

# Tulsa Law Review

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Volume 23 | Number 3

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Spring 1988

## Oklahoma's Make My Day Law

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### Recommended Citation

Donna Smith, *Oklahoma's Make My Day Law*, 23 Tulsa L. J. 533 (1988).

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# RECENT DEVELOPMENT

## OKLAHOMA'S "MAKE MY DAY" LAW

### I. INTRODUCTION

On April 30, 1987, Governor Henry Bellmon signed into law Oklahoma House Bill No. 1511<sup>1</sup> which contained the controversial "Make My Day" law.<sup>2</sup> This new law expanded Oklahoman's right to use deadly force to protect their homes from intruders. In addition, the law provides immunity from civil liability.<sup>3</sup> The law changed hundreds of years of self-defense in the home or defense of dwelling law in order to protect the sanctity of the home. Although Oklahoma's "Make My Day" law addresses both nondeadly and deadly force, the following discussion of the law will be generally limited to the use of deadly force and, therefore, the defense of justifiable homicide.

### II. DEFENSE OF DWELLING—HISTORY AND DEVELOPMENT

A cursory look at the development of self-defense and defense of dwelling law provides a background for examination of Oklahoma's previous and present law in this area. The doctrines of self-defense and defense of dwelling have evolved over hundreds of years. An innocent person's right to defend himself from an unlawful attack is well established. The exact boundaries of this right to defend against an attack inside or outside the home, however, are not easily defined. The difficulty in defining the limits of self-defense and defense of dwelling reflects the innumerable fact patterns under which the issue can arise, as well as the confusing development of this area of the law.<sup>4</sup>

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1. H. 1511, 41st Leg., 1987 Okla. Sess. Law Serv. 205 (West).

2. *Id.* The bill was nicknamed the "Make My Day" bill early in its history. See Okla. Legislative Reporter, March 20, 1987; *'Home is Castle' Bill Filed in Oklahoma Senate*, NEW GUN WEEK, Feb. 27, 1987, p. 2.

3. H. 1511, 41st Leg., 1987 Okla. Sess. Law Serv. 205 (West).

4. See *Brown v. United States*, 256 U.S. 335 (1921). The Court stated that "historical mistakes" may be part of the law of self-defense. *Id.* at 343.

### A. *Early English Law*

Under the early English law regarding use of deadly force in self-defense, the defender was justified in the use of deadly force only when committed in execution of the King's law.<sup>5</sup> In other situations when an innocent person killed another in self-defense, the defender was convicted of homicide but was often automatically pardoned.<sup>6</sup> The early English law of self-defense included the requirement that the degree of force used by the defender could not be greater than the threat of the attacker as reasonably perceived by the defender.<sup>7</sup> The early English law of self-defense further required that a defender was justified in using deadly force against an attacker only when he had retreated "to the wall."<sup>8</sup>

In 1532, England enacted a statute codifying the common law, but failed to address the duty to retreat.<sup>9</sup> Perhaps because the statute was silent regarding the duty to retreat, confusion still reigned in this area. The English courts split in their application of the duty to retreat under the new statute. Some courts required an innocent victim to safely retreat from a murderous attack, while others imposed no such duty.<sup>10</sup> The law and the courts continued to require, however, that the amount of force used by the defender be proportionate to the force used by the attacker.<sup>11</sup>

Somewhat different rules developed with regard to use of deadly force to defend one's dwelling. In early England, the castle was seen as a sanctuary from danger. The protection it offered was jealously protected by the law.<sup>12</sup> The duty to retreat was not imposed when the defender was warding off an assault upon the castle.<sup>13</sup> Early English law reflected the high regard for the castle as a refuge.<sup>14</sup>

5. Beale, *Retreat from a Murderous Assault*, 16 HARV. L. REV. 567, 567-68 (1903).

6. *Id.* at 568; W. WALSH, *OUTLINES OF THE HISTORY OF ENGLISH AND AMERICAN LAW* 373-74 (1923).

7. Comment, *Criminal Law—Lovers and Other Strangers: Or, When Is A House a Castle?—Privilege of Non-Retreat in the Home Held Inapplicable to Legal Co-Occupants—State v. Bobbitt*, 415 So. 2d 724 (Fla. 1982), 11 FLA. ST. U. L. REV. 465, 467 (1983) [hereinafter *Castle Doctrine*].

8. Comment, *Dwelling Defense Law in Missouri: In Search of Castles*, 50 UMKC L. REV. 64, 66 (1981) [hereinafter *Dwelling Defense Law in Missouri*].

