, 774 N.Y.S.2d 328, 328 (1st Dep’t 2004). Other courts have sidestepped the dwelling exception by focusing on the killer’s untoward behavior. *See, e.g., United States v. Peterson*, 483 F.2d 1222, 1237 (D.C. Cir. 1973) (loading shotgun on outdoor porch).

<sup>74</sup> *People v. Aiken*, 4 N.Y.3d 324, 325, 828 N.E.2d 74, 75, 795 N.Y.S.2d 158, 159 (2005).

<sup>75</sup> *State v. Bonano*, 284 A.2d 345, 348 (N.J. 1971).

<sup>76</sup> *See State v. Gardner*, 606 S.W.2d 236, 239 (Mo. Ct. App. 1980).

## II. BALANCING PROPERTY RIGHTS WITH HUMAN RIGHTS IN THE SELF-DEFENSE ARENA

### A. *The Dwelling Exception May Be Interpreted as a Defense-of-Property Rule*

#### 1. No Need to Hide in the Basement or Abandon the Children

The practicalities of personal combat suggest that in most situations where someone is attacked in her own dwelling, the retreat rule simply does not apply. “The exception to the duty to retreat is premised upon the notion that when a person is in his or her own home or its curtilage, there is no safer place to which to retreat.”<sup>77</sup> With a deadly felon lurking in the foyer, no reasonable person would be expected to find refuge in a bedroom, basement, or attic.<sup>78</sup> The only truly safe alternative would be to evacuate the home at once.

Nor is the dwelling exception grounded in the “historical notion of the home as a place critical for the protection of the family.”<sup>79</sup> More than one court has cautioned that “[m]andating 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.”<sup>80</sup> Such reasoning ignores that escape from conflict is compelled only when it can be undertaken with absolute safety “to oneself and *others*.”<sup>81</sup>

These principles, revolving around necessity, appear to render even the dwelling exception “a neutral modification that

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<sup>77</sup> State v. Warren, 794 A.2d 790, 794 (N.H. 2002).

<sup>78</sup> For a contrary thought experiment, see *State v. Pranckus*, 815 A.2d 678, 687–88 (Conn. App. Ct. 2003). The defendant in *Pranckus* was convicted of murdering two teenagers at a house party. The court rejected his justification defense due to imputed knowledge that retreat was possible via an adjacent laundry room, which “had a door that would close and block the entry of others from the kitchen into that room.” *Id.* at 687. Although the *Pranckus* defendant provoked the encounter in someone else’s dwelling, the obvious drawbacks of requiring a homeowner to cover in a laundry room outweigh any negligible safety benefits.

<sup>79</sup> State v. Carothers, 594 N.W.2d 897, 901 (Minn. 1999).

<sup>80</sup> People v. Aiken, 4 N.Y.3d 324, 327, 828 N.E.2d 74, 77, 795 N.Y.S.2d 158, 161 (2005) (quoting *Carothers*, 594 N.W.2d at 901).

<sup>81</sup> N.Y. PENAL LAW § 35.15(2)(a) (Consol. 2007) (emphasis added). Moreover, no other inference is acceptable where a statute lacks explicit language regarding the safety of third parties when retreating and yet authorizes deadly force in their defense. See, e.g., CONN. GEN. STAT. § 53a-19 (2007). Otherwise, defending another would subject the actor to potential criminal liability for not retreating.

does not change the normal operation of the defensive force principle.”<sup>82</sup> Without some other explanation, a separately codified dwelling exception adds little to an already seemingly redundant retreat rule.<sup>83</sup>

## 2. No Need to Take to the Highways

History supports the notion that the dwelling exception is meant to prevent people from having to flee their homes in times of danger. New York's bellwether case, *People v. Tomlins*,<sup>84</sup> made clear this very principle nearly a century ago. The defendant in *Tomlins* was a father convicted of shooting and killing his adult son on the ground floor of their shared premises.<sup>85</sup> Although the father claimed “that he had acted justifiably, in lawful self-defense,”<sup>86</sup> the trial court instructed the jury that the defendant “had no right to use the weapon against his son, unless all reasonable means of retreating were cut off.”<sup>87</sup> Taking judicial notice of seemingly limitless escape routes, the trial court further instructed that if 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.”<sup>88</sup>

The Court of Appeals in *Tomlins* disagreed with the trial court and held instead that the defendant had no “duty to abandon his home and take refuge in the streets.”<sup>89</sup> Invoking the castle doctrine, Judge Cardozo wrote that it “never has been the law that a man assailed in his own dwelling, is bound to retreat.”<sup>90</sup> Construing the dwelling exception from the inside

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<sup>82</sup> 2 ROBINSON, *supra* note 18, at 80.

