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## Shooting from the Hip: Missouri's New Approach to Defense of Habitation

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## SHOOTING FROM THE HIP: MISSOURI'S NEW APPROACH TO DEFENSE OF HABITATION

### INTRODUCTION

In 2007, the 94th General Assembly of the State of Missouri enacted Senate Bills 62 and 41, expanding the justified use of deadly force in defense of habitation.<sup>1</sup> While the defense of habitation could only be used in limited circumstances both at common law and when originally encoded into statute,<sup>2</sup> deadly force could now be used against anyone unlawfully entering or remaining upon an occupant's premises, seemingly regardless of the trespasser's intent to commit a crime therein.<sup>3</sup> Merging the defense of habitation with the self-defense statute, the Missouri legislature demolished the defense of habitation's long-standing distinction from self defense by conflating the harms to be protected against<sup>4</sup> and extending defense of habitation even after entry has been achieved.<sup>5</sup>

In 2010, the Missouri House of Representatives passed a further and even more unusual extension to the defense of habitation statute.<sup>6</sup> Effective August 28, 2010, a person can use deadly force against those unlawfully entering or remaining not only in his residence, car, or dwelling, including any building, inhabitable structure, tent, or conveyance which is temporary, permanent, mobile or immobile, as provided already,<sup>7</sup> but also on his private property.<sup>8</sup>

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1. S.B. 62 & 41, 94th Gen. Assemb., 1st Reg. Sess. (Mo. 2007).

2. *See* MO. REV. STAT. § 563.036.2(2) (Supp. 1977) (allowing deadly force to be used in defense of habitation only when the homeowner has reasonable belief that the intruder intends to commit arson or burglary).

3. "A person may not use deadly force upon another person under the circumstances specified in subsection 1 of this section unless: . . . (2) Such force is used against a person who unlawfully enters, remains after unlawfully entering, or attempts to unlawfully enter a dwelling, residence, or vehicle lawfully occupied by such person." MO. REV. STAT. § 563.031.2(2) (Supp. 2007).

4. *See, e.g.*, *State v. Ivicsics*, 604 S.W.2d 773, 777 (Mo. Ct. App. 1980) (holding that self defense protects against danger of personal harm while defense of habitation protects against danger of entry).

5. *See State v. Brookshire*, 353 S.W.2d 681, 692 (Mo. 1962) (finding the doctrine of defense of habitation inapplicable after the trespasser has crossed the threshold into the house).

6. H.B. 1692, 1209, 1405, 1499, 1535 & 1811, 95th Gen. Assemb., 2d Reg. Sess. (Mo. 2010).

7. S.B. 62 & 41, 94th Gen. Assemb., 1st Reg. Sess. (Mo. 2007).

8. MO. REV. STAT. § 563.011(6) (Supp. 2010); H.B. 1692, 1209, 1405, 1499, 1535 & 1811, 95th Gen. Assemb., 2d Reg. Sess. (Mo. 2010).

The House Bill, thus, effectively extends the occupant's justified use of deadly force from his house or car to his property's limits.<sup>9</sup>

While political rhetoric asserting a homeowner's right to defend his turf, stand his ground and protect his castle made for an easy passage of these bills,<sup>10</sup> there remain some ambiguities and possible inconsistencies in the statute, creating potential confusion in applying the new law. This Comment will trace the history of defense of habitation through the common law to the case law and statutory amendments currently in place in Missouri. Based on analysis of the current statutes recently enacted, the Comment will also make recommendations for possible revisions to make the statues and application of defense of habitation less ambiguous.

### I. A HISTORY OF DEFENSE OF HABITATION

Because the common law placed greater value on the preservation of human life than on any property, the laws of defense of property and defense of habitation did not allow deadly force to be used unless there was some additional threat other than trespass or larceny.<sup>11</sup> At common law, therefore,

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9. See H.B. 1692, 1209, 1405, 1499, 1535 & 1811, 95th Gen. Assemb., 2d Reg. Sess. (Mo. 2010); S.B. 62 & 41, 94th Gen. Assemb., 1st Reg. Sess. (Mo. 2007). As will be discussed later, the 2010 House Bill also introduced a rebuttable presumption that the defender's use of deadly force was reasonable and necessary. However, that presumption only applies to the dwelling, residence, or vehicle, not to the 2010 extension to private property. See *infra* Part IV.C.

10. See Andrew Denney, *Omnibus bill in Missouri would expand Castle Doctrine*, MO. LAW. WKLY., Apr. 18, 2010, at 3 ("The House approved the bill 130–21 in late March."); *House Rollcall on 03/16/2010*, MO. DIGITAL NEWS, [http://www.mdn.org/2010/FORMS/VIEWVOTE.HTM?ne\\_year=2010&ne\\_vote=979](http://www.mdn.org/2010/FORMS/VIEWVOTE.HTM?ne_year=2010&ne_vote=979) (last visited Mar. 14, 2012) (vote in House was 130 to 22); *Missouri Governor Signs Important Pro-Gun Measures into Law*, NAT'L RIFLE ASS'N INST. FOR LEGIS. ACTION (July 14, 2010), <http://www.nraila.org/legislation/state-legislation/2010/7/missouri-governor-signs-important-pro-g.aspx?s=pro-gun%20measures&st=10489&ps=> (characterizing the bill as "expand[ing] Missouri's 'Castle Doctrine' protections to any property boundaries one leases or owns[,] which it considered 'a victory and important advancement for gun rights in Missouri'"); *Missouri Governor Signs Castle Doctrine, Hunting Preservation Bills Into Law*, NAT'L RIFLE ASS'N INST. FOR LEGIS. ACTION (July 6, 2007), <http://www.nraila.org/hunting/issues-and-alerts/2007/missouri-governor-signs-castle-doctrine.aspx?s=castle&st=10489&ps=> (describing the Senate Bill as one of the "NRA-ILA's top legislative priorities"); *Vote on Missouri's Castle Doctrine Legislation Could Happen At Any Time!*, NAT'L RIFLE ASS'N INST. FOR LEGIS. ACTION (May 2, 2007), <http://www.nraila.org/legislation/state-legislation/2007/5/vote-on-missouri%20castle-doctrine-legislation.aspx?s=castle%20doctrine%20legislation&st=10489&ps=> (reporting that the House passed the bill by a vote of 154 to 6).

11. WILLIAM L. CLARK & WILLIAM L. MARSHALL, A TREATISE ON THE LAW OF CRIMES 291 (Herschel B. Lazell ed., 2d ed. 1905) ("While a person cannot take another's life or inflict great bodily harm in defense of his property, except when it is necessary to prevent a felony attempted by violence or surprise, he may use any force short of this that may reasonably seem to be necessary in defense of his property, *real or personal*.")) (emphasis added).

defense of property was never sufficient in and of itself to justify the use of deadly force<sup>12</sup> because “the preservation of life has such moral and ethical standing in our culture and society, that the deliberate sacrifice of life merely for the protection of property ought not to be sanctioned by law.”<sup>13</sup> Defense of habitation, however, was and is different than mere defense of property because of the idea that “it is sacred for the protection of [a] person and of his family.”<sup>14</sup> Nevertheless, even at common law, the doctrine of defense of habitation “[did] not justify a homicide merely to prevent a trespass upon the habitation, when it is evident that there is no intention to commit a felony or to inflict great bodily harm upon an inmate.”<sup>15</sup> Rather, an inhabitant had to have a “*bona fide* and reasonable belief that the assailant intends a felony or great bodily harm to an inmate” in order for his use of deadly force to be justified.<sup>16</sup> So, while one claiming defense of habitation could use deadly force at common law, such force was justifiable only if the inhabitant could show that it was used to protect against a violent or forcible felony, not a mere trespass.<sup>17</sup>

The common law maxim that a man’s home is his castle<sup>18</sup> is often invoked today to justify the use of deadly force in defense of habitation. However, much of the rationale for allowance of such force at common law is no longer pertinent. For one, all common law felonies were punishable by either life imprisonment or death.<sup>19</sup> Thus, use of deadly force appeared more proportionate against a felony when such felony would be punishable by death

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12. Comment, *The Use of Deadly Force in the Protection of Property Under the Model Penal Code*, 59 COLUM. L. REV. 1212, 1214 (1959) (“The common-law rule clearly allows one in lawful possession of any property to use reasonable but not deadly force to protect that property, even when the taking or trespass is attempted under a claim of right.”).

13. *Continuation of Discussion of the Model Penal Code (Tentative Draft No. 8)*, 35 A.L.I. PROC. 274, 285–86 (1958).

