

The Englishman's Castle

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The right to use reasonable force in self-defence, defence of others and defence of property—what is sometimes called “necessary” or “private” defence—lies at the heart of criminal law systems in the common law world [1] and elsewhere [2,3]. The common law allows force to be used in these circumstances, but only so far as is reasonable; as is sometimes said, the force used must be both necessary and proportionate [4]. In particular, force will generally be regarded as unreasonable where the harm done by the defendant is out of all proportion to the harm threatened by the attacker, as where someone is killed to prevent a slap on the face, or as in the famous case of *Regina v Howe* to prevent him stealing the defendant's chickens [5].

However, there is in many jurisdictions an exception to this where force is used to repel an intruder into the defendant's house [6]; here it seems that the threat to the householder's security and privacy is allowed to trump the interests of the victim, even to the extent of allowing him or her to be killed. Attempts to eradicate this anomaly—the so-called “castle” doctrine [7] – from the law have generally been unsuccessful; indeed following a furore in the British press a judge has recently stated that being shot by a homeowner was in some cases a risk that burglars had to take [8].

What is the rationale of this anomaly? None of the theories on which the concept of private defence has been based seem to work in this context. For instance, it can be said that a person acting in self-defence has no choice but to attack his or her opponent, but this can hardly apply to the defence of property rather than the person [9]. Again, it can be argued that the defence is based on a choice of evils [10], but on what rational ground can the death of the intruder be regarded as a lesser evil than the defence of the householder's property? Another argument bases the defence on the violation of the defender's autonomy [11], but while this may very well justify the use of lethal force to protect the home, it is hard to see why it does not also justify such force in other cases not covered by the present law, such as serious sexual assault. The same can be said of arguments based on the forfeiture of rights by the aggressor [12]; if this is the case, why should such rights be forfeited by an invasion of the home but not by a non-lethal attack in the street?

Whichever way one looks at it, one cannot avoid the conclusion that an attack on the home is privileged in this context, in the sense that it allows for a greater response than would be warranted on strictly utilitarian grounds. Why should this be? Perhaps the answer lies in the

emotional factors involved; as has been pointed out on more than one occasion, the home is more than just a piece of property [13]. Rather, the notion of “home” is bound up with the occupant's identity, security, and sense of belonging [14]; as the old saying goes, “home is where the heart is” [14]. Seen in this light, the right to defend the home can be readily explained both in terms of excuse and in terms of justification. It can be explained in terms of excuse, because a person whose home is under threat cannot be blamed for taking extreme measures against the aggressor. It can be explained in terms of justification, because a threat to the home is more than just a threat to property; rather, it is, in the terms stated above, a fundamental violation of the occupant's autonomy. This of course gives rise to the question whether there are not perhaps other areas which deserve to be privileged in the same way, but that is a question for another day.

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