<sup>83</sup> See discussion *supra* Part I.A.1.

<sup>84</sup> 213 N.Y. 240, 107 N.E. 496 (1914) (Cardozo, J.).

<sup>85</sup> *Id.* at 241, 107 N.E. at 497 (“The shooting took place . . . in the little cottage in Stony Point where the son had been born and reared.”).

<sup>86</sup> *Id.* at 241, 107 N.E. at 497. The father testified alternatively that “he had acted without premeditation, when blinded by passion because of blows and insults.” *Id.* at 241, 107 N.E. at 497. Family mediation might have been appropriate.

<sup>87</sup> *Id.* at 242, 107 N.E. at 497 (internal quotation marks omitted).

<sup>88</sup> *Id.* at 242, 107 N.E. at 497 (internal quotations marks omitted).

<sup>89</sup> *Id.* at 244, 107 N.E. at 498.

<sup>90</sup> *Id.* at 243, 107 N.E. at 497. The exception's applicability to “occupants of the same household” was reaffirmed in the domestic violence context in *People v. Jones*, 3 N.Y.3d 491, 496, 821 N.E.2d 955, 958, 788 N.Y.S.2d 651, 654 (2004) (stating that a battered spouse need not retreat). *But see* State v. Quarles, 504 A.2d 473, 476 (R.I. 1986) (“[S]everal jurisdictions that have adopted the castle doctrine have held that it has no application to cases between two persons entitled to occupy the same

looking out, Cardozo declared that a beleaguered resident “may stand his ground, and resist the attack. He is under no duty to take to the fields and the highways, a fugitive from his own home.”<sup>91</sup> When the exception was later made statutory, its drafters pointed to *Tomlins* “as representative of the application of the traditional rule which [the statute] was intended to codify.”<sup>92</sup> This traditional rule is born from the idea—recently echoed by the Court of Appeals in *Aiken*—that “people’s homes are their castles, and that as such one’s home is a place of sanctuary; a castle *to which, and not from which*, a person retreats.”<sup>93</sup> Hence, both precedent and common sense dictate that “requiring a person standing in the doorway to step inside the apartment to avoid a violent encounter is not the equivalent of mandating retreat from one’s home.”<sup>94</sup>

### 3. No Need to Surrender the Castle

Thus, it makes sense to think of the dwelling exception as a stand-alone provision in defense of the physical home. Drawing upon English scholarly authority, the Court of Appeals implied this in *Tomlins*. The besieged homeowner can stay put, wrote Cardozo, “‘for he hath the protection of his house to excuse him from flying, for that would be to give up the possession of his house to his adversary by his flight.’”<sup>95</sup>

Indeed, “the asylum of the home” is hardly metaphysical.<sup>96</sup> A house brings sanctuary because it provides concrete shelter from unpleasant externalities, whether thieves or thunderstorms. Even minus a statutory dwelling exception, there is certainly no legal duty to abandon one’s family to the

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dwelling.”).

<sup>91</sup> *Tomlins*, 213 N.Y. at 243, 107 N.E. at 497.

<sup>92</sup> *People v. Hernandez*, 98 N.Y.2d 175, 182, 774 N.E.2d 198, 202, 746 N.Y.S.2d 434, 438 (2002). Showing its durability, Cardozo’s “fugitive” language from *Tomlins* was quoted eighty-nine years later in *People v. Aiken*, 4 N.Y.3d 324, 327, 828 N.E.2d 74, 77, 795 N.Y.S.2d 158, 161 (2005).

<sup>93</sup> *Jones*, 3 N.Y.3d at 495, 821 N.E.2d at 957, 788 N.Y.S.2d at 653 (emphasis added).

