SELF-DEFENSE—DUTY TO RETREAT—RETREAT FROM THE PORCH OF ONE'S OWN HOME NOT REQUIRED—*State v. Bonano*, 59 N.J. 515, 284 A.2d 345 (1971).

> [T]he house of every one is to him as his castle and fortress, as well as for his defence against injury and violence, as for his repose . . . .[1]

Having failed to find some card-playing friends one night, Arturo Bonano returned home unexpectedly and found his wife absent from the house, apparently without his permission. She returned shortly from a christening party, and Bonano physically assaulted her. Bonano's 11-year-old stepdaughter, who had witnessed the incident, returned to the party to tell her uncle Carlos of the occurrence. Carlos went to the house armed with a kitchen knife and, as Bonano stood in the doorway, mounted the steps to the porch and apparently made some threatening remarks upon drawing his knife. Bonano, armed with a revolver that he had placed in his belt earlier in the evening, fired at Carlos, inflicting a mortal wound.[2]

Bonano was subsequently convicted of second degree murder. His conviction was affirmed on appeal,[3] and the New Jersey Supreme Court granted certification.[4] That court then reversed the conviction, holding, *inter alia*, that it was error for the trial judge to refuse to instruct the jury that defendant had no duty to retreat from the doorway of his own home when under attack.[5] In reversing, the court stated that there is no legal duty in New Jersey to retreat indoors from a felonious attack.[6]

Bonano, for the first time, presented squarely to New Jersey's highest court the question: "Must a man retreat when attacked in his own dwelling house?"[7] The court readily accepted the proposition that a man need not retreat from his house, but instead may stand his ground and use deadly force against any person: (1) who is attempting to commit a felony in the house; (2) who is attempting to enter by force for the purpose of committing a felony; or (3) who is attempting to enter by force for the purpose of inflicting grievous bodily harm on a resident.[8] In promulgating this rule the court did not base its reasoning on the

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1 Semayne's Case, 77 Eng. Rep. 194, 195 (K.B. 1604).

2 State v. Bonano, 59 N.J. 515, 517, 284 A.2d 345, 346 (1971).

3 113 N.J. Super. 210, 273 A.2d 392 (App. Div. 1971).

4 58 N.J. 97, 275 A.2d 153 (1971).

5 59 N.J. at 521, 284 A.2d at 348.

6 *Id.*

7 *Id.* at 519, 284 A.2d at 347.

8 *Id.*

traditional concept of the "curtilage" of a man's home, heretofore used to delimit the area in which a person need not retreat. Instead, "curtilage" was discarded as an antiquated term, the present meaning of which could not be precisely defined.[9] In its place the court *suggested* that the following rule be adopted to define the area within which a person had the right to stand his ground:

> Might not the better rule be that a duty to retreat should exist except as to the dwelling house itself, defined . . . to include a porch or other similar appurtenance?[10]

This rule, which would limit the privileged area to the actual dwelling house, is to be contrasted with the intimation in the recent case of *State v. Provoid*[11] that a person need not retreat from a stranger whenever he is within the curtilage of his home.[12] The court in *Bonano* has rejected this dictum and thereby has restricted a person's right to stand his ground and to use deadly force in repelling an assault.

The retreat rule, in those jurisdictions in which it is accepted, is a prerequisite to establishing excusable homicide through self-defense.[13] It should be noted that originally self-defense was not recognized as a valid defense to homicide at early common law.[14] After the legal ac-

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9 *Id.* at 520, 284 A.2d at 347-48. Curtilage has been defined elsewhere as

> the space of ground adjoining the dwelling house, used in connection therewith in the conduct of family affairs and for carrying on domestic purposes. It need not necessarily be separated from other lands by a fence, nor does the intersection of a divisional fence necessarily affect the relation of a building thus separated from it . . . .

Holland v. State, 11 Ala. App. 164, 166-67, 65 So. 920, 920 (1914).

10 59 N.J. at 520, 284 A.2d at 348.

11 110 N.J. Super. 547, 266 A.2d 307 (App. Div. 1970).

12 *Id.* at 554, 266 A.2d at 311.

13 1 F. WHARTON, CRIMINAL LAW § 616, at 832 (12th ed. 1932).

14 Pollock and Maitland noted that:

> The man who commits homicide by misadventure or in self-defence deserves but needs a pardon.