9. *Id.*; see also 2 F. POLLOCK & F. MAITLAND, *HISTORY OF ENGLISH LAW* 478-79 (1968).

10. *Dwelling Defense Law in Missouri*, *supra* note 7, at 66-67.

11. 3 J. STEPHEN, *A HISTORY OF THE CRIMINAL LAW OF ENGLAND* 12 (1883); 4 STEPHENS' *COMMENTARIES ON THE LAWS OF ENGLAND* 38 (W. Winder & L. Warmington eds. 1950).

12. See 4 W. BLACKSTONE, *COMMENTARIES* 223 (1898). In discussing the right of habitation, Blackstone stated that, "the law of England has so particular and tender a regard to the immunity of a man's house, that it styles it his castle, and will never suffer it to be violated with impunity. . . ." *Id.*

13. *Castle Doctrine*, *supra* note 7, at 467-68.

14. 5 Coke 91, 77 Eng. Rep. 194 (1604); see also Comment, *Is a House a Castle?*, 9 CONN. L.

B. *American law*

## 1. Criminal liability for defense of dwelling

American courts and legislatures adopted and codified the English law in the area of self-defense. The duty to retreat when threatened with a deadly assault was adopted by some states.<sup>15</sup> Others adopted what came to be called the "true-man" rule holding that retreat was unnecessary to justify homicide committed in self-defense.<sup>16</sup>

All states, however, adopted the rule that deadly force could be used only when the defender believed that death or serious bodily injury was threatened.<sup>17</sup> Some jurisdictions held that the homicide was justified when that belief was honest,<sup>18</sup> while other jurisdictions required a reasonable belief.<sup>19</sup>

REV. 110, 114 (1976) (characterizing early English defense of habitation law as allowing deadly force to defend any intrusion on the home). The *Semayne's Case* stated:

That the house of every one is to him as his castle and fortress, as well for his defence against injury and violence, as for his repose; and although the life of man is a thing precious and favoured in law; so that although a man kills another in his defence, or kills one *per infortun'*, without any intent, yet it is felony, and in such case he shall forfeit his goods and chattels, for the great regard which the law has to a man's life; but if thieves come to a man's house to rob him, or murder, and the owner of his servants kill any of the thieves in defence of himself and his house, it is not felony, and he shall lose nothing.

*Semayne's Case*, 5 Coke 91, 77 Eng. Rep. 194, 195 (1604). The two classifications of homicide recognized in England are reflected in the court's language. For homicide in self-defense, the defendant was required to forfeit his goods. Homicide in defense of the home, however, was justified and the defendant lost nothing. For a discussion of homicide in self-defense and justifiable homicide, see Green, *The Jury of the English Law of Homicide, 1200-1600*, 74 MICH. L. REV. 413, 428-44 (1976).

15. *King v. State*, 233 Ala. 198, 171 So. 254 (1936); *State v. Donnelly*, 69 Iowa 705, \_\_, 27 N.W. 369, 370 (1886); *State v. Cox*, 138 Me. 151, \_\_, 23 A.2d 634, 641-42 (1941); *State v. Dettmer*, 124 Mo. 426, \_\_, 27 S.W. 1117, 1119 (1894); *State v. Abbott*, 36 N.J. 63, \_\_, 174 A.2d 881, 884-86 (1961); *State v. Jackson*, 227 S.C. 271, \_\_, 87 S.E.2d 681, 685 (1955). An early Alabama court upheld jury instructions that embodied the rationale behind the duty to retreat. "In the system [of self-defense] so established no balm or protection is provided for wounded pride or honor in declining combat, or sense of shame in being denounced as cowardly. Such thoughts are trash, as compared with the inestimable right to live." *Springfield v. State*, 96 Ala. 81, \_\_, 11 So. 250, 252 (1892).

16. *Brown v. U.S.*, 256 U.S. 335, 342-43 (1921); *People v. Hecker*, 109 Cal. 451, \_\_, 42 P. 307, 313 (1895); *Enyart v. People*, 67 Colo. 434, \_\_, 180 P. 722, 723-24 (1919); *Runyan v. State*, 57 Ind. 80, 84 (1877); *Burgess v. Territory*, 8 Mont. 57, \_\_, 19 P. 558, 566 (1888); *Willis v. State*, 43 Neb. 102, \_\_, 61 N.W. 254, 258-59 (1894); *State v. Grimmitt*, 33 Nev. 531, 112 P. 273 (1910); *Erwin v. State*, 29 Ohio St. 186, 200 (1876); *Voight v. State*, 53 Tex. Crim. 258, 109 S.W. 205, 206-07 (1908); *State v. Carter*, 15 Wash. 121, 45 P. 745, 746 (1896).