<sup>94</sup> *Aiken*, 4 N.Y.3d at 330, 828 N.E.2d at 79, 795 N.Y.S.2d at 163. Indeed, *Tomlins* is cited with approval by Missouri, whose dwelling exception reads: “A person does not have a duty to retreat *from* a dwelling, residence, or vehicle where the person is not unlawfully entering or unlawfully remaining.” MO. REV. STAT. § 563.031(3) (West 2007) (emphasis added).

<sup>95</sup> *Tomlins*, 213 N.Y. at 243, 107 N.E. at 497 (quoting 1 HALE’S PLEAS OF THE CROWN 486 (1736)).

<sup>96</sup> *Aiken*, 4 N.Y.3d at 330, 828 N.E.2d at 79, 795 N.Y.S.2d at 163.

mercy of prowlers, and very likely no duty to hide in a closet for the duration of the prowl.<sup>97</sup> The dwelling exception to the retreat rule proclaims that citizens should not hesitate before answering calls to arms in their own castles. The alternative would be surrendering one's real property and finding "refuge in the streets,"<sup>98</sup> where sanctuary from thieves and thunderstorms is nonexistent. Respecting private property in this way leads to greater security overall—that someone might be safer in the long run while outdoors and away from her home is absurd. Streets provide little refuge. Inviolable safety is built by actual walls.

A pair of overarching themes is clear. One, citizens have a "right to expect absolute safety within their own homes."<sup>99</sup> Two, they have a concomitant right to freedom from damage to their proprietary interests in real property.<sup>100</sup> The dwelling exception to the retreat rule thus protects both home and homeowner. If the opposite were true, taking to the highways would not be only customary; it would be required. "A duty to retreat is incompatible with the right to prevent the commission of a felony within one's home,"<sup>101</sup> most notably theft of the home itself.<sup>102</sup>

*B. Pulling up the Drawbridge: Applauding and Extending Aiken's Approach*

1. Curtilage's Role in the Justification Equation Should Be Limited

Given the life-and-death stakes involved, *Aiken* is correct to construe the dwelling exception narrowly. The exemption clearly confers a special immunity upon the home, though "somewhat at odds with this privileged status accorded the home is the state's general interest in protecting life."<sup>103</sup> Therefore, immunity

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<sup>97</sup> See discussion *supra* Part II.A.1.

<sup>98</sup> *Tomlins*, 213 N.Y. at 244, 107 N.E. at 498.

<sup>99</sup> COLO. REV. STAT. ANN. § 18-1-704.5(1) (West 2007).

<sup>100</sup> The author does not pass on the theoretical justification behind shooting an intruder for threatening ownership of one's plasma television set.

<sup>101</sup> *State v. Carothers*, 594 N.W.2d 897, 901 (Minn. 1999).

<sup>102</sup> Rather than leaving this a necessary inference, the Model Penal Code's drafters made it express. See MODEL PENAL CODE § 3.06(3)(d)(i) (1980) (declaring deadly force justifiable if the actor believes that "the person against whom the force is used is attempting to dispossess him of his dwelling otherwise than under a claim of right to its possession").

<sup>103</sup> *People v. Aiken*, 4 N.Y.3d 324, 327–28, 828 N.E.2d 74, 77, 795 N.Y.S.2d 158, 161 (2005).

should extend no farther than necessary to promote the goals of safety to person and property. The starting point is that “[p]remises and house are not synonymous words.”<sup>104</sup>

Cases defining curtilage in the Fourth Amendment context offer guidance. Protection from warrantless government searches generally extends to any location in which a homeowner has a “reasonable expectation of privacy.”<sup>105</sup> This meshes with the inquiry of whether a defendant claiming justification had “exclusive possession and control”<sup>106</sup> of the area in question. Naturally, one has the greatest expectation of privacy in those parts of her premises that are least accessible to outsiders. Thus, the soundest rationale for including curtilage within the dwelling exception is that the area “relate[s] to the intimate activities of the home.”<sup>107</sup> Equating dwelling with residence absorbs this idea, since residents often engage in the same activities, “such as eating, reading, sleeping, entertaining, and relaxing,” in their backyards and living rooms.<sup>108</sup>

