

Defensive Homicide and the Requirement of Retreat in Maryland Law (1776–1849)

I. Introduction: The Foundation of Defensive Homicide in Early Maryland

Upon achieving independence, Maryland perpetuated the complex framework of English common law governing defensive homicide, extending medieval and early modern doctrines into the 19th century. This continuity meant that judicial interpretation of self-defense was primarily rooted in authoritative English Crown Law treatises, such as those authored by Hale, Foster, Hawkins, and Blackstone.¹

The Maryland legislature reinforced this reliance on common law through its selective intervention in 1809. The Act of 1809, Chapter 138, addressed the grading of felonious homicide by dividing the crime of murder into degrees, largely based on the presence or absence of *malice aforethought*.³ Significantly, this statute refrained from defining or codifying the lesser crime of manslaughter or the defenses related to self-preservation.⁴ This non-intervention by the General Assembly implied legislative satisfaction with the common law classifications for defensive killings (*se defendendo*), which remained wholly controlling. Consequently, the Maryland judiciary was tasked with applying the common law tripartite classification of homicide: (1) Felonious (Murder or Manslaughter); (2) Justifiable (Lawful Killing); and (3) Excusable (*Per Infortunium* or *Se Defendendo*).⁵

II. The Essential Doctrinal Divide: Justifiable vs. Excusable Homicide

The crucial aspect of defensive homicide in Maryland law before 1850 lay in the distinction between justifiable and excusable homicide, a separation that determined the financial fate of the defendant, even if absolved of a capital charge.

A. Excusable Homicide: *Se Defendendo*

Homicide committed *se defendendo* (in self-preservation) fell under the category of excusable homicide. Blackstone defined this class as killings that "imports some fault, some error or omission" on the part of the slayer.⁵ Although the act was deemed necessary to protect life, the common law considered the slayer "not wholly free from blame".⁶

The practical consequence of a verdict of excusable homicide was severe: the common law mandated a forfeiture of the slayer's goods (chattels).⁶ While the slayer was not executed and was entitled to a "pardon of course" upon removing the record to Chancery⁷, the economic penalty of forfeiture remained a powerful deterrent. This pecuniary consequence motivated early legal counsel to strive for a classification of justifiable homicide whenever possible. Procedurally, a defendant claiming *se defendendo* was instructed to "plead not guilty, and give the special matter in evidence".⁷

B. Justifiable Homicide: The Standard of No Fault

Justifiable homicide, by contrast, represented a killing that was entirely lawful and incurred no punishment or forfeiture. This classification was reserved for killings that the law "must require," typically carried out for "the prevention of any forcible and atrocious crime".⁵

Sir Michael Foster clarified this high standard, stating that the act must repel force against one who "manifestly intendeth and endeavourath with Violence or Surprize to commit a known Felony upon either [Person, Habitation, or Property]".² This requirement of repelling a "known Felony" meant that killing a mere trespasser or someone committing a minor battery could not attain justifiable status. In such lesser conflicts, the killing would be classified as excusable (*se defendendo*) or, if excessive force were used, potentially manslaughter.

The following common law classification table illustrates the critical distinctions maintained in Maryland pre-1850:

Homicide Classification Pre-1850 Common Law

Classification	Description/Context	Consequence	Key Terminology
Justifiable Homicide	Commanded or permitted by law; killing to prevent a <i>forcible and atrocious felony</i> .	Complete Acquittal; No Forfeiture; No Pardon Required.	Prevention of Known Felony; <i>Mandate of Law</i> . ⁵
Excusable Homicide	Committed in self-preservation, implying "some fault" but lacking <i>malice aforethought</i> .	Forfeiture of Chattels; Pardon of Course required.	<i>Se Defendendo</i> ; Not Wholly Free From Blame. ⁶
Felonious Homicide (Manslaughter)	Unlawful killing without <i>malice aforethought</i> , resulting from <i>sudden combat</i> or breach of the duty to retreat.	Felony conviction; Death penalty avoided.	<i>Chance-Medley</i> ; Sudden Transport of Passion. ²

III. The General Duty to Retreat: *Fugere ad Murum*

A core principle adopted from English common law required a person outside their dwelling to demonstrate the necessity of using deadly force by exhausting all means of avoidance.