17. 2 F. WHARTON'S CRIMINAL LAW § 125 (C. Torcia 14th ed. 1979).

18. See *State v. Cope*, 78 Ohio App. 429, \_\_, 67 N.E.2d 912, 917 (1946) (taking into account the particular qualities of the defendant rather than the qualities of a reasonably brave man); *People v. Lennon*, 71 Mich. 298, 38 N.W. 871, 872-73 (1888) (defendant's weakness should be weighed in his favor).

19. The reasonableness of the belief must be analyzed under the facts of each case. As Justice Holmes stated, "Detached reflection cannot be demanded in the presence of an uplifted knife." *Brown v. United States*, 256 U.S. 335, 343 (1921).

The American defense of dwelling law often appears to be more an application of self-defense principles to attacks on the home and its occupants, rather than an adoption of the separate defense of habitation law that developed around the English castle.<sup>20</sup> While American courts have adopted the language and rhetoric surrounding the English castle doctrine, case law reveals that courts often applied self-defense principles with some modification regarding the duty to retreat.<sup>21</sup> American courts and statutes have traditionally maintained the proportionality requirement so that an occupant of a dwelling could use only that amount of physical force necessary to repel an intruder.<sup>22</sup> Many states adopted statutes providing that deadly force could only be used when serious bodily injury, death, or certain serious crimes were threatened.<sup>23</sup> Despite confusing language used by American courts, self-defense principles requiring threatened harm to the defender or other members of the household were often applied to attacks upon the home.

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20. See Comment, *Is a House a Castle?*, 9 CONN. L. REV. 110 (1976) (although courts may use broad defense of habitation language, decisions are generally based on the doctrine of self-defense); 1 W. LAFAVE & A. SCOTT, *SUBSTANTIVE CRIMINAL LAW* § 5.9(b) (1986) (the broad defense of habitation rule has generally not been used by courts).

21. An early Vermont court explained defense of habitation by comparing it to self-defense. *State v. Patterson*, 45 Vt. 308 (1873).

The sense in which the house has a peculiar immunity, is, that it is sacred for the protection of his person, and of his family. An assault on the house can be regarded as an assault on the person, only in case the purpose of such assault be injury to the person of the occupant, or members of his family, and in order to accomplish this, the assailant attacks the castle, in order to reach the inmate.

*Id.* See also, *People v. Ceballos*, 12 Cal. 3d 470, \_\_\_, 526 P.2d 241, 249, 116 Cal. Rptr. 233, 239-40 (1974) (mechanical device could not be used in defense of habitation where dweller was not home and thus not threatened with great bodily harm); *Crawford v. State*, 231 Md. 354, 190 A.2d 538, 542 (1963) (noting the rules regarding the defense of one's dwelling "are generally similar" to self-defense principles); *State v. Schaefer*, 295 S.E.2d 814, 817-18 (W. Va. 1982) (stating where a person lives is their castle while discussing self-defense and defense of family).

22. 2 W. LAFAVE & A. SCOTT, *SUBSTANTIVE CRIMINAL LAW* § 5.7(b) (1986); see also *Bray v. State*, 16 Ala. App. 433, 78 So. 463, 464 (1918) (unless the defendant reasonably believed death or serious bodily injury was threatened, deadly force to repel a trespasser was not justified); *State v. Ivicsics*, 604 S.W.2d 773, 777 (Mo. App. 1980) (deadly force may not be used in defense of habitation where personal assault is not likely to cause death or serious bodily harm); *State v. Miller*, 267 N.C. 409, \_\_\_, 148 S.E.2d 279, 281 (1966) (homicide is not justified if defendant uses excessive force in defending person or habitation).

23. ARK. STAT. ANN. § 41-508 provides that deadly force may be used in self-defense or when a person "reasonably believes the use of such force is necessary to prevent the commission of arson or burglary by a trespasser"; GA. CODE ANN. § 26-903 (Harrison 1983) provides that deadly force may be used to prevent or terminate an entry made "in a violent and tumultuous manner" so that the person believes personal violence is threatened or when the entry is made "for the purpose of committing a felony;" MONT. CODE ANN. § 45-3-103 (1987) and UTAH CODE ANN. § 76-2-405 (1978) are similar to the Georgia statute.