14. CLARK & MARSHALL, *supra* note 11, at 410 n.527 (quoting *State v. Patterson*, 45 Vt. 308 (1873)).

15. *Id.* at 410; see also 4 WILLIAM BLACKSTONE, COMMENTARIES \*180 (“If any person . . . attempts to break open a house *in the night time*, (which extends also to an attempt to burn it,) and shall be killed in such attempt, the slayer shall be acquitted and discharged. This reaches not to any crime unaccompanied with force, . . . or to the breaking open of any house *in the day time*, unless it carries with it an attempt of robbery also.”); 3 EDWARD COKE, INSTITUTES OF THE LAW OF ENGLAND \*220 (“If it be found by verdict, that the party (indicted or appealed for the death of A) A attempted to have murdered or robbed him . . . in his mansion or dwelling house; or for the killing of him which attempteth burglary to break his dwelling house in the night; the judgment upon such a verdict shall be, that he shall be acquitted [sic] of the death of such a person.”).

16. CLARK & MARSHALL, *supra* note 11, at 410.

17. “[D]eadly force was allowed only if a forcible entry was made under such circumstances as to create a reasonable apprehension that it was the design of the assailant to commit a violent or forcible felony or to inflict serious bodily harm on the occupants.” Comment, *supra* note 12, at 1216.

18. *State v. Taylor*, 44 S.W. 785, 788 (Mo. 1898).

19. Comment, *supra* note 12, at 1217.

and when felonies were far more limited in number. Another rationale for the use of deadly force in defense of habitation at common law was that “law enforcement was largely in the hands of private citizens” at that time.<sup>20</sup> In modern society, with more numerous statutory felonies, less extreme punishment of such felonies, and greater access to law enforcement personnel, these justifications are less applicable.

Castle doctrine, not to be confused with defense of habitation, provided an exception to the duty to retreat when a person is in his own home.<sup>21</sup> At common law, a person was required to “retreat to the wall” before he could claim that the deadly force used against another was necessary.<sup>22</sup> Castle doctrine removed that retreat prerequisite to using deadly force if the person was at home because the law believed that retreating to the home was, essentially, retreating to the wall.<sup>23</sup> Of course, while retreat was not required, all other self-defense requirements remained.<sup>24</sup>

## II. MISSOURI’S CASE LAW ON DEFENSE OF HABITATION PRE-2007

One of Missouri’s oldest cases affirming the common law understanding of defense of habitation is *State v. Taylor*.<sup>25</sup> In *Taylor*, the defendant and the victim got into a fist-fight in the defendant’s home.<sup>26</sup> The defendant ejected the victim from his house, but the victim soon returned.<sup>27</sup> When a friend told him that the victim was outside his house, the defendant shouted, “I will kill the first one that comes in” and thereafter shot the victim when he entered.<sup>28</sup> At trial, the defendant asserted that he had a right to defend his dwelling against unlawful trespass.<sup>29</sup> Although the court recognized that the defendant had no duty to retreat in his own home,<sup>30</sup> it did not think that, just because the shooting occurred in the defendant’s house, his action was justifiable under the maxim that “every man’s house is his castle.”<sup>31</sup> In conformity with the

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20. *Id.* at 1221.

21. Stuart P. Green, *Castles and Carjackers: Proportionality and the Use of Deadly Force in Defense of Dwellings and Vehicles*, 1999 U. ILL. L. REV. 1, 9.

22. *Id.*

23. *Id.*

24. *Id.* at 7, 9.

25. *State v. Taylor*, 44 S.W. 785 (Mo. 1898).

26. *Id.* at 786.

27. *Id.*

28. *Id.*

29. *Id.*

30. *Taylor*, 44 S.W. at 789.

31. *Id.* (“When a person is attacked in his own house, he need retreat no further. . . . In this sense, and in this sense alone, are we to understand the maxim that ‘every man’s house is his castle.’ An assailed person . . . is not entitled . . . to kill his assailant . . .”)

common law, the court rejected the defendant's argument,<sup>32</sup> insisting that he was "not entitled . . . to kill his assailant unless he honestly and nonnegligently believe[d] that he [was] in danger of his life from the assault."<sup>33</sup> Basically, the court applied the normal requirement for using deadly force in self defense—that the defendant have a reasonable belief in an imminent threat of serious physical injury—and refused to make an exception merely because of the location of the crime at the defendant's house.<sup>34</sup> The court summed up a person's rights in using deadly force to defend his home, which essentially remained unchanged until 2007, by saying that a person "has no right to kill unless it becomes necessary to prevent a felonious destruction of his property or the commission of a felony therein, or to defend himself against a felonious assault against his life or person."<sup>35</sup>

In *State v. Brookshire*, a much later case, the court further clarified a homeowner's rights in defense of habitation by explaining that the defense of habitation is not applicable if the trespasser crosses the threshold of the house.<sup>36</sup> The victim in this case was threatening the defendant outside the defendant's home.<sup>37</sup> The court recognized that if force, even deadly force, had been used *at that point*, it may have been justified under defense of habitation because he "could reasonably have believed his life was in danger."<sup>38</sup> However, the defendant did not use any force until *after* the victim entered the house.<sup>39</sup> "The barrier had been crossed,"<sup>40</sup> and with that crossing, the defendant lost the right to claim defense of habitation: "Under the common law<sup>41</sup> of the defense of habitation defendant had no right to punish deceased for the unlawful entry already completed."<sup>42</sup> While the defendant lost the right to claim defense of habitation, he retained the right to argue self defense coupled

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32. *Id.* at 788. ("It is insisted by defendant that at common law one was justifiable in killing a mere trespasser upon his dwelling house. We do not so understand the sages of the law.")

33. *Id.* at 789.

34. *See id.*

35. *Taylor*, 44 S.W. at 789.

36. *State v. Brookshire*, 353 S.W.2d 681, 692 (Mo. 1962).

37. *Id.*

38. *Id.*

39. *Id.*

40. *Id.*

41. While the court did look to the common law to show that the defendant's right to claim defense of habitation extinguished on the victim's crossing the threshold, it also explicitly stated that "[t]he statutory definition of justifiable homicide, insofar as it pertains to a dwelling house, does not include all of the common law defense of habitation." *Brookshire*, 353 S.W.2d at 690. In *State v. Gardener*, 606 S.W.2d 236, 240 (Mo. Ct. App. 1980), the court recognized this point and further concluded that, although the common law defense of habitation may have included "curtilage," Missouri law did not. Thus, even though the defendant in *Gardener* was on her driveway, she had a duty to retreat to her "house proper" before she could use deadly force. *Id.*

42. *Brookshire*, 353 S.W.2d at 692.

with an instruction that he had no duty to retreat.<sup>43</sup> So, in addition to *Taylor*'s requirement that deadly force not be used unless the homeowner fears a felony will be committed on him or his property,<sup>44</sup> *Brookshire* points out that *no* force can be justified under defense of habitation unless it is used prior to "crossing the barrier" of the home.<sup>45</sup> Thus, after an intruder enters the house proper, a homeowner can only plead self defense, as the defense of habitation only applies to actions taken prior to the intruder's entrance into the home.<sup>46</sup>

In *State v. Ivicsics*, a 1980 case, the Eastern District Court of Appeals closely examined the state of defense of habitation in Missouri in finding that the defendant should have received such an instruction.<sup>47</sup> The defendant in *Ivicsics* was convicted of manslaughter for stabbing his brother, Robert.<sup>48</sup> The two brothers had been inside the defendant's trailer when they began arguing and fighting.<sup>49</sup> The defendant ordered Robert to leave, and when he failed to do so, a friend who was also present forcibly pushed him out.<sup>50</sup> Robert then ran to his car, reached under the seat, and turned to go back to the trailer.<sup>51</sup> The defendant believed that his brother was getting a gun from his car while the defendant was retrieving an old army bayonet from his room.<sup>52</sup> There was some dispute about where the stabbing took place—the state claimed ten to fifteen feet from the trailer, but the defendant claimed at the doorway of the trailer—but it was clear Robert was returning to continue the fight with the defendant.<sup>53</sup>

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43. *Id.*

44. *Taylor*, 44 S.W. at 789.

45. *Brookshire*, 353 S.W.2d at 692; *see also State v. Hashman*, 197 S.W.3d 119, 132 (Mo. Ct. App. 2006) (upholding first degree assault conviction and finding that the defendant was not entitled to a defense of premises instruction because at the time he used the deadly force, the victim had already entered the house); *State v. Hafeli*, 715 S.W.2d 524, 528 (Mo. Ct. App. 1986) ("When attacked in his own house . . . it is [a] question of the law of self-defense and not the law of defense of habitation which is involved."); *State v. Battle*, 625 S.W.2d 252, 254 (Mo. Ct. App. 1981) (holding that the defendant was not entitled to an instruction of defense of habitation when police entered his house, responding to domestic dispute call, because their entry was not unlawful and they had already entered the house when the defendant fired his rifle).

