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**GUNSMOKE AND LEGAL MIRRORS:  
WOMEN SURVIVING INTIMATE BATTERY AND  
DEADLY LEGAL DOCTRINES**

*Judith E. Koons\**

*Gunsmoke trail.  
Oh tell me of days gone by.  
- Theme from Gunsmoke<sup>†</sup>*

*[Y]ou wanna control.  
I mean, that's where the hitting comes from.  
To put fear in 'em.  
- Participant in Batterers' Intervention Program<sup>‡</sup>*

*We do not ask of the man in the barroom brawl  
that he leave the bar before the occurrence of an anticipated fight,  
but we do ask the battered woman threatened with a gun why she  
did not leave the relationship.  
- V. F. Nourse<sup>§</sup>*

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\* Associate Professor of Law, Barry University School of Law, Orlando, Florida. B.A., J.D. University of Florida, M.T.S. Harvard Divinity School. Copyright, Judith E. Koons, 2006. I am indebted to the faculty and staff of the law library, particularly Ann Pascoe, for their patient expertise, to Professor Mark Summers for his generous collegiality, to Melissa Martin for her helpful research assistance, and to Barry University School of Law for its manifold support of my work.

<sup>†</sup> REX KOURY & GLENN J. SPENCER, THEME FROM GUNSMOKE (Herman Music, Inc. 1955).

<sup>‡</sup> Julia T. Wood, *Monsters and Victims: Male Felons' Accounts of Intimate Partner Violence*, 21 J. SOC. & PERS. RELATIONSHIPS 564 (2004) (reporting accounts of intimate partner violence and how the accounts draw upon understandings of codes of manhood).

<sup>§</sup> V.F. Nourse, *Self-Defense and Subjectivity*, 68 U. CHI. L. REV. 1235, 1238 (2001) [hereinafter Nourse, *Subjectivity*].

## INTRODUCTION

In a prototypical plot of the 1960s television series “Gunsmoke,” Miss Kitty is defending herself against a homicidal bandit while Marshall Dillon deputizes the men of the town.<sup>1</sup> In 2005—and in true Gunsmoke-ethos—Florida fortified the castle doctrine’s privilege in which people are permitted to use deadly force in their homes without retreating.<sup>2</sup>

Supported by an unprecedented system of presumptions justifying the use of deadly force, as well as immunities from criminal and civil actions where force is used as authorized, the act abrogated the common law duty to retreat outside of a dwelling.<sup>3</sup>

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<sup>1</sup> E.g., *Gunsmoke: Help Me Kitty* (featuring Miss Kitty’s shooting a stagecoach bandit in self-defense) (CBS television broadcast Nov. 7, 1964) (episode guide), at [http://www.tv.com/gunsmoke/show/236/episode\\_guide.html&season=10](http://www.tv.com/gunsmoke/show/236/episode_guide.html&season=10) (last visited July 20, 2005); *Gunsmoke: Uncle Finney* (depicting an attempted robbery that is thwarted by Festus, acting as Matt Dillon’s deputy) (CBS television broadcast Oct. 14, 1968). Set in Dodge City, Kansas, in 1873, *Gunsmoke* aired from 1955-1975 and starred James Arness as Marshall Matt Dillon, Amanda Blake as Kitty Russell, Milburn Stone as Doc Adams, Dennis Weaver as Chester Goode, and Ken Curtis as Festus Hagen. The (New) Network and Cable TV Guide, *Gunsmoke*, at <http://www.geocities.com/TelevisionCity/9348/gunsmoke.htm?200528> (last visited Jul. 27, 2005).

<sup>2</sup> See S.B. 436, 107th Leg., Reg. Sess. (Fl. 2005); see also Rick Neale, “Deadly Force” Law Draws Mixed Views, FL. TODAY, Apr. 28, 2005, available at <http://www.floridatoday.com> (last visited May 30, 2005) (referring to statement of Peter Gunn, spokesperson of the Brady Campaign to Prevent Gun Violence, that Florida’s act operates to deputize its entire citizenry). For a discussion of the history of the castle doctrine, see *infra* Part II. For a review of Florida’s codification of the castle doctrine, see *infra* Part III.

<sup>3</sup> Florida joined a number of states that have abrogated the duty to retreat outside of a dwelling, but was the first state to adopt a system of statutory presumptions justifying the use of deadly force and immunities from civil action and criminal prosecution where force is used as authorized. See S.B. 436, 107th Leg., Reg. Sess. (creating Fla. Stat. § 776.013(1), which establishes a presumption of fear of death or great bodily harm to justify deadly force against a person who is unlawfully and forcefully entering a dwelling or occupied vehicle, and creating Fla. Stat. § 776.032, which provides immunity from criminal prosecution and civil action where force is used as outlined in the statute); see also Catherine L. Carpenter, *Of the Enemy Within, The Castle*

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At the same time, the statutory re-casting of the castle doctrine left intact ambiguities in the law that effectively place a duty to retreat on women who live with battering men.<sup>4</sup> The re-working of the castle doctrine gives occasion for the broader project of this article—to study gender contradictions in the construction of legal doctrines.<sup>5</sup>

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*Doctrine, and Self-Defense*, 86 MARQ. L. REV. 653, 663 (2003) (advising that “[m]ost jurisdictions do not impose the duty to retreat on one who is unlawfully attacked, whether in public or private space.”). For an overview of the duty to retreat in the United States, see Part II, *infra*. For a jurisdiction-by-jurisdiction analysis of the retreat doctrine, see *infra* note 41. For a discussion of the duty to retreat in Florida, see *infra* Part III.

<sup>4</sup> That the Florida legislature was not considering the circumstances of women who live with battering men is apparent by the bill’s granting a presumption of fear of death or great bodily harm in situations of unlawful entry into a residence (or classic stranger violence that is commonly experienced by men), not where a person is being battered by a co-resident who is lawfully on the premises (or classic intimate partner violence that is commonly experienced by women). See, e.g., Ronet Bachman & Linda Saltzman, U.S. Dept. of Justice, Violence Against Women: Estimates from the Redesigned Survey 3 (Aug. 1995), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/femvied.pdf> [hereinafter Bachman & Saltzman] (reporting findings of the National Crime Victimization Survey of the Bureau of Justice Statistics, U.S. Department of Justice, including results that “[m]en were about twice as likely as women to experience acts of violence by strangers” while “women were about 6 times more likely to experience violence committed by an intimate.”). Furthermore, the act asserts a standard of imminence (i.e., deadly force is justified where necessary to prevent imminent death, great bodily harm, or to prevent the imminent commission of forcible felony). S.B. 436, 107th Leg., Reg. Sess. (Fl. 2005) (amending ‘ 776.012). Imminence has been critiqued as a porous standard that has operated to the disadvantage of women who kill battering men. Nourse, *Subjectivity*, *supra* note §, at 1237, 1282. For further discussion of the act, see Part III, *infra*. For further discussion of the standard of imminence, see Parts V.A. & C., *infra*.

<sup>5</sup> This article highlights the Florida act to examine the construction of the law (and gender inequity in the law). I have previously situated my work within a feminist history of ideas and construction of thought. See Judith E. Koons, *Motherhood, Marriage, and Morality, The Pro-Marriage Moral Discourse of American Welfare Policy*, 19 WIS. WOMEN’S L.J. 1 (2004) [hereinafter Koons, *Motherhood*] (utilizing a critical genealogical approach to inspect the social, theological, and historical tracks of four sets of values (good mother / bad mother, deserving / undeserving, independent / dependent, and legitimate /

A key lobbyist for the National Rifle Association (the “NRA”) characterized the emboldened castle doctrine as the “first step of a multi-state strategy” to introduce similar legislation across the country.<sup>6</sup> Citing plans to begin “dropping bills” in capitals, the NRA’s Executive Vice President Wayne LaPierre advised, “We will go everywhere, red states and blue states, including New York. It is both a liberty and a crime issue with a big political tailwind. Politicians are putting their career in jeopardy if they oppose this type of bill.”<sup>7</sup>

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illegitimate) in the moral discourse of contemporary welfare policy); FRIEDRICH NIETZSCHE, ON THE GENEALOGY OF MORALS: A POLEMIC 16 (Walter Kaufmann & R. J. Hollingdale trans., Vintage Books ed. 1989) (1887) (developing a critical genealogical approach to question “where our good and evil really originated.”) (emphasis in original); PIERRE BOURDIEU, OUTLINE OF A THEORY OF PRACTICE 168-69 (1977) (proposing that outside of the universe of orthodoxy and heterodoxy (or “right” opinion and “left” or “wrong” opinion), is the doxa, which is the “universe of the undiscussed” (the class of that which is beyond question and taken for granted) and that the truth of doxa is only revealed when critique “brings the undiscussed into discussion.”); see also Nancy Fraser & Linda Gordon, *The Genealogy of Dependency: Tracing a Keyword of the U.S. Welfare State*, 19 SIGNS: J. OF WOMEN IN CULTURE & SOC’Y 309, 310 (1994) (reconstructing the genealogy of dependency) reprinted in BARBARA LANSLETT, ET AL., RETHINKING THE POLITICAL 36 (1995); CORNEL WEST, PROPHECY DELIVERANCE: AN AFRO-AMERICAN REVOLUTIONARY CHRISTIANITY 48 (1st ed. 1982) (seeking, in a non-reductive historiography, the “‘moment of arising’ of the idea of white supremacy within the modern discourse in the West”); Nourse, *Subjectivity*, supra note §, at 1293 (adopting an intellectual method of constitutive feminist inquiry to ask how the law “constitutes us and our relationship to the political order.”). Cf. HENRY DAVID THOREAU, WALDEN 92 (Brooks Atkinson ed., 1992) (1854) (while “burrowing” his cabin on the hillside of Walden and suggesting that “our lives must be stripped,” Thoreau advised us to “work and wedge our feet down through the mud and slush of opinion, and prejudice, and tradition, and delusion, and appearances, that alluvium which covers the globe . . .”).

<sup>6</sup> Manuel Roig-Franzia, *Fla. Gun Law to Expand Leeway for Self-Defense*, WASH. POST, Apr. 26, 2005, at A01; see also Jacqui Goddard, *Florida Boosts Gun Rights, Igniting a Debate*, CHRISTIAN SCIENCE MONITOR, May 10, 2005, at 2 (noting that the NRA chose Florida to launch this gun initiative and hopes to take the campaign nationwide).

<sup>7</sup> Andrew Metz, *NRA Axiom Now Fla. Law*, NEWSDAY, Apr. 28, 2005, at A27 (also reporting that the NRA plans to target “at least 29 states, including New York, that have laws with specific retreat requirements.”).

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Although proponents contended that “[d]isorder and chaos are always held in check by the law-abiding citizen,”<sup>8</sup> critics asserted that the act is a dangerous return to the Wild West.<sup>9</sup> Some observers described the political impulse behind the act as “a perverse exploitation of a politician’s fear of appearing soft on crime,”<sup>10</sup> while others proposed that the “emotionally manipulative measure” merely codifies pre-existing rights to self-defense.<sup>11</sup>

While echoing many of the foregoing general criticisms, this article sets up a hermeneutic<sup>12</sup> of inclusive conversation<sup>13</sup> to

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<sup>8</sup> Roig-Franzia, *supra* note 6, at 2 (quoting House sponsor Dennis Baxley (R. Ocala)).

<sup>9</sup> Marc Caputo & Gary Fineout, *Deadly Force Bill Passes House*, MIAMI HERALD, Apr. 1, 2005, at A1; *see also* Goddard, *supra* note 6, at 2 (quoting opponent who fears the measure will promote vigilantism and “turn Florida into the O.K. Corral.”).

<sup>10</sup> Metz, *supra* note 7, at 2 (quoting Richard Aborn, president of New Yorkers Against Gun Violence). The Florida House of Representatives voted 94 to 20 in favor of the bill; the Florida Senate passed it on a vote of 39 to 0. Abby Goodnough, *Florida Expands Right to Use Deadly Force in Self-Defense*, N.Y. TIMES, Apr. 27, 2005, at A18.

<sup>11</sup> Daniel Ruth, *You Talkin’ To Me?*, TAMPA TRIBUNE, Apr. 22, 2005, at 2. At first glance, it may seem that the Florida legislature merely shored up pre-existing law. However, the legislature endowed the castle doctrine with a novel system of presumptions and immunities, creating a “castle doctrine on steroids.” For further discussion of the presumptions and immunities adopted by the act, *see infra* Part II.

<sup>12</sup> In a narrow sense, hermeneutics refers to the interpretation of written texts. *E.g.*, DONALD K. MCKIM, WESTMINSTER DICTIONARY OF THEOLOGICAL TERMS 127 (1996) [hereinafter WESTMINSTER] (defining hermeneutics in terms of searching for meanings of writings, particularly biblical texts). Broadly speaking, however, hermeneutics is understood as the “art of understanding.” Bernard C. Latagan, *Hermeneutics*, in ANCHOR BIBLE DICTIONARY 149 (David Noel Freedman ed., 1992) (also observing that hermeneutics includes the name of “Hermes,” the messenger of the gods and the inventor of speech and writing). For an elaboration on the theoretical basis for the hermeneutical enterprise, *see infra* Part IV.

<sup>13</sup> Social ethicist Ralph B. Potter, Professor Emeritus of Harvard Divinity School, developed the framework of inclusive conversation to encourage full moral deliberation in public and interpersonal discourse. *See* Ralph B. Potter, Reunion Day 4 (1980) (unpublished manuscript, McCormick Theological Seminary, Chicago, IL., on file with the author) [hereinafter Potter 1980]; *see*

examine gender distortions in the law's construction of the retreat and castle doctrines. For, while women who have been battered in their homes<sup>14</sup> and who must then fight for their lives in a criminal justice system that is structured with inhospitable legal doctrines, people (mostly men) have been given license to carry concealed weapons<sup>15</sup> and expanded legal protections for the use of deadly force in the public domain.<sup>16</sup> Given the human wreckage created by domestic violence,<sup>17</sup> the discriminatory effects of the gender

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also Judith E. Koons, *Making Peace With Difference: A Hermeneutic of Inclusive Conversation*, 12 TEX. J. WOMEN & L. 1 (2002) [hereinafter Koons, *Making Peace*] (adapting Potter's approach to construct an interdisciplinary critical and constructive hermeneutic for evaluating the "problem" and the "potentiality" of difference). Also known as "Potter's Boxes," the methodology seeks to ensure that the critical dimensions of our existence (the natural order, self, society, and ultimate reality) are included in moral deliberation. *Id.* at 20. This article adapts Potter's Boxes to examine the experiences of women who live with battering men and key doctrines that structure the criminal justice system for women who kill battering men. For a discussion of Potter's Boxes, see *infra* Part IV.