## 2. Civil liability for defense of dwelling

In addition to criminal liability for the use of force in protection of the home civil liability may arise if the defender's conduct was not reasonable.<sup>24</sup> Under the Restatement (Second) of Torts, deadly force may be used to prevent or terminate an intrusion when the "actor reasonably believes that the intruder, unless expelled or excluded, is likely to cause death or serious bodily harm. . . ."<sup>25</sup> Use of deadly force is also privileged to prevent a felony of the type which threatens death or serious bodily injury, or which involves breaking and entering a dwelling.<sup>26</sup> Further, no duty to retreat exists when an attack upon a person occurs in the dwelling.<sup>27</sup>

The Restatement principles mirror the criminal defense of habitation principles. Perhaps for this reason courts have generally held that the criminal defense applies as well to a civil action.<sup>28</sup> Therefore, if the homeowner reasonably believes that use of deadly force is necessary to protect the home or its occupants from a felony or serious bodily injury, civil liability should not attach.

### III. OKLAHOMA'S SELF-DEFENSE AND DEFENSE OF DWELLING LAW

#### A. *History of Self-defense and Defense of Dwelling*

##### 1. Criminal liability for defense of dwelling

In Oklahoma, self-defense and defense of dwelling law are quite similar. No duty to retreat exists whether the attack occurs inside or outside

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24. See Annotation, *Civil Liability for Use of Firearm in Defense of Habitation or Property*, 100 A.L.R.2d 1021, 1025 (1965). While the governing principle is reasonableness, each case must be determined on its facts. However, "[t]he courts are nearly unanimous . . . that a person acting under the reasonable belief that his home is about to be invaded by an intruder may use a firearm in defense thereof without incurring civil liability." *Id.* at 1025.

25. RESTATEMENT (SECOND) OF TORTS § 79 (1965).

26. *Id.* at § 143(2).

27. *Id.* at § 65.

28. See *Evans v. Hughes*, 135 F. Supp. 555 (D.C.N.C. 1955) (defendant not criminally liable on the basis of self-defense is also not civilly liable); *Nakashima v. Takase*, 8 Cal. App. 2d 35, \_\_, 46 P.2d 1020, 1022 (1935) (California's justifiable homicide statute discussed in death action where circumstances were sufficient to "exonerate defendant from any civil or criminal liability"); *Hamilton v. Howard*, 234 Ky. 321, \_\_, 28 S.W.2d 7, 10 (1930) (defense of habitation not applicable in action for damages for assault and battery where defendant followed victim from house and shot him 250 yards from house); *Smith v. Delery*, 238 La. 180, \_\_, 114 So. 2d 857, 858-59 (1959) (defendant's shooting of fourteen-year-old newspaper boy justified in action for damages because defendant acted as a "reasonable and prudent man in the belief that he and his family were in immediate danger"); *Anderson v. Jenkins*, 220 Miss. 145, \_\_, 70 So. 2d 535, 537-38 (Miss. 1954) (defendant liable for damages when he shot teen-age trespasser despite prior warning).

of the home.<sup>29</sup> Oklahoma courts' statements of the law of self-defense and defense of dwelling are often interrelated or identical.<sup>30</sup> In codifying the law, defense of dwelling was not set out under a separate statute, but was included within the statutes addressing self-defense and justifiable homicide.<sup>31</sup>

Oklahoma's justifiable homicide statute is divided into three sections, each addressing types of situations where deadly force may be used.<sup>32</sup> First, a homicide is justifiable to resist murder or a felony upon the person or upon or in his house if he is present.<sup>33</sup> Second, a homicide is justifiable when the defender reasonably believes imminent danger of a felony or design to do great personal harm to him, his family, or servants exists.<sup>34</sup> Finally, a homicide is justifiable when trying to apprehend a felon, to suppress a riot, or to keep the peace.<sup>35</sup>

The present justifiable homicide statute was in effect in 1914 when the Oklahoma Court of Criminal Appeals discussed whether a duty to retreat existed.<sup>36</sup> Self-defense law was applied when the owner of a "joint" shot and killed a man after they argued over a card game.<sup>37</sup> The

29. *Fowler v. State*, 8 Okla. Crim. 130, 126 P. 831 (1912); *Mulkey v. State*, 5 Okla. Crim. 75, 113 P. 532 (1911); *Turner v. State*, 4 Okla. Crim. 164, 111 P. 988 (1910); *Mahaffey v. Territory*, 11 Okla. 213, 66 P. 342 (1901), *rev'd on other grounds*, 13 Okla. 466, 74 P. 901 (1903).