46. *Brookshire*, 353 S.W.2d at 692. Remember though, that although self defense alone, and not defense of habitation, is available to the defendant, the requirement of retreat is not necessary. *See id.* ("[W]hat protective action the occupant may take after the aggressor has effected his entry . . . is justifiable only under the usual rules of self-defense . . . except that there is no duty to retreat.").

47. *State v. Ivicsics*, 604 S.W.2d 773, 778 (Mo. Ct. App. 1980).

48. *Id.* at 775.

49. *Id.*

50. *Id.*

51. *Id.*

52. *Ivicsics*, 604 S.W.2d at 775.

53. *Id.*

At trial, the court gave an instruction on self defense, but failed to also give an instruction on defense of habitation, which the defendant claimed he was entitled to.<sup>54</sup> The court began its analysis comparing self defense and defense of habitation to determine whether an instruction on both self defense and defense of habitation was necessary, or whether the given instruction “adequately submit[ted] the defense of habitation.”<sup>55</sup> Because this was a case in which deadly force was used, the court considered both defenses in that context.<sup>56</sup>

At that time, “[s]elf defense grant[ed] a defender the privilege to use deadly force in the effort to defend himself *against personal harm* threatened by the unlawful act of another, if the defender has reasonable cause to believe that (1) there is immediate danger the threatened harm will occur, (2) the harm threatened is death or serious bodily injury and (3) deadly force is necessary to overcome the harm as reasonably perceived.”<sup>57</sup> In contrast, defense of habitation “grants a defender the privilege to use force<sup>58</sup> to defend his dwelling *against an unlawful entry*” rather than the danger of personal harm.<sup>59</sup> Thus, the harm to be avoided—harm against the person for self defense and harm of unlawful entry for defense of habitation—was different with the two justifications.

The other significant difference from the normal qualifications to using deadly force in self defense is that the defender need not retreat, even if feasible, before he uses deadly force when he is in his home.<sup>60</sup> However, other than having no duty to retreat and focusing on different acts to be prevented, that is, harm threatened against the person for self defense versus an unlawful entry for defense of habitation, all other elements must still be present: “The defense of habitation grants the lawful occupant of a dwelling the privilege to use deadly force to prevent an attempted unlawful entry into the dwelling, if the occupant had reasonable<sup>61</sup> cause to believe that (1) there is immediate

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54. *Id.* at 776.

55. *Id.*

56. *Id.*

57. *Ivicsics*, 604 S.W.2d at 776 (emphasis added) (citing *State v. Sanders*, 556 S.W.2d 75, 76 (Mo. Ct. App. 1977) and *State v. Jackson*, 522 S.W.2d 317, 319 (Mo. Ct. App. 1975)). The current self-defense statute was not codified until 1977 and did not become effective until 1979. See *infra* note 125 and accompanying text.

58. The force justified for mere unlawful entry is only non-lethal, reasonably necessary force, not deadly force, which can only be used if the homeowner fears a felony or seriously bodily injury from the intruder. *Ivicsics*, 604 S.W.2d at 776–77.

59. *Id.* at 776 (emphasis added) (quoting *State v. Brookshire*, 353 S.W.2d 681, 690 (Mo. 1962)).

60. *Id.* at 777. This no-duty-to-retreat rule also applies to self defense, though, as long as the defender is in his home proper when defending himself.

61. See *State v. Lumpkin*, 850 S.W.2d 388, 392 (Mo. Ct. App. 1993) (pointing out that the defendant’s belief must be *objectively reasonable*: “It is not sufficient solely that the defendant

danger the entry will occur, (2) the entry is being attempted for the purpose of killing or inflicting serious bodily harm on the occupant and (3) deadly force is necessary<sup>62</sup> to prevent the unlawful entry.”<sup>63</sup> Thus, in comparing the self-defense test with that of defense of habitation, the primary difference is that with defense of habitation the “protective acts [can] be taken earlier than they otherwise would be authorized.”<sup>64</sup>

The court in *Ivicsics* recognized that some other jurisdictions had a broader defense of habitation doctrine that allowed the homeowner to use deadly force even against a non-deadly personal attack.<sup>65</sup> These other jurisdictions justified a more expansive defense of habitation relying on the often-used rationale that a dwelling is “a place of refuge in which the occupant may expect to be free from personal attack even of a non-deadly character.”<sup>66</sup> However, the Missouri court explicitly rejected adopting such a doctrine, asserting that “our courts have consistently refused to extend the privilege of using deadly force to prevent an entry attempted for the mere purpose of making a personal assault which is neither intended nor likely to kill or to inflict serious bodily harm.”<sup>67</sup> In rejecting this broader doctrine of defense of habitation, the court concluded that “defense of habitation is nothing more than accelerated self defense, and the difference between the two defenses is a function of time and space.”<sup>68</sup>

After clarifying the true distinctions between self defense and defense of habitation, the court returned to the question on appeal: whether the defendant should have been given an instruction of defense of habitation.<sup>69</sup> Despite the substantial similarities between the doctrines, the court held that the trial court’s failure to give a defense of habitation instruction was prejudicial error.<sup>70</sup> Although the difference between the two defenses was one of “time and space,”<sup>71</sup> that difference significantly changed the focus for the jury: in self defense, the defendant must wait to use deadly force until the danger of harm from personal attack is imminent while defense of habitation requires only

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believed in his or her own mind that the other person was attempting to enter the premises to commit burglary; the belief must also be objectively reasonable.”).

62. See *State v. Dulaney*, 989 S.W.2d 648, 650 (Mo. Ct. App. 1999) (suggesting that failure to remain in your home and call the police where possible will destroy the necessity element and prevent a defense of premises instruction).

63. *Ivicsics*, 604 S.W.2d at 777.

64. *Id.* (quoting *Brookshire*, 353 S.W.2d at 692).

65. *Id.* at 776 (citing *Leverette v. State*, 122 S.E.2d 745, 746–47 (Ga. Ct. App. 1961); *People v. Eatman*, 91 N.E.2d 387, 389–90 (Ill. 1950)).

66. *Id.*

67. *Id.* at 777.

68. *Ivicsics*, 604 S.W.2d at 777.

69. *Id.* at 778.

70. *Id.*

71. *Id.*

danger of immediate unlawful entry.<sup>72</sup> So, “[a]s long as the evidence shows the intruder has not entered the dwelling, an instruction defining the defense of habitation must be given so the jury can focus on the immediacy of the danger of the entry rather than on the immediacy of the danger of the harm.”<sup>73</sup> Interestingly, the court notes that these two defenses of self defense and defense of habitation may merge at the point when “the defender is immediately adjacent to the doorway,” and an instruction of either self defense or defense of habitation would suffice.<sup>74</sup> However, since such a determination is “abstract and theoretical,” a court should not be allowed to decide if the merger did occur and must give an instruction of both in such a close case.<sup>75</sup> That situation was not present here though; because the defendant’s brother had not yet crossed the threshold into his trailer, the defendant was entitled to an instruction of defense of habitation.<sup>76</sup>

The next major examination of Missouri’s defense of habitation doctrine came in 2001 with *State v. Johnson*, heard by the Western District Court of Appeals.<sup>77</sup> *Johnson* addressed the situation that the *Ivicsics* court mentioned in dicta: when the doctrine of self defense and defense of habitation merge at the threshold of the defendant’s dwelling.<sup>78</sup> The defendant in *Johnson* lived with his wife and two daughters,<sup>79</sup> who, on the day of the shooting, were having a barbecue on the front porch.<sup>80</sup> His daughters had invited friends, Mr. Watkins and Mr. Taylor, whom the defendant disapproved of and asked to leave.<sup>81</sup> When, after the defendant’s wife told them they could stay, the two men remained, the defendant proceeded to lock all the windows and doors to the house, forbidding those inside to open the doors.<sup>82</sup> The defendant claimed that when he asked the boys to leave, he saw something that looked like a weapon stuffed in the back of Taylor’s pants.<sup>83</sup> Although the two men left, they returned shortly thereafter, at which point the defendant went to his bedroom and retrieved a gun.<sup>84</sup> The defendant then went onto the porch, showed the

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72. *Id.*

73. *Ivicsics*, 604 S.W.2d at 778.

74. *Id.*

75. *Id.*

76. *Id.* The court notes that the defendant would have been entitled to such an instruction even if he failed to request it. *Id.* at 776.

77. *State v. Johnson*, 54 S.W.3d 598 (Mo. Ct. App. 2001).

78. *Id.* at 603.

79. The defendant also lived with another “occasional resident,” who is irrelevant to this analysis. *Id.* at 599.

80. *Id.*

81. *Id.*

82. *Johnson*, 54 S.W.3d at 599–600.

