

1951

## The Retreat to the Wall Doctrine of Self-Defense

Robert Hall Smith  
*University of Kentucky*

Follow this and additional works at: <https://uknowledge.uky.edu/klj>



Part of the [Criminal Law Commons](#), and the [Criminal Procedure Commons](#)

[Right click to open a feedback form in a new tab to let us know how this document benefits you.](#)

---

### Recommended Citation

Smith, Robert Hall (1951) "The Retreat to the Wall Doctrine of Self-Defense," *Kentucky Law Journal*: Vol. 39: Iss. 3, Article 10.

Available at: <https://uknowledge.uky.edu/klj/vol39/iss3/10>

This Note is brought to you for free and open access by the Law Journals at UKnowledge. It has been accepted for inclusion in Kentucky Law Journal by an authorized editor of UKnowledge. For more information, please contact [UKnowledge@lsv.uky.edu](mailto:UKnowledge@lsv.uky.edu).

involuntary manslaughter in Kentucky. A death which is the result of ordinary negligence is held to constitute the offense.<sup>20</sup> Such decisions in effect establish the tort standard of care for involuntary manslaughter. Here, again, Kentucky is in opposition to the overwhelming weight of authority. It is a general principle of criminal law that something more than a lack of ordinary care is requisite to criminal liability.<sup>21</sup> However, the application of any other higher standard of care to involuntary manslaughter is precluded in Kentucky by the definition of voluntary manslaughter as a homicide resulting from gross negligence. Since involuntary manslaughter is the lesser offense, the standard of care employed must necessarily be lower because the culpable negligence involved in each instance is the basis of liability. Therefore, the only workable standard of care beneath the standard required by Kentucky in its fictitious voluntary negligent manslaughter is ordinary care or the tort standard. Nevertheless, the classification of any negligent manslaughter as a voluntary one is fundamentally erroneous, and this error should not be used to force the law of the sister offense of involuntary manslaughter into the realm of criminal liability for the lack of mere ordinary care.

Although it may be asserted that the classification of certain negligent manslaughters as voluntary manslaughter is justified in Kentucky by the fact that the existing punishment for involuntary manslaughter is not severe enough due to the rule that it is only a common law misdemeanor in Kentucky, such a procedure is erroneous both logically and legally and is a breeder of confusion. Moreover, anomalies of this character are utterly unnecessary although the exigencies of some situations seem to demand them. The obvious answer to Kentucky's primary need in the law of manslaughter is statutory reform—at least a statute placing negligent manslaughter under involuntary manslaughter where it ought to be, and punishing the crime in a degree appropriate to the felony that it is, and defining the standard of care as one appropriate to criminal liability.

JAMES DANIEL CORNETTE

#### THE RETREAT TO THE WALL DOCTRINE OF SELF-DEFENSE

In order to be excused on the grounds of self-defense in the early law of homicide, it was necessary to gain the king's pardon.<sup>1</sup> Gradually, however, self-defense became a legally recognized excuse for homicide, although some of its most fundamental principles did not fully crystallize until modern times.

At the very beginning the so-called "retreat to the wall" doctrine became a

<sup>20</sup> *Embry v. Commonwealth*, 236 Ky. 204, 32 S.W. 2d 979 (1931).

<sup>21</sup> *State v. Elliott*, 1 Terry 250, 8 A. 2d 873 (Del. 1939); *Pitts v. State*, 132 Fla. 812, 182 So. 234 (1938); *Croker v. State*, 57 Ga. App. 895, 197 S.E. 92 (1938); *People v. Hansen*, 378 Ill. 491, 38 N.E. 2d 738 (1941); *State v. Ela*, 136 Me. 303, 8 A. 2d 589 (1939); *Scott v. State*, 183 Miss. 788, 185 So. 195 (1939); *State v. Carter*, 342 Mo. 439, 116 S.W. 2d 21 (1938); *Commonwealth v. Aurick*, 342 Pa. 282, 19 A. 2d 920 (1941); *State v. Lingman*, 97 Utah 180, 91 P. 2d 457 (1939); *Bell v. Commonwealth*, 170 Va. 597, 195 S.E. 675 (1938); *State v. Lawson*, 128 W. Va. 136, 36 S.E. 2d 26 (1946); MAY, CRIMINAL LAW sec. 174.

<sup>1</sup> POLLOCK AND MAITLAND, HISTORY OF ENGLISH LAW 478 (2d ed., 1911). "The defendant deserved but needed the king's pardon."