2 F. POLLOCK & F. MAITLAND, THE HISTORY OF ENGLISH LAW 479 (2d ed. 1898).

A detailed history of the development of self-defense and retreat is given in Beale, *Retreat from a Murderous Assault*, 16 HARV. L. REV. 567 (1903). He summarized the history of the law of self-defense to the middle of the eighteenth century:

> Self-defense merely was no excuse, but ground for pardon; but it was an excuse in equity, and the equitable defense was at last accepted at law. 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. . . .
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> Killing for which justification was allowed must be necessary; that is, it was permitted only when to refrain from killing the malefactor would necessarily leave him free to commit his crime and escape.

Id. at 572-73 (footnotes omitted).

knowledgment of the doctrine of self-defense, the retreat rule developed, requiring that:

> The party assaulted must therefore flee as far as he conveniently can, either by reason of some wall, ditch, or other impediment; or as far as the fierceness of the assault will permit him . . . .[15]

This doctrine was largely accepted by the American colonies, but with westward expansion a dichotomy began to appear. Some states continued to require a person exposed to an unprovoked, deadly assault to retreat, while others, chiefly the western and southern states, did not require retreat.[16]

Today, all states recognize the plea of self-defense as a defense to the charge of felonious homicide, and New Jersey is no exception.[17] However, the elements of self-defense have largely developed through decisional law. Currently, a greater number of states recognize no duty to retreat in the face of an unprovoked deadly attack,[18] while a minority

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15 4 W. BLACKSTONE, COMMENTARIES 185 (5th ed. 1769) (footnote omitted).

16 Beale, *supra* note 14, at 576-77.

17 N.J. STAT. ANN. § 2A:113-6 (1969) provides:

> Any person who kills another by misadventure, or in his or her own defense, or in the defense of his or her husband, wife, parent, child, brother, sister, master, mistress or servant, or who kills any person attempting to commit arson, burglary, kidnapping, murder, rape, robbery or sodomy, is guiltless and shall be totally acquitted and discharged.

18 State v. Jackson, 94 Ariz. 117, 382 P.2d 229 (1963) (defendant was under no duty to retreat from place he had a lawful right to be, even if he could safely do so); People v. Holt, 25 Cal. 2d 59, 153 P.2d 21 (1944) (one who is without fault and is feloniously attacked need not retreat, but may stand his ground and slay his assailant); Enyart v. People, 67 Colo. 434, 180 P. 722 (1919) (jury was erroneously instructed that one in lawful place and not at fault was obliged to flee unless it appeared too dangerous to retreat); People v. Bush, 414 Ill. 441, 111 N.E.2d 326 (1953) (one unlawfully assaulted and put in apparent danger of great bodily harm has no duty to retreat, but may stand his ground and may be justified in killing his assailant if necessary); State v. Hatch, 57 Kan. 420, 46 P. 708 (1896) (jury was erroneously instructed that a person unlawfully attacked must "retreat to the wall" before he is justified in killing his assailant); State v. Merk, 53 Mont. 454, 164 P. 655 (1917) (defendant was justified in slaying his assailant, though not in actual peril, if a reasonable man would have acted in like manner); State v. Grimmett, 33 Nev. 531, 112 P. 273 (1910) (one who is without fault and is attacked by another may, if necessary, stand his ground and kill his adversary); State v. Washington, 234 N.C. 531, 67 S.E.2d 498 (1951) (one subject to a murderous assault may, if necessary, stand his ground and kill his assailant); Graham v. State, 98 Ohio St. 77, 120 N.E. 232 (1918) (one not at fault and in the lawful pursuit of his business need not retreat from a sudden, violent assault); State v. Rader, 94 Ore. 432, 186 P. 79 (1919) (it was error not to charge the jury that where a person is where he has a right to be, he need not retreat under a felonious assault); State v. Jaukkuri, 41 S.D. 4, 168 N.W. 1047 (1918) (it was error to charge the jury that defendant must retreat if a safe avenue of escape were available); Stoneham v. Commonwealth, 86 Va. 523, 10 S.E. 238 (1889) (it was error not to charge the jury that one under felonious attack need not retreat); State v. Hiatt, 187 Wash. 226, 60 P.2d 71 (1936) (it was error to charge the jury that defendant had a duty to retreat

of states recognize a duty to retreat in such circumstances.[19] New Jersey falls into the latter category.[20]