83. *Id.*

84. *Id.*

boys his gun, asked them to leave again, and returned back into his house.<sup>85</sup> When the defendant thought he heard someone trying to open the screen door from the porch, he loaded the gun and opened the inside door to find Watkins standing in front of the screen door still dividing them.<sup>86</sup> Upset upon seeing the shotgun, Watkins threatened the defendant and grabbed for the screen door.<sup>87</sup> The two struggled for the door, and when the defendant heard what he thought was the slide chamber of a gun, he fired upon Watkins.<sup>88</sup> The jury convicted the defendant of second-degree murder.<sup>89</sup>

On appeal, Johnson demanded reversal for the trial court's failure to give a defense of habitation instruction.<sup>90</sup> Even though it appears the defendant did not request the instruction,<sup>91</sup> as an instruction on justifiable homicide, defense of habitation must be given whether or not requested.<sup>92</sup> The defendant met his "burden of injecting the issue" by merely presenting facts that would support it.<sup>93</sup> The State, looking to the dicta set forth in *Ivicsics*, argued that, although failure to give the instruction was error, it was harmless error because the two defenses of self defense and defense of habitation were "practically identical,"<sup>94</sup> especially since the jury was instructed that the defendant had no duty to retreat in his use of deadly force in this case.<sup>95</sup> Because, the State argued, defense of habitation is different from self defense only in that it creates no duty to retreat and allows protective acts to be taken earlier, there was no prejudice in a situation like the present one where the retreat rule was identical and the struggle, occurring at the doorway, effectively merged the two doctrines.<sup>96</sup> However, the court of appeals rejected this argument:

[T]he determination of the point in time and space that the two defenses merge is an abstract and theoretical determination. *The trial court should not . . . make this determination.* As long as the evidence shows the intruder has not

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85. *Id.*

86. *Id.*

87. *Johnson*, 54 S.W.3d at 600.

88. *Id.*

89. *Id.* at 599.

90. *Id.* at 600–01.

91. *Id.* at 605 ("It is difficult to fault the trial judge for failing to instruct on this defense when no one else, including defense counsel, realized that the instruction should have been given.").

92. *Johnson*, 54 S.W.3d at 601.

93. *Id.* (citing MO. APPROVED INSTRUCTIONS—CRIMINAL 3D § 306.10, n.2 (1995)); *see also* MO. REV. STAT. § 556.051 (2000) ("When the phrase 'The defendant shall have the burden of injecting the issue' is used in the code, it means (1) The issue referred to is not submitted to the trier of fact unless supported by evidence; and (2) If the issue is submitted to the trier of fact any reasonable doubt on the issue requires a finding for the defendant on that issue.").

94. *Johnson*, 54 S.W.3d at 601.

95. *Id.* at 602.

96. *Id.*

entered the dwelling, an instruction defining the defense of habitation must be given so the jury can focus on *the immediacy of the danger of the entry* rather than on *the immediacy of the danger of the harm.*<sup>97</sup>

Based on the defendant's testimony, the court found that he was trying to keep the two young men from entering his house, a clear signal for a defense of habitation instruction.<sup>98</sup> Focusing on *Ivicsics*'s mandate that "[a]s long as the evidence shows the intruder has not entered the dwelling, an instruction defining the defense of habitation must be given,"<sup>99</sup> rather than its reflection that at the doorway "either defense may suffice"<sup>100</sup> the court found that, despite the extreme similarity between the two doctrines in this fact pattern, failure to give a defense of habitation instruction was reversible and prejudicial error.<sup>101</sup> The court made clear, therefore, that the two defenses were to be kept separate, despite their similarities, because of the distinct difference in the harm to be prevented.<sup>102</sup>

In *Wright v. State*, the court made clear that there must be imminent danger of unlawful entry into *the dwelling itself*, not merely the *curtilage*.<sup>103</sup> The defendant and the victim in this case had a strained relationship, and the victim had, earlier that day, challenged the defendant to a fight.<sup>104</sup> While the defendant was at his girlfriend's house, the victim came over and repeatedly banged on the door, renewing his challenge to fight.<sup>105</sup> The defendant did not respond until the victim was walking back to his car, having already scaled the fence surrounding the property.<sup>106</sup> When the defendant shouted for the victim to leave, even though he was no longer on the property, the victim turned and began to walk toward the defendant.<sup>107</sup> Before he had even crossed the fence back into the yard, though, the defendant shot him three times.<sup>108</sup> His body was found *outside* the fenced area.<sup>109</sup>

The defendant argued that his counsel provided ineffective assistance,<sup>110</sup> in part because of a failure to request a defense of habitation instruction.<sup>111</sup> The

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97. *Id.* at 603 (emphasis added) (quoting *State v. Ivicsics*, 604 S.W.2d 773, 778 (Mo. Ct. App. 1980)).

98. *Id.* at 604.

99. *Johnson*, 54 S.W.3d at 605 (quoting *Ivicsics*, 604 S.W.2d at 778).

100. *Id.* at 603.

101. *Id.* at 605.

102. *Id.* at 603.

103. *Wright v. State*, 125 S.W.3d 861, 868 (Mo. Ct. App. 2003) (emphasis added). The "curtilage" in *Wright* is the area around the home enclosed by a fence. *Id.*

104. *Id.* at 865.

105. *Id.*

106. *Id.*

107. *Id.*

108. *Wright*, 125 S.W.3d at 865.

109. *Id.*

110. *Id.*

court rejected the defendant's argument, holding that counsel was not ineffective for failing to request the instruction because no evidence presented at trial supported such an instruction.<sup>112</sup> Distinguishing *Johnson*, the court believed no instruction on defense of habitation was necessary: "the victim in *Johnson* was shot while trying to gain direct entry into the defendant's home, not while standing outside a fence surrounding the *curtilage* of the premises supposedly protected."<sup>113</sup> Thus, just as previous courts had set the internal boundaries of defense of habitation at the doorway, this court set the external boundaries, holding that force used to protect the curtilage, rather than the house proper, would not be protected by this defense.<sup>114</sup>

The Missouri Supreme Court's most recent opinion on defense of habitation came in *State v. Avery*, where it found in 2003 that the trial court's failure to give a defense of habitation instruction was reversible error.<sup>115</sup> The Supreme Court's opinion did not change the law of defense of habitation in Missouri at all, nor did it address a new nuance of the law as it had in *Johnson*.<sup>116</sup> *Avery* did, however, clearly and concisely summarize the state of the defense of habitation doctrine in Missouri prior to the statutory changes made in 2007, which created a significant departure from the case law up to that point.<sup>117</sup>

The defendant lived in her boyfriend's house, while having an affair with the victim, Mr. Paris.<sup>118</sup> One evening, while her boyfriend was out of town, the defendant invited the victim back to her boyfriend's house.<sup>119</sup> However, after a call from her boyfriend, the defendant asked the victim to leave.<sup>120</sup> When he refused to leave, the defendant claimed that she became frightened

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111. *Id.* at 868.

112. *Id.*

113. *Wright*, 125 S.W.3d at 868 (emphasis added).

114. *Id.* In *State v. Goodine*, 196 S.W.3d 607, 613 (Mo. Ct. App. 2006), the court adopted this point even more explicitly by noting that, when defense of habitation is at issue, "'premises' is usually understood to constitute the house, or dwelling, and not broadly to include all of the defendant's property."

115. *State v. Avery*, 120 S.W.3d 196, 198 (Mo. 2003).

116. As discussed above, the nuance explored in *Johnson* was the merging of self defense and defense of habitation at the threshold of the dwelling. *State v. Johnson*, 54 S.W.3d 598, 603 (Mo. Ct. App. 2001).

117. It also was a significant departure from previous statutory law regulating defense of habitation. For a discussion on the statutory changes, see *infra* Part IV.

118. *Avery*, 120 S.W.3d at 198. Note that the defendant in this case presumably did not actually have a property interest in the house since it was her boyfriend's, not her own. *Id.* Still, the court concluded that she was entitled to the instruction because that is where she lived. *Id.* at 204. Thus, it seems that even before the 2007 amendment, those who occupied the dwelling had a right to invoke the defense of habitation, even if they did not own or lease the dwelling.

119. *Id.* at 199.