30. *See Collegenia v. State*, 9 Okla. Crim. 425, 132 P. 375 (1913); *Armstrong v. State*, 11 Okla. Crim. 159, 143 P. 870 (1914).

31. OKLA. STAT. tit. 21, § 733 (1981) provides:

Homicide is also justifiable when committed by any person in either of the following cases:

1. When resisting any attempt to murder such person, or to commit any felony upon him, or upon or in any dwelling house in which such person is; or,

2. When committed in the lawful defense of such person, or of his or her husband, wife, parent, child, master, mistress, or servant, when there is a reasonable ground to apprehend a design to commit a felony, or to do some great personal injury, and imminent danger of such design being accomplished; or,

3. When necessarily committed in attempting, by lawful ways and means, to apprehend any person for any felony committed; or in lawfully suppressing any riot; or in lawfully keeping and preserving the peace.

*Id.* OKLA. STAT. tit. 21, § 643 (1981) also addresses the use of force in self-defense:

To use or attempt to offer to use force or violence upon or toward the person of another is not unlawful in the following cases:

3. . . . When committed either by the party about to be injured, or by any other person in his aid or defense, in preventing or attempting to prevent an offense against his person, or any trespass or other unlawful interference with real or personal property in his lawful possession; provided the force or violence used is not more than sufficient to prevent such offense.

32. OKLA. STAT. tit. 21, § 733 (1981).

33. *Id.*

34. *Id.*

35. *Id.*

36. *See Armstrong v. State*, 11 Okla. Crim. 159, 143 P. 870, 872 (1914).

37. *Fowler v. State*, 8 Okla. Crim. 130, 126 P. 831 (1912).

defendant was convicted of manslaughter in the first degree and appealed alleging error in the self-defense instructions.<sup>38</sup> In condemning the instructions requiring the defendant to retreat, the court discussed development of the duty to retreat. According to the court, retreat to the wall was required under the old common law. In America, however, the law provided a wall of rights. This wall of rights was always at a defender's back and thus allowed self-defense without the duty to retreat.<sup>39</sup>

In *Collegenia v. State*,<sup>40</sup> the Oklahoma Court of Appeals discussed defense of dwelling principles as well as self-defense principles.<sup>41</sup> The defendant was accused and convicted of killing a peace officer. Evidence revealed, however, that the attack occurred in or around the defendant's home, and that the peace officer was not necessarily justified in his assault on the defendant. On appeal, the defendant argued that the court's failure to instruct the jury regarding justifiable homicide in self-defense was reversible error.<sup>42</sup> The court cited early English authorities and stated that the domicile could be defended from unlawful attack, and that the defense could consist of deadly force if a felony was threatened. However, the court recognized that deadly force would not be justified unless a felony was involved and the danger was imminent.<sup>43</sup>

Oklahoma's self-defense and defense of dwelling law also requires that the defender's belief in danger of serious bodily injury or imminent death be reasonable. In *Jamison v. State*,<sup>44</sup> the Oklahoma Court of Criminal Appeals examined the two views which addressed the defender's belief that danger was imminent. Under one view, an honest belief justified

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38. *Id.* at 833.

39. *Id.* The court stated:

Under the old common law, no man could defend himself until he had retreated, and until his back was to the wall; but this is not the law in free America. Here the wall is to every man's back. It is the wall of his rights; and when he is at a place where he has a right to be, and he is unlawfully assailed, he may stand and defend himself; and cases sometimes arise in which he has the right, when unlawfully assailed, to advance and defend himself until he finds himself out of danger.

40. 9 Okla. Crim. 425, 132 P. 375 (1913).

41. *Id.* at 379-80.

42. *Id.* at 378, 381.

43. *Id.* at 379. The value of human life was recognized when the court stated its view of the law regarding self-defense and defense of dwelling:

The law in its humanity will not justify the taking of life to repel a mere trespass or invasion of the home without felonious intent or in resisting a nonfelonious assault; but a man who is without fault may repel force with force in defense of his person, habitation, or property against any one or many who manifestly intend and endeavor with violence to commit a felony thereon or therein. In such case he is not compelled to retreat, but may pursue his adversary until he finds himself out of danger, and, if in the conflict between them he happens to kill him, such killing is justifiable.

*Id.* at 379-80.