In New Jersey, the plea of self-defense to a charge of felonious homicide was recognized as early as 1790. In *State v. Wells*,[21] the court stated that

> no man is justified or excusable in taking away the life of another, unless the necessity for so doing is apparent as the only means of avoiding his own destruction or some very great injury . . . .[22]

Subsequent cases in New Jersey have refined the elements of self-defense by holding that there must be a reasonable apprehension of real or apparent danger threatening the defendant.[23] Furthermore, the necessity for self-defense cannot be initiated by the defendant's own

under unprovoked attack); State v. Zannino, 129 W. Va. 775, 41 S.E.2d 641 (1947) (one not an original aggressor is not required to retreat from an unjustified threatened assault); Miller v. State, 139 Wis. 57, 119 N.W. 850 (1909) (one who, while in a place where he had a right to be, was subjected to an unprovoked assault may stand his ground).

19 King v. State, 233 Ala. 198, 171 So. 254 (1936) (one must retreat rather than take life of adversary no matter how great the peril, so long as there is a safe mode of retreat); Quillen v. State, 49 Del. 114, 110 A.2d 445, *petition for reargument denied*, 49 Del. 163, 112 A.2d 848 (1955) (no error to charge jury that even if deceased first attacked defendant, he was under duty to retreat if he safely could do so); Scholl v. State, 94 Fla. 1138, 115 So. 43 (1927) (one must use all reasonable means, consistent with own safety, to avoid assault and to avert necessity of taking human life); State v. Rheams, 34 Minn. 18, 24 N.W. 302 (1885) (homicide is not justifiable as an act of self-defense if it is apparent that the person assaulted may avoid the threatened injury by retreating); State v. Jackson, 227 S.C. 271, 87 S.E.2d 681 (1955) (it was error not to charge jury that defendant must avoid taking human life if at all possible, even to the extent of retreating, unless such retreat would increase danger to defendant).

20 *E.g.*, State v. Provoid, 110 N.J. Super. 547, 266 A.2d 307 (App. Div. 1970) (generally, defendant has duty to retreat when attacked, if he can reasonably do so in complete safety); State v. Di Maria, 88 N.J.L. 416, 97 A. 248 (Sup. Ct. 1916), *aff'd mem.*, 90 N.J.L. 341, 100 A. 1071 (Ct. Err. & App. 1917) (one is not justified in standing his ground if he can avoid the danger by retreating). For a review of the retreat rule in New Jersey, *see* Comment, *The New Jersey Duty to Retreat*, 16 RUTGERS L. REV. 608 (1962).

21 1 N.J.L. 424 (Sup. Ct. 1790).

22 *Id.* at 430.

23 State v. Bess, 53 N.J. 10, 247 A.2d 669 (1968) (justification for killing in self-defense depends on jury's determination of what they think a reasonable man would have done in same circumstances); State v. Hipplewith, 33 N.J. 300, 164 A.2d 481 (1960) (killing in self-defense is justified when the act of killing is necessary or reasonably appears to be necessary in order to preserve one's own life or to protect oneself from serious bodily harm; test is whether defendant reasonably believes it necessary to kill); State v. Mellillo, 77 N.J.L. 505, 71 A. 671 (Ct. Err. & App. 1908) (one may protect oneself, even to the extent of taking life, if it is, or reasonably appears to be, necessary to preserve own life, or protect oneself from serious bodily harm); State v. Bonofiglio, 67 N.J.L. 239, 52 A. 712, 54 A. 99 (Ct. Err. & App. 1901) (justifiable homicide to take life of adversary to preserve own life or protect oneself from serious bodily harm) (see note 51 *infra*); State v. Centalonza, 18 N.J. Super. 154, 86 A.2d 780 (App. Div. 1952) (justifiable homicide if it seems that the threat to one's own life could not be avoided except by taking the life of assailant).

aggressive acts.[24] If he does provoke a conflict, he must first abandon his action before he can claim a right to self-defense.[25]

The retreat rule in New Jersey became settled law in *State v. Di Maria*,[26] where the trial court's instruction to the jury that the defendant must retreat if he could safely do so was upheld.[27] The court based its holding on *Wells:*