120. *Id.*

and retrieved a gun from the bedroom.<sup>121</sup> After seeing the weapon, the victim decided to leave.<sup>122</sup> Shortly thereafter, the defendant took her dog for a walk.<sup>123</sup> When she heard noises and saw someone approaching, the defendant ran back to her house in such haste that she forgot to shut the door behind her.<sup>124</sup> The victim had returned, and, upon seeing the gun pointed at him while he was in the doorway, became angry and approached.<sup>125</sup> While the facts are not entirely clear as to whether the victim had actually entered or not,<sup>126</sup> the court believed that there were sufficient facts to give an instruction and allow the jury to decide.<sup>127</sup>

The court began its analysis by acknowledging and reaffirming the case law that had already laid out the doctrine of defense of habitation as compared to self defense:

In Missouri, defense of premises is essentially accelerated self-defense because it authorizes protective acts to be taken earlier than they otherwise would be authorized, that is, at the time when and place where the intruder is seeking to cross the protective barrier of the house. Once the person enters the premises without resistance, the principles of self-defense apply.<sup>128</sup>

This is the basic and oft-repeated distinction between normal defense of habitation and self defense prior to the 2007 amendments.<sup>129</sup> The use of deadly force, as had been established by previous case law dating back to common law, could be used in defense of habitation “when a person reasonably believes it necessary to prevent what [s]he reasonably believes to be an attempt by the trespasser to commit arson or burglary upon h[er] dwelling.”<sup>130</sup> Because the victim attempted to enter the defendant’s house for the purpose of assaulting her, the evidence supported a finding of burglary, therefore making the defendant’s actions fall within the scope of the defense of habitation doctrine.<sup>131</sup> The court asserted that, where the facts presented

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121. *Id.*

122. *Id.*

123. *Avery*, 120 S.W.3d at 199.

124. *Id.*

125. *Id.*

126. The defendant testified that he approached her and they struggled, but his body was found in the doorway suggesting that he had not yet crossed the threshold into the dwelling. *Id.* at 199, 204.

127. *Id.* at 204.

128. *Avery*, 120 S.W.3d at 204 (citation omitted).

129. See, e.g., *Perkins v. State*, 77 S.W.3d 21, 24 (Mo. Ct. App. 2002); *State v. Ivicsics*, 604 S.W.2d 773, 777 (Mo. Ct. App. 1980).

130. *Avery*, 120 S.W.3d at 204 (quoting MO. REV. STAT. § 563.036.2(2) (2000)).

131. *Id.*

support a submission of both self defense and defense of habitation, both *must* be given.<sup>132</sup>

While the case law did not change dramatically over the last century,<sup>133</sup> courts did address nuances providing clarity in the distinctions between self defense and defense of habitation. As the court made clear in *Ivicsics*, the main difference between self defense and defense of habitation is “a function of time and space;”<sup>134</sup> defense of habitation will *only* apply if the force, either deadly or non-lethal, is used *prior to the intruder’s entry into the house proper*.<sup>135</sup> After the barrier is crossed, any kind of force used must be justified under the normal rules of self defense, except that there is no duty for the defender to retreat.<sup>136</sup> This line drawn at the doorway of the house dividing the applicability of the two doctrines is due to the different harm to be protected against: danger of personal injury versus danger of entry.<sup>137</sup> The jury *must* be given *both* instructions if the intruder has not crossed the barrier of the house because the focus is different.<sup>138</sup>

Self defense and the defense of habitation can be asserted for both deadly and non-deadly force.<sup>139</sup> The defender can use non-deadly force when he reasonably believes such force to be necessary to prevent the other party from committing trespass.<sup>140</sup> Defense of habitation is only available following the use of deadly force when the defender had not only a reasonable fear of an imminent entry into his home, but also a reasonable belief that the intruder would commit some additional act, including the felonies of arson or burglary, upon entry.<sup>141</sup> It is important to understand the clarity the courts sought in distinguishing self defense from defense of habitation and deadly force from non-lethal force, largely because the current statute has combined the two doctrines, muddying the doctrine’s previous perspicuity.

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132. *Id.* at 204–05.

133. Compare *State v. Taylor*, 44 S.W. 785 (Mo. 1898), with *Avery*, 120 S.W.3d 196.

134. *Ivicsics*, 604 S.W.2d at 777.

135. *Wright v. State*, 125 S.W.3d 861, 868 (Mo. Ct. App. 2003); *State v. Brookshire*, 353 S.W.2d 681, 692 (Mo. 1962).

136. *Brookshire*, 353 S.W.2d at 692.

137. *Ivicsics*, 604 S.W.2d at 776.

138. *Id.* at 778.

139. See MO. REV. STAT. § 563.036 (2000).

140. *Id.* § 563.036.1.

141. MO. REV. STAT. § 563.036.2 (2000); *State v. Avery*, 120 S.W.3d 196, 204 (Mo. 2003).

### III. STATUTORY REFORM

#### A. *Statutory History: 1977–2006*

Missouri's defense of habitation<sup>142</sup> and self-defense statutes have a common history in many ways, but the merging of the two doctrines in 2007 is somewhat surprising considering the significant differences in the doctrines and the court's emphatic separation of the two.<sup>143</sup> Prior to the 2007 amendment combining the self defense and defense of habitation doctrines, the statutes provided for the defenses separately,<sup>144</sup> which was, and remains, the common treatment of the doctrine.<sup>145</sup> An examination of both, therefore, is necessary to understand the context of the 2007 and 2010 amendments.

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142. The statute was actually titled “defense of premises,” but premises, habitation, and dwelling are used interchangeably by courts and have no unique meaning.

143. See MO. REV. STAT. § 563.031 (Supp. 2007). Remember, the courts thought that the doctrines were separate enough that failure to give one instruction when both were applicable was considered prejudicial.

144. MO. REV. STAT. §§ 563.031, 563.036 (2000); MO. REV. STAT. §§ 563.031, 563.036 (1994); MO. REV. STAT. §§ 563.031, 563.036 (1986); MO. REV. STAT. §§ 563.031, 563.036 (1978).

145. E.g., ALASKA STAT. §§ 11.81.335, 11.81.350 (2010) (“Justification: Use of deadly force in defense of self” and “Justification: Use of force in defense of property and premises”); ARIZ. REV. STAT. ANN. §§ 13-405, 13-407 (2010) (“Justification; use of deadly physical force” and “Justification; use of physical force in defense of premises”); ARK. CODE ANN. §§ 5-2-607, 5-2-608 (2010) (“Use of deadly physical force in defense of a person” and “Defense of premises justification”); COLO. REV. STAT. §§ 18-1-704, 18-1-704.5, 18-1-705 (2010) (“Use of physical force in defense of a person,” “Use of deadly physical force against an intruder,” and “Use of physical force in defense of premises”); CONN. GEN. STAT. §§ 53a-19, 53a-20 (2011) (“Use of physical force in defense of person” and “Use of physical force in defense of premises”); DEL. CODE ANN. tit. 11, §§ 464, 469 (2007) (“Justification—Use of force in self-protection” and “Justification—Person unlawfully in dwelling”); FLA. STAT. §§ 776.012, 776.013 (2010) (“Use of force in defense of person” and “Home protection; use of deadly force; presumption of fear of death or great bodily harm”); GA. CODE ANN. §§ 16-3-21, 16-3-23 (2007) (“Use of force in defense of self or others; evidence of belief that force was necessary in murder or manslaughter prosecution” and “Use of force in defense of habitation”); 720 ILL. COMP. STAT. 5/7-1, 5/7-2 (2008) (“Use of force in defense of person” and “Use of force in defense of dwelling”); KAN. STAT. ANN. §§ 21-3211, 21-3212, 21-3212a (2007) (“Use of force in defense of a person; no duty to retreat,” “Presumption of reasonable belief in necessity of use of force,” and “Use of force in defense of dwelling; no duty to retreat”); KY. REV. STAT. ANN. §§ 503.050, 503.055 (LexisNexis 2008) (“Use of physical force in self-protection; admissibility of evidence of prior acts of domestic violence and abuse” and “Use of defensive force regarding dwelling, residence, or occupied vehicle; exceptions”); MONT. CODE ANN. §§ 45-3-102, 45-3-103 (2009) (“Use of force in defense of person” and “Use of force in defense of occupied structure”); NEB. REV. STAT. §§ 28-1409, 28-1411 (2008) (“Use of force in self-protection” and “Use of force for protection of property”); N.H. REV. STAT. ANN. §§ 627:4, 627:7 (Cum. Supp. 2010) (“Physical Force in Defense of a Person” and “Use of Force in Defense of Premises”); N.J. REV. STAT. §§ 2C:3-4, 2C:3-6 (2010) (“Use of force in self-protection” and “Use of force in defense of premises or personal property”); N.Y. PENAL LAW §§ 35.15, 35.20 (McKinney 2009) (“Justification; use of

The statutes have a relatively intertwined history in their creation and revision. Both statutes were created in 1977 by Senate Bill No. 60, which became effective in 1979.<sup>146</sup> The section on self defense as a justification provided:

1. A person may, subject to the provisions of subsection 2, use physical force upon another person when and to the extent he reasonably believes such to be necessary to defend himself or a third person from what he reasonably believes to be the use or imminent use of unlawful force by such other person, unless:
  - (1) The actor was the initial aggressor; except that in such case his use of force is nevertheless justifiable provided
    - (a) He has withdrawn from the encounter and effectively communicated such withdrawal to such other person but the latter persists in continuing the incident by the use or threatened use of unlawful force; or
    - (b) He is a law enforcement officer and as such is an aggressor pursuant to section 563.046; or
    - (c) The aggressor is justified under some other provision of this chapter or other provision of law;
  - (2) Under the circumstances as the actor reasonably believes them to be, the person whom he seeks to protect would not be justified in using such protective force.
2. A person may not use deadly force upon another person under the circumstances specified in subsection 1 unless he reasonably believes that such deadly force is necessary to protect himself or another against death, serious physical injury, rape, sodomy or kidnapping.
3. The justification afforded by this section extends to the use of physical restraint as protective force provided that the actor takes all reasonable measures to terminate the restraint as soon as it is reasonable to do so.
4. The defendant shall have the burden of injecting the issue of justification under this section.<sup>147</sup>

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physical force in defense of a person" and "Justification; use of physical force in defense of premises and in defense of a person in the course of burglary"; N.D. CENT. CODE §§ 12.1-05-03, 12.1-05-06, 12.1-05-07.1 (2011) ("Self-defense," "Use of force in defense of premises and property," and "Use of deadly force—Presumption of fear of death or serious bodily injury"); OR. REV. STAT. §§ 161.209, 161.225 (2007) ("Use of physical force in defense of a person" and "Defense of Premises"); 18 PA. CONS. STAT. ANN. §§ 505, 507 (1998) ("Use of force in self-protection" and "Use of force for the protection of property"); UTAH CODE ANN. § 76-2-405 (LexisNexis 1994) ("Force in defense of person – Forcible felony defined" and "Force in defense of habitation"). *But cf.* IND. CODE § 35-41-3-2 (2008) ("Use of force to protect person or property"); WYO. STAT. ANN. § 6-2-602 (2009) ("Use of force in self defense").

146. S.B. 60, 79th Gen. Assemb., 1st Reg. Sess. (Mo. 1977).

147. MO. REV. STAT. § 563.031 (Supp. 1977).

The section on defense of habitation stated:

1. A person in possession or control of premises or a person who is licensed or privileged to be thereon, may, subject to the provisions of subsection 2, use physical force upon another person when and to the extent that he reasonably believes it necessary to prevent or terminate what he reasonably believes to be the commission or attempted commission of the crime of trespass by the other person.
2. A person may use deadly force under circumstances described in subsection 1 above only
  - (1) When such use of deadly force is authorized under other sections of this chapter; or
  - (2) When he reasonably believes it necessary to prevent what he reasonably believes to be an attempt by the trespasser to commit arson or burglary upon his dwelling.
3. The defendant shall have the burden of injecting the issue of justification under this section.<sup>148</sup>

In 1993, both statutes were amended, again, by the same bill, Senate Bill No. 180.<sup>149</sup> The only substantive changes made to the self-defense statute, section 563.031, was the addition under subsection 2 allowing deadly force to be used to protect against serious physical injury through robbery, burglary, or arson if all the other conditions were met.<sup>150</sup>

The bill made, arguably, more significant changes to the defense of habitation section. As the bill had widened the permissible use of deadly force under the self-defense section, it also, nominally at least, increased a homeowner's right to use deadly force in defense of habitation.<sup>151</sup> The bill added a third subdivision to subsection 2 that allowed deadly force to be used, provided all other elements were met,

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148. MO. REV. STAT. § 563.036 (Supp. 1977). Note that although the wording of allowing force to prevent *or terminate* suggests that force could be used against one who had already crossed the threshold, the courts did not so interpret the language and continued to enforce the doctrine only up to the point where the threshold into the house was crossed. *State v. Avery*, 120 S.W.3d 196, 204 (Mo. 2003) ("In Missouri, defense of premises is essentially accelerated self-defense because it authorizes protective acts to be taken earlier than they otherwise would be authorized, that is, at the time when and place where the intruder is seeking to cross the protective barrier of the house. Once the person enters the premises without resistance, the principles of self-defense apply.") (citation omitted) (internal quotation marks omitted).

149. S.B. 180, 87th Gen. Assemb., 1st Reg. Sess. (Mo. 1993).

150. MO. REV. STAT. § 563.031 (Supp. 1993). The amendment also added the phrase "of this section" and "force" for clarity, but such additions did not change the substance of the section. *Id.*

151. See MO. REV. STAT. § 563.036 (Supp. 1993) (setting forth the permissible use of physical force in defense of premises).

when entry into the premises is made or attempted in a violent and tumultuous manner, surreptitiously, or by stealth, *and* he reasonably believes that the entry is attempted or made for the purpose of assaulting or offering physical violence to any person or being in the premises *and* he reasonably believes that force is necessary to prevent the commission of a felony.<sup>152</sup>

While this section appears to add another situation in which deadly force may be used, upon consideration of the burglary statutes in place, it is unclear when this section would be necessary as opposed to subdivision 2 of subsection 2. For, under that section, a homeowner was allowed to use deadly force when he reasonably believed that the trespasser was going to commit burglary.<sup>153</sup>

According to the burglary statute in place when the 1993 amendment was passed, first-degree burglary occurred when:

A person . . . knowingly enters unlawfully or knowingly remains unlawfully in a building or inhabitable structure for the purpose of committing a crime therein, and when in effecting entry or while in the building or inhabitable structure or in immediate flight therefrom, he or another participant in the crime: (1) Is armed with explosives or a deadly weapon or; (2) Causes or threatens immediate physical injury to any person who is not a participant in the crime; or (3) There is present in the structure another person who is not a participant in the crime.<sup>154</sup>

Also, second-degree burglary was committed when a person “knowingly enters unlawfully or knowingly remains unlawfully in a building or inhabitable structure for the purpose of committing a crime therein.”<sup>155</sup> So, first-degree burglary would occur, and thus, subdivision 2 would apply, if a trespasser entered the house, in any manner, as long as it was unlawful, with the intent to commit a crime, while someone was at home.<sup>156</sup> It is hard then, to conceive of a situation where subdivision 3 would apply, but subdivision 2 would not.

As the case law consistently reflected, a person who uses physical force under the defense of premises section must have an objectively reasonable belief that the intruder intends to trespass on his premises,<sup>157</sup> which as cases noted, only included the house proper.<sup>158</sup> Moreover, again in line with common law and reflected in the cases,<sup>159</sup> a person may use deadly force only when protecting himself, his home, or other occupants against arson, burglary, or an assault.<sup>160</sup> It is extremely important to note the interrelation between

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152. *Id.* (emphasis added).

153. *Id.* § 563.036.2(2).

154. MO. REV. STAT. § 569.160.1 (1994).

155. *Id.* § 569.170.1.

156. See *id.* §§ 569.160, 563.036.2(2), 563.036.2(3).

157. See *id.* § 563.036.1.

158. See *supra* Part II.

159. See *supra* Parts I-II.

160. MO. REV. STAT. §§ 563.036.2–563.036.3 (1994).

subsections 1 and 2: subsection 2 explicitly requires that not only must the elements of subsection 2 be met in order to use deadly force, but the requirements of subsection 1 must be met as well.<sup>161</sup> Thus, by incorporating subsection 1 into the deadly force section, the legislature continued to require that the defender have *reasonable belief* of the imminent danger of unlawful entry and trespass as well as a reasonable belief that the trespasser will commit arson, burglary, or assault and that deadly force is necessary for prevention.<sup>162</sup> So, up to this point, the statutes in place reflected the case law history defining the boundaries of defense of habitation in Missouri.

#### B. Statutory History: 2007–2009

In 2007, after an intertwined but still distinct history, defense of habitation and self defense officially merged into one statute.<sup>163</sup> Senate Bills 62 and 41 repealed section 563.036 and created a new defense of habitation provision within the pre-existing self-defense statute:<sup>164</sup>

1. A person may, subject to the provisions of subsection 2 of this section, use physical force upon another person when and to the extent he or she reasonably believes such force to be necessary to defend himself or herself or a third person from what he or she reasonably believes to be the use or imminent use of unlawful force by such other person, unless:
    - (1) The actor was the initial aggressor;
    - ...
  2. A person may not use deadly force upon another person under the circumstances specified in subsection 1 of this section unless:
    - (1) He or she reasonably believes that such deadly force is necessary to protect himself or herself or another against death, serious physical injury, or any forcible felony; or
    - (2) Such force is used against a person who unlawfully enters, remains after unlawfully entering, or attempts to unlawfully enter a dwelling, residence, or vehicle lawfully occupied by such person.
  3. A person does not have a duty to retreat from a dwelling, residence, or vehicle where the person is not unlawfully entering or unlawfully remaining.
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161. See *id.* § 563.036.2 (“A person *may* use deadly force under circumstances described in subsection 1 above *only* [when]”) (emphasis added).