*Aiken*’s holding seems correct on its peculiar facts—an apartment’s doorway bears no hallmarks of exclusivity or intimacy—but does not go far enough. The dwelling exemption across all retreat jurisdictions should extend only to inhabited physical structures and completely enclosed appurtenances, such as porches and terraces.<sup>109</sup> This workable rule allows fact finders to focus less on whether something is or is not a dwelling on a case-by-case basis, and more on the “central question [of] whether defendant reasonably believed she was about to suffer death or serious physical injury.”<sup>110</sup> Furthermore, while curtilage inquiries are appropriate for civil rights claims, “[i]t

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<sup>104</sup> *Valentine v. State*, 98 So. 483, 487 (Ala. Ct. App. 1923) (internal quotation marks omitted).

<sup>105</sup> *E.g.*, *United States v. Reilly*, 76 F.3d 1271, 1276 (2d Cir. 1996); *see also* *United States v. Dunn*, 480 U.S. 294, 301 (1987) (proposing multi-factor inquiry for resolving curtilage questions).

<sup>106</sup> *People v. Hernandez*, 98 N.Y.2d 175, 183, 774 N.E.2d 198, 203, 746 N.Y.S.2d 434, 439 (2002).

<sup>107</sup> *People v. Reynolds*, 71 N.Y.2d 552, 558, 523 N.E.2d 291, 294, 528 N.Y.S.2d 15, 18 (1988).

<sup>108</sup> *Aiken*, 4 N.Y.3d at 330 n.4, 828 N.E.2d at 78 n.4, 795 N.Y.S.2d at 162 n.4.

<sup>109</sup> The Court of Appeals seemingly adopted this as New York’s approach in *Hernandez*. The New Jersey Supreme Court has likewise stated that this might be “the better rule.” *State v. Bonano*, 284 A.2d 345, 348 (N.J. 1971).

<sup>110</sup> *People v. Emick*, 103 A.D.2d 643, 661, 481 N.Y.S.2d 552, 563 (4th Dep’t 1984).

may be seriously doubted whether a concept arising in the [medieval] land law furnishes an intelligent guide in determining whether the taking of a life is to be justified."<sup>111</sup>

A recently introduced New York State Senate bill illustrates the problems with coextending property and justification law. The proposal would amend the dwelling exception under Penal Law section 35.15(a)(i) to include "surrounding grounds," defined as "real property owned by the owner of the dwelling or in any common areas owned by a cooperative or condominium association."<sup>112</sup> This would make property owners a privileged class for self-defense purposes.<sup>113</sup> For instance, someone on his property acres from his house would be exempt from retreating before using defensive deadly force. By comparison, a neighbor traversing an easement over that same area, mere yards from her own home, would not be. Nor would be an innocent trespasser who happened upon the property without knowing who owned it. The flaws in such artificial distinctions are apparent, especially with retreat so intertwined with (and often a proxy for negating) necessity. A deed, without more, should not change one's status in the eyes of the criminal law.<sup>114</sup>

A front yard or lawn, however pleasantly landscaped, is not a residence. It provides no "reasonable expectation of seclusion and refuge from the outside world."<sup>115</sup> Similarly, an outdoor weekend barbecue has never been the functional equivalent of an indoor Sunday dinner. The latter is prized in large part for occurring in a place of sanctuary "from which nonresidents could ordinarily be excluded."<sup>116</sup> Conversely, the former involves a

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<sup>111</sup> *Bonano*, 284 A.2d at 348.

<sup>112</sup> N.Y.S. 685-A, 2007–2008 Reg. Sess. (2007), available at <http://assembly.state.ny.us/leg/?bn=S00685&sh=t>. A competing New York State Assembly bill would eliminate retreat for anyone "in a place where he or she has a right to be." N.Y.A. 8182, 2007–2008 Reg. Sess. (2007), available at <http://assembly.state.ny.us/leg/?bn=A08182&sh=t>. Both single-house proposals were referred to their respective Codes Committees, though neither is approaching a final vote.