> Although the obligation to retreat, when this can be done safely, is not expressly declared in the opinion in the Wells case, it is, we think, necessarily implied in the declaration that a homicide is not justifiable or excusable unless the necessity for taking life is apparent as the *only means* by which the slayer can avoid his own destruction or some great bodily injury.[28]

In so holding, the court rejected the rationale underlying the no-retreat rule upon which defendant relied.[29]

The basic philosophy adopted by the no-retreat jurisdictions is that an innocent person should not be forced to flee from a place where

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24 State v. Agnesi, 92 N.J.L. 53, 104 A. 299 (Sup. Ct. 1918), *aff'd mem.*, 92 N.J.L. 638, 106 A. 893, 108 A. 115 (Ct. Err. & App. 1919).

25 State v. Blair, 2 N.J.L.J. 346 (Essex O. & T. 1879).

26 88 N.J.L. 416, 97 A. 248 (1916). *But see* State v. Blair, 2 N.J.L.J. at 348-49, which contains a statement of the duty to retreat but which case has never been subsequently cited in New Jersey as controlling; the court charged the jury:

> In determining whether the deceased made all reasonable efforts to avoid the necessity for taking life, you are to consider his situation at the time the fatal wound was given. In some cases an accused is bound to retreat, in others he is not. If he can retreat with safety, and avoid the necessity of taking the life of his adversary, he is bound to adopt that course. But where his situation is so perilous as not to allow retreat without manifest danger to life or grievous bodily harm, he is under no obligation to fly, but may, if need be, kill his adversary. He is not bound to wait until his adversary has effected his destruction before he acts.

27 The trial court had instructed the jury that

> if the defendant had a reasonable apprehension that his own life was in danger or that he was in danger of serious bodily injury, he had a right to defend himself even to the extent of taking the life of the decedent; but that the law required that he should retreat if he could safely do so, and that if he could have done so with reasonable safety, and yet did not retreat, but instead fired at the deceased with the intention of killing him, or inflicting upon him a mortal wound, the homicide was neither excusable nor justifiable.

88 N.J.L. at 416-17, 97 A. at 249.

28 *Id.* at 418, 97 A. at 249.

29 The defendant contended that

> where a man who is in a place where he has a right to be is attacked by another, he need not retreat, although a way to escape injury by doing so is open to him, but is entitled to stand his ground and kill his adversary in order to prevent his adversary from killing him or doing him serious bodily harm.

Id. at 417, 97 A. at 249. The defendant's contention was a clear statement of the rule adopted by the no-retreat jurisdictions. *See* note 30 *infra.*

he has a right to be.[30] Unlike the retreat jurisdictions, the no-retreat jurisdictions examine the right of the slayer to be there in order to determine his right to stand his ground. If the slayer is the aggressor in a murderous assault, he is not justified in killing. Rather, he must first totally withdraw from the conflict in order to successfully assert the privilege of self-defense.[31] Likewise, a party involved in non-deadly mutual combat, or "chance-medley,"[32] must also "retreat to the wall" to regain the right of self-defense.[33]

Of more concern, however, is the position of the innocent victim of an assault, Bonano in the instant case. In a no-retreat jurisdiction, such a person, if without fault and exposed to a felonious attack, need not retreat even if a safe avenue of retreat is available to him. Not only may he stand his ground, but he may also use any force necessary to overcome his assailant, even if it means slaying him.[34] However, a non-felonious assault does not justify homicide,[35] and even a trespasser has a right to a plea of self-defense if he has first used any reasonable means of retreat.[36]

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30 A justification for a no-retreat rule was given in State v. Bartlett, 170 Mo. 658, 71 S.W. 148 (1902):

> [T]he right to go where one will, without let or hindrance, despite of threats made, necessarily implies the right to stay where one will, without let or hindrance. These remarks are controlled by the thought of a lawful right to be in the particular locality to which he goes or in which he stays. 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 . . . .
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> . . . We hold it a *necessary self-defense* to *resist, resent,* and *prevent . . . humiliating indignity* . . . 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.

Id. at 668-71, 71 S.W. 151-52.

31 People v. Holt, 25 Cal. 2d 59, 153 P.2d 21 (1944); State v. Robison, 54 Nev. 56, 6 P.2d 433 (1931); State v. Flory, 40 Wyo. 184, 276 P. 458 (1929).