162. *Id.*

163. S.B. 62 & 41, 94th Gen. Assemb., 1st Reg. Sess. (Mo. 2007).

164. *Id.*

5. The defendant shall have the burden of injecting the issue of justification under this section.<sup>165</sup>

Clearly, gone is the distinction between defense of habitation and self defense that the former can only be invoked prior to the invader's entry of the home.<sup>166</sup> With the addition of "unlawfully remaining," defense of habitation can be invoked even when the intruder has crossed the threshold into the house.<sup>167</sup> Now, when force is used in the home and the victim had no lawful right to be there, the defendant is entitled to an instruction of defense of habitation in all cases.<sup>168</sup> The distinction made in the cases about a difference in time and space is no more.

Not only was the doctrine extended to include invasions of the house already completed, but also it was broadened as to the places in which it may be used. Instead of being limited to use of force in protection of the house proper, a person can use deadly force when someone unlawfully enters or remains in his "dwelling, residence, or vehicle."<sup>169</sup> As the definitions indicate, the place protected need not be permanent and the defender need not have a property interest in the dwelling—even a guest may use deadly force against an intruder.<sup>170</sup>

A further *possible* result of the amendment may be the destruction of the requirements of reasonable belief, necessity, and imminent harm. Because such a conclusion is debatable, both conclusion and counter-argument will be analyzed.

Consider, first, the changes from section 563.036.2 to 563.031.2. Worthy of note is the change of the logical terms used, which connect subsections 1 and 2. In the previously separate defense of habitation section, the connection read "[a] person *may use* deadly force under circumstances described in subsection 1 above *only* [when] . . ."<sup>171</sup> indicating that the requirements of subsection 1 must be present in addition to those listed in subsection 2; however, the new statute says "[a] person *may not use* deadly force upon

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165. MO. REV. STAT. § 563.031 (Supp. 2007).

166. *Id.*

167. *Id.* § 563.031.2(2).

168. See MO. APPROVED INSTRUCTIONS-CRIMINAL 3D § 306.11 (2011).

169. MO. REV. STAT. § 563.031.2(2) (Supp. 2007). According to MO. REV. STAT. §§ 563.011(2)–563.011(3) (Supp. 2007), a dwelling is "any building, inhabitable structure, or conveyance of any kind, whether the building, inhabitable structure, or conveyance is temporary or permanent, mobile or immobile, which has a roof over it, including a tent, and is designed to be occupied by people lodging therein at night," and a residence is "a dwelling in which a person resides either temporarily or permanently or is visiting as an invited guest."

170. *Id.* The inclusion of "vehicle" in this section was presumably to protect against carjackings.

171. MO. REV. STAT. § 563.036 (1994).

another person under the circumstances specified in subsection 1 of this section *unless . . .*<sup>172</sup> making the relation between the two subsections less clear.

With the wording in place following the 2007 amendment, an argument could well be made that the section regulating deadly force in defense of habitation does not incorporate the first section. “Unless” can be a tricky word in terms of logical meaning, but the Oxford English Dictionary defines it as “except if”<sup>173</sup> and Merriam-Webster defines it as “except on the condition that” or “under any other circumstance than.”<sup>174</sup> Thus, the phrasing suggests that “[a] person may not use deadly force upon another person under the circumstances specified in subsection 1 of this section” except on the condition that the requirements of a subdivision of subsection 2 are met;<sup>175</sup> that is, a person may not use deadly force, even under the circumstances specified in subsection 1 except on the condition that he falls into one of the subdivisions specified. Since subdivision 2 does not itself reincorporate the requirements set forth in subsection 1, there appears a defensible theory that subsection 1 simply does not apply to that subdivision.<sup>176</sup>

If such a reading were true, subsection 2, delimiting the use of deadly force, would not explicitly incorporate subsection 1’s requirements of reasonable belief, necessity, and imminent harm.<sup>177</sup> This conclusion results in an extreme exemption to the prohibition of using deadly force. No longer would a person need to have reasonable belief that there is an imminent threat of harm—if a person with no right to be there enters another’s house, the homeowner can use deadly force, even if the invader poses no real threat! Furthermore, upon examining the chapter definitions, one finds that unlawful entry does not require any felonious intent or forceful entry; it is merely when “a person . . . enters such premises and is not licensed or privileged to do so.”<sup>178</sup>

Assuming *arguendo* that section 1 is not incorporated because of the changes previously discussed, the legislature, in essence, diverged from the common law and case law principle that deadly force could not be used against a mere trespasser.<sup>179</sup>

Of course, an equally strong counter argument to this reading of the 2007 statutory amendments is also possible. While a consideration of only the previous defense of premises statute would lead more strongly to the

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172. *Id.* § 563.031 (Supp. 2007).

173. 19 OXFORD ENGLISH DICTIONARY 100 (2d ed. 1989).

174. WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE UNABRIDGED 2503 (Philip B. Gove et al. eds., 2002).

175. See MO. REV. STAT. § 563.031 (Supp. 2007).

176. See *id.*

177. See *id.*

178. *Id.* § 563.011(8).

179. See *State v. Taylor*, 44 S.W. 785, 789 (Mo. 1898).

conclusion that subsection 1 should not be incorporated,<sup>180</sup> when it is read in conjunction with the history of self defense and the courts' interpretation of the statute, the conclusion that subsection 1 should be incorporated is stronger. For example, in *State v. Chambers*, the Missouri Supreme Court stated that "[d]eadly force may be used in self-defense only when there is . . . an absence of aggression or provocation on the part of the defender . . .".<sup>181</sup> Thus, the Missouri Supreme Court has read into the self-defense statute that subsection 1 is, in fact, incorporated into subsection 2.<sup>182</sup> Therefore, the addition of a subdivision would not change the applicability of subsection 1 to subsection 2.

Although Missouri courts have not dealt with the new statute in any cases yet, the new Model Jury Instruction, accounting for both the 2007 and 2010 amendments, indicates that the court will likely incorporate the requirements of subsection 1 for defense of habitation situations.<sup>183</sup> The instruction itself does not mention an initial aggressor requirement, suggesting that subsection 1 should not be incorporated, but the Notes on Use section explains that the requirement for an unlawful entering or remaining means it would be rare that the defender would be an initial aggressor.<sup>184</sup> Because it appears from the notes that there is an initial aggressor element, despite it not being mentioned in the text of the jury instruction itself, it is probably safe, but not certain, to predict that courts will read subsection 1 into subsection 2.

Note, though, that even if this latter interpretation is true, there is still an extreme divergence from the proportionality element that has been present up to this point. In traditional self defense, a person can only use deadly force when the attacker threatens him with death, serious physical injury, or a

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180. The change in wording from the 1994 version of "a person *may use . . . only*" to the 2007 defense of premises version of "a person *may not use . . . unless*," should, according to the statutory construction rule that a change is ordinarily intended to have some effect, be given some effect. The only effect that it can be given, since the legislature clearly knew how to unambiguously incorporate a previous subsection into a latter one as they did in MO. REV. STAT. § 563.036, is that the new version was not meant to incorporate the requirements of subsection 1.

181. *State v. Chambers*, 671 S.W.2d 781, 783 (Mo. 1984). *Chambers* is still good law as, other than the 1993 addition of certain felonies justifying deadly force, the language has not been changed. Thus, its applicability remains.

182. *Id.*

183. MO. APPROVED INSTRUCTIONS-CRIMINAL 3D § 306.11 (2011).

184. *Id.* ("Section 563.031(1), provides that self-defense by occupiers of dwellings, residences and vehicles and self-defense under MAI-CR 3d 306.06A will, subject to some exceptions, be denied to a person who is an initial aggressor. It will be rare for this issue to arise under this instruction. A person lawfully occupying a dwelling, residence or vehicle can only be an initial aggressor if he uses force against a person who is not attempting to enter unlawfully, has not unlawfully entered, or has not remained after unlawfully entering the dwelling, residence or vehicle. Should such a situation arise, this instruction must be modified to include the issue of initial aggressor.").

forcible felony.<sup>185</sup> If the attacker only threatens “unlawful force,” deadly force is not justified.<sup>186</sup> Now, however, simple unlawful force will justify a response of deadly force if the person using unlawful force is also trespassing.<sup>187</sup> Thus, even if the courts ultimately interpret subsection 2 as incorporating subsection 1, there has still been a distinct move away from the proportionality demanded in the past.

### C. Statutory History: 2010

The statutory overhaul of the defense of habitation doctrine did not end in 2007. In 2010, House Bill 1692 was passed broadening, limiting, and arguably complicating the doctrine.<sup>188</sup> The extension came through the addition of subdivision 3 to subsection 2, which allows deadly force when “[s]uch force is used against a person who unlawfully enters, remains after unlawfully entering, or attempts to unlawfully enter *private property* that is owned or leased by an individual claiming a justification of using protective force under this section.”<sup>189</sup> As “private property” includes “any real property in this state that is privately owned or leased,”<sup>190</sup> this amendment effectively extends defense of habitation to a homeowner’s property line. Where courts had previously refused to extend defense of habitation to include the “curtilage,” the legislature boldly pushed far beyond.