44. 35 Okla. Crim. 302, 250 P. 548 (1926).



the killing, but under the other view, a reasonable belief was required.<sup>45</sup> The court indicated that Oklahoma had adopted the majority view requiring a reasonable belief. The court stated that "the apprehension of danger and belief of necessity which will justify killing in self-defense must be a reasonable apprehension and belief, such as a reasonable man would, under the circumstances, have entertained."<sup>46</sup> Although the circumstances are to be considered from the defendant's point of view at the time of the killing, the killing is justified only if a reasonable man would have believed danger of death or serious bodily injury was imminent.<sup>47</sup> Therefore, cowardice or unreasonable fear will not justify the killing.<sup>48</sup>

## 2. Civil liability for defense of dwelling

The Oklahoma Supreme Court has recognized that criminal self-defense principles may influence the determination of the reasonableness of a defendant's conduct in a civil suit for wrongful death.<sup>49</sup> In a civil suit, the duty of care owed to the victim must first be determined. Under the common negligence standard, the defendant may owe the victim an "affirmative duty to exercise ordinary care."<sup>50</sup> If the victim is a trespasser, however, the "applicable test of defendant's liability [is] whether his conduct amounted to intentional harm or willful or wanton injury."<sup>51</sup>

In *Foster v. Emery*,<sup>52</sup> the defender feared more than a simple trespass on his property because of past incidents of "prowling and window-peeping."<sup>53</sup> Even though the trespasser had invaded the curtilage of the home, the court only discussed self-defense and defense of others.<sup>54</sup> The court found that use of deadly force, unavailable where simple trespass is involved, may result in civil liability "only if, in view of [defendant's] 'mental state', his conduct was 'so unreasonable and dangerous' as to charge him with knowledge that his acts would 'in all common

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45. *Id.* at 550.

46. *Id.*

47. *Id.* at 551.

48. *Id.*

49. *Foster v. Emery*, 495 P.2d 390, 394 (Okla. 1972).

50. *Id.* at 392.

51. *Id.*

52. 495 P.2d 390 (Okla. 1972).

53. *Id.* at 394.

54. *Id.* The curtilage is the area that immediately surrounds the dwelling. While defense of habitation principles apply to attacks occurring in the curtilage of a dwelling, the defense is not applicable where no felony is attempted or bodily harm threatened. The trespass must be suffered and redress sought in the law. *Turpen v. State*, 89 Okla. Crim. 6, 204 P.2d 298 (1949).

probability' result in injury."<sup>55</sup> The court upheld instructions that generally reflected the self-defense principles of Oklahoma's Criminal Code.<sup>56</sup>

### B. *The New Law as Proposed*

On February 12, 1987, Senate Bill No. 122 was introduced to the Oklahoma Legislature.<sup>57</sup> The bill as introduced provided that an occupant of a dwelling could use physical force, including deadly force against an intruder when the occupant reasonably believed that the intruder had committed or intended to commit a crime or believed that the intruder intended to use even a slight amount of physical force against the occupant.<sup>58</sup> The bill also provided criminal and civil immunity from liability.<sup>59</sup> This would have been a significant departure from existing Oklahoma defense of dwelling law in several aspects: (1) the crime committed in the dwelling would have been reduced from a felony to any crime or even a suspected crime, (2) the threatened force to justify homicide would have been reduced from a danger of death or serious bodily injury to any force, however slight, and (3) the defender would have been immune from criminal liability rather than having an affirmative defense.<sup>60</sup>

The bill also included a proposal to amend Oklahoma's justifiable

55. 495 P.2d at 394. This conduct would then meet the legal standard of "wanton." *Id.* at 392-93.

56. *Id.* at 394-95; see also *Thweatt v. Ontko*, 814 F.2d 1466 (10th Cir. 1987) (Oklahoma's criminal law regarding self-defense and defense of others applied in civil suit; defendant's violation of city ordinance prohibiting discharging firearms within 600 feet of a residence not negligence per se).

57. S. 122, 41st Leg., 1st Sess. (1987) (as introduced). The bill as introduced stated:

SECTION 1. NEW LAW A new section of law to be codified in the Oklahoma Statutes as Section 1289.25 of Title 21, unless there is created a duplication in numbering, reads as follows:

A. The Legislature hereby recognizes that the citizens of the State of Oklahoma have a right to expect absolute safety within their own homes.