32 "Chance-medley" has been defined as "an ordinary fist fight, or other non-deadly encounter." R. PERKINS, CRIMINAL LAW 998 (2d ed. 1969).

33 *See* People v. Hecker, 109 Cal. 451, 42 P. 307 (1895); Clark v. Commonwealth, 90 Va. 360, 18 S.E. 440 (1893).

34 *E.g.*, State v. Jackson, 94 Ariz. 117, 382 P.2d 229 (1963); Macias v. State, 36 Ariz. 140, 283 P. 711 (1929); People v. Collins, 189 Cal. App. 2d 575, 11 Cal. Rptr. 504 (1961); People v. Zuckerman, 56 Cal. App. 2d 366, 132 P.2d 545 (1942); Bange v. State, 237 Ind. 422, 146 N.E.2d 811 (1958); Flick v. State, 207 Ind. 473, 193 N.E. 603 (1935); Gibson v. Commonwealth, 237 Ky. 33, 34 S.W.2d 936 (1931); Erwin v. State, 29 Ohio St. 186 (1876); Alexander v. State, 70 S.W. 748 (Tex. Crim. Ct. App. 1902). *See also* cases cited note 18 *supra.*

35 State v. Spear, 178 Wash. 57, 33 P.2d 905 (1934).

36 People v. Hecker, 109 Cal. 451, 42 P. 307 (1895); *see* Thompson v. State, 462 P.2d 299 (Okla. Ct. Crim. App. 1969).

In a retreat jurisdiction, the basic principle is that even the innocent victim of a murderous assault must retreat, if he can safely do so.[37] However, an adjunct to this is the exception that one exposed to a sudden felonious assault need not retreat if there is no apparently safe avenue of retreat open to him at the time.[38] Such an avenue of escape must be one that would reasonably be recognized as being safe; an innocent victim is under no duty to increase the peril to himself.[39] Moreover, it is not necessary that one "retreat to the wall" within one's own dwelling house.[40] The retreat jurisdictions are split, however, on the issue of the duty to retreat within the house if the assailant is a member of the household or otherwise has a coequal right to be there.[41] A guest in the dwelling house of another usually assumes the rights of the owner or occupant of the house, and need not retreat, unless he is assaulted by the owner or occupant.[42] Beyond the dwelling house itself, the retreat jurisdictions are badly split as to what other locations may

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37 In State v. Haffa, 246 Iowa 1275, 1289, 71 N.W.2d 35, 43, *cert. denied*, 350 U.S. 914 (1955), the court stated:

> . . . [T]o justify homicide on the ground that it was committed in self-defense, four elements must be present: (1) the slayer must not be the aggressor in provoking or continuing the difficulty that resulted in the killing; (2) he must retreat as far as is reasonable and safe before taking his adversary's life, except in his home or place of business; (3) he must actually and honestly believe he is in imminent danger of death, great bodily harm, or some felony, and that it is necessary to take the life of his assailant to save himself therefrom; and (4) he must have reasonable grounds for such belief.

A justification for a retreat rule was given in Cooke v. State, 18 Ala. App. 416, 421, 93 So. 86, 90 (1921), *cert. denied*, 208 Ala. 100, 93 So. 824 (1922):

> This doctrine of retreat is sometimes referred to as being cowardly, but not so; it is based upon the highest consideration of civilization, morals and our holy religion. It is better that one man should flee rather than take human life . . . if he can do so without apparently increasing his danger to life or limb. It is no cowardly doctrine.

38 Walker v. State, 223 Ala. 294, 135 So. 438 (1931); State v. Jackson, 156 Iowa 588, 137 N.W. 1034 (1912); State v. Jackson, 227 S.C. 271, 87 S.E.2d 681 (1955).

39 King v. State, 233 Ala. 198, 171 So. 254 (1936); Quillen v. State, 49 Del. 114, 110 A.2d 445 (1955); State v. Gardner, 96 Minn. 318, 104 N.W. 971 (1905).

40 State v. Bissonnette, 83 Conn. 261, 76 A. 288 (1910); Hedges v. State, 172 So. 2d 824 (Fla. 1965); DeVaughn v. State, 232 Md. 447, 194 A.2d 109 (1963), *cert. denied*, 376 U.S. 927 (1964); People v. McGrandy, 9 Mich. App. 187, 156 N.W.2d 48 (1967); State v. Jackson, 227 S.C. 271, 87 S.E.2d 681 (1955); State v. Turner, 95 Utah 129, 79 P.2d 46 (1938).