<sup>113</sup> Ownership is key; regular apartment hallways like *Aiken's* are noticeably omitted.

<sup>114</sup> This view is not entirely novel. See *State v. Lawrence*, 569 S.W.2d 263, 266 (Mo. Ct. App. 1978) (recognizing the right to use deadly force in defense of habitation but refusing to extend it to "mere breaking of the curtilage").

<sup>115</sup> *People v. Aiken*, 4 N.Y.3d 324, 330, 828 N.E.2d 74, 79, 795 N.Y.S.2d 158, 163 (2005). A yard clearly would be part of someone's residence where it is fenced in a manner that bars seeing into it, offers no means of outside entry except by climbing the fence, and is marked as private property.

<sup>116</sup> *Id.* at 330, 828 N.E.2d at 79, 795 N.Y.S.2d at 163.

voluntary confrontation with the community. Should storm clouds or an unpleasant situation brew, the resident—if he can safely do so—need simply pull “up the drawbridge, to be secure in his castle.”<sup>117</sup> An exemption from retreat for a homeowner who barely discerns danger to his person or property, and yet chooses to escalate hostilities, may be a free pass for murder.

## 2. Standing One’s Ground Presents Practical Difficulties

Leading the charge, in 2006 between ten and fifteen states repealed their laws requiring a person to consider retreat before using defensive deadly force.<sup>118</sup> Supporters claim that these “stand your ground” laws empower victims to fight back, while detractors argue that the “shoot first” measures will increase violence in the aggregate while allowing the already criminally inclined to evade conviction.<sup>119</sup> Still others “doubt the laws will make a practical difference.”<sup>120</sup> The latter view appears contrary to reality. Many of the incidents making headlines involve neighbors or acquaintances freely assaulting each other with deadly weapons, rather than people successfully repelling home invasions by strangers. The early case studies include a crack addict beating his drug dealer to death with a lamp and a homeowner shooting his neighbor while arguing over garbage bins.<sup>121</sup> These are no surprise, since the Florida statute, by creating a presumption of “reasonable fear of imminent peril,” effectively authorizes deadly force to repel attempted trespass.<sup>122</sup>

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<sup>117</sup> *Id.* at 330, 828 N.E.2d at 79, 795 N.Y.S.2d at 163.

<sup>118</sup> Compare Liptak, *supra* note 3 (describing fifteen states), with *Brady Campaign to Prevent Gun Violence: After Passage of ‘Shoot First’ Law, Getting Away with Murder*, U.S. NEWSWIRE, Aug. 3, 2006, available at 8/3/06 USNWSW 19:20:11 (Westlaw) (describing laws in ten states). The National Rifle Association successfully lobbied for these laws and has yet more states in its crosshairs. See, e.g., Liptak, *supra* note 3. A full analysis of the measures’ impact is beyond the scope of this Comment.

<sup>119</sup> See Tanner, *supra* note 19.

<sup>120</sup> Liptak, *supra* note 3.

<sup>121</sup> See *One Year After Florida Law Took Effect, Six Dead, Two Others Wounded, and Killers Hoping to Walk Away Scot Free*, U.S. NEWSWIRE, Sept. 30, 2006, available at 9/30/06 USNWSW 12:20:51 (Westlaw). It is submitted that the majority of disputes about garbage are senseless.

<sup>122</sup> FLA. STAT. § 776.013(1)(a) (2007) (stating that a killing is presumptively justified if the victim “was in the process of unlawfully and forcefully entering, or had unlawfully and forcibly entered, a dwelling, residence, or occupied vehicle”); see also TEX. PENAL CODE § 9.32(b)(1)(A) (Vernon 2007) (extending the presumption to “place[s] of business or employment”).