B. Any occupant of a dwelling is justified in using any degree of physical force, including but not limited to deadly force, against another person who has made an unlawful entry into that dwelling, and when the occupant has a reasonable belief that such other person has committed a crime in the dwelling in addition to the unlawful entry, or is committing or intends to commit a crime against a person or property in addition to the unlawful entry, and when the occupant has a reasonable belief that such other person might use any physical force, no matter how slight, against any occupant of the dwelling.

C. Any occupant of a dwelling using physical force, including but not limited to deadly force, pursuant to the provisions of subsection B of this section, shall be immune from criminal prosecution for the reasonable use of such force and shall be immune from any civil liability for injuries or death resulting from the reasonable use of such force.

SECTION 2. This act shall become effective November 1, 1987.

58. *Id.*

59. *Id.*

60. Compare S. 122, 41st Leg., 1st Sess. (1987) (as introduced) with OKLA. STAT. tit. 21 § 733 (1981).

homicide statute.<sup>61</sup> The most significant change proposed that homicide would be justified when the defender reasonably believed "personal injury" rather than "great personal injury" was threatened. Although the bill met with strong opposition during House debate,<sup>62</sup> the measure passed by a vote of seventy to twenty-six.<sup>63</sup>

Recognizing that existing Oklahoma law adequately provided for self-defense and defense of the home, Governor Bellmon refused to sign the bill.<sup>64</sup> Bellmon indicated that several serious issues were raised by the bill: (1) limitation of a wrongful death action under the civil immunity provision violated the Oklahoma Constitution, (2) jury determination of justifiable homicide airs the facts and is preferable to immunity from criminal prosecution, and (3) civilized society does not condone killing when only slight physical force is threatened. Deeply critical of the bill, Bellmon stated that "[t]he only people this bill 'makes the day' for are potential murderers and their defense attorneys."<sup>65</sup>

### C. *Changes Under the New Law as Enacted*

#### 1. Changes in the criminal law

Although narrower than the vetoed proposal, Oklahoma's new defense of habitation law as enacted significantly changes the criminal law regarding defense of habitation. Under existing statutory and case law, deadly force may be used only when necessary to prevent a felony or when serious bodily injury or death is threatened.<sup>66</sup> The new law provides that deadly force may be used against an intruder who has unlawfully entered the dwelling as long as the "occupant has a reasonable belief that such other person might use any physical force, no matter how

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61. S. 122, 41st Leg., 1st Sess. (1987) (Committee Substitute).

62. OKLAHOMA LEGISLATIVE REPORTER, at 4-5 (April 10, 1987). Opposition to the bill was generated by accounts that a similar Colorado law had not had the intended result of protecting homeowners. Legislators expressed fears that the law would result in "wholesale killing," "open season on [Oklahoma] citizens," "hot-headed people" getting away with murder, and policeman being killed with the killer going free. *Id.* at 5.

63. *Id.*

64. Objections Resulting in Veto of Senate Bill 122. Governor Bellmon cited *Mulky v. State*, 5 Okla. Crim. 75, 113 P. 532 (1911) (sic); *Adams v. State*, 93 Okla. Crim. 333, 228 P.2d 195 (1951); *Anderson v. State*, 90 Okla. Crim. 1, 209 P.2d 721 (1949); and *Terhune v. State*, 530 P.2d 557 (Okla. Crim. 1974) for the proposition that Oklahoma's present law adequately provides for self-defense and protection of the home. The Governor believed the "criminal element of our society" could abuse the law. *Id.*

65. *Id.*

66. See *supra* notes 29-48 and accompanying text.

slight, against any occupant of the dwelling."<sup>67</sup> Should a criminal prosecution arise "from the reasonable use of such force," the occupant will have an affirmative defense.<sup>68</sup> The affirmative defense is similar to the previous criminal law.

## 2. Changes in civil liability

The law as enacted provides for immunity from civil liability for the reasonable use of force under the new standard set out in the statute.<sup>69</sup> Oklahoma courts previously determined the reasonableness of an alleged tortfeasor's conduct by considering standards of self-defense as set out in the Oklahoma Criminal Code.<sup>70</sup> However, under the new standard for determining reasonableness of conduct, the alleged tortfeasor need only show a reasonable belief that the intruder might use even slight physical force.<sup>71</sup>

While the legislature may lower the standard of what constitutes reasonable conduct, the civil immunity from a wrongful death action presents a constitutional question. The Oklahoma Constitution prohibits legislative acts that abrogate "[t]he right of action to recover damages for injuries resulting in death."<sup>72</sup> This provision has been interpreted to mean that "the legislature . . . may not withdraw, take away, annul, or repeal the provisions of [the wrongful death statute],"<sup>73</sup> and that "the right of action . . . is the right to effectively pursue a remedy."<sup>74</sup> This statute's provision for immunity from civil liability arguably "takes away" a "victim's right to effectively pursue a remedy" that had existed before the statute was enacted. Therefore, the constitutionality of the statute can be seriously questioned.