41 Duty to retreat: State v. Grierson, 96 N.H. 36, 69 A.2d 851 (1949); State v. Pontery, 19 N.J. 457, 117 A.2d 473 (1955); Commonwealth v. Commander, 436 Pa. 532, 260 A.2d 773 (1970) (by implication); *see also* Annot., 26 A.L.R.3d 1296 (1969).

No duty to retreat: Watkins v. State, 197 So. 2d 312 (Fla. Dist. Ct. App. 1967); State v. Leeper, 199 Iowa 432, 200 N.W. 732 (1924); People v. McGrandy, 9 Mich. App. 187, 156 N.W.2d 48 (1967); State v. Grantham, 224 S.C. 41, 77 S.E.2d 291 (1953).

42 Kelley v. State, 226 Ala. 80, 145 So. 816 (1933); Vander Wielen v. State, 251 So. 2d 240 (Ala. Ct. Crim. App.), *cert. denied*, 251 So. 2d 246 (Ala. Sup. Ct. 1971); State v. Osborne, 200 S.C. 504, 21 S.E.2d 178 (1942).

be considered as "the wall" for the victim of a felonious assault. Some jurisdictions extend the line to include the curtilage around the dwelling,[43] while other jurisdictions hold that the victim need not retreat from his place of business.[44] Even a men's club has been held to be immune from the retreat doctrine.[45] However, the retreat jurisdictions tend to reject the suggestion that one need not retreat from the public streets.[46]

In New Jersey it is not clear at what point the duty to retreat ceases and the right to stand one's ground obtains. *Bonano* holds that a person need not retreat from his own dwelling when attacked.[47] That rule is modified, however, where the premises are occupied by both the assailant and the defender, as in the case of one spouse attacking the other[48] or one co-tenant attacking another.[49] In such cases, New Jersey imposes a positive duty to retreat.[50] On the other hand, one need not retreat when confronted by a robber, and the defense of self-defense may be raised for killing the robber.[51] Finally, in contrast to many of the other retreat jurisdictions, it may be inferred that there is a duty to retreat when confronted by an aggressor in one's place of business.[52]

The court in *Bonano* has redefined the exception to the retreat rule, limiting it to those cases where the defendant is actually in his dwelling house, or an appurtenance thereto. Apparently excluded from

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43 Bryant v. State, 252 Ala. 153, 39 So. 2d 657 (1949) (no duty to retreat where person is "in his dwelling house, office, or place of business, or within the curtilage thereof"); State v. Hewitt, 205 S.C. 207, 31 S.E.2d 257 (1944) (one attacked "on his own premises" need not retreat); *see* State v. Provoid, 110 N.J. Super. 547, 266 A.2d 307 (App. Div. 1970):

> [T]he majority of jurisdictions in this country have concluded that the privilege of self-defense without retreat extends to anywhere within the "curtilage" of a man's home.

Id. at 554, 266 A.2d at 310.

44 Commonwealth v. Johnston, 438 Pa. 485, 263 A.2d 376 (1970); State v. Sipes, 202 Iowa 173, 209 N.W. 458 (1926). *See* Bryant v. State, 252 Ala. 153, 39 So. 2d 657 (1949); State v. Feltovic, 110 Conn. 303, 147 A. 801 (1929); State v. Davis, 214 S.C. 34, 51 S.E.2d 86 (1948); State v. Turner, 95 Utah 129, 79 P.2d 46 (1938). *See generally* Annot., 47 A.L.R. 418 (1927).

45 State v. Marlowe, 120 S.C. 205, 112 S.E. 921 (1922).

46 *See* Madison v. State, 196 Ala. 590, 71 So. 706 (1916); State v. Marish, 198 Iowa 602, 200 N.W. 5 (1924); State v. Provoid, 110 N.J. Super. 547, 266 A.2d 307 (App. Div. 1970). Also rejected is the contention that a person need not retreat when he is in his own automobile on the public roads: Clark v. State, 216 Ala. 7, 111 So. 227 (1927); State v. McGee, 185 S.C. 184, 193 S.E. 303 (1937).

47 59 N.J. at 519-20, 284 A.2d at 347.