A. The Requirement in Sudden Affrays

In cases not involving felonious assault, particularly those arising from sudden combat or *chance-medley*, the common law in effect in Maryland imposed the strict mandate that the defender was "bound to retreat to the wall, before turning and resisting an adversary".⁹ This requirement to retreat to the wall (*fugere ad murum*) served as proof that the defender was unwilling to kill and that the final deadly act was unavoidable and necessary for self-preservation. If a viable avenue of retreat was available but not utilized, the killing could be deemed excessive, classifying the act as felonious homicide (manslaughter) rather than excusable homicide (*se defendendo*).

B. Limitations and Provocation

The benefit of self-defense was unavailable to the initial aggressor or one who was not "without fault in bringing the conflict on".⁶ When an individual entered into a "mutual affray" or sudden combat, their right to self-defense was restricted. Homicide arising from such conflict often fell into the category of excusable homicide if the defense was genuinely necessary and immediate, but if malice was implied, or the force was grossly disproportionate to the threat, the act escalated to manslaughter.² Furthermore, the defense failed entirely if the defendant "continued the use of force after the apparent necessity for self defense had ceased".¹¹

IV. Defense of Habitation: The "Castle" Doctrine Exception

The most significant exception to the duty to retreat applied when the conflict occurred within the dwelling house.

A. The Right to Stand Ground

The English common law, recognized in Maryland, designated a man's house as his "Castle," granting the lawful occupant the right to defend it without withdrawing.¹ As noted by legal authorities, the resident "is not obliged to retire from his house" and "may stand his ground and resist the attack".¹² This doctrine exempted the resident from the general common law

duty to "take to the fields".¹²

B. Securing Justifiable Status within the Castle

While the Castle Doctrine removed the duty to retreat, securing the status of *justifiable* homicide (and thus avoiding chattel forfeiture) still required the resident to demonstrate that the intruder was attempting to commit a "known Felony" within the habitation.² If the intruder posed a non-felonious threat, such as simple assault or trespass, the resulting death would likely only meet the standard for *excusable* homicide, still resulting in the common law penalty of forfeiture. Thus, the Castle Doctrine primarily guaranteed the right to non-retreat but did not automatically guarantee complete legal immunity unless the threat was felonious.

C. Scope of the Dwelling

The protection afforded by the "Castle" doctrine historically extended beyond the physical walls to the enclosed area immediately surrounding the house, known as the *curtilage*.¹³ However, defining the exact boundaries of the *curtilage*—whether it included specific outbuildings, yards, or porches—was a source of legal ambiguity, and pre-1850 Maryland precedent on the precise geographic scope of the non-retreat right is not readily available.¹³

V. Additional Elements and Constraints

A. Proportionality and Necessity

The central element for any claim of self-defense was necessity, requiring that the force used be proportional to the harm threatened. Deadly force was acceptable only when the defendant reasonably believed it was "necessary for his own protection" against death or serious bodily harm.¹¹ If the defendant employed "more force than reasonably appeared necessary," the defense failed, and the act risked classification as manslaughter or murder,

depending on the circumstances of *malice*.¹¹

B. Defense of Others

The legal standards governing the defense of a third party were undeveloped in pre-1850 Maryland law. While the common law generally acknowledged a right to defend immediate family or servants against a felonious attack, the crucial determination of whether this right was derivative—meaning the person defended must have been legally innocent—or independent (based on the defender's reasonable belief) is undocumented in early Maryland court reports.¹⁵ It is assumed that the strictest common law application, often the derivative right standard, prevailed during this era.

Deliverables

1. Doctrinal Summary (Pre-1850 Maryland Self-Defense)

The law of defensive homicide in Maryland adhered strictly to the English common law tradition, classifying killings as either justifiable or excusable.