<sup>2</sup> Beale, *Retreat From a Murderous Assault*, 16 HARV. L. REV. 567 (1903). "[It] is a doctrine of modern, rather than of medieval law."

necessary part of the law of self-defense.<sup>3</sup> If one murderously assailed could escape the attack by retreating, he had to do so rather than kill.<sup>4</sup> Thus, four hundred years after the recognition of this requirement an Iowa judge instructed a jury as follows:

" it is a general rule of law that, where one person is assaulted by another, it is the duty of the person thus assaulted to retire to what is termed in the law a wall or ditch before he is justified in repelling such assault in taking the life of his assailant. But cases frequently arise where the assault is made with a dangerous or deadly weapon, and in so fierce a manner as not to allow the party thus assaulted to retire without manifest danger to his life or of great bodily injury. in such cases he is not required to retreat."<sup>5</sup>

This was the view as it developed in England and as it was brought to this country by the English colonists.<sup>6</sup> Hale, in attempting to rationalize the doctrine, wrote:

"For though in cases of hostility between two nations it is a reproach and piece of cowardize to fly from an enemy, yet in cases of assaults and affrays between subjects under the same law, the law owns not any such point of honour, because the king and his laws are to be the *vindices injurarum*, and private persons are not trusted to take capital revenge one of another."<sup>7</sup>

This basic rule requiring retreat to prevent the taking of life has always been subject, however, to certain exceptions. Thus in *People v. Tomlins*,<sup>8</sup> the defendant, attacked in his home by his son, inflicted a mortal wound. In reversing a conviction of murder in the first degree, Justice Cardozo said, "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 highways, a fugitive from his own home." This exception has been extended in many cases from the home or "castle" to the curtilage,<sup>9</sup> to the place of work,<sup>10</sup> to a hotel office,<sup>11</sup> to the defendant's property,<sup>12</sup> and even to any place he had a "right to be."<sup>13</sup> As will be discussed later, the expansion of this exception has led to virtually complete abrogation of the retreat rule in most jurisdictions.

<sup>3</sup> *Id.* at 575. See also *State v. Jones*, 89 Iowa 182, 56 N.W. 427 (1893); *State v. Warner*, 100 Iowa 260, 69 N.W. 546 (1896).

<sup>4</sup> I HALE, *PLEAS OF THE CROWN* 481 (1778); Beale, *supra* note 2 at 574.

<sup>5</sup> *State v. Donnelley*, 69 Iowa 705, 27 N.W. 369, 370 (1886). In *Commonwealth v. Drumm*, 58 Penn. 9 (1868), it was stated that as between safe retreat and the death of even an assailant who intends to kill, the former is preferable.

<sup>6</sup> Beale, *supra* note 2 at 568.

<sup>7</sup> HALE, *supra* note 4.

<sup>8</sup> 213 N. Y. 240, 107 N.E. 496, 497 (1914).

<sup>9</sup> *State v. Rutledge*, 135 Iowa 581, 113 N.W. 461 (1907); *State v. Bennett*, 128 Iowa 713, 105 N.W. 324 (1905); see *People v. Lilly*, 38 Mich. 270 (1878).

<sup>10</sup> *Brown v. United States*, 256 U. S. 335 (1921). "While one's house formerly meant his home, his dwelling, the rule has also been extended to one's place of business or his place of refuge; consequently a man's place of business must be regarded pro hac vice his dwelling. He has the same right to defend it against intrusion, and is under no more necessity of retreating from the one than from the other; his duty to defend one is the same as to defend the other." *Hill v. State*, 194 Ala. 11, 25, 69 So. 941, 946 (1915).

<sup>11</sup> *Rowe v. United States*, 164 U. S. 546 (1896).

<sup>12</sup> *Beard v. United States*, 158 U. S. 550 (1895).

<sup>13</sup> *Gibson v. Commonwealth*, 237 Ky. 33, 34 S.W. 2d 936 (1931).

A second possible exception existed in the doubt as to whether the right to kill in self-defense could be invoked by those who were at fault in provoking the difficulty.<sup>14</sup> In this country, however, an aggressor in sudden affray may invoke the right to kill in self-defense if he first *retreats* and thus makes unmistakably clear his intention of quitting the combat.<sup>15</sup>

In addition, it is important to draw the distinction between a simple assault and a murderous assault. In the first instance the person attacked is able to stand his ground and meet the attack with a reasonable force.<sup>16</sup> But in the case of the murderous assault, the amount of force required to repel the attack may cause death or great bodily harm, and it is in this situation that the "retreat to the wall" rule becomes applicable.<sup>17</sup>

The retreat rule has had rough sailing in the United States, particularly in the South where a strong code of personal honor prohibited an ignominious retreat and the West where such honor was combined with the rough necessities and imminent dangers of frontier life. In a land where six-shooters ruled, there was no room for a rule of retreat. "The king and his laws" offered little protection from a bullet in the back.