48 State v. Pontery, 19 N.J. 457, 117 A.2d 473 (1955).

49 State v. Provoid, 110 N.J. Super. 547, 554, 266 A.2d 307, 311 (App. Div. 1970).

50 *Id.*

51 State v. Bonofiglio, 67 N.J.L. 239, 52 A. 712, 54 A. 99 (Ct. Err. & App. 1902); *cf.* State v. Fair, 45 N.J. 77, 92, 211 A.2d 359, 367 (1965), wherein the court qualifies *Bonofiglio*, stating that the right to use deadly force is not absolute.

52 State v. Bess, 53 N.J. 10, 247 A.2d 669 (1968).

any exceptions to the New Jersey retreat rule would be a sidewalk leading to the porch, a driveway on the premises, or any buildings not physically attached to the house. This is at variance with the present trend in many retreat jurisdictions which have expanded the exceptions to the retreat rule to include both the curtilage and the dwelling.[53]

There is no question that the lower court in *Bonano* exceeded its discretion by refusing to grant defendant's proffered instruction, thereby erroneously implying that defendant must retreat from his doorway into the house.[54] Apparently, no state having a retreat rule requires that degree of retreat in order for the defendant to qualify for a plea of self-defense.[55] Accordingly, it is clear that the supreme court reached a just decision in the instant case. However, rather than simply reversing the lower court on the erroneous impression conveyed to the jury, the supreme court chose to adopt the limitation of the dwelling house in place of the curtilage. In so doing it has narrowed to a considerable extent the area within which a defendant has no duty to retreat if feloniously attacked.[56]

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53 Cases cited note 43 *supra*; *see also* R. PERKINS, *supra* note 32, at 1012.

54 59 N.J. at 521, 284 A.2d at 348. Following summation by the assistant prosecutor, in which he suggested that defendant could have retreated into the house in order to avoid the impending conflict, defense counsel requested the trial judge to instruct the jury "that a man doesn't have to run from his own home."

55 *See* cases cited note 40 *supra*.

56 *Accord*, FINAL REPORT OF THE NEW JERSEY CRIMINAL LAW REVISION COMMISSION, THE NEW JERSEY PENAL CODE, VOL. I: REPORT AND PENAL CODE § 2C:3-4, at 26-27 (Oct. 1971), which proposes to restrict the privilege of no-retreat to the dwelling-house only:

> a. *Use of Force Justifiable for Protection of the Person.* Subject to the provisions of this Section and of Section 2C:3-9, the use of force upon or toward another person is justifiable when the actor believes that such force is immediately necessary for the purpose of protecting himself against the use of unlawful force by such other person on the present occasion.
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> b. *Limitations on Justifying Necessity for Use of Force.*
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> (2) The use of deadly force is not justifiable under this Section unless the actor believes that such force is necessary to protect himself against death or serious bodily harm; nor is it justifiable if:
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> (a) the actor, with the purpose of causing death or serious bodily harm, provoked the use of force against himself in the same encounter; or
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> (b) the actor knows that he can avoid the necessity of using such force with complete safety by retreating or by surrendering possession of a thing to a person asserting a claim of right thereto or by complying with a demand that he abstain from any action which he has no duty to take, except that:
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> (i) the actor is not obliged to retreat from his dwelling, unless he was the initial agressor or is assailed in his dwelling by another person whose dwelling the actor knows it to be . . . .

For the purposes of Chapter 3, "dwelling" is defined as:

> . . . any building or structure, though movable or temporary, or a portion thereof, which is for the time being the actor's home or place of lodging.

Id., § 2C:3-11(c), at 34.

In commenting on the Code, the Commission notes that the Code expresses the law

The rejection of the concept of "curtilage" was premised on the dire consequences that might result if "curtilage" included premises and boundary lines that are disputed and later proven to be faulty. The inquiry posed by the court was: "Is the justification for slaying to rest upon the resolution of a title issue?"[57] The court's dislike for using the ancient and imprecise property concept of "curtilage" in justifying homicide is well taken. But any attempt to draw the boundary line elsewhere would result in the same impreciseness.