- **Classification and Consequence:** Homicide *se defendendo* was classified as excusable, implying fault and resulting in the mandatory forfeiture of the slayer's chattels, although a pardon was granted as a matter of course].
- **Justifiable Homicide:** A killing was only justifiable if performed "for the prevention of any forcible and atrocious crime," conferring complete immunity from punishment and forfeiture.²
- **Duty to Retreat:** Outside the dwelling, the defender was typically "bound to retreat to the wall, before turning and resisting an adversary" in cases of sudden combat or mutual affray.⁹
- **Castle Doctrine:** The duty to retreat did not apply within the dwelling house, as a man "is not obliged to retire from his house".¹
- **Proportionality and Necessity:** Deadly force was only permitted when "necessary for his own protection" and failed if the defendant "used more force than reasonably appeared necessary".¹¹

- **Limitations:** The defense was unavailable to those who were not "without fault in bringing the conflict on" or who engaged in mutual combat without proper withdrawal.²

2. Timeline (Earliest to Latest Pre-1850 Milestones)

- **1532 — 24 Henry VIII, ch. 5** — English statute enlarged the basis of justification for self-defense, gradually diminishing the distinction from excusable homicide, though forfeiture remained.⁶
- **1736 — Hale, *Historia Placitorum Coronæ*** — Treatise confirming that a man "is not obliged to retire from his house".¹
- **1762 — Foster, *Crown Cases*** — Treatise defining justifiable self-defense as repelling a "known Felony upon either [Person, Habitation, or Property]".²
- **1769 — Blackstone, *Commentaries on the Laws of England*** — Treatise rigidly separating justifiable and excusable homicide based on the requirement of "some fault".⁵
- **1776 — Maryland Declaration of Rights** — Adoption of common law principles, including those governing defensive homicide.¹⁷
- **1809 — Maryland Act, Ch. 138** — Statutory division of murder into degrees, implicitly leaving manslaughter and self-defense definitions to common law.³
- **1846 — Wharton, *A Treatise on the Criminal Law of the United States*** — Early American treatise describing the distinction that forfeiture followed excusable homicide].

3. Authorities Table

Authorities for Pre-1850 Maryland Self-Defense Doctrine

Authority	Year	Type	Holding/Rule (1–2 sentences)	Pin Cite	Short Quotation (≤40 words)
Blackstone, <i>Commentaries</i>	1769	Treatise	Excusable homicide (se defendend	Book 4, 186 (approx.) ⁵	"excusable homicide, the very name

			o) implies some fault, distinguishing it from justifiable homicide which is required by law.		whereof imports some fault, some error or omission." ⁵
Hale, <i>Pleas of the Crown</i>	1736	Treatise	A person is not required to retreat when defending their dwelling house, establishing the foundation of the castle doctrine.	1 H.H.P.C. 486 ¹	"A Man is not obliged to retire from his house." ¹
Foster, <i>Crown Cases</i>	1762	Treatise	Justifiable self-defence is reserved for repelling force against one who intends to commit a known felony upon the person or habitation.	273 ²	"In the Case of Justifiable Self-Defence the injured Party may repel Force with Force in Defence of his Person, Habitation, or Property..."

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Wharton, <i>Criminal Law</i>	1846	Treatise	Excusable homicide led to the forfeiture of the slayer's goods because the slayer was deemed not wholly free from blame.	Sec. 3 at 211 (1855 ed. commentary) ⁶	"...in the latter case the slayer, considered to be not wholly free from blame, suffered a forfeiture of his goods." ⁶
Common Law Rule	N/A	Doctrine	A defendant claiming self-defense in mutual combat must retreat to the boundary of safety ("the wall") before using deadly force.	N/A ⁹	"He is bound to retreat to the wall, before turning and resisting an adversary." ⁹

4. Terminology Map

Historic Term	Definition + Source
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<i>Se defendendo</i>	Homicide committed "upon a principle of self-preservation," classified as excusable homicide. ⁵
Excusable Homicide	A killing involving "some fault" that warrants a pardon, but required the forfeiture of chattels.[5, 6]
Justifiable Homicide	A lawful killing required for the "prevention of any forcible and atrocious crime," resulting in full acquittal. ²
<i>Chance-medley</i>	Homicide occurring in the heat of sudden transport of passion, often resulting in manslaughter.[8]
Affray / Mutual Combat	A fight or sudden falling out where both parties willingly participate, often limiting the self-defense claim. ²
"Dwelling house" / "Castle"	The residence of an individual, where the duty to retreat did not apply. ¹
<i>Curtilage</i>	The enclosed space immediately surrounding the dwelling house, whose inclusion in the castle doctrine was often debated. ¹³
"Retreat to the wall"	The maximum extent of non-lethal withdrawal required by common law before deadly force could be justified. ⁹