<sup>14</sup> Approximately three-fourths of women who experience intimate violent report that the offense occurred at or near their homes. Lawrence A. Greenfeld et al., U.S. Dept. of Justice, *Violence by Intimates: Analysis of Data on Crimes by Current or Former Spouses, Boyfriends, and Girlfriends* 11 (1998), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/vi.pdf> (also stating that women are five to eight times more likely than men to be victimized by an intimate partner) [hereinafter Greenfeld]; see also Bachman & Saltzman, *supra* note 4, at 1 (advising that about seventy-five percent of "lone-offender" violence against women was carried out by an offender known to the victim and that twenty-nine percent of violence against women was perpetrated by an intimate partner).

<sup>15</sup> See Fla. Stat. § 790.06 (2005). In the wake of Florida's adoption of a mandatory conceal-carry licensing act in 1987, one million licenses were issued. Lee Nessel Daszuta, *Sticking to their Guns*, FLA. TODAY, Apr. 25, 2005.

<sup>16</sup> Most men are assaulted and killed outside their homes by strangers, but most women are assaulted and killed within their homes by male partners. Marina Angel, *Criminal Law and Women: Giving the Abused Woman Who Kills a Jury of Her Peers Who Appreciate Trifles*, 33 AM. CRIM. L. REV. 229, 320 (1996). Of the 341,974 current conceal-carry gun licenses held in the state, approximately eighty-five percent are issued to men. See Daszuta, *supra* note 15, at 4 (also quoting the statements of Marion Hammer, NRA spokesperson, that the NRA "fought for seven years" to pass the law and, after it was vetoed by Governor Graham in 1986, "we elected a new governor and passed it again.").

<sup>17</sup> Considerable attention has been paid by feminist scholars to the use of

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the terms “domestic violence,” “spouse abuse,” and “battered women.” *E.g.*, Joan S. Meier, *Notes from the Underground: Integrating Psychological Legal Perspectives on Domestic Violence in Theory and Practice*, 21 HOFSTRA L. REV. 1295, 1299 n. 9 (1993) (noting dissatisfaction with the terminology, as “domestic violence” is inaccurately gender-neutral and trivializes the criminality of the behavior, while “battered woman” connotes weakness, passivity, or abnormality); *see also* Mary Ann Dutton, *Understanding Women’s Responses to Domestic Violence: A Redefinition of Battered Woman Syndrome*, 21 HOFSTRA L. REV. 1191, 1204 (1993) (advising that the terms “spouse abuse,” “domestic violence,” “marital assault,” “woman abuse,” and “battering” are, in the scientific field, used interchangeably to refer to the broad range of behaviors considered to be violent and abusive within an intimate relationship).

The phrases “domestic violence” and “spouse abuse” have been challenged as connoting an inappropriate gender symmetry. *E.g.*, Margaret Thornton, *Feminism and the Contradictions of Law Reform*, 19 INT’L J. SOC. L. 453, 460 (1991) (proposing that “spouse abuse” suggests a non-existent neutrality and that “domestic violence” also disguises which sex is responsible for the preponderance of the battering). A recent Department of Justice study shows that about three-fourths of the victims of family violence were women and that three-fourths of the persons who perpetrated family violence were male. Matthew R. Durose et al., U.S. Dept. of Justice, *Family Violence Statistics* (June 2005), *available at* <http://www.ojp.usdoj.gov/bjs/pub/pdf/fvs02.pdf> (also stating that women were eighty-four percent of spouse abuse victims and eighty-six percent of victims of intimate abuse).

Furthermore, the term “battered women” has been critiqued as “reductive,” by implying that the total experience of a woman is limited to being battered. ELIZABETH SCHNEIDER, *BATTERED WOMEN AND FEMINIST LAWMAKING* 61 (2000) [hereinafter SCHNEIDER, *LAWMAKING*]. *Cf.* Robert L. Burgdorf, Jr., *“Substantially Limited” Protection from Disability Discrimination: The Special Treatment Model and Misconstructions of the Definition of Disability*, 42 VILL. L. REV. 409, 534 (1997) (reporting that terminology has been a “sensitive issue” for people with disabilities: they have strongly insisted that “we are people first,” and have demanded that their common humanity be acknowledged rather than their differences magnified”).

The clear gender asymmetry of “domestic violence” warrants gender-specific language, and the prevalence of abuse by intimate male partners mandates attention to the intimate relationship. Consequently, while recognizing that, for practical purposes, the terms overlap and are often synonymous, the article will privilege the term “women who live with battering men” to recognize the gender-specificity and intimate relational basis of “domestic violence.” Martha R. Mahoney, *Legal Images of Battered Women: Redefining the Issue of Separation*, 90 MICH. L. REV. 1, 25 (1991) (recounting the resistance of some women to apply the term “battered woman” to themselves” and noting that, at



incongruities are particularly lethal.

Following this Introduction, Part I of the article offers a summary of justifiable homicide and related doctrines, including the duty to retreat, the requirement of imminence, as well as the privilege of non-retreat that is reflected in the castle doctrine. Part II reviews the legal context of Florida's codification of the castle doctrine. Part III outlines the elements of a hermeneutic of inclusive conversation while Part IV unfolds the hermeneutic to interrogate the disjuncture between the framework of the law of self-defense and the experiential reality of women who live with (and sometimes kill)<sup>18</sup> battering men.

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one conference, several women described themselves with the phrase “a woman who used to be married to a battering man”).

<sup>18</sup> In 1992, it was estimated that 800 to 1,000 of the women who were battered each year were charged with the murder of abusive partners. Erich P. Andersen & Anne Read-Andersen, *Constitutional Dimensions of the Battered Woman Syndrome*, 53 OHIO ST. L.J. 363, 366 n.16 (1992) [hereinafter Andersen & Read-Andersen]. Between 1993 and 2001, an intimate partner killed about thirty-three percent of female murder victims and four percent of male murder victims. Callie Marie Rennison, U.S. Dept. of Justice, *Intimate Partner Violence, 1993-2001*, (Feb. 2003), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/ipv01.pdf> (reporting, in a Department of Justice study, that 1,247 women and 440 men were killed by an intimate partner in 2000 and that 1,581 women and 708 men were killed by an intimate partner in 1993).

In this article, I articulate a feminist critique of the doctrines structuring the law of self-defense as applied to women who kill battering men. The article should not be considered an apology for vigilantism or an exercise in victimism. BELINDA MORRISSEY, *WHEN WOMEN KILL: QUESTIONS OF AGENCY AND SUBJECTIVITY* 25 (2003) (proposing that female killers are depicted as victims, insane, or monsters and defining “victimism” as the portrayal of people who have been abused as incapable of acting due to prior abuse); see also Elizabeth M. Schneider, *Resistance to Equality*, 57 U. PITT. L. REV. 477, 486 (1996) [hereinafter Schneider, *Equality*] (arguing that the circumstances of women who kill battering men “are critical junctures for the intersection of law and social attitudes because they trigger a national chord of anxiety about “abuse excuse’ justice and “feminazi’ vigilantism.”). The article does not assert that claims of self-defense are appropriate for all women who kill battering men. Schneider, *Equality*, *supra*.

At the same time, I recognize some staggering statistics. At least seventy percent of women who kill intimate partners do so during an ongoing attack or where

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## I. NECESSITY AND JUSTIFIABLE HOMICIDE: OF “TRUE MEN” AND “HONORABLE MEN”

Justification rests on considerations of necessity and proportionality.<sup>19</sup> In considering claims of justifiable homicide,

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there is an imminent threat of death or serious bodily injury. Holly Maguigan, *Battered Women and Self-Defense: Myths and Misconceptions in Current Reform Proposals*, 140 U. PA. L. REV. 379, 382, 384, 397-99, & nn.68-75 (1991) (concluding, in a study of 223 homicide cases defended by women who were battered, that seventy-five percent of women were killed during confrontations with their partners, and also offering sources for data that between seventy and ninety percent of intimate homicides by women were victim-precipitated). Furthermore, nearly fifty percent of women are in prison for killing a relative or intimate, almost sixty percent of female inmates in state prisons have experienced physical or sexual abuse, and over half of the female inmates who have been abused were sentenced for homicide crimes. Tracy L. Snell, U.S. Dept. of Justice, *Women in Prison* 3, 6 (1991), available at <http://www.ojp.usdoj.gov/bjs/abstract/wopris.htm>; Lawrence Greenfeld & Tracy A. Snell, U.S. Dept. of Justice, *Women Offenders* 1 (1999), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/worpris.pdf> (stating, in a Department of Justice study, that almost six in ten women in state prisons had experienced past abuse).

While urging care in the interpretation of such statistics, some psychiatrists offer the Freudian concept of repetition compulsion, whereby people who are traumatized find themselves reenacting aspects of previous trauma. JUDITH LEWIS HERMAN, *TRAUMA AND RECOVERY* 40-41, 74-75, 110-12 (1992) (also noting commonalities in the effects of trauma experienced by hostages, survivors of war, political prisoners, slaves, survivors of child abuse, and women who have been battered); see also Daniella Levine, *Children in Violent Homes: Effects and Responses*, 68 FLA. BAR J. 62, 63 (Oct. 1994) (advising that seventy-three percent of men in a batterers' study reported having been physically or sexually abused as children). A concern raised by some feminist scholars is that the law constructs women as victims, erasing their agency, or as rational agents, denying their defenses. *E.g.*, Schneider, *Equality*, *supra* at 499; see also WESTMINSTER, *supra* note 12, at 178 (defining moral agency in terms of the capability of humans to carry out ethical actions). However, the curious congruence of women killing most often during assaults as well as women killing who have been previously victimized affirms that victimization and agency are not opposed, but are as profoundly related for women who kill battering men as are notions of oppression and resistance. Schneider, *Equality*, *supra* at 523.

<sup>19</sup> 1 PAUL H. ROBINSON, *CRIMINAL LAW DEFENSES* 86-88 (1984) (advising

courts have read several rules into necessity, including variations of a duty to retreat as well as a requirement that deadly force only be used when an attack (or harm) is imminent.<sup>20</sup> Principles of retreat and imminence have particular salience in cases in which women claim justifiable homicide of battering men. As a predicate to considering the gender implications of retreat and imminence rules that act as “translators” of necessity, this section of the article traces the legal development of those doctrines.<sup>21</sup>

Prior to *Bracton*, the common law did not recognize defenses to homicide.<sup>22</sup> A person killing by accident, while insane, or in self-defense was sentenced to the gallows, subject only to a reprieve by a king’s pardon.<sup>23</sup> Where the jury relayed one of the foregoing circumstances to the king, a pardon was generally

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that “[a]ll justification defenses have the same internal structure: triggering conditions permit a necessary and proportional response”).

<sup>20</sup> Richard A. Rosen, *On Self-Defense, Imminence, and Women Who Kill Their Batterers*, 71 N.C.L. REV. 371, 380-81 (proposing that imminence “operates as a condition precedent for a finding of necessity”); Nourse, *Subjectivity*, *supra* note §, at 1236 (arguing imminence “often operates as a proxy for any number of other self-defense factors—for example, strength of threat, retreat, proportionality, and aggression”); *see also* MODEL PENAL CODE AND COMMENTARIES, pt. 1, MPC 3.04 cmt. at 53 (1985) (stating that “[t]here is a sense in which a duty to retreat may be regarded as a logical derivative of the underlying justifying principle of self-defense: belief in the necessity of the protective action”).

<sup>21</sup> Rosen, *supra* note 20, at 381 (characterizing imminence as a “translator” of necessity).

<sup>22</sup> MARTIN R. GARDNER & RICHARD G. SINGER, *CRIMES AND PUNISHMENT: CASES, MATERIALS, AND READINGS IN CRIMINAL LAW* 1063 (4th ed. 2004) [hereinafter GARDNER & SINGER]. *Bracton* was a legal treatise (*circa* 1230) that was named for a royal judge, Henri de Bracton (d. 1268). It was the first legal treatise in Anglo-American law that developed constitutional and legal theory. DANIEL CONQUILLETTE, *THE ANGLO-AMERICAN LEGAL HERITAGE* 61-2, 88-92 (1999) (discussing and quoting excerpts of BRACTON ON THE LAWS AND CUSTOMS OF ENGLAND (Samuel E. Thorne trans., George E. Woodbine ed. 1968) (1230)).

<sup>23</sup> GARDNER & SINGER, *supra* note 22, at 1063; *see also* Eugene R. Milhizer, *Justification and Excuse: What They Were, What They Are, and What They Ought to Be*, 78 ST. JOHN’S L. REV. 725, 775-76 (2004) (noting that *Bracton*’s concept of criminal intent later served as the basis for acquittal for accident, madness, and immaturity).

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granted.<sup>24</sup> At the beginning of the 15<sup>th</sup> century, these circumstances became grounds for acquittal and for pardons that were issued as a matter of course.<sup>25</sup> Forfeiture to the king of all land and chattel of a defendant remained a prerequisite to a pardon.<sup>26</sup> In 1532, Parliament adopted a statute that characterized killings as “justifiable” when committed by persons to prevent felonies or by victims who suffered unprovoked deadly attacks on highways or in homes.<sup>27</sup> While an “excusable” killing required forfeiture of land and chattel, “justifiable” homicide did not.<sup>28</sup>

By the time of Blackstone, homicide that was committed to prevent “any forcible and atrocious crime” was justifiable by the laws of nature and those of England.<sup>29</sup> A person committing justifiable homicide was found to be completely without fault.<sup>30</sup> In contrast, homicide in self-defense was viewed as excusable, rather than justifiable.<sup>31</sup> A person committing excusable homicide was

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<sup>24</sup> GARDNER & SINGER, *supra* note 22, at 1063.

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> *Id.* (referring to 24 Hen. 8, c. 5 (1532) (Eng.)).

<sup>28</sup> *Id.* For a discussion of the theories underlying justification and excuse, see JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 205-19 (3d ed. 2001) [hereinafter DRESSLER, UNDERSTANDING].

<sup>29</sup> WILLIAM BLACKSTONE, 4 COMMENTARIES \*179-80, available at <http://www.lonang.com/exlibris/blackstone/bla-414.htm> [hereinafter BLACKSTONE]; see also MODEL PENAL CODE § 3.02 cmt. 1 (1985) (proposing that, although there were issues as to definition and extent, “necessity seems clearly to have standing as a common law defense.”).

<sup>30</sup> BLACKSTONE, *supra* note 29, at \*179-80; see also CHARLES E. TORCIA, 2 WHARTON’S CRIMINAL LAW 181 (15th ed. 1994) [hereinafter WHARTON’S].