A new Missouri statute replaces the presumption with a conjunction—deadly force is justified if reasonably believed necessary *or* as against a trespasser—although it continues to require retreat generally.<sup>123</sup>

The recent legislative trend only reaffirms using retreat to deter senseless violence. Due to the safety and necessity requirements built into retreat and self-defense, retreating is not commanded in the vast majority of cases. Nonetheless, the duty to retreat is an important mechanism allowing juries and judges to decide, in sterile courtrooms after the fact, whether a given defendant truly and reasonably believed that defensive deadly force was warranted, or whether that defendant was himself an aggressor. In *People v. Russell*,<sup>124</sup> for instance, the New York Court of Appeals upheld three murder convictions based on “evidence that defendants did not avail themselves of opportunities for safe retreat.” For their part, the defendants had waged a protracted gang-related gun battle across several city blocks before killing a bystander.<sup>125</sup>

Even in less extreme cases, evidence of safe alternatives is “relevant to the reasonableness of defendant’s perceptions [even if] not to the question of whether defendant was obligated to retreat.”<sup>126</sup> This logic has continued vitality. The defendant in *People v. Grady*<sup>127</sup> was convicted after shooting two police officers. He claimed to reasonably believe they were about to kill him. The Appellate Division disagreed: “[S]ince the officers were down, one disarmed, there is no reasonable view of the evidence that defendant—who remained standing and uninjured—had no available avenue of safe retreat or even attempted to retreat.”<sup>128</sup>

In homicide cases, “[t]he People are required to prove beyond a reasonable doubt that the defendant was not justified.”<sup>129</sup> Where defensive deadly force is allowed as a first resort, however, courts and juries will be left to speculate regarding the accused’s thoughts. Was the person actually in fear? Was the

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<sup>123</sup> MO. REV. STAT. § 563.031(2) (2007).

<sup>124</sup> 91 N.Y.2d 280, 290, 693 N.E.2d 193, 196, 670 N.Y.S.2d 166, 169 (1998).

<sup>125</sup> *Id.* at 280, 693 N.E.2d at 196, 670 N.Y.S.2d at 169.

<sup>126</sup> *People v. Emick*, 103 A.D.2d 643, 658, 481 N.Y.S.2d 552, 561 (4th Dep’t 1984).

<sup>127</sup> 40 A.D.3d 1368, 838 N.Y.S.2d 207 (3d Dep’t 2007).

<sup>128</sup> *Id.* at 1372, 838 N.Y.S.2d at 212.

<sup>129</sup> CJI 2d [N.Y.] PL 35.15, [http://www.courts.state.ny.us/cji/1-General/Defenses/CJI2d.Justification.Person.Deadly\\_Force.pdf](http://www.courts.state.ny.us/cji/1-General/Defenses/CJI2d.Justification.Person.Deadly_Force.pdf).

killing defensive? Was it calculated? Most importantly, was it necessary? Evidence concerning retreat may be disallowed or, if allowed, disregarded.<sup>130</sup> The defendant standing his ground thus gains a tactical advantage in the courtroom, and the prosecution loses a key weapon in its arsenal. These byproducts may not be accidental. Texas, which recently eliminated its largely nominal retreat provision, made one consequence explicit: “[I]n determining whether an actor . . . reasonably believed that the use of deadly force was necessary, a finder of fact may not consider whether the actor failed to retreat.”<sup>131</sup>

### 3. Standing One’s Ground Is Not Ethically Mandated

Requiring retreat brings the added benefit of affirming the value of human life. Many have recognized “the sanctity of human life as the primary principle underlying the duty to retreat.”<sup>132</sup> The counter-argument is that “retreat is said to injure the actor’s reputation and self-respect by requiring cowardly conduct.”<sup>133</sup> Acknowledging this tension in his classic *Tomlins* opinion, Cardozo upheld retreat “even though it may not seem dignified and manly.”<sup>134</sup> Not surprisingly, states that allow an individual to stand her ground sometimes label their justification provisions “true man” laws.<sup>135</sup>

Three responses should quell critics. One, there is nothing undignified about avoiding deadly conflicts. In fact, weighing the options and choosing not to enter an affray with someone bent on causing harm is often braver than lashing out violently in fear. Needless bravado, moreover, may readily bring death to either party.<sup>136</sup> Two, irrespective of location, “one is never obliged to

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<sup>130</sup> Perhaps in part because of this, prosecutors under Florida’s new anti-retreat laws have often refrained from bringing charges. See Liptak, *supra* note 3 (“The law also forbids the arrest, detention or prosecution of the people covered by the law, and it prohibits civil suits against them.”).