An excellent rationalization of this departure from the retreat rule in the South and West appears per Sherwood, J., in *State v. Bartlett*:

"It is true, human life is sacred, but so is human liberty. One is as dear in the eye of the law as the other, and neither is to give way and surrender its legal status in order that the other may exclusively exist, supposing for a moment such an anomaly be possible. In other words, the wrongful and violent act of one man shall not abolish or even temporarily suspend the lawful and constitutional right of his neighbor

"But nothing above asserted is intended to convey the idea that one man, because he is the physical inferior of another, from whatever cause such inferiority may arise, is, because of such inferiority, bound to submit to a public horsewhipping. We hold it a necessary self-defense to resist, resent, and prevent such humiliating indignity—such a violation of the sacredness of one's person—and that, if nature has not provided the means for such resistance, art may; in short, a weapon may be used to effect the unavoidable necessity."<sup>18</sup>

The law of Texas very strongly adopts these views and completely abrogates the retreat rule.<sup>19</sup> In fact most American jurisdictions have virtually abolished the rule.<sup>20</sup> They have not, however, done so by subscribing to the views of the

<sup>14</sup> I HAWKINS, PLEAS OF THE CROWN 82, 87 (8th ed. 1824); I EAST, PLEAS OF THE CROWN 277, 278 (5th ed. 1803. According to HALE, *supra* note 4, the aggressor was excused for slaying in self-defense, if he retreated in an honest endeavor to save his life.

<sup>15</sup> See *People v. Garretson*, 2 Wheeler's Crim. Cases 347, 351 (N. Y. 1823).

<sup>16</sup> *Id.* at 354.

<sup>17</sup> *Id.* at 354.

<sup>18</sup> 170 Mo. 658, 71 S.W. 148, 151, 152 (1902).

<sup>19</sup> *Brown v. United States*, 256 U. S. 335 (1921). Justice Holmes cites Texas and other jurisdictions as subscribing to the proposition that "if a man reasonably believes he is in immediate danger of death or grievous bodily harm from his assailant he may stand his ground and that if he kills him he has not exceeded the bounds of lawful self-defense."

<sup>20</sup> Note, 41 COL. L. REV. 733 (1941).

South and West, but rather have extended the "defense of castle" doctrine, alluded to earlier, to include any place where the defendant had a "right to be." Even in *State v. Bartlett*,<sup>21</sup> above, the court emphasized that the defendant had a right to be where he was. It is evident, therefore, that the common law rule has been largely repudiated even though lip-service frequently is rendered to an abstract "duty to retreat."<sup>22</sup>

Today the majority of American courts hold that whether or not the assault be felonious,<sup>23</sup> any person not a trespasser<sup>24</sup> may stand his ground against an assailant,<sup>25</sup> except where the slayer sought or commenced the affray.<sup>26</sup> A smaller number of courts have imposed the duty of retreat from personal assault in all circumstances<sup>27</sup> where it appears consistent with the actor's safety.<sup>28</sup> A third group of decisions<sup>29</sup> are traceable to Sir Michael Foster,<sup>30</sup> who, supported by other writers,<sup>31</sup> argued that slaying a would-be murderer in self-defense is a *justifiable* rather than *excusable* homicide.<sup>32</sup> *Justifiable* homicide, was a killing by operation of law,<sup>33</sup> unlike *excusable* homicide, imposed no duty of retreat.<sup>34</sup> Courts following this rule impose no duty to retreat where the deceased manifestly attempted to commit a felony involving force.<sup>35</sup> They do, however, impose a duty to retreat where the slaying occurs as the result of a mutual encounter or sudden affray.<sup>36</sup>

Is it possible to reconcile these conflicting views and resolve them into a workable and universal retreat rule for self-defense? Should we be swayed by the powerful argument of Professor Beale<sup>37</sup> that "it may be distasteful to retreat

<sup>21</sup> *Supra* note 18 at 71 S.W. at 151. "He had a right to be where he was, and the wrong of Edwards in assaulting and beating him there could not deprive him of that right. And this idea of the non-necessity of retreating from any locality where one has a right to be is growing in favor, as all doctrines based upon sound reason inevitably will."

<sup>22</sup> *Enyart v. People*, 67 Colo. 434, 180 Pac. 722 (1919); *People v. Durand*, 307 Ill. 611, 139 N.E. 78 (1923); *State v. Grimmett*, 33 Nev. 531, 112 Pac. 273 (1910); *State v. Rader*, 94 Ore. 432, 186 Pac. 79 (1919); *Earles v. State*, 94 S.W. 464 (Tex. 1906); *State v. Donahue*, 79 W. Va. 260, 90 S.E. 834 (1916). See JEROME HALL, *CASES AND READINGS ON CRIMINAL LAW* 255 (1949).

<sup>23</sup> *State v. Rader*, 94 Ore. 432, 186 Pac. 79 (1919).

<sup>24</sup> A trespasser cannot kill in self defense when retreat is possible. *Macias v. State*, 36 Ariz. 140, 283 Pac. 711, 717 (1929).