<sup>31</sup> Blackstone contrasted justifiable homicide to hinder the perpetration of a capital crime and excusable homicide in self-defense “or *se defendendo*, upon a sudden affray . . . whereby a man may protect himself from an assault, or the like, in the course of a sudden brawl or quarrel, by killing him who assaults him.” BLACKSTONE, *supra* note 29, at \*183-84 (referring to excusable homicide in self-defense as “*chance-medley*” or casual affray and “*chaud-medley*” or affray in the heat of blood or passion). While noting Blackstone’s “two-headed” version of self-defense, criminal law scholars have differed in their interpretations, mostly surrounding the necessity of retreat. Nourse, *Subjectivity*, *supra* note §, at 1244, n.50. Some feminist scholars have argued that the law of self-defense developed “with an underlying gender bias” that rendered it unable

found to be at some fault and to receive some degree of punishment.<sup>32</sup>

Retreat “to the wall” was required of a person who killed another in excusable self-defense.<sup>33</sup> No retreat was required in the case of justifiable homicide.<sup>34</sup> When the practice of forfeiture came to an end in the early 19<sup>th</sup> century, legal scholars merged justifiable prevention of a felony into killing in self-defense and required retreat even in cases that had previously been considered to be justifiable.<sup>35</sup>

Americans were “loath to retreat.”<sup>36</sup> In the 1800s, no-retreat

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to deal justly with women who kill abusive men. *Developments in the Law—Legal Responses to Domestic Violence*, 106 HARV. L. REV. 1574, 1575-76 (1993) [hereinafter *Developments*] (characterizing the development of self-defense doctrine with two paradigms in mind—a sudden attack by a stranger or intruder and a dispute between two persons of equal size and strength).

<sup>32</sup> BLACKSTONE, *supra* note 29, at \*183-84; *see also* WHARTON’S, *supra* note 30, at 225.

<sup>33</sup> “The law requires that the person, who kills another in his own defense, should have retreated as far as he conveniently or safely can, to avoid the violence of the assault, before he turns upon his assailant. . . . The party assaulted must therefore flee as far as he conveniently can, either by reason of some wall ditch, or other impediment. . . .” BLACKSTONE, *supra* note 29, at \*183-84; *see also* Nourse, *Subjectivity*, *supra* note §, at 1244, n.50 (arguing that, to Blackstone, retreat was required only where there was “fault” for entering the fray). The phrase “retreat to the wall” finds its origin in an early English case in which the defendant had been driven to a wall between two houses, beyond which he was not able to pass; there he stood and killed the other in self-defense. GARDNER & SINGER, *supra* note 22, at 1070 (referring to FITZHERBERT, GRAND ABRIDGMENT, C. and P.C. No. 284 (1328)). Fitzherbert was a judge of the Common Pleas from 1522-1538 and a “writer of the highest authority.” *Sykes v. Director of Public Prosecutions*, 3 All Eng. Rep. 33 (House of Lords 1961).

<sup>34</sup> GARDNER & SINGER, *supra* note 22, at 1069 (noting that “the fully innocent target of an unprovoked attack could stand his ground and kill”).

<sup>35</sup> *Id.*; *see also* WHARTON’S, *supra* note 30, at 181 (citing 3 STEPHEN, A HISTORY OF THE CRIMINAL LAW OF ENGLAND 11, 77 (1883)) (advising that the penalty of forfeiture was abolished in 1828).

<sup>36</sup> Stephen P. Aggergaard, Case Note, *Retreat from Reason: How Minnesota’s New No-Retreat Rule Confuses the Law and Cries for Alteration*, 29 WM. MITCHELL L. REV. 657, 659 (2002) (reciting George Washington’s scolding of Major General Charles Lee for “an unnecessary, disorderly, and shameful retreat” during the Battle of Momouth in the Revolutionary War); *see*

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rules became common in the Colonies and the Midwest.<sup>37</sup> An 1876 Ohio Supreme Court decision advised that “a true man, who is without fault, is not obliged to fly from an assailant, who, by violence or surprise, maliciously seeks to take his life or do him enormous bodily harm.”<sup>38</sup> However, retreat was more commonly required in the Northeast and the South.<sup>39</sup> In 1903, Harvard Professor Joseph Beale articulated the premises for the rule of retreat:

A really honorable man, a man of truly refined and elevated feeling, would perhaps always regret the apparent cowardice of retreat, but he would regret ten times more, after the excitement of a contest was past, the thought that he had the blood of a fellow-being on his hands. It is undoubtedly distasteful to retreat; but it is ten times more disgraceful to kill.<sup>40</sup>

One hundred years later, state law reflects the division between the “true man” privilege of non-retreat and the “honorable man” duty of retreat to avoid deadly confrontation.<sup>41</sup>

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also L.S. Rogers, Annotation, *Homicide: Extent of Premises Which May be Defended Without Retreat Under Right of Self-Defense*, 52 A.L.R.2D 1458 (1957) (noting a “general revulsion in America to so unnatural a standard of conduct” of retreating from an assailant).

<sup>37</sup> Aggergaard, *supra* note 36, at 659-60; *see also* Susan Estrich, *Defending Women*, 88 MICH. L. REV. 1430, 1431-32 (1990) (arguing self-defense rules exist not so much to define manly behavior as to limit manly instincts—in order to preserve human life).

<sup>38</sup> *Erwin v. State*, 29 Ohio St. 186, 199-200 (Ohio 1876); *see also* *Runyan v. State*, 57 Ind. 80, 84 (1877) (contrasting the “ancient doctrine” of retreat with the “weight of modern authority” to meet force with force when a person is violently assaulted). The United States Supreme Court cited both decisions with approval in *Beard v. United States*, 158 U.S. 550, 560-62 (1895) (holding that the lower court erred in ruling that the accused, while on his premises outside of his residence, was under a legal duty to retreat).

<sup>39</sup> Aggergaard, *supra* note 36, at 660.

<sup>40</sup> Joseph H. Beale, Jr., *Retreat from a Murderous Assault*, 16 HARV. L. REV. 567, 581 (1903).

<sup>41</sup> *Compare* Carpenter, *supra* note 3, at 663 (stating “[m]ost jurisdictions do not impose the duty to retreat on one who is unlawfully attacked, whether in public or private space”) *with* Aggergaard, *supra* note 36, at 661-62 (2002) (proposing, as of 2002, that nineteen jurisdictions generally do not require

retreat, twenty-nine jurisdictions “have resisted the stand-your-ground ethos” and require retreat, and three jurisdictions “claim a ‘middle ground’ that shuns a categorical duty to retreat but still scrutinizes the defender’s behavior.”); *see also* DRESSLER, UNDERSTANDING , *supra* note 28, at 226 n.36 (noting the “current trend appears to favor movement away from the no-retreat requirement rule.”).

Research indicates that twenty-two jurisdictions could fairly be considered to require a defendant to retreat prior to using deadly force, where retreat can be done in complete safety. Alabama: ALA. CODE ‘ 13A-3-23 (2005); Alaska: ALASKA STAT. ‘ 11.81.335 (2005); Arkansas: ARK. CODE ANN. ‘ 5-2-607 (2005); Connecticut: CONN. GEN. STAT ‘ 53a-19 (2005); Delaware: DEL. CODE ANN. tit. 11, ‘ 464 (2005); Hawaii: HAW. REV. STAT. ‘ 703-304 (2004); Iowa: IOWA CODE ‘ 704.3 (2003); Maine: ME. REV. STAT. ANN. tit.17-A, ‘ 108 (2005); Maryland: *Burch v. State*, 696 A.2d 443, 458 (Md. 1997) (“One of the elements of the defense of self-defense is the duty of the defendant to retreat or avoid danger if such means were within his power and consistent with his safety.”); Massachusetts: *Commonwealth v. Gagne*, 326 N.E.2d 907, 910 (Mass. 1975) (“[T]he defendant recognizes that we follow the rule that a person attacked with deadly force must retreat whenever it is possible to do so in safety”); *see also* *Commonwealth v. Niemic*, 696 N.E.2d 117, 121 (Mass. 1998) (“The right of self-defense does not accrue to a person until he has availed all proper means to avoid physical combat. Thus, if a defendant has an opportunity to retreat but fails to do so, the defendant has no privilege to use force in self-defense.”); Minnesota: *State v. Carothers*, 594 N.W.2d 897, 899 (Mn. 1999); Missouri: *State v. Jordan*, 646 S.W.2d 747, 751 (Mo. 1983); Nebraska: NEB. REV. STAT. ‘ 28-1409 (2005); New Hampshire: N.H. REV. STAT. ANN. ‘ 627:4 (2005); New Jersey: N.J. STAT. ANN. ‘ 2C:3-4 (West 2005); *see also* *State v. Gartland*, 694 A.2d 564, 571 (N.J. 1997) (noting statutory duty to retreat and commending to the legislature “consideration of the application of the retreat doctrine in the case of a spouse battered in her own home.”); New York: N.Y. PENAL LAW ‘ 35.15 (McKinney 2005); North Carolina: *State v. Stevenson*, 344 S.E.2d 334, 335 (N.C. Ct. App. 1986) (“The duty to retreat requires a victim of an assault to retreat to the wall before using deadly force in self-defense.”); North Dakota: N.D. CENT. CODE ‘ 12.1-05-07 (2005); Ohio: OHIO REV. CODE ANN. ‘ 2901.05 (West 2005); Pennsylvania: 18 PA. STAT. ANN. ‘ 505 (2005); Rhode Island: *State v. Martinez*, 652 A.2d 958, 961 (R.I. 1995); South Carolina: *State v. Long*, 480 S.E.2d 62 (S.C. 1997) (“To establish self-defense, a defendant must establish . . . he has no other probable means of avoiding the danger. However, a person attacked on his own premises, without fault, has the right to claim immunity from the law of retreat.”).

Research also indicates that twenty-one jurisdictions could fairly be considered not to impose a duty to retreat before a defendant may resort to deadly force. Arizona: ARIZ. REV. STAT. ANN. ‘ 13-411 (2004) (“B. There is no duty to retreat

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before threatening or using deadly physical force justified by subsection A of this section.”). *See also* State v. Korzep, 799 P.2d 831 (Ariz. 1990); California: People v. Collins, 11 Cal. Rptr. 504, 513-14 (Cal. Ct. App. 1961); People v. Humphrey, 921 P.2d 1 (Cal. 1996) (citing jury instruction); Colorado: COLO. REV. STAT. ‘ 18-1-704 (2004); Harris v. People, 75 P. 427 (Colo. 1904); People v. Garcia, 28 P.3d 340, 348 (Colo. 2001); Florida: FLA. STAT. ‘ 776.012 (2005) (effective Oct. 1, 2005); Georgia: GA. CODE ANN. ‘ 16-3-21 (2004); Johnson v. State, 315 S.E.2d 871 (Ga. 1984); Idaho: IDAHO CODE ANN. ‘ 18-4009 (2005); State v. McGreevey, 105 P. 1047, 1051 (Idaho 1909); Illinois: 720 ILL. COMP. STAT. 5/7-1 (2005); People v. Bush, 111 N.E.2d 326 (Ill. 1953); People v. Rodriguez, 543 N.E.2d 324, 328 (Ill. App. Ct. 1989); Indiana: IND. CODE ANN. ‘ 35-41-3-2 (LexisNexis 2004); Page v. State, 40 N.E. 745, 745-746 (Ind. 1895); Kansas: KAN. STAT. ANN. ‘ 21-3211 (2005); State v. Scobee, 748 P.2d 862 (Kan. 1988); Kentucky: KY. REV. STAT. ANN. ‘ 503.050 (West 2004); Sikes v. Commonwealth, 200 S.W.2d 956, 960 (Ky. 1947); Mississippi: MISS. CODE ANN. ‘ 97-3-15 (2005); Haynes v. State, 451 So. 2d 227 (Miss. 1984); Cook v. State, 467 So. 2d 203, 211 n.7 (Miss. 1985); Montana: MONT. CODE ANN. ‘ 45-3-102 (2004); State v. Merk, 164 P.655, 658 (Mont. 1917); Nevada: NEV. REV. STAT. ‘ 200.120 (2004); State v. Kennedy, 7 Nev. 375 (1872) (decision under former similar statute); Runion v. State, 13 P.3d 52 (Nev. 2000); New Mexico: N.M. U.J.I. CR. 14-5190 (2005) (jury instruction states, in part: “A person who is threatened with an attack need not retreat. In the exercise of his right of self defense, he may stand his ground and defend himself.”); Oklahoma: Neal v. State, 597 P.2d 334, 337 (Ok. Crim. App. 1979) (“The law in Oklahoma is clear: There is no duty to retreat if one is threatened with bodily harm.”); Tennessee: TENN. CODE ANN. ‘ 39-11-611 (2005) (“(a) . . . [t]here is no duty to retreat before a person threatens or uses force.”); State v. Renner, 912 S.W.2d 701 (Tenn. 1995) (“Under the ‘true man’ doctrine, one need not retreat from the threatened attack of another even though one may safely do so; neither must one pause and consider whether a reasonable person might think it possible to safely flee rather than to attack and disable or kill the assailant.”); Utah: UTAH CODE ANN. ‘ 76-2-402 (2005) (“(3) A person does not have a duty to retreat from the force or threatened force described in Subsection (1) in a place where that person has lawfully entered or remained, except as provided in Subsection (2)(c)” (pertaining to aggressors and combat by agreement)); State v. Mares, 192 P.2d 861 (Utah 1948); Vermont: VT. STAT. ANN. tit. 13, ‘ 2305 (2004); State v. Hatcher, 706 A.2d 429, 435 (Vt. 1997); Virginia: McCoy v. Commonwealth, 99 S.E. 644, 645 (Va. 1919); Washington: State v. Allery, 682 P.2d 312, 316 (Wash. 1984); West Virginia: State v. Crawford, 66 S.E. 110, 113 (W. Va. 1909).