<sup>131</sup> TEX. PENAL CODE § 9.32(d) (Vernon 2007).

<sup>132</sup> *People v. Canales*, 624 N.W.2d 918, 919 (Mich. 2001) (Corrigan, C.J., dissenting).

<sup>133</sup> 2 ROBINSON, *supra* note 18, at 81.

<sup>134</sup> *People v. Tomlins*, 213 N.Y. 240, 242, 107 N.E. 496, 497 (1914) (Cardozo, J.).

<sup>135</sup> See, e.g., *State v. Renner*, 912 S.W.2d 701, 704 (Tenn. 1995) (“Under the ‘true man’ doctrine, one need not retreat from the threatened attack of another even though one may safely do so.”). The label stems from language in *Beard* that “a true man who is without fault is not obligated [sic] to fly from an assailant.” *Id.* (quoting *Beard v. United States*, 158 U.S. 550, 561 (1895)).

<sup>136</sup> See Michael Wilson, *Actress Killed in Lower East Side Robbery*, N.Y. TIMES, Jan. 28, 2005, at B1 (taunting of mugger by victim leads to fatal shooting).

retreat from a sudden, fierce, and violent attack, because under such circumstances a reasonable person would, as a rule, find it necessary to use force against force without retreating.”<sup>137</sup> New York has long recognized this pragmatic constraint.<sup>138</sup> Three, correct application of the retreat doctrine will not “require an innocent victim to increase his own peril out of regard for the safety of a murderous assailant.”<sup>139</sup> An individual near her home will never be ordered to rummage for keys or fiddle with locks to preserve the life of a rapidly approaching burglar or rapist. Someone’s arguing with an acquaintance in an open doorway or on a front porch is another matter entirely, and the culpability far less one-sided. The law should not shield those who violate “the duty to refrain from staging a counteroffensive rather than the duty to retreat.”<sup>140</sup>

#### CONCLUSION

“The duty to retreat reflects the idea that a killing is justified only as a last resort, an act impermissible as long as other reasonable avenues are open.”<sup>141</sup> In *Aiken*, the New York Court of Appeals boldly proclaimed its support for the value of human life. At first glance, the decision appears to favor would-be criminals. Upon closer inspection, however, *Aiken* reveals a reasoned effort to condemn and hopefully avert senseless killings. This is especially true in light of the retreat rule’s narrow application. Granted, some citizens will respond to situations violently regardless of the status of justification law in their home states. It is precisely these individuals whom the criminal law should target.

Life’s daily incidents breed unavoidable yet temporary conflict. Death, on the other hand, is permanent. With the nationwide trend in favor of shooting first and asking questions

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<sup>137</sup> *People v. Riddle*, 649 N.W.2d 30, 40 (Mich. 2002); accord *Brown v. United States*, 256 U.S. 335, 343 (1921) (“[I]t is not a condition of immunity that one in that situation should pause to consider whether a reasonable man might not think it possible to fly with safety or to disable his assailant rather than to kill him.”).

<sup>138</sup> See *People v. Asan*, 22 N.Y.2d 526, 531, 239 N.E.2d 913, 915, 293 N.Y.S.2d 326, 329 (1968) (disapproving the incorrect “impression that a person feloniously attacked” with a deadly weapon needs to retreat before defending herself).

<sup>139</sup> *Commonwealth v. Shaffer*, 326 N.E.2d 880, 883 (Mass. 1975).

<sup>140</sup> *People v. Lugo*, 291 A.D.2d 359, 360, 739 N.Y.S.2d 32, 33 (1st Dep’t 2002).

<sup>141</sup> *People v. Aiken*, 4 N.Y.3d 324, 328, 828 N.E.2d 74, 77, 795 N.Y.S.2d 158, 161 (2005) (internal quotation marks omitted).

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later, a decision like *Aiken's* is welcome. Whether defensive force is justified rightly turns on necessity, and the notion that unnecessary killings should be tolerated or encouraged is barely defensible. In cases where pulling up the drawbridge is just as easy as pulling the trigger, the ground that one stands is neither the legal nor the ethical high ground. Neighbors all over New York should thank their highest court for refusing to equate retreat with surrender.