However, some restrictions were put in place in the 2010 amendments as well. Amending subsection 5, which provides that the defendant has the burden of injecting the issue of justification,<sup>191</sup> the legislature made the following a rebuttable presumption that the state must overcome:

If a defendant asserts that his or her use of force is described under subdivision (2) of subsection 2 of this section, the burden shall then be on the state to prove beyond a reasonable doubt that the defendant did not reasonably believe that the use of such force was necessary to defend against what he or she reasonably believed was the use or imminent use of unlawful force.<sup>192</sup>

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185. MO. REV. STAT. § 563.031.2(1) (Supp. 2007).

186. *Id.* § 563.031.1.

187. *Id.* § 563.031.

188. H.B. 1692, 1209, 1405, 1499, 1535, & 1811, 95th Gen. Assemb., 2d Reg. Sess. (Mo. 2010).

189. MO. REV. STAT. § 563.031.2(3) (Supp. 2010).

190. *Id.* § 563.011(6).

191. Remember, this is a low burden: the defendant need not even request the defense; if facts are presented that support an instruction of defense of premises, the court is required to give one.

192. MO. REV. STAT. § 563.031.5 (Supp. 2010).

In creating this rebuttable presumption, the legislature effectively incorporated subsection 1<sup>193</sup> into subdivision 2, but shifted the burden to the state to prove that the elements were not present.

Despite the superficially straightforward and reasonable appearance of the new rebuttable presumption, upon closer examination, there seem to be some ambiguities and discrepancies. First, it is worthy of note that nowhere in the Missouri Revised Statutes is “unlawful force” defined. Presumably, it includes any and all force against both person and property that is not authorized in some other section.<sup>194</sup> Since it is not limited to force against a person, force used to enter a dwelling (such as breaking a window) would be sufficient—and remember, such force need not actually be used, there simply must be a reasonable belief in the imminent use of such force.<sup>195</sup> Even if some force were used, this section would allow deadly force to be used against a non-deadly threat. Notice that deadly force is *not* allowed in subdivision 1 of subsection 2 unless the force defended against is that which could cause death, serious physical injury, or any forcible felony.<sup>196</sup> A simple change of location, therefore, greatly modifies the amount of force that is allowed.

The second discrepancy of subsection 5 is that it fails to mention subdivision 3 *at all*. Although subsection 5 creates a rebuttable presumption for subdivision 2, limiting the use of deadly force in defense of one’s dwelling, residence, or vehicle, it completely fails to mention subdivision 3, which extended the doctrine to all private property. It is unclear, therefore, what the restrictions are for subdivision 3, who bears the burden, and what that burden is.

There are three possibilities on how to read the interaction between subdivision 3 and subsection 5, depending on whether subsection 1 is going to be read into subsection 2 by the courts: (1) the legislature intentionally left subdivision 3 out and subsection 1 is read into subsection 2, requiring the court to make a nearly impossible distinction and resulting in extremely different burdens; (2) the legislature intentionally left it out and subsection 1 is *not* incorporated into subsection 2, making it harder to defend your home than your backyard; or (3) the legislature made a mistake and forgot to include

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193. Note, however, not all elements of subsection 1 were included: the requirement that the defendant not be the initial aggressor is not included. *See id.* § 563.031.2(3).

194. The Model Penal Code defines unlawful force as “force, including confinement, that is employed without the consent of the person against whom it is directed and the employment of which constitutes an offense or actionable tort or would constitute such offense or tort except for a defense (such as the absence of intent, negligence, or mental capacity; duress; youth; or diplomatic status) not amounting to a privilege to use the force. Assent constitutes consent, within the meaning of this Section, whether or not it otherwise is legally effective, except assent to the infliction of death or serious bodily injury.” MODEL PENAL CODE § 3.11 (1980).

195. MO. REV. STAT. § 563.031.1 (Supp. 2010).

196. *Id.* § 563.031.2(1).

subdivision 3 in the rebuttable presumption. The third possibility seems the most likely—the legislature simply made a mistake.

First, assuming that subsection 2 incorporates the requirements of subsection 1, the legislature *could* have intentionally left out subdivision 3 from the rebuttable presumption so that a defendant using deadly force in protection of private property, not habitation, would have a higher burden. For if subsection 1 was already read into subsection 2, the rebuttable presumption would solely be lowering the burden for a person defending his or her habitation by shifting the burden of proof to the state.<sup>197</sup> The legislature may reasonably have been hesitant to extend that burden-shifting to someone who is only defending his private property rather than his home. Superficially this makes sense, but practically it would be extremely difficult for a court to decide which subdivision applies. After all, the court would have to determine whether the invader on another's private property was "unlawfully remaining" on the private property, or whether he was "attempting to unlawfully enter" the house proper. Add on to that inquiry the defender's "reasonable belief" of what he or she thought the invader's intent was and the issue would become extremely messy. With such a disparate burden, it is doubtful that the legislature actually intended such an indeterminate distinction to be made.

On the other hand, if subsection 1 is not incorporated into subsection 2, there is an even less likely result: subsection 5 would make it harder to protect a person's home than their yard. The rebuttable presumption would not only be shifting the burden, *but also* introducing new criteria, requiring, namely, that the homeowner's use of deadly force was reasonable and necessary.<sup>198</sup> However, if that is the case, the homeowner would have to show that his force was reasonable and necessary in defending his house proper but would *not* have to prove those elements if he were defending his curtilage or private property. Neither of these two results seems very likely.

Therefore, the most probable conclusion is that the legislature simply forgot to include subdivision 3 in the revision of subsection 5. A revision would make the burden the same for both subdivisions 2 and 3 and negate the need to make an odd and probably futile distinction between the two subdivisions.

#### IV. CONCLUSION

Moving from a clear and consistent common law and case law standard, the amendments in 2007 and 2010 seem to have complicated the issue more than anything else. With burdens shifted for some but not all subdivisions, and subsections only possibly incorporating the restrictions of the other,

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197. *See id.* § 563.031.

198. *See id.*

clarification, and probably revisions, are needed—especially when deadly force is involved. Putting aside political opinions about whether expanding the allowable use of deadly force in defense of habitation is desirable, it is indisputable that at the very least the doctrine needs to be clear. Unfortunately, in an aim to provide greater protection to people at home, Missouri lawmakers instead have left their constituents less sure of what action they can legally take to defend their castles.

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## APPENDIX

Following the legislature's lead, this author will suggest one more amendment to, hopefully, resolve the uncertainties of Missouri's new defense of habitation statute. As many of the clarity issues arise because of the merger of two doctrines—intended by Missouri courts to be separate doctrines as evidenced by case law<sup>199</sup> and current model jury instructions<sup>200</sup>—the proposed revision would return the self-defense statute back to its 2006 language, and provide a new defense of habitation statute as follows:

1. A person may use deadly force upon another person only when he or she reasonably believes such force to be necessary to defend himself or herself or a third person from what he or she reasonably believes to be the use or imminent use of unlawful force by such other person and:
  - (1) Such force is used against a person who unlawfully enters, remains after unlawfully entering, or attempts to unlawfully enter a dwelling, residence, or vehicle lawfully occupied by such person; or
  - (2) Such force is used against a person who unlawfully enters, remains after unlawfully entering, or attempts to unlawfully enter private property that is owned or leased by an individual claiming a justification of using protective force under this section.
2. A person does not have a duty to retreat from a dwelling, residence, or vehicle where the person is not unlawfully entering or unlawfully remaining. A person does not have a duty to retreat from private property that is owned or leased by such individual.
3. The defendant shall have the burden of injecting the issue of justification under this section. Upon successfully injecting the issue of justification, the burden shall then be on the State to prove beyond a reasonable doubt that the defendant did not reasonably believe that the use of such force was necessary to defend against what he or she reasonably believed was the use or imminent use of unlawful force.

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199. See *State v. Ivicsics*, 604 S.W.2d 773, 776–78 (Mo. Ct. App. 1980) (discussing the distinctions between the self defense and defense of habitation).

200. See MO. APPROVED INSTRUCTIONS–CRIMINAL 3D § 306.11 (2011) (Justification: Self-Defense in Dwellings and Vehicles); MO. APPROVED INSTRUCTIONS–CRIMINAL 3D § 306.06A (Justification: Use of Force in Self-Defense); MO. APPROVED INSTRUCTIONS–CRIMINAL 3D § 306.07A (Justification: Use of Deadly Force in Self-Defense-Battered Spouse) (providing separate instructions for normal self defense and force used in defense of habitation).

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