Research indicates that eight jurisdictions may be considered to occupy a “middle ground,” in which retreat is a factor in determining whether deadly force is justified. District of Columbia: United States v. Peterson, 483 F.2d 1222



The Model Penal Code articulates the rule of retreat, as follows: “The use of deadly force is not justifiable . . . if . . . the actor knows that he can avoid the necessity of using such force

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(D.C. Cir. 1973), *cert. denied*, 414 U.S. 1007 (1973) (“Before a person can avail himself of the plea of self-defense against the charge of homicide, he must do everything in his power, consistent with his safety, to avoid the danger and avoid the necessity of taking life.”); *Cooper v. United States*, 512 A.2d 1002 (D.C. 1986) (“The middle ground approach to self-defense imposes no duty to retreat, but it permits the jury to consider whether a defendant, if he safely could have avoided further encounter by stepping back or walking away, was actually or apparently in imminent danger of bodily harm. In short, this rule permits the jury to determine if the defendant acted too hastily, was too quick to pull the trigger.”); Louisiana: *State v. Brown*, 414 So. 2d 726, 729 (La. 1982) (“Although there is not an unqualified duty to retreat, the possibility of escape is a recognized factor in determining whether or not a defendant had the reasonable belief that deadly force was necessary to avoid the danger.”); Michigan: *People v. Riddle*, 649 N.W.2d 30, 39 (Mich. 2002) (“An accused’s conduct in failing to retreat, or to otherwise avoid the intended harm, may in some circumstances, other than those in which the accused is the victim of a sudden violent attack, indicate a lack of reasonableness or necessity in resorting to deadly force in self-defense.”); Oregon: *State v. Charles*, 647 P.2d 897, 903 (Or. 1982) (“This court has never laid down an absolute rule endorsing either ‘retreat’ or ‘no retreat’ as the rule in Oregon . . . The duty has depended on the threat posed and the facts of each case.”); South Dakota: *Compare State v. Stumbaugh*, 132 N.W. 666, 674 (S.D. 1911) (“The law, as stated in the old law books, is that the person assaulted must retreat to the wall or ditch, meaning, of course, he must go as far as he can with safety, before he would be justified in taking the life of his assailant.”), *overruled on other grounds*, *State v. Waff*, 373 N.W.2d 18, 22 (S.D. 1985), *with State v. Wilcox*, 204 N.W. 369, 373 (S.D. 1925) (“[H]e was not obliged to retreat, nor to consider whether he could safely retreat, but was entitled to stand his ground. . . .”); Texas: TEX. PENAL CODE ANN. ‘ 9.32 (Vernon 2004) (“ (a) A person is justified in using deadly force . . . (2) if a reasonable person in the actor’s situation would not have retreated . . . “); Wisconsin: *State v. Wenger*, 593 N.W.2d 467, 471 (Wis. Ct. App. 1999), *rev. denied*, 599 N.W. 2d 409 (Wis. 1999) (“While Wisconsin has no statutory duty to retreat, whether the opportunity to retreat was available may be a consideration regarding whether the defendant reasonably believed the force used was necessary to prevent or terminate the interference.”); Wyoming: *Garcia v. State*, 667 P.2d 1148, 1153 (Wyo. 1983) (“Prior to resorting to deadly force, a defendant has a duty to pursue reasonable alternatives under the circumstances. Among those reasonable alternatives may be the duty to retreat.”).

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with complete safety by retreating. . . .”<sup>42</sup> Some legal scholars have questioned whether, in the era of the firearm,<sup>43</sup> a defender can ever avoid using deadly force “with complete safety” and whether the Code has only “paid homage to the retreat requirement, while allowing virtually every defendant to stand her ground.”<sup>44</sup>

Of the jurisdictions that have adopted a duty of retreat, most of them also recognize the “castle doctrine,” which provides an exception to the retreat rule and authorizes the use of deadly force by a person who is protecting her home and its inhabitants from attack.<sup>45</sup> The castle doctrine harkens back to the feudal precept that

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<sup>42</sup> Section 3.04(2)(b)(ii) of the Model Penal Code states: “The use of deadly force is not justifiable under this Section unless the actor believes that such force is necessary to protect himself against death, serious bodily injury, kidnapping or sexual intercourse compelled by force or threat; nor is it justifiable if . . . (ii) the actor knows that he can avoid the necessity of using such force with complete safety by retreating or by surrendering possession of a thing to a person asserting a claim of right thereto or by complying with a demand that he abstain from any action that he has no duty to take . . . .” MODEL PENAL CODE ‘ 3.04(2)(b)(ii) at 31 (1985). The Model Penal Code places the use of defensive force against felonious attack within “a single rule, not varied when the case is viewed as one of self-defense or one of crime prevention.” *Id.* cmt. at 38. Consequently, the Code disavows justification for the use of force “in the absence of belief by the actor in its necessity for the protective purpose he attempts to serve.” *Id.*

<sup>43</sup> The .50 caliber rifle, available on the civilian market, is able to “penetrate light armor, down helicopters, destroy commercial aircraft, and blast through rail cars and bulk storage tanks filled with explosive or toxic chemicals,” all from a mile away. Tom Diaz, *Clear and Present Danger* (Violence Policy Center), June 2005, at iii, available at <http://www.vpc.org/studies/50danger.pdf>; see also *.50 Caliber Danger* (NBC Dateline television broadcast June 19, 2005).

<sup>44</sup> GARDNER & SINGER, *supra* note 22, at 1070-71.

<sup>45</sup> BLACK’S LAW DICTIONARY 209 (7th ed. 1999). One articulation of the castle doctrine provides: “[T]hose who are unlawfully attacked in their homes have no duty to retreat, because their home offers them the safety and security that retreat is intended to provide. They may lawfully stand ground instead and use deadly force if necessary to prevent imminent death or great bodily injury, or the commission of a forcible felony.” Carpenter, *supra* note 3, at 656-57 & n.12 (concluding that this statement of the castle doctrine “merges traditional notions of the defense of habitation and self-defense in the home.”). Carpenter also argues that, rather than providing a “settled exception to the generalized

an “Englishman’s home is his castle.”<sup>46</sup> In 1895, the United States Supreme Court endorsed the principle, advising that the “weight of modern authority . . . establishes the doctrine that, when a person, being without fault and in a place where he has a right to be, is violently assaulted, he may, without retreating, repel force by force. . . .”<sup>47</sup> In expressing the sentiment underlying the doctrine, Judge Cardozo insisted:

It is not now and never has been the law that a man assailed in his own dwelling is bound to retreat. If assailed there, he may stand his ground and resist the attack. He is under no duty to take to the fields and the highways, a fugitive from his own home.<sup>48</sup>

The Model Penal Code recognizes other exceptions to the duty to retreat. Neither a person attacked at her place of work, nor a public officer engaged in the performance of duties, nor a person justified in using force to make an arrest or prevent an escape is required to retreat.<sup>49</sup> Some state legislative bodies have recently enacted “Make-My-Day,” “Shoot-the-Burglar,” and “Shoot-the-Carjacker” laws.<sup>50</sup> The latter justifies a homicide committed

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duty to retreat, the Castle Doctrine has evolved into a confusing patchwork of rules.” *Id.* at 657.

<sup>46</sup> *R. v. Southwark London Borough Council*, [2002] EWHC 153 (Q.B. 2002) (referring to *Sendil’s Case* [1585] 7 Co. Rep. 6a and quoting *Semayne’s Case* [1604] 5 Co. Rep. 91a, 91b as follows: “The house of every one is to him as his castle and fortress, as well for his defence against injury and violence, as for his repose.”); *see also* BLACKSTONE, *supra* note 29, at 4:223 (“And the law of England has so particular and tender a regard to the immunity of a man’s house, that it stiles is his castle, and will never suffer it to be violated with impunity).

<sup>47</sup> *Beard*, 158 U.S. at 562 (noting the accused was where he had a right to be, to wit: “on his own premises, constituting a part of his residence at home, at the time the deceased approached him in a threatening manner. . . .”).

<sup>48</sup> *People v. Tomlins*, 107 N.E. 496, 497 (N.Y. 1914); *see also* *Weiand v. State*, 732 So. 2d 1044, 1050 (Fla. 1999) (quoting *Hedges v. State*, 172 So. 2d 824, 827 (Fla. 1965) for the proposition that “[w]hen in his home he has ‘retreated to the wall’”).

<sup>49</sup> MODEL PENAL CODE ‘ 3.04 cmt. at 52-3 (1985).

<sup>50</sup> In 1985, Colorado adopted a defense of habitation act, also known as the “Make-My-Day” law, in which deadly force is justified against a person making

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against a person who is attempting to make unlawful entry into a vehicle if the actor reasonably believes that deadly force is “necessary to prevent the entry or to compel the intruder to leave.”<sup>51</sup> Under this Louisiana statute, there is no stated requirement that the defender either be in danger or believe that she is in danger of receiving injury.<sup>52</sup>

On the privilege of non-retreat in the home, courts have endorsed varying views regarding the applicability of the privilege to co-occupants and invited guests.<sup>53</sup> In recapitulating a duty to

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an unlawful entry and committing a crime in a dwelling where the occupant “reasonably believes that such other person might use any physical force, no matter how slight, against any occupant.” See COLO. REV. STAT. 18-1-704.5(2)-(4) (2004) (also providing immunity from criminal prosecution and civil liability); see also *People v. Janes*, 982 P.2d 300 (Colo. 1987) (affirming reversal of a manslaughter conviction where the instruction regarding defendant’s “Make-My-Day” defense failed to explain that the state effectively had to disprove the affirmative defense beyond a reasonable doubt). Louisiana adopted a defense of habitation law, also known as the “Shoot-the-Burglar” act, in 1982. See LA. REV. STAT. ANN. 14:20(3)-(4) (1983) (creating the crime of “unauthorized entry of an inhabited dwelling” without a specific intent requirement); see also John S. Baker, Jr., *Criminal Law*, 44 LA. L. REV. 279, 288-89 (1983) (critiquing the act and proposing that the measure was a legislative reaction to judicial reversal of burglary convictions). In the “Shoot-the-Carjacker” law, Louisiana expanded the defense of premises to automobiles. See LA. REV. STAT. ANN. 14:20(3)-(4) (2004); see also Stephanie Grace, *Carjacker Law Debated as Too Much, Too Little*, TIMES-PICAYUNE, Nov. 8, 1997, at A1 (discussing legal and political changes effected by the act and reporting the debate as a “political Rorschach test”). For a discussion of these legislative elaborations of the defense of premises doctrine, see 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 (1999). For a discussion of the traditional defense of habitation, see MODEL PENAL CODE § 3.06 & cmt. at 91 (1985) (noting limitations on the use of deadly force in defense of premises).

<sup>51</sup> LA. REV. STAT. ANN. 14:20(3)-(4) (2004) (also revising the “imminent danger” standard to “reasonable belief” and eliminating the duty to retreat).

<sup>52</sup> Green, *supra* note 50, at 3.

<sup>53</sup> While noting a split among the state courts, an annotation advises that a majority of courts that have adopted the castle doctrine also considers the “principle equally applicable when the assailant is a cohabitant.” Linda A. Sharp, Annotation, *Homicide: Duty to Retreat Where Assailant and Assailed Share the Same Living Quarters*, 67 A.L.R.5TH 637 (1999). However, a number

retreat and adopting the cohabitant exception to the castle doctrine, some courts have recognized the policy that two people who share a residence have “equal rights to be in the ‘castle’” and neither has the right to eject the other.<sup>54</sup>

Related to the duty to retreat is imminence. As commonly formulated, to claim self-defense to a charge of homicide, a defendant must reasonably believe “that he is in imminent danger of losing his life or suffering great bodily harm.”<sup>55</sup> Unlike the duty to retreat, which has an earlier common law lineage, the requirement of imminence began to be expressed in the late eighteenth century.<sup>56</sup>

To support the element of imminence in self-defense, the perceived danger need not be actual.<sup>57</sup> The defendant must have a reasonable belief that she is in danger, which is not justified unless

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of cases reach a contrary result and distinguish an encounter between two occupants from an encounter between an occupant and an intruder, reasoning that “since both the assailed and the assailant are on common ground and neither has the right to eject the other, the person assailed is under a duty to retreat before killing the assailant.” *Id.* (identifying nine jurisdictions that affirm a common law or statutory duty to retreat for cohabitants: District of Columbia, Florida, Massachusetts, New Hampshire, New Jersey, North Dakota, Pennsylvania, Rhode Island, and South Carolina); *see also* *Weiand v. State*, 732 So. 2d 1044, 1051 (Fla. 1999) (citing Connecticut, Kentucky, Massachusetts, New Hampshire, New Jersey, North Dakota, Rhode Island, and West Virginia as requiring retreat of cohabitants at the time of its decision in *State v. Bobbitt*, 415 So. 2d 724 (1982)).

<sup>54</sup> *E.g.*, *State v. Bobbitt*, 415 So. 2d at 726, *overruled by* *Weiand*, 732 So. 2d at 1044; *see also* *Carpenter*, *supra* note 3, at 657-58 (discussing the policies underlying the debate over the castle doctrine’s applicability to cohabitants and invitees).

<sup>55</sup> *Rosen*, *supra* note 20, at 378; *see also* WHARTON’S, *supra* note 30, at 181 (providing the following standard: “A defendant may kill in self-defense when he reasonably believes he is in imminent danger of losing his life or suffering great bodily harm.”); DRESSLER, UNDERSTANDING, *supra* note 28, at 222 (noting that imminence is an aspect of the necessity component of self-defense).

<sup>56</sup> Blackstone advised that self-defense arose only in cases that were “sudden and violent . . . when certain and immediate suffering would be the consequence of waiting for the assistance of the law.” BLACKSTONE, *supra* note 29, at 4:14; *see also* *Rosen*, *supra* note 20, at 387 n.45.

<sup>57</sup> WHARTON’S, *supra* note 30, at 181.

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some act has been performed that manifests an intent to expose the defendant to such danger.<sup>58</sup> In cases in which a defendant reasonably anticipates that the other person intends to kill her, many courts require the defendant to wait until an act is performed that indicates that the homicidal attack is imminent.<sup>59</sup> In cases in which the danger has ceased to exist, such as where an assailant has abandoned an attack, a defendant cannot claim justifiable killing.<sup>60</sup>

On this historic template, Supreme Courts of several states, including Florida, have recently grappled with the consequences for victims of domestic violence of the duty to retreat that is imbricated in the cohabitor exception to the castle doctrine.<sup>61</sup> As will be discussed in the following section, the Florida legislature could have bolstered the law's resolve for the safety of women who live with battering men.<sup>62</sup> Instead, the legislature focused on strengthening the castle doctrine for men carrying concealed

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<sup>58</sup> *Id.* at 184.

<sup>59</sup> *Id.* at 188. The Model Penal Code states as follows: “[T]he use of force upon or toward another person is justifiable when the actor believes that such force is immediately necessary for the purpose of protecting himself against the use of unlawful force by such other person on the present occasion.” MODEL PENAL CODE § 3.04(1) (1985); *see also* Nourse, *Subjectivity*, *supra* note §, at 1242 (advising that, by shifting the focus from the threat to the response (“immediately necessary”), the Model Penal Code attempted to soften the notion that “the time for defense is now. The defender cannot wait any longer”).

<sup>60</sup> WHARTON'S, *supra* note 30, at 190.

<sup>61</sup> *E.g.*, *Weiland v. State*, 732 So. 2d 1044, 1051 (Fla. 1999) (receding from imposing on cohabitants a duty to retreat from the residence and adopting a limited duty to retreat within the residence); *State v. Thomas*, 673 N.E.2d 1339, 1343 (Ohio 1997) (finding error in an instruction that a cohabitant assailant had a duty to retreat and noting in cases of domestic violence that survivors had already “retreated to the wall” many times); *State v. Gartland*, 694 A.2d 564 (N.J. 1997) (requiring tailored instruction on statutory duty to retreat for cohabitants); *see also State v. Glowacki*, 630 N.W.2d 392, 402 (Minn. 2001) (adopting a rule of non-retreat for co-occupants, but placing the absence of a duty to retreat within an obligation to act reasonably and ruling that the trial court's instruction was harmless error).