5. Gaps and Conflicts in Maryland Practice

The enforcement of self-defense doctrine in pre-1850 Maryland relied heavily on English treatises, leading to several ambiguities regarding local practice:

- **Specific Retreat Precedent:** While the common law mandate to "retreat to the wall" is clear ⁹, the available record lacks definitive appellate holdings from early Maryland reporters (H. & McH. or H. & J.) that specifically outline the judicial application of this

rule, particularly in distinguishing between simple affray and felonious assault.¹⁰

- **Enforcement of Forfeiture:** The common law consequences of *se defendendo* included the forfeiture of the defendant's chattels.⁶ Documentation detailing the actual post-1776 Maryland court process for managing this forfeiture, including the executive or judicial issuance of the "pardon of course" necessary to finalize the excusable verdict, is silent.
 - **Defense of Others Standard:** Early Maryland sources offer no explicit discussion or ruling on the standard required for the defense of a third party. It is unresolved whether Maryland followed the strict *alter ego* rule (where the defended person must have the legal right to defend themselves) or allowed the defense based solely on the defender's reasonable belief.¹⁵
 - **Scope of Habitation:** The precise legal extent of the non-retreat rule beyond the immediate dwelling walls—specifically, how the *curtilage* was judicially defined in Maryland to include outbuildings or specific yard boundaries—is not addressed in the available authorities.¹³
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Annotated Bibliography

The following resources represent the authoritative sources underpinning the common law of defensive homicide applied in Maryland before 1850, prioritizing print materials and their digital equivalents.

Primary Sources (Maryland Law and Commentary)

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 - *Relevance:* This statute divided murder into degrees but left the definitions of manslaughter and defensive homicide entirely to the existing common law.³
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 - *Electronic Link Equivalent:* Digitized copies of Maryland Session Laws (e.g., through Maryland Archives or HeinOnline State Session Laws).
2. **Foster, Michael. *A Report of Some Proceedings on the Commission of Oyer and Terminer and Goal Delivery for the Trial of the Rebels in the Year 1746... and of other Crown Cases. To Which are Added Discourses upon a few Branches of the Crown Law*. Oxford, 1762.**
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 - *Relevance:* Highly influential treatise distinguishing justifiable homicide (repelling a known felony) from excusable homicide.²
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- 4. **Blackstone, William. *Commentaries on the Laws of England*. Book IV. Oxford, 1769.**
 - *Citation Reference*: 4 Blackstone Comm. 186.
 - *Relevance*: Provides the definitive common law separation of justifiable homicide (lawful requirement) and excusable homicide (*se defendendo*), noting the "fault" implied in the latter.⁵
 - *Print Resource*: Blackstone, William. *Commentaries on the Laws of England*. Edited by Edward Christian. London: T. Cadell and W. Davies, 1809.
 - *Electronic Link Equivalent*: Yale Law School's Avalon Project or Google Books digitized copies (e.g., source snippet ¹⁸ and ⁵ detail the relevant passages).
- 5. **Wharton, Francis. *A Treatise on the Criminal Law of the United States*. Philadelphia, 1846.**
 - *Citation Reference*: Wharton, *Homicide* Sec. 3 at 211 (1855 ed.).
 - *Relevance*: Although the specific edition quoted is slightly post-1850, it provides descriptive commentary on the pre-1850 common law consequence of excusable homicide, specifically the forfeiture of goods.⁶
 - *Print Resource*: Wharton, Francis. *A Treatise on the Criminal Law of the United States*. 3rd ed. Philadelphia: Kay and Brother, 1855.
 - *Electronic Link Equivalent*: HathiTrust or Google Books digitized copies.

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