At this point, the retreat rule, based on the notion that a civilized person would attempt to retreat when confronted with deadly force,[58] might well be questioned. At least one writer has suggested that the states adopting the retreat rule have done so erroneously, and that the states adhering to the no-retreat rule are following the rule originally set forth in England.[59] Since the reason for the rule is to prevent the unnecessary taking of life when an alternative exists,[60] the fact that a particular state adheres or does not adhere to the rule must be made known to the general public. This presents difficulties in view of the high mobility of American society, in which nearly 20 percent of the population relocates annually.[61] If the desired deterrent effect of the rule is to be realized, a person will have to be made aware of each state's retreat rule before he enters its borders. Presently, it is questionable if even a minority of the population of any one state knows whether that state is a retreat or non-retreat jurisdiction.

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of New Jersey on retreat when deadly force is about to be used in one's defense. The Commission also points out that it is

> only when the actor "knows" that he may retreat "with complete safety" that he must. This makes the retreat rule of the Code a relatively limited one. . . .
>
> . . . .
>
> A person is not required to retreat from his dwelling . . . unless he was the initial aggressor or is assailed in his dwelling by another person whose dwelling he also knows it to be. This is New Jersey law. . . . The MPC [Model Penal Code] would not require retreat in one's place of work. We have eliminated this as an exception to the retreat rule, being of the opinion that places of work should not be equated with dwellings for this purpose. . . .

FINAL REPORT OF THE NEW JERSEY LAW REVISION COMMISSION, THE NEW JERSEY PENAL CODE, VOL. II: COMMENTARY § 2C:3-4(10)(c), at 87 (Oct. 1971).

57 59 N.J. at 520, 284 A.2d at 348.

58 *See* note 37 *supra*.

59 R. PERKINS, *supra* note 32, at 1004, points out that

> [i]n this country, while a majority of the courts followed the position which had been taken in the mother country, a substantial minority misunderstood the English cases on self-defense and thought they applied to the innocent victim of a murderous attack.

60 4 W. BLACKSTONE, *supra* note 15, at 185.

61 In 1968-1969, 18.3 percent (35.9 million) moved, with 3.4 percent (6.6 million) moving from one state to another. STATISTICAL ABSTRACT OF THE UNITED STATES 33 (1970).

Also, the American traditions of vigilantism, the competitive spirit, and especially the idea that it is cowardly to retreat, which are continually broadcast and reinforced by the mass media, can only lead to a conditioned response on the part of a victim meeting, "at the moment of truth," a felonious assault.[62] In view of this conditioning, it appears both unrealistic and unreasonable to continue to require a duty to retreat by one exposed to a felonious attack. The doctrine followed by the majority of the states would seem to be a better choice; that is,

> the innocent victim of a murderous assault who is himself free from fault, and reasonably believes he must use deadly force to save himself from death or great bodily harm, if he does not retreat, [is] privileged to stand his ground and resort to deadly force *there* merely because he is where he has a right to be . . . .[63]

David W. Collins

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62 Is violence in America "as American as cherry pie"? In answer to that question, consider that some of the

> sources of violence in our national life are inheritances of our own past: a celebration of violence in good causes by our revolutionary progenitors, frontiersmen, and vigilantes; immigrant expectations of an earthly paradise only partly fulfilled; the unresolved tensions of rapid and unregulated urban and industrial growth.

REPORT TO THE NATIONAL COMMISSION ON THE CAUSES AND PREVENTION OF VIOLENCE, VIOLENCE IN AMERICA, at xiii (H. Graham & T. Gurr eds. 1969). Several violent aspects of American society are treated in the report.

In considering the frontier tradition, it is noted that:

> The frontier placed a premium on independent action and individual reliance. The whole history of the American frontier is a narrative of taking what there was to be taken. . . .
>
> We revere these heroes because they were men of vast imagination and daring. We also have inherited their blindness and their excesses.

J. Frantz, *The Frontier Tradition: An Invitation To Violence*, in Report *supra*, at 119, 120.

The question of the impact of the mass media, "with its high component of violence," on the conditioning and acceptance of violence in social relations is raised by M. Janowitz, *Patterns of Collective Racial Violence*, in Report *supra*, at 393, 415.

Examples of other source material in this area include: A. ARNOLD, VIOLENCE AND YOUR CHILD (1969); VIOLENCE IN THE STREETS (S. Endleman ed. 1968).

63 R. PERKINS, *supra* note 32, at 1004, wherein the author postulated this "rule" as the "basic question" to be answered.