<sup>62</sup> For discussion of the use of the phrase “women who live with battering men,” *see supra* note 17.

weapons on the street.<sup>63</sup>

## II. GUNSMOKE OVER THE SUNSHINE STATE

Two major policy steps were taken in Florida prior to refashioning the castle doctrine. The first measure, adopted in 1987, was a statewide conceal-carry gun licensure act.<sup>64</sup> Concealed weapons laws fall into two categories: discretionary (or “may issue”) systems in which licenses are granted only to citizens who establish a compelling need to carry a gun and non-discretionary (or “shall issue”) licensing systems in which authorities must provide a license to any applicant who meets stated criteria.<sup>65</sup> In 1985, the NRA announced it would lobby for “shall issue” laws in specified states.<sup>66</sup> Florida was one of the first states to move from a “may issue” to a “shall issue” law, rendering its conceal-carry system among the most permissive in the nation.<sup>67</sup>

Since the enactment of the law, one million concealed weapon licenses have been issued in the state; 341,974 of those licenses

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<sup>63</sup> See Angel, *supra* note 16, at 320 (arguing the duty of retreat for co-occupants disadvantages women because most women are assaulted and killed within their homes by intimate male partners, while most men are assaulted and killed outside their homes by strangers); Daszuta, *supra* note 15, at 4 (reporting that approximately eighty-five percent of the current conceal-carry licenses in Florida are issued to men).

<sup>64</sup> See FLA. STAT. § 790.06 (2005). The legislature found it necessary to regulate “concealed weapons or firearms for self-defense to ensure that no honest, law-abiding person who qualifies under the provisions of this section is subjectively or arbitrarily denied his or her rights.” FLA. STAT. § 790.06(15) (also directing that the section be liberally construed “to carry out the constitutional right to bear arms for self-defense”); see also Daszuta, *supra* note 15, at 4 (discussing the NRA’s seven-year battle to pass the act, the veto by Governor Graham in 1986, the re-adoption of the bill in 1987, and its signing by a new Governor in 1987).

<sup>65</sup> David McDowall et al., *Easing Concealed Firearms Laws: Effects on Homicide in Three States*, 86 J. CRIM. L. & CRIMINOLOGY 193, 193-94 (1995) [hereinafter McDowall].

<sup>66</sup> *Id.*

<sup>67</sup> *Id.*; see also George Volsky, *Guns in Florida*, N.Y. TIMES, Sept. 27, 1987, at 26 (reporting that the law, “one of the most liberal in the country,” would be watched closely to see if there is any effect on crime statistics).

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were valid as of March 31, 2005.<sup>68</sup> Before the enactment of the law, 16,000 persons in the state had licenses to carry guns.<sup>69</sup> Florida's law became the blueprint for dozens of states to pass similar laws and ignited the debate over concealed weapons as a deterrent for violent crime.<sup>70</sup>

The second measure came in 1999 when the state Supreme Court modified the duty to retreat from a residence before deadly

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<sup>68</sup> Daszuta, *supra* note 15, at 4.

<sup>69</sup> Myra MacPherson, *Pistol-Packin' Populace: Florida Up in Arms*, WASH. POST, Oct. 22, 1987, at E1.

<sup>70</sup> Goddard, *supra* note 6, at 2. *But see* Richard Getchell, Comment, *Carrying Concealed Weapons in Self-Defense: Florida Adopts Uniform Regulations for the Issuance of Concealed Weapons Permits*, 15 FLA. ST. U. L. REV. 751, 752 (1987) (noting the new act was "expressly intended as a self-defense bill, not as a deterrent."). A study of the frequency of firearm homicides in the urban areas of Florida, Mississippi, and Oregon resulted in two conclusions: the stronger conclusion that "shall issue" laws do not reduce homicides and the weaker conclusion that "shall issue" laws raise levels of firearms murders. McDowall, *supra* note 65, at 202-03. *But see* Ryan S. Andrus, *The Concealed Handgun Debate and the Need for State-to-State Concealed Handgun Reciprocity*, 42 ARIZ. L. REV. 129, 132-33 (2000) (discussing the major empirical studies that support and oppose the proposition that concealed handguns deter crime and concluding that existing research provides "little support" for the fears of opponents); *see also* MacPherson, *supra* note 69, at 6 (proposing that the "strongest argument" for controlling handgun sales arises from comparing the U.S. murder rate with that of countries that have highly restrictive handgun laws: "A 1986 study of cities of comparable size showed 67 handgun murders in London, 1,582 in New York."). *Compare* U.S. v. Miller, 307 U.S. 174, 178 (1939) (interpreting the Second Amendment as relating to the preservation or efficiency of an organized state militia), *with* U.S. v. Emerson, 270 F.3d 203 (5th Cir. 2001), *cert. denied*, 536 U.W. 907 (2002) (holding that the Second Amendment protects the right of individuals "to privately possess and bear their own firearms"); Robert J. Spitzer, *The Second Amendment "Right to Bear Arms" and United States v. Emerson*, 77 ST. JOHN'S L. REV. 1, 19 (2003) (proposing that the Supreme Court (in *Miller*) and "over forty lower court rulings are correct in embracing the collective or militia view of the amendment. The *Emerson* majority . . . fails to dislodge the formers' reasoning or conclusions."). Despite others' misgivings about the validity of *Emerson*, then-Attorney General Ashcroft embraced *Emerson* as "the policy of the Justice Department" and directed all ninety-three United States Attorneys to adopt *Emerson* as the law of the United States. *Id.* at 2 n.4.



force may be used against a co-occupant.<sup>71</sup> From 1982 to 1999, Florida had followed a rule of retreat in co-occupant cases, reasoning that the castle doctrine did not apply because cohabiting spouses had equal rights to occupy the residence.<sup>72</sup> In *Weiand v. State*, the court receded from requiring a full retreat from the premises prior to using deadly force in self-defense.<sup>73</sup> Two reasons were cited by the court to sustain this conclusion. First, the court characterized earlier precedent as having been “grounded upon the sanctity of property and possessory rights, rather than the sanctity of human life.”<sup>74</sup> Second, the court recognized that “imposing a duty to retreat from the residence has a potentially damaging effect on victims of domestic violence claiming self-defense.”<sup>75</sup>

However, to satisfy any concern that eliminating a duty to retreat might “invite violence,” the court adopted a limited duty to retreat *within* the residence where reasonably possible without increasing the danger of death or great bodily harm.<sup>76</sup> The court also determined that it was inappropriate to distinguish between victims of domestic violence and other defendants who were

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<sup>71</sup> *Weiand v. State*, 732 So. 2d 1044, 1056-57 (Fla. 1999). Kathleen Weiand was convicted of second-degree murder in the killing of her husband, Todd, who had beaten and choked her during their three-year relationship. *Id.* at 1048. During the pendency of her appeal to the Supreme Court and after serving four years in prison, she was granted executive clemency. *Id.* at 1047; Sue Carlton, *Battered Spouse Case is Closed*, ST. PETERSBURG TIMES, Aug. 27, 1999, at 1B.

<sup>72</sup> *Bobbitt*, 415 So. 2d at 726 (reasoning the cohabitants “had equal rights to be in the ‘castle’ and neither had the legal right to eject the other.”).

<sup>73</sup> *Weiand*, 732 So. 2d at 1051 (adopting Justice Overton’s dissent in *Bobbitt*, 415 So. 2d at 726).

<sup>74</sup> *Id.* at 1052.

<sup>75</sup> *Id.* at 1051.

<sup>76</sup> *Id.* at 1056. While asserting that “the availability of the nonretreat instruction does not ‘invite’ violence,” the court adopted a “middle ground” instruction to satisfy “any concern that eliminating a duty to retreat might invite violence.” *Id.* (noting a lack of empirical data that demonstrated any correlation between eliminating the duty to retreat from the home and an increase in domestic violence). *Cf.* REINHOLD NIEBUHR, AN INTERPRETATION OF CHRISTIAN ETHICS 197 (1935) (“Political problems drive pure moralists to despair because in them the freedom of the spirit must come to terms with the contingencies of nature, the moral ideal must find a proper mechanism for its incarnation, and the ideal principle must be sacrificed to guarantee its partial realization.”).

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attacked in a residence by a co-occupant.<sup>77</sup>

It was in this legal context in 2005 that the Governor signed into law the new statutory right to stand one's ground outside of a dwelling, residence, or automobile and "meet force with force" where a person "reasonably believes it is necessary to do so to prevent death or great bodily harm to himself or herself or another or to prevent the commission of a forcible felony."<sup>78</sup> Where a person against whom defensive force is used was unlawfully and forcefully *entering* (or had entered) a dwelling, residence, or occupied vehicle, the act creates a *presumption* of fear of death or great bodily harm for the defender using deadly force.<sup>79</sup> However,

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<sup>77</sup> *Weiland*, 732 So. 2d at 1057. The impetus for the court's reconsideration of *Bobbitt* was "our increased knowledge of the complexities of domestic violence." *Id.* However, the court also determined not to distinguish between cotenants and invitees. *Id.* (adopting a broad reading of the position advanced by Justice Overton's dissent in *Bobbitt*, 415 So. 2d at 726).

<sup>78</sup> S.B. 436, 107th Leg., Reg. Sess. (Fl. 2005) (creating Fla. Stat. § 776.013(3), referring to "[a] person who is not engaged in unlawful activity and who is attacked in [a place other than a dwelling, residence, or vehicle] where he or she has a right to be"). This section of the statute, among others, reflects apparent gender distortion, in that men are generally assaulted and killed outside their homes by strangers, but women are generally assaulted and killed in their homes by male partners. Angel, *supra* note 16, at 320.

<sup>79</sup> S.B. 436, 107th Leg., Reg. Sess. (Fl. 2005) (creating Fla. Stat. § 776.013(1)(a)). The staff of the Senate Judiciary Committee noted that the presumptions created by the act "appear to be conclusive," not rebuttable. STAFF OF SENATE JUDICIARY COMMITTEE, 107TH LEG. SESS., SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT 6 (Feb. 25, 2005). "Dwelling" is defined as a "building or conveyance of any kind . . . designed to be occupied by people lodging therein at night." S.B. 436, 107th Leg., Reg. Sess. (Fl. 2005) (creating Fla. Stat. § 776.013(5)(a)). "Residence" is a "dwelling in which a person resides either temporarily or permanently or is visiting as an invited guest." *Id.* (creating Fla. Stat. § 776.013(5)(b)). With these definitions, in a case where a man has been invited to a woman's home on one occasion and thereafter becomes abusive, a woman may not be able to claim the benefit of the presumption. The breadth of the definitions may even lead courts to consider a man in such a circumstance to be a lawful resident. *Cf.* *State v. James*, 867 So. 2d 414, 416 n.3 (Fla. 3d Dist. Ct. App. 2003) (noting the trial judge's response to the claim for extension of the castle doctrine to a man who had been in an apartment on two occasions, once for consensual sex: "I expect home to be where you hang your hat and in this case, as I understand it, the defendant was doing more than

the presumption is unavailing where the person against whom force is used “has the right to be in or is a lawful resident of the dwelling, residence, or vehicle, such an owner, lessee, or titleholder.”<sup>80</sup> By disallowing the presumption for cohabitants, the legislative scheme significantly disfavors women who live with battering men.<sup>81</sup>

Furthermore, the act provides for *immunity* from criminal and civil actions that arise out of the justifiable use of deadly force.<sup>82</sup> In a criminal investigation, law enforcement officers are prohibited from arresting the person using force unless there is probable cause to believe that unlawful force was employed.<sup>83</sup> In a civil action successfully defended by a person who is immune from prosecution, the court is required to order attorney’s fees, costs, compensation for loss of income, and all expenses incurred in defense of the action.<sup>84</sup>

In reviewing the act’s abrogation of the common law duty to retreat before a person may resort to deadly force, legislative staff analyses noted some confusion regarding the duty to retreat.<sup>85</sup>

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hanging his hat; he was hanging his pants. So, I think he has the right to the same kind of protection in that home.”).

<sup>80</sup> See S.B. 436, 107th Leg., Reg. Sess. (Fl. 2005) (creating Fla. Stat. ‘ 776.013(2)(A)).

<sup>81</sup> Most violence toward women comes from cohabiting male partners. *E.g.*, Angel, *supra* note 16, at 320. The legislation only addresses women who live with battering men in those limited cases where the women have obtained injunctions for protection or no-contact orders. See S.B. 436, 107th Leg., Reg. Sess. (Fl. 2005) (creating Fla. Stat. ‘ 776.013(2)(A)). (providing that the presumption of fear of death or great bodily harm does not apply where the person against whom defensive force is used is a lawful resident and where “there is not an injunction for protection from domestic violence or a written pretrial supervision order of no contact against that person.”). Presumably, where a person enters a dwelling in violation of an injunction for protection or an order of no contact, the presumption of fear of death or great bodily harm would apply, not because of the behavior of the perpetrator, but because of the unlawfulness of the entry, given the court orders.

<sup>82</sup> *Id.* (creating Fla. Stat. ‘ 776.032(1)).

<sup>83</sup> *Id.* (creating Fla. Stat. ‘ 776.032(2)).

<sup>84</sup> *Id.* (creating Fla. Stat. ‘ 776.032(3)).

<sup>85</sup> The Senate Staff of the Judiciary Committee noted that the bill abrogates the common law duty to retreat. STAFF OF SENATE JUDICIARY COMMITTEE,

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More significantly, however, the act purported to eliminate the duty to retreat only where the presumptions of fear of death or great bodily harm are operable or where the harm is imminent.<sup>86</sup> Women who live with battering men are caught on both prongs of the statute. First, the favorable presumptions are unavailing to women who live with battering men because the presumptions contemplate stranger violence (through unlawful entry), rather than violence at the hands of intimate partners.<sup>87</sup> Second, the standard of imminence effectively functions as a retreat rule. While retreat rules invite juries to consider why defendants did not leave, the

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107TH LEG. SESS., SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT 5-7 (Feb. 25, 2005) (stating, too, that “a person will no longer have any duty to retreat, unless the person is not in a place where he or she is lawfully entitled to be.”). The analysis also suggested that, by cross-referencing the section on self-defense in a dwelling, residence, or vehicle that does not speak to a duty to retreat, the committee substitute is “somewhat confusing in the way that the Florida common law duty to retreat is completely abrogated.” *Id.* at 7-8. The Senate Staff of the Criminal Justice Committee proposed that the “elimination of the duty to retreat will arguably effectively extend the ‘castle doctrine’ to anyone who is an invited guest (i.e., has the right to be at the location) and could create confusion with regard to whose right to be in a particular location is paramount for the purposes of justifiable use of force.” STAFF OF SENATE CRIMINAL JUSTICE COMMITTEE, 107TH LEG. SESS., SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT 7 (Feb. 10, 2005).