## IV. RECOMMENDATION

### A. "Make My Day" Provision Regarding Criminal Liability Should Be Repealed

Oklahoma's previous law provided adequate protection from criminal liability for those who reasonably used deadly force in defense of their

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67. H. 1511, 41st Leg. 1987 Okla. Sess. Law. Serv. 205 (West).

68. *Id.*

69. *Id.*

70. *See supra* notes 49-56 and accompanying text.

71. H. 1511; 41st Leg. 1987 Okla. Sess. Law. Serv. 205 (West).

72. OKLA. CONST. art. 23, § 7.

73. *F.W. Woolworth Co. v. Todd*, 204 Okla. 532, 535, 231 P.2d 681, 684 (1951).

74. *Roberts v. Merrill*, 386 P.2d 780, 783 (Okla. 1963).

dwelling and its occupants. Governor Bellmon recognized this when he vetoed the initial "Make My Day" proposal. He stated that existing law offered adequate protection and that few homeowners were prosecuted for defending their homes.<sup>75</sup>

An inherent tension exists between a person's right to protect the home, and the sanctity of human life. This tension was reflected in previous Oklahoma law because the homeowner was justified in using deadly force when harm was threatened<sup>76</sup> but not against a mere trespasser.<sup>77</sup> In vetoing the earlier version of the law, Governor Bellmon stated that "allowing killing for slight personal injury is contrary to standards of civilized society."<sup>78</sup> The law as enacted, however, favors the person's right to protect the home over the sanctity of human life by allowing killing when "any physical force, no matter how slight," *might* be used.<sup>79</sup> Thus, the new law's omission of any proportionality requirement makes it subject to abuse. For example, a large man could shoot an unarmed person much smaller and of no physical threat to him whatsoever. For these reasons, the portion of the law changing the criminal law regarding defense of habitation should be repealed.

B. *"Make My Day" Provision Regarding Civil Immunity is a Necessary Tort Reform*

Civil immunity from liability provides a homeowner who has been exonerated from criminal charges with much-needed protection. The defendant should be immune from civil liability if criminal charges for the act are not filed or if he is exonerated in criminal proceedings. Under present law, the victim may bring a civil suit whether or not criminal charges have been filed.<sup>80</sup> The defender is faced with two potentially costly options—the suit may be settled or defended. Because courts look to the criminal law to help determine the reasonableness of the defender's conduct,<sup>81</sup> if that conduct has been found to be reasonable under criminal law, the defender's assets should not be threatened with a civil suit. The victim's use of the law creates a lawsuit with nuisance value, forcing the defender to settle or to pay attorney's fees. Even if such immunity in

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75. Objections Resulting in Veto of Senate Bill 122.

76. See *supra* notes 30-50 and accompanying text.

77. *Turpen v. State*, 89 Okla. Crim. 6, 204 P.2d 298 (1949); *Hovis v. State*, 83 Okla. Crim. 299, 176 P.2d 833 (1947).

78. Objections Resulting in Veto of Senate Bill 122.

79. H. 1511, 41st Leg. 1987 Okla. Sess. Law Serv. 205 (West).

80. See *Foster v. Emery*, 495 P.2d 390, 391 (Okla. 1972).

81. *Id.* at 394.

a wrongful death action is found to be unconstitutional,<sup>82</sup> a constitutional amendment could cure this problem. Characterized as a tort reform measure, the "Make My Day" provision providing immunity from civil liability should be maintained. However, exoneration from criminal liability should be based on the statutory law and case law in existence before the "Make My Day" law was passed.

#### V. CONCLUSION

The changes effected in the criminal law by the new "Make My Day" law raise many philosophical questions on the value of human life, as well as many legal questions regarding self-defense and defense of dwelling law. Because previously existing criminal law adequately protected homeowners and because the new law is subject to abuse, the "Make My Day" criminal liability provision should be repealed. The provision of the law that provides homeowners with immunity from civil liability, however, provides needed protection and should remain in effect, but should be based on the criminal law previously in existence.

*Donna Smith*

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82. See *supra* notes 72-74 and accompanying text.