<sup>25</sup> *Enyart v. People*, 67 Colo. 434, 180 Pac. 722 (1919).

<sup>26</sup> *State v. Hatch*, 57 Kan. 420, 424, 46 Pac. 708, 709 (1896).

<sup>27</sup> This view does not extend to one's home. *People v. Tomlins*, 213 N. Y. 240, 107 N.E. 496 (1914).

<sup>28</sup> *Bieard v. State*, 189 Ark. 217, 72 S.W. 2d. 530 (1934).

<sup>29</sup> See *Erwin v. State*, 29 Ohio St. 186 (1876); *State v. Phillips*, 59 Wash. 252, 109 Pac. 1047 (1910); Note, 41 COL. L. REV. 733 (1941).

<sup>30</sup> FOSTER, *CROWN LAW* 273 (1762).

<sup>31</sup> 1 BISHOP, *CRIMINAL LAW* 605 (9th ed. 1923); 1 EAST, *PLEAS OF THE CROWN* 271 (1806); 3 RUSSELL, *CRIMES* 213 (6th ed. 1896).

<sup>32</sup> Beale, *supra* note 2 at 573. Professor Beale feels that Foster's view is erroneous and stems from a faulty understanding of a passage from Coke.

<sup>33</sup> Beale, *supra* note 2 at 572. "Killing in due execution of law was *justifiable*. This meant at first killing under warrant or by custom; later private persons were permitted to execute the law upon felons in a few cases. These cases were almost without exception attacks by robbers."

<sup>34</sup> FOSTER, *supra* note 32.

<sup>35</sup> *State v. Glenn*, 198 N. C. 79, 150 S.E. 663 (1929); *Erwin v. State*, 29 Ohio St. 186 (1876); *State v. Phillips*, 59 Wash. 252, 109 Pac. 1047 (1910).

<sup>36</sup> *Jones v. State*, 22 Ala. App. 472, 116 So. 896 (1928); see *State v. Lucas*, 164 N. C. 471, 474, 79 S.E. 674, 675 (1913).

<sup>37</sup> Beale, *supra* note 2 at 581.

but it is ten times as distasteful to kill?" On the other hand, should we support the position of Judge Sherwood in *Bartlett v. State* and hold that human honor, dignity, and right are in equal value to human life?

It appears that the very existence of such divergent views impels us inevitably to the conclusion that the retreat rule should not stand as the final test of self-defense, but rather should be but *one factor* in determining the guilt or innocence of the defendant.

As Justice Holmes wrote in *Brown v. U S.*, "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."<sup>38</sup> An avenue of possible retreat should be a circumstance in the case along with size and the location of parties, provocation, suddenness of combat, and other factors a jury must weigh in determining whether the defendant is to be excused for his homicide in self-defense.

ROBERT HALL SMITH

#### SOLICITATION AS A BASIS OF JURISDICTION OVER A FOREIGN CORPORATION

The amenability of foreign corporations to suit in state courts has long been a troublesome problem, both in state courts and, since the problem is essentially one of due process, in federal courts. It has been said that in matters of jurisdiction the courts tend to treat natural persons and corporations similarly, but this is overstatement. On the other hand, the dictum of Mr. Chief Justice Taney in *Bank of Augusta v. Earle* that "a corporation can have no legal existence out of the boundaries of the sovereignty by which it is created," does not present a realistic view of the situation. And yet, Taney's statement represented the prevailing view at one time. Such a doctrine could not stand in an era in which the corporation was fast becoming the most popular method of carrying on business.

To meet the demands of practical necessity in subjecting foreign corporations to proceedings in courts outside their state of domicile, various theories have been advanced. As in the case of an individual, jurisdiction in personam may be acquired over a foreign corporation by consent. An agent may be appointed by the corporation to accept service of process. The appointment of an agent<sup>3</sup> or of a state official to accept service of process is treated as consent to the exercise of jurisdiction. Where such an appointment has been made by the corporation, it is clear that there is actual consent to service of process and the state's courts have jurisdiction to render a valid judgment.<sup>4</sup> Where such an appointment is not made consent is sometimes implied. The theory of "implied consent" supposes that since a corporation may not enter a state without permission, its voluntary entry into the state renders valid the assumption that it has impliedly assented to

---

<sup>38</sup> 256 U. S. 335, 343 (1921). Holmes went on to say, "Detached reflection cannot be demanded in the presence of an uplifted knife."

<sup>1</sup> *Barrow Steamship Company v. Kane*, 170 U. S. 100 (1898).  
13 Pet. 519 (U. S. 1839).

<sup>3</sup> *Pennsylvania Fire Insurance Company v. Gold Issue Mining and Milling Company*, 243 U. S. 93 (1917).

<sup>4</sup> *Ibid.*