<sup>86</sup> One section of the statute was amended to state, in pertinent part: “However, the person is justified in the use of deadly force and does not have a duty to retreat only if: (A) He or she reasonably believes that such force is necessary to prevent imminent death or great bodily harm to himself or herself or another or to prevent the imminent commission of a forcible felony; or (B) Under those circumstances permitted pursuant to s. 776.013.” S.B. 436, 107th Leg., Reg. Sess. (Fl. 2005) (amending Fla. Stat. ‘ 776.012). Another section described as pertaining to “use of force in defense of others” was amended to state: “However, the person is justified in the use of deadly force only if he or she reasonably believes that such force is necessary to prevent the imminent commission of a forcible felony. A person does not have a duty to retreat if the person is in a place where he or she has a right to be.” *Id.* (amending Fla. Stat. ‘ 776.031).

<sup>87</sup> *See, e.g.*, Bachman & Saltzman, *supra* note 4, at 3 (reporting findings of a Department of Justice study that men were more likely to encounter violence by strangers, while women were much more likely to face violence by intimate partners).

requirement of imminence encourages juries to ask the same question, although in a temporal form—whether defendants had the time to leave.<sup>88</sup> Consequently, by asserting a standard of imminence, the legislature adopted a “silent retreat rule,” taking back what it claimed to disavow.<sup>89</sup>

What effect do principles such as imminence and retreat have on women who live with battering men—and on their standing in the criminal justice system when they kill their abusers? The article will answer those questions by engaging a hermeneutic of inclusive conversation, the theoretical basis of which is discussed in the following section.

### III. A HERMENEUTIC OF INCLUSIVE CONVERSATION: POTTER’S BOXES

In its narrow frame of reference, hermeneutics is defined as “the rules one uses for searching out the meaning of writings.”<sup>90</sup> In a broader sense, hermeneutics goes beyond textual interpretation to

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<sup>88</sup> Nourse, *Subjectivity*, *supra* note §, at 1267-68.

<sup>89</sup> *Id.* at 1281-82 (observing that imminence operates as a silent retreat rule, even in states that have rejected retreat). For a discussion of imminence as a species of retreat, see *infra* Parts IV.A. & C.

<sup>90</sup> WESTMINSTER, *supra* note 12, at 127; see also Elisabeth Schüssler Fiorenza, *Feminist Hermeneutics*, in THE ANCHOR BIBLE DICTIONARY 783, 785 (David Noel Freeman ed., 1992) (advising that the term “hermeneutics” is derived from the Greek word *hermeneuein* / *hermeneia*, defined as “the practice and theory of interpretation.”). Distinctions have been traditionally drawn between general philosophical hermeneutics and critical hermeneutics as well as between specialized forms of hermeneutics such as legal and theological hermeneutics. Lategan, *supra* note 12, at 149-50 (noting that a hermeneutics of jurisprudence—reflected in modernity as modes of interpreting statutes—arose out of a revival of interest in Roman Law in the 12th century). More recently, legal scholars are looking to philosophical hermeneutics to deepen legal hermeneutical analysis. See, e.g., Ioannis S. Papadopoulos & Mark Tushnet, *Legal Hermeneutics at a Crossroads: Giuseppe Zaccaria’s Questioni di Interpretazione*, 8 CARDOZO J. INT’L & COMP. L. 261 (2000) (proposing Zaccaria’s work as a bridge between American legal thought and philosophical hermeneutics); Francis J. Mootz III, *Review Essay: The New Legal Hermeneutics*, 47 VAND. L. REV. 115 (1994) (reviewing GREGORY LEYH, *LEGAL HERMENEUTICS: HISTORY, THEORY, AND PRACTICE* (1992)).

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“refer to one’s means or ways of interpreting and construing the meaning of experience.”<sup>91</sup> Closely related is *a* hermeneutic, which is defined as “the lens or perspective or set of assumptions through which experience is processed, or through which life is ‘read.’”<sup>92</sup>

Against a backdrop of key legal doctrines, this article uses a hermeneutic of inclusive conversation to read the experiences of women who live with and kill abusive male partners. The methodology is an adaptation of a hermeneutic for moral deliberation known as “Potter’s Boxes” that was developed by Harvard social ethicist Ralph B. Potter.<sup>93</sup>

Potter’s Boxes begin with an inquiry into the adequacy of our moral discourse.<sup>94</sup> According to Potter, to be adequate, a moral discourse must enable us to speak about the four critical dimensions of our existence: the natural order, self, society, and ultimate reality.<sup>95</sup> The first dimension, which also corresponds to

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<sup>91</sup> CHARLES R. FOSTER & THEODORE BRELSFORD, WE ARE THE CHURCH TOGETHER: CULTURAL DIVERSITY IN CONGREGATIONAL LIFE 166 (1996).

<sup>92</sup> *Id.* at 163.

<sup>93</sup> See Potter 1980, *supra* note 13; see also Ralph B. Potter, *Colloquium in Ethics* (Sept. 21, 1989) [hereinafter Potter 1989] (unpublished collection) (on file with the author); Ralph B. Potter, *Qualms of a Believer*, 69 SOUNDINGS 111 (1986) [hereinafter Potter 1986]; Ralph B. Potter, *Justice and Beyond in Moral Education*, 19 ANDOVER NEWTON Q. 3 (1979) [hereinafter Potter 1979]. This schema was adapted by Potter from the work of Harvard sociologist Talcott Parsons, whose social systems theory envisioned the domains of life as functionally interrelated. Potter 1989, *supra*. Feminist sociologist Miriam Johnson offered a feminist reappraisal of the work of Talcott Parsons. Miriam M. Johnson, *Feminism and the Theories of Talcott Parsons*, in FEMINISM AND SOCIOLOGICAL THEORY 101 (Ruth A. Wallace ed., 1989) (focusing on the “fit” between feminism and Parsons’ theory of social progress). I have previously emphasized the multidimensional and interdisciplinary methodology at the heart of Parsons’ work as bearing fruit for feminist scholarship. Koons, *Making Peace*, *supra* note 13, at 20, n.93.

<sup>94</sup> The description of Potter’s Boxes was drawn from Koons, *Making Peace*, *supra* note 13, at 19-22.

<sup>95</sup> Potter 1986, *supra* note 93, at 112-13. These four domains relate to the four functional prerequisites of Parsons’ social system analysis: adaptation, goal attainment, integration, and latent pattern maintenance. Potter 1989, *supra* note 93. Potter translated the Parsonsian functions into moral considerations as follows:

the first of four domains of Potter's Boxes, orients toward the *facts* of a situation and relates us to the natural order through empirical disciplines. Utilitarianism is an example of a moral language that arises from this quadrant. The second domain centers on *loyalties* and imparts a psychological account of self, relationships, and community. Communitarianism is a representative moral language from this domain. The third domain highlights *norms* and expresses a political philosophy of what is a just society. Moral languages reflecting this domain are Deontology and Rights-Based Justice. The fourth domain inquires into *meaning* and questions the purpose of life and the terms of our human existence. Illustrative moral languages located in this domain are from Religious or Philosophical Traditions.<sup>96</sup>

To Potter, each domain may be seen as employing a different moral language that represents one of the four major orientations to life.<sup>97</sup> In Potter's view, each language is distinctive by virtue of having "its own logic, criteria of adequacy, prospect of criticism, and possibility of 'improvement.'"<sup>98</sup>

At heart, Potter's Boxes reject any methodology that would privilege one of the four moral languages or that would seek to create another moral "first language" as the vehicle for considering

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First, an adequate moral language must relate us to the natural order through 'economic' and 'ecological' doctrines. Second, it must provide a psychological account of how a stable sense of self is created and maintained. Third, it must yield a political philosophy guiding our reconstruction of a just and sustainable society. Fourth, it must express a common sense of what life is about and, ultimately, the terms of our human existence.

Potter 1986, *supra* note 93, at 113.

<sup>96</sup> *Id.* Two moral languages which are often considered the foundation of our Western legal system are Utilitarianism and Deontology. The relational domain has been the locus of feminist critiques of rights-based justice. *E.g.*, Carol Gilligan, *In a Different Voice: Women's Conceptions of Self and of Morality*, 47 HARV. EDUC. REV. 481 (1977).

<sup>97</sup> In *Qualms of a Believer*, Potter presented examples of utilitarian individualism, expressive individualism, the civic republican tradition, and the biblical tradition. Potter 1986, *supra* note 93.

<sup>98</sup> Potter 1979, *supra* note 93, at 147.

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aspects of the common life.<sup>99</sup> Potter insisted that a significant problem of moral adequacy arises when one of these languages is advanced as a first language, seeking to serve as the basis for adjudicating all questions of the common life.<sup>100</sup> Potter argued that each perspective is incomplete, by offering a skewed moral vocabulary and only a partial vision for public discourse.<sup>101</sup>

In Potter's understanding, a full moral deliberation necessarily includes each of the moral languages.<sup>102</sup> Each language privileges certain considerations and also flags areas of concern when those considerations are offended. Consequently, a full moral deliberation among interlocutors may include comments such as the following:

‘You don’t have the facts straight,’ ‘You have failed to take into account the welfare of certain persons who deserve consideration,’ ‘You have neglected a variety of relevant

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<sup>99</sup> Potter 1986, *supra* note 93, at 114 (critiquing ROBERT N. BELLAH ET AL., *HABITS OF THE HEART* (1985) as posing civic republicanism as a moral first language).

<sup>100</sup> *Id.*

<sup>101</sup> *Id.*

<sup>102</sup> *Id.* Potter's Boxes may be used in the classroom as the basis for a critical self-reflective process that also brings stories of people and considerations of meaning into equal partnership with the facts and norms. Potter's Boxes offers a way to talk about and across issues of race, gender, and class. For example, when discussing racism and white privilege in jurisprudence classes, I invite students to identify the considerations that they are privileging, to sharpen or modify their moral commitments, to diagnose the considerations that are being privileged by others in the conversation, and to assess the factors that are being overlooked in the conversation. Potter's Boxes helps some students to see that they may be privileging a short-term historical perspective and a norm of individual responsibility, while other students may be taking a longer-term historical perspective, emphasizing the effect of racism on people, or probing the structural causes of racism. Potter's Boxes also has potential for transforming the law by offering a ground for critiquing hidden norms and assumptions of the law as well as by encouraging a vision of justice that is participatory and dialogic. The hermeneutic widens the circle of relevant considerations and offers a norm of inclusion in which all voices are necessary for a full conversation, including those traditionally silenced. *See, e.g.,* Koons, *Making Peace*, *supra* note 13 (employing Potter's Boxes to imagine justice in terms of inclusive mutuality).



considerations and given others undue weight,' or 'You've taken only a short-term view, or failed to comprehend what the purpose of our whole enterprise is.'<sup>103</sup>

Each language not only contributes its distinctive orientation for organizing and understanding the world, but also serves as a necessary corrective to the partiality of the others. The interweaving of languages is essential to the framework of inclusive conversation and offers a structural assurance of regard "not only for the form of moral logic employed, but also for one's capacity to get the facts straight, to judge whose welfare is at stake, and to interpret life in some fairly coherent manner."<sup>104</sup>

Western jurisprudence, based on Utilitarianism and Deontology, so often focuses on the facts and the law, neglecting considerations of relationships and meaning.<sup>105</sup> For many legal scholars, the legitimacy of the legal system is squarely based on the necessity of judging by neutral principles.<sup>106</sup> Despite such stated formalism, the law silently absorbs social norms into its "neutral principles."<sup>107</sup> Of moment to this article is the notion that

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<sup>103</sup> Potter 1979, *supra* note 93, at 147. To extend Potter's schema, the four identified moral languages may be heard to ask: What is Good? What is Fitting? What is Right? What is True?

<sup>104</sup> *Id.* Addressing the problem of living and moral agency, Alasdair MacIntyre called for the development of thoughtful moral agency—one that is able to identify presuppositions and one that is able to reflectively choose how to live and how to work. Alasdair MacIntyre, *The Recovery of Moral Agency?*, HARV. DIV. BULL. 6 (Fall 1999) (The Dudleian Lecture at Harvard Divinity School, Apr. 16, 1999) (proposing that the knowledge needed for thoughtful moral agency is not theoretical, but practical).

<sup>105</sup> Inattention to stories of clients and considerations of wider meaning may be seen as leading to the impoverishment of the law. *See, e.g.*, Christopher Gilkerson, *Poverty Law Narratives: The Critical Practice and Theory of Receiving and Translating Client Stories*, 43 HASTINGS L.J. 86, 909, 920 (1992) (proposing that client narratives and the deeper meanings in clients' struggles "hold the potential to make judges aware of and acknowledge the perspective of those excluded, and can empower lawyers with the ability to breathe life into stale, abstracted legal rules and doctrines.").

<sup>106</sup> *E.g.*, Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959); Barry Friedman, *Neutral Principles: A Retrospective*, 50 VAND. L. REV. 503 (1997).

<sup>107</sup> Nourse, *Subjectivity*, *supra* note §, at 1294, 1298 (inviting recognition

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among the social norms that fill the law with meaning are pernicious ideas of gender hierarchy.<sup>108</sup> Criminal law purports to be based on neutral principles, but remains full of contested meanings.<sup>109</sup>

In the next section, the article constructs a hermeneutic of inclusive conversation to engage in a gender analysis of domestic violence and the doctrinal strictures of the criminal justice system. By centering its analysis in four different domains, the article will illuminate some of the contradictions that structure the legal claims of women who live with—and kill—battering men.

#### IV. THE LEGAL FRAMEWORK AND THE LIVED REALITY OF BATTERING: ASSESSING THE FACTS, LOYALTIES, NORMS, AND MEANINGS

##### *A. The Facts: Intimate Battering of Women*

Every fifteen seconds a woman is beaten in the United States.<sup>110</sup> An estimated 1 million to 4.8 million women are

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“of the ways in which the law absorbs and constitutes popular norms that it does not disclose and may even disavow” as well as the ways that criminal law “not only oppresses openly and in positive law, but quietly and constitutively.”)

<sup>108</sup> Victoria F. Nourse, *Law's Constitution: A Relational Critique*, 17 WIS. WOMEN'S L.J. 23, 38-39 (2002) [hereinafter Nourse, *Relational*] (discussing the discrimination that is reflected in the rule of imminence, and the social norms that it absorbs, as “a discrimination of relation, a rule that reenacts a relation of inferiority and invisibility.”); Judith Lorber, “*Night to His Day*”: *The Social Construction of Gender*, in FEMINIST FRONTIERS 40 (Laurel Richardson et al. eds, 5<sup>th</sup> ed. 2001) (describing the social institution of gender in three ways: as a process of creating social statuses; as a part of a stratification system that hierarchically ranks men and women; and as a structure that “divides work in the home and in economic production, legitimates those in authority, and organizes sexuality and emotional life”).

<sup>109</sup> Nourse, *Subjectivity*, *supra* note §, at 1239.

<sup>110</sup> Walter W. Steele, Jr. & Christine W. Sigman, *Reexamining the Doctrine of Self-Defense to Accommodate Battered Women*, 18 AM. J. CRIM. L. 169 (1991) [hereinafter Steele & Sigman] (referring to DALLAS MORNING NEWS, July 16, 1990, at C3).

assaulted by their intimate partners every year.<sup>111</sup> More precise figures are difficult to adduce because intimate assaults of women are only reported in one-fourth to one-seventh of all cases.<sup>112</sup> However, a number of sources estimate that one-third to one-half of all American women endure at least one physical assault by a partner during adulthood,<sup>113</sup> and that up to twenty-five percent of all intimate relationships are marked by violence toward a female partner.<sup>114</sup>

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<sup>111</sup> Andersen & Read-Andersen, *supra* note 18, at 366 (1992); *see also* Incidents of Family Violence: A Special Study 341, *available at* <http://www.ojp.usdoj.gov/bjs/ibrs.htm> (reporting data from the Federal Bureau of Investigation's Uniform Crime Reporting Program that 3.2 million domestic violence incidents were reported in 2001); HARBOR HOUSE, NATIONAL STATISTICS: DOMESTIC VIOLENCE IS DAMAGING PHYSICALLY AND EMOTIONALLY, *available at* <http://www.harborhouseoccadv.com/facts/dvstats.htm> (last visited June 29, 2005) [hereinafter Harbor House] (citing National Violence Against Women Survey, Extent, Nature, and Consequences of Intimate Partner Violence (2002) for a reported annual estimate of 4.5 million physical assaults and 300,000 sexual assaults against U.S. women).

<sup>112</sup> DISTRICT OF COLUMBIA COALITION AGAINST DOMESTIC VIOLENCE, THE COSTS OF DOMESTIC VIOLENCE TO SOCIETY, *at* <http://www.dccadv.org/statistics.htm> (last visited June 28, 2005) [hereinafter DISTRICT OF COLUMBIA]; FLORIDA MORTALITY REVIEW PROJECT 3 (1997) (referring to Governor's Task Force on Domestic and Sexual Violence for data that approximately one-seventh of domestic assaults come to the attention of police); *see also* HARBOR HOUSE, *supra* note 111, at 1 (citing National Violence Against Women Survey (July 2000) for data that one-fourth of physical assaults against women by intimate partners were reported to police).

<sup>113</sup> Jill Smolowe, *When Violence Hits Home*, TIME, July 4, 1994, at 18 (referring to a 1992 report of the American Medical Association that as many as one in three women will be assaulted by an intimate partner during their lifetimes); Mahoney, *supra* note 17, at 10 nn.40-41 (citing LENORE WALKER, THE BATTERED WOMEN 19 (1979)) (estimating that half of all women will be battered at some point in their lives and noting estimates by other researchers that fifty to seventy percent of women are battered during marriage).

<sup>114</sup> Meier, *supra* note 17, at 1304 n.24 (advising that surveys show between one-fourth and one-fifth of marital or cohabiting relationships experience at least one incident of violence); Ann Coker et al., *Frequency and Correlates of Intimate Partner Violence by Type: Physical, Sexual, and Psychological Battering*, 90 AM. J. PUB. HEALTH 553 (Apr. 2000) (reporting results of a survey of 1401 women that 20.2 percent were currently experiencing intimate partner

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“Domestic violence”<sup>115</sup> is the major cause of injury to women, ranking above auto accidents, rapes, and muggings.<sup>116</sup> Of the women who seek treatment in emergency rooms, an estimated twenty-two to thirty-five percent are treated from injuries related to ongoing partner abuse.<sup>117</sup>

Between 2,000 and 4,000 women die each year at the hands of abusers, many of whom are husbands and boyfriends.<sup>118</sup> Thirty

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violence and 55.1 percent had experienced intimate partner violence in a current or past relationship with a male partner).

<sup>115</sup> For an overview of critiques of the use of the phrases “domestic violence,” “spouse abuse,” and “battered women,” see Meier, *supra* note 17. In studying intimate partner violence, some sociologists have identified four subtypes: 1) situational couple violence, occurring in a non-controlling relationship; 2) intimate terrorism (also called patriarchal terrorism), motivated by desire by a partner (usually a man) for general relationship control; 3) violent resistance, fighting back or acting in self-defense against a violent, controlling partner; and 4) mutual violent control, characterized by violence and control by both partners. Wood, *supra* note 4, at 557 (noting that intimate terrorism is “the most extreme and dangerous kind of intimate violence”).

<sup>116</sup> *E.g.*, *Weiland v. State*, 732 So. 2d 1044, 1053 (Fla. 1999) (citing Governor’s Task Force on Domestic Violence, The First Report 2 (1994)); HARBOR HOUSE, *supra* note 111, at 1 (referring to the Federal Bureau of Investigation, Uniform Crime Reports (1991)).

<sup>117</sup> HARBOR HOUSE, *supra* note 111, at 1 (citing David Adams, *Identifying the Assaultive Husband in Court: You’re the Judge*, BOSTON B. J. 33-34 (July-Aug. 1989)).

<sup>118</sup> Steele & Sigman, *supra* note 110, at 169 (referring to report of DALLAS MORNING NEWS, July 16, 1990, at C3 that more than 2,000 women are murdered by husbands and boyfriends each year); *Weiland*, 732 So. 2d at 1053 (quoting Governor’s Task Force on Domestic Violence, The First Report 3 (1994) that “[o]ver four thousand women die annually at the hands of their abuser.”).

Men who engage in battering have their own stories to tell—stories of loss and, perhaps at a deeper level, stories from childhood of having witnessed their mothers being abused. Michelle Fine, *Crime Stories: A Critical Look Through Race, Ethnicity, and Gender*, 11 INT’L J. QUALITATIVE STUDIES IN ED. 435 (1998) (discussing, in a qualitative study of the life histories of residents of low-income urban communities, the “stories of loss . . . voiced in a discourse of property rights of white, working class males); Levine, *supra* note 18, at 63 (reporting that seventy-three percent of men in a study reported having been physically or sexually abused as children). In a study of men in a batterers’ intervention program that asked how men account for their battering and how

percent of female murder victims in 1990 were killed by their husbands or boyfriends, prompting one scholar to describe the phenomenon as “Intimate Femicide.”<sup>119</sup> In Florida, spouses and cohabitants far outstrip other persons in committing the most domestic violence offenses.<sup>120</sup> In 2004, for example, of 119,772 reported domestic violence offenses in the state, 30,427 were committed by spouses and 36,289 were committed by cohabitants.<sup>121</sup>

Medical expenses of women who are battered by intimate partners total \$3 to \$5 billion dollars each year.<sup>122</sup> Businesses lose \$100 million in lost wages, sick leave, absenteeism, and non-productivity.<sup>123</sup> An estimated twenty-five percent of workplace non-productivity arises out of domestic violence.<sup>124</sup> Individual costs of spouse abuse include personal injuries from battery and

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their accounts draw on their understandings of manhood, a sociologist identified “dueling narratives of manhood” in the accounts: a code of male superiority, in which perceived entitlements justified the exercise of violence and a code of chivalry, in which an attitude of protectionism was linked to women in the abstract or to specific women, such as mothers and daughters. Wood, *supra* note ±, at 571, 573 (also noting that the mission of the program was to help men to “redefine what it means to be a man.”).

<sup>119</sup> The Paladin Group Grant Mentors, Domestic Violence Articles, 2, available at <http://www.silcom.com/~paladin/madv/stats2.html> (last visited June 29, 2005) [hereinafter Paladin] (referring to study by Karen Stout, *Intimate Femicide: A National Demographic Overview*, 1 VIOLENCE UPDATE 3 (Feb. 1991)).

<sup>120</sup> FLORIDA DEP’T OF LAW ENFORCEMENT, STATEWIDE TRACKING OF DOMESTIC VIOLENCE CASES, at <http://www.fdle.state.fl.us/FSAC/Publications/dv-jan98.asp> (recommending that a Domestic Violence Data Resource Center be established within the Florida Department of Law Enforcement).

<sup>121</sup> For the 119,772 domestic violence crimes reported in 2004, the relationship of victim to offender was as follows: 30,427 (spouse), 11,670 (parent), 9,361 (sibling), 9,213 (child), 7,978 (other family), 36,289 (cohabitant), 14,834 (other). *Id.* (citing Florida Statistical Analysis Center, Crime in Florida, Florida Uniform Crime Report (1992-2004)). Of the 119,772 crimes reported, arrests were made in 64,072 cases. *Id.*

<sup>122</sup> Paladin, *supra* note 119 (citing COLORADO DOMESTIC VIOLENCE COALITION, DOMESTIC VIOLENCE FOR HEALTH CARE PROVIDERS (3d ed. 1991)).

<sup>123</sup> *Id.*

<sup>124</sup> *Id.* (citing data from Minnesota Employee Assistance Providers).

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psychological injury from intentional infliction of emotional distress.<sup>125</sup> Some women who have sought shelter have reported that the abusers have destroyed an estimated \$10,000 of family property prior to separation.<sup>126</sup> Moving expenses for a woman who is battered—when those funds are available—may cost another \$5,000.<sup>127</sup>

The drastic impact on women of a retreat rule for cohabitants is apparent when considering the pervasiveness of battering of women by husbands in the home. For example, every nine seconds, a husband physically abuses his wife in the United States.<sup>128</sup> Women are abused in an estimated twelve percent of all marriages.<sup>129</sup>

Physical violence is simply one aspect of the injury suffered by women who are battered. Domestic violence, as experienced by many women,<sup>130</sup> is a continuing pattern of behavior that includes

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<sup>125</sup> Ann Campbell White, *What You Didn't Learn in Law School: Family Law and Domestic Violence*, 68 FLA. B. J. 38, 40 (Oct. 1994).

<sup>126</sup> *Id.*

<sup>127</sup> *Id.*

<sup>128</sup> *Weiand v. State*, 732 So. 2d 1044, 1054 (Fla. 1999) (citing Executive Office of the Governor, The Governor's Task Force on Domestic and Sexual Violence, The Third Report, vii (March 31, 1997)).

<sup>129</sup> *Id.* (citing Joan H. Krause, *Of Merciful Justice and Justified Mercy: Commuting the Sentences of Battered Women Who Kill*, 46 FLA. L. REV. 699, 702 (1994)).

<sup>130</sup> In evaluating commonalities in perceived patterns of battering, I am not arguing that the experiences of women who live with battering men are the same. *E.g.*, Koons, *Making Peace*, *supra* note 13, at 64-65 (discussing difference, sameness, commonality, and connection in proposing a model of inclusive mutuality as a praxis for justice). Experiences of battering carry with them enormous complexity and variety. *E.g.*, Christina Nicolaidis et al., *Could We Have Known? A Qualitative Analysis of Data From Women Who Have Survived an Attempted Homicide by an Intimate Partner*, 18 J. GEN. INTERNAL MEDICINE 788, 792 (Oct. 2003). In seeking to avoid the perils of essentialism, I also situate the article within the theoretical frame of "the personal is political." Pepi Leistyna et al., *Glossary*, in *BREAKING FREE: THE TRANSFORMATIVE POWER OF CRITICAL PEDAGOGY* 336-37 (Pepi Leistyna et al. eds., 1996) (defining essentialism as an orientation that "ascribes a fundamental nature or biological determinism to humans . . . Within this monolithic and homogenizing view, categories such as race and gender become gross generalizations, and

physical and non-physical manifestations of power and control.<sup>131</sup> Yet, the law often focuses on discrete incidents of physical violence—the “number of hits”—not the “continuum of sexual and verbal abuse, threats, economic coercion, stalking, and social isolation” that is the experiential nature of domestic violence.<sup>132</sup>

Some women who have been battered by their male partners describe the non-physical abuse, including humiliation and psychological degradation, as particularly painful.<sup>133</sup> A man who

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single-cause explanations about individual character.”); *see also* Fine, *supra* note 118, at 5 (“While we refuse essentialisms of race and gender, and must recognize enormous individual variation within groups, we also need to emphasize that the intersectionalities of race, gender, and class lead to important questions and generalizations” about violence in communities). “The personal is political,” as received wisdom of the women’s movement, continues to have vitality in challenging the deadly belief that experiences, such as battering, are too unique or personal to be discussed in public and, being sequestered in the private realm, are not deserving of political attention or resolution. IRIS MARION YOUNG, *JUSTICE AND THE POLITICS OF DIFFERENCE* 120-21 (1990) (explaining that the slogan “expresses the principle that no social practices or activities should be excluded as improper subjects for public discussion, expression, or collective choice.”).

<sup>131</sup> Batterer is “the establishment of control and fear in a relationship through violence and other forms of abuse. The batterer uses acts of violence and a series of behaviors, including intimidation, threats, psychological abuse, [and] isolation . . . to coerce and control the other person.” OREGON COMMISSION AGAINST DOMESTIC AND SEXUAL VIOLENCE, *DOMESTIC VIOLENCE MYTHS AND FACTS*, at <http://www.ocadsv.com/myths.htm> (citing Federal Bureau of Investigation, *Uniform Crime Reports* (1990)); *see also* Deborah Tuerkheimer, *Recognizing and Remediating the Harm of Battering: A Call to Criminalize Domestic Violence*, 94 *J. CRIM. L. & CRIMINOLOGY* 959, 961 (2004) [hereinafter Tuerkheimer] (characterizing domestic violence as “an ongoing pattern of behavior defined by both physical and non-physical manifestations of power.”).

<sup>132</sup> SCHNEIDER, *LAWMAKING*, *supra* note 17, at 65; Tuerkheimer, *supra* note 131, at 963-65 (asserting that power and control are at the heart of battering, “[y]et the boundaries of criminal law have remained largely impermeable” to an accurate and accepted understanding of battering).

<sup>133</sup> Charles Patrick Ewing, *Psychological Self-Defense*, 14 *L. & HUM. BEHAV.* 579, 587 (1990) (arguing for the permissible use of deadly force to prevent serious psychological injury). In *State v. Norman*, the intermediate appellate court recounted the following facts as part of the non-physical trauma that Ms. Norman experienced the day before killing her husband while he slept:

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batters often exercises domination by making rules that his partner must follow, such as dictating with whom she may talk, monitoring phone conversations, identifying what clothes she may wear, denoting how household chores must be done, keeping her from reading materials or ideas that he does not like, requiring her to ask permission to leave the room or take a bath, forcing her to stay awake, and requiring her to engage in demeaning activities like kneeling or begging for money.<sup>134</sup> A man who batters may also establish forms of abuse as enforcement mechanisms for violations of rules.<sup>135</sup> Rule-making and punishing eventually give way to “a

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“[John] Norman asked [Judy Norman] to make him a sandwich; when [Judy] brought it to him, he threw it on the floor and told her to make him another. [Judy] made him a second sandwich and brought it to him; [John] again threw it on the floor, telling her to put something on her hands because he did not want her to touch the bread. [Judy] made a third sandwich using a paper towel to handle the bread. [John] took the third sandwich and smeared it in [Judy’s] face.” *State v. Norman*, 366 S.E.2d 586, 588 (N.C. Ct. App. 1988), *rev’d* 378 S.E.2d 8 (N.C. 1989) (also noting that, in the thirty-six hours prior to his death, he forced her to commit prostitution to make money, made threats to cut off her breast “and shove it up her rear end,” made a number of threats to kill family members, interfered with emergency medical personnel who were trying to revive her from an overdose of pills (saying, “Let the bitch die . . . . She ain’t nothing but a dog. She don’t deserve to live.”), and repeatedly physically assaulted her in a number of ways).

<sup>134</sup> Karla Fischer et al., *The Culture of Battering and the Role of Mediation in Domestic Violence Cases*, 46 S.M.U. L. REV. 2117, 2126 (1992-1993) (citing the following examples of rules made by a battering husband: “that no one (including guests and their toddler children) wear shoes in the house, that the furniture be in the same indentations in the carpet, that the vacuum marks in the carpet be parallel, that any sand that spilled from the children’s sandbox during their play be removed from the surrounding grass.”). Any real or imagined infraction of these kind of rules often resulted in a beating or the expression of irritation that was a prelude to a beating. *Id.* Four rules are cited as most important to men who batter: “1. You cannot leave this relationship unless I am through with you. 2. You may not tell anyone about my violence or coercive controls. 3. I am entitled to your obedience, service, affection, loyalty, fidelity, and undivided attention. 4. I get to decide which of the other rules are critical.” Barbara J. Hart, *Rule Making and Enforcement / Rule Compliance and Resistance*, in *I AM NOT YOUR VICTIM* 259 (Bethel Sipe & Evelyn J. Hall eds., 1996).

<sup>135</sup> Fischer, *supra* note 134, at 2131.



general climate of increasingly subtle control, where the batterer needs to do less and less to structure his family's behavior."<sup>136</sup>

In many cases, keys to the enforcement mechanisms for rule violations are fear, emotional abuse, and social isolation.<sup>137</sup> To control a partner by fear, a man who batters may use a symbol, a look, or a gesture associated with abuse to signal the threat of violence.<sup>138</sup> Men who batter may also use "mental games" to control women.<sup>139</sup> One man explained that after he had hit his girlfriend once, "I never hit her again ever. I was more mental."<sup>140</sup> Mental and emotional abuse can be just as devastating as physical abuse. According to one survivor:

He always found something wrong with what I did, even if I did what he asked. No matter what it was. It was never the way he wanted it. I was either too fat, didn't cook the food right . . . I think he wanted to hurt me. To hurt me in the sense . . . to make me feel like I was a nothing.<sup>141</sup>

Battering, as experienced by many women, is distorted when read through doctrines such as imminence.<sup>142</sup> In the context of the

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<sup>136</sup> *Id.* at 2129.

<sup>137</sup> *Id.* at 2131-32.

<sup>138</sup> *Id.* at 2120, 2126.

<sup>139</sup> Wood, *supra* note 2, at 561-62 (articulating seven themes in a study of twenty-two incarcerated men who had volunteered for a batterers' intervention program, including justifications ("A man has a right to control his woman."), dissociations ("My violence was limited."), and remorse ("I regret that I abused her.")).

<sup>140</sup> *Id.* at 566 (noting that men who engaged in battering defined their violence as limited by pointing out the limits that they observed, such as not hitting a partner when she was pregnant).

<sup>141</sup> Fischer, *supra* note 134, at 2117 (quoting the text of an interview of one of eighty-three women seeking court protection from battering partners in Karla Fisher, *The Psychological Impact and Meaning of Court Orders of Protection for Battered Women* (1992) (unpublished Ph.D. thesis, University of Illinois (Urbana-Champaign)).

<sup>142</sup> In the law of self-defense, a force is imminent "if it will occur 'immediately' or 'at once.' The danger must be 'pressing and urgent.' Force is not imminent if an aggressor threatens to harm another person at a later time." DRESSLER, *UNDERSTANDING*, *supra* note 28, at 229; *see also* Mahoney, *supra* note 17, at 84 (arguing that decisions that construe imminence "as virtually

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killing of a battering man by a woman, imminence is a confused doctrine.<sup>143</sup> While it purports to be based simply on the passage of time, imminence actually reflects subjective social norms, such as that a woman who lives with a battering man “should have left” the room, the house, or the relationship.<sup>144</sup> Infused with suppositions about gender roles and behavior, imminence often functions as a retreat rule to enforce unspoken societal assumptions that women should leave battering relationships before episodes of violence take place.<sup>145</sup> Yet, requiring retreat, in whatever form, exposes women to greater danger of abuse.<sup>146</sup>

The unworkability of a retreat rule is manifest when considering the phenomenon of separation assault. Legal scholars have defined separation assault as “the attack on the woman’s body and volition in which her partner keeps her from leaving, retaliates for the separation, or forces her to return.”<sup>147</sup> The concept of separation assault recognizes that patterns of violence, already dramatic, often increase upon a woman’s separation from a

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equivalent to immediacy place significant limits on the ability of women to raise claims that they acted in self-defense.”).

<sup>143</sup> “If imminence serves as a proxy for other self-defense factors—questions of motive and emotion and retreat—then scholars of self-defense should be worried not only that imminence is sloppy but also that, as applied, imminence invites doctrinal confusion.” Nourse, *Subjectivity*, *supra* note §, at 1260.

<sup>144</sup> *Id.* at 1281-83; *see also* Nourse, *Relational*, *supra* note 108, at 36-38 (illustrating how time absorbs social norms (i.e., she should have left)).

<sup>145</sup> Nourse, *Subjectivity*, *supra* note §, at 1281-85 (also noting the incongruity of requiring a woman to leave before a confrontation occurs).

<sup>146</sup> Melissa Wheatcroft, Note, *Duty to Retreat for Cohabitants—In New Jersey A Battered Spouse’s Home is Not Her Castle*, 30 RUTGERS L.J. 539, 566 (1999) (arguing that “[a] safe retreat for the battered spouse is often an impossibility.”); *see also* U.S. v. Peterson, 483 F.2d 1222 (D.C. Cir. 1973) (outlining general principles of self-defense and observing: “The doctrine of retreat was never intended to enhance the risk to the innocent; its proper application has never required a faultless victim to increase his assailant’s safety at the expense of his own.”). For discussion of states observing the cohabitant exception to the castle doctrine, *see supra* note 53.

<sup>147</sup> Separation assault (an attack on the separation) “is an attempt to gain, retain, or regain power in a relationship, or to punish the woman for ending the relationship. It often takes place over time.” Mahoney, *supra* note 17, at 65-66.

battering man.<sup>148</sup> According to the Department of Justice, seventy-five percent of assaults occur when the abused party is divorced or separated from the abuser.<sup>149</sup> Another study indicates that forty-five percent of murders of women arise out of a man's "rage over the actual or impending estrangement from his partner."<sup>150</sup> Women who are separated from their spouses are three times more likely to be attacked than divorced women and twenty-five times more likely to be attacked than married women.<sup>151</sup>

Even a limited retreat rule, as had been carved out by the Florida Supreme Court, places women at increased risk of violence. It is at the moment of separation—the first physical move toward separation—that a battering man is prone to become more violent.<sup>152</sup> A decision—or even a threat—to leave can trigger lethal violence.<sup>153</sup> Because domestic violence is marked by power and control, attempting to exit a room may be considered "disobedience," spurring escalated violence.<sup>154</sup> Resistance

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<sup>148</sup> *Id.* at 5-6.

<sup>149</sup> Linda Dakis, *Injunctions for Protection*, 68 FLA. BAR J. 48, 50 (Oct. 1994) (citing U.S. DEP'T OF JUSTICE, NAT'L REPORT ON CRIME AND JUSTICE (1983)); see also Bachman & Saltzman, *supra* note 4, at 1, 4 (reporting that women separated from husbands were victimized at a rate three times higher than women who were divorced and twenty-five times higher than women who were married).

<sup>150</sup> *Weiand v. State*, 732 So. 2d 1044, 1053 (Fla. 1999) (quoting a study in DONALD G. DUTTON, *THE BATTERER: A PSYCHOLOGICAL PROFILE* 15 (1995)).

<sup>151</sup> Bachman & Saltzman, *supra* note 4, at 2.

<sup>152</sup> Mahoney, *supra* note 17, at 5-6. A study of thirty women who survived attempted femicide found that, in the majority of cases, the attack took place as the woman was trying to leave the relationship. Nicolaidis, *supra* note 130, at 731. See also Deborah J. Anderson, *The Impact of Subsequent Violence on Returning to an Abusive Partner*, 34 J. COMPARATIVE FAMILY STUD. 93 (2003) (demonstrating that victims of domestic violence who temporarily leave an abusive relationship experience an average of eight more violent incidents per year than victims who stay).

<sup>153</sup> Mahoney, *supra* note 17, at 5-6 (discussing separation assault where a decision to leave triggers an attack).

<sup>154</sup> Tuerkheimer, *supra* note 131, at 963 (noting the ubiquity of a "power and control" dynamic in the lives of women who live with battering men). See also Hart, *supra* note 134, at 259 (advising that many men who commit intimate battery create a hierarchy of rule and enforcement measures for disobedience of

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strategies (such as leaving a room) may force an abuser “to make his coercive power explicit. Any threat, however small, to the abuser’s authority within the family is likely to be met with violence.”<sup>155</sup> According to one woman, “The best way to avoid [battering] was to show as little reaction as possible . . . I didn’t dare argue with him or challenge him—for fear of my life actually.”<sup>156</sup> Trying to exit past a raging man may be the final move of a woman seeking only to avoid violence.<sup>157</sup> Killing a battering man may be the safest available alternative.<sup>158</sup>

*B. The Loyalties: The Relational Context of Battering of Women*

The second movement of the hermeneutic invites consideration of relationships. Yet, the language of law—individuality, neutrality, and abstraction—blocks us from talking about values, relationships, and structural injustice.<sup>159</sup> Because legal language is unable to express the “complex relationship between power, gender, and knowledge” and because the framework of battering inexorably links power, control, and violence, the law does not apprehend the experience of many women who live with battering men.<sup>160</sup>

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the rules).

<sup>155</sup> Fischer, *supra* note 134, at 2133.

<sup>156</sup> *Id.* at 2130 n.69 (quoting a participant in a study by LIZ KELLY, SURVIVING SEXUAL VIOLENCE 180 (1988)).

<sup>157</sup> Nicolaidis, *supra* note 130, at 791, 793 (finding, in a study of survivors of attempted femicide, that nearly half of the victims were surprised by the attacks and were trying to leave relationships for reasons other than violence); *see also* Levine, *supra* note 18, at 63 (noting that seventy-three percent of men in a study reported having been physically or sexually abused as children).

<sup>158</sup> Evan Stark, *Rethinking Homicide: Violence, Race, and the Politics of Gender*, 20 INT’L J. HEALTH SERVICES 18 (1990) (proposing that killing may be the safest alternative due to the absence or ineffectiveness of police protection).

<sup>159</sup> Lucinda M. Finley, *Breaking Women’s Silence in Law: The Dilemma of the Gendered Nature of Legal Reasoning*, 64 NOTRE DAME L. REV. 886, 896 (1989) (also identifying the language of neutrality as a device for silencing women).

<sup>160</sup> *Id.*; Mahoney, *supra* note 17, at 5 (pointing to power and control as “the

Objectivity, conflict, legal status, and atomized events form the terrain of the law.<sup>161</sup> However, *relationship* forms the terrain of the system of domination of many men who engage in battering.<sup>162</sup> The relational context of a battering relationship has been characterized by three elements: a systematic pattern of domination and control; abuse (physical, emotional, sexual, familial, or property); and denying, hiding, or minimizing the abuse.<sup>163</sup> Relationally, the dynamics of battering are much like that of hostage-taking.<sup>164</sup> One survivor of battering put it like this:

I just couldn't take all this . . . Panicked and caged, and not being able to go anywhere and do anything. It was like he was an animal trainer, coming in and beating on the bars of the cage with a stick—only he was outside the bars so he couldn't get hurt.<sup>165</sup>

Unlike the admiration expressed for male hostages who resist captors in wartime, a woman who resists her captor is not acclaimed, socially or legally, when that captor is a battering male partner.<sup>166</sup>

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heart of the battering process.”); Tuerkheimer, *supra* note 131, at 966, 978 (arguing that the law fails to hear and provide justice for women in battering relationships).

<sup>161</sup> Finley, *supra* note 159, at 899 (recognizing law as a language of conflict); Tuerkheimer, *supra* note 131, at 962-63 (arguing that “[p]aradigmatic crimes are “transaction-bound.”).

<sup>162</sup> Tuerkheimer, *supra* note 131, at 973; Fischer, *supra* note 134, at 2119, 2141, 2172.

<sup>163</sup> Fischer, *supra* note 134, at 2141.

<sup>164</sup> Mahoney, *supra* note 17, at 87-88 (noting cases that make “a persuasive analogy” between women who are battered and prisoners of war). A finding of imminence should not be precluded where a hostage grabs a gun and kills a guard who has fallen asleep. *Id.* at 87 (citing *State v. Stewart*, 763 P.2d 572, 584 (Kan. 1988) (Herd, J., dissenting)).

<sup>165</sup> Fischer, *supra* note 134, at 2132 (quoting survivor of battering in JEAN GILES-SIMS, *WIFE BATTERING: A SYSTEMS THEORY* 114 (1983)).

<sup>166</sup> “The common law’s overt judgment that a woman who kills her husband is fully traitorous, and a man who kills to defend his marriage is partly patriot, remains two hundred years later.” Nourse, *Subjectivity*, *supra* note §, at 1293-94; see also HERMAN, *supra* note 18, at 74 (commenting that “[p]olitical captivity is generally recognized, whereas domestic captivity is often unseen.”).

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The law may be seen as structurally disabled from hearing and responding to the relational dynamics that are often at the heart of battering of women by intimate partners.<sup>167</sup> For example, the law is structured around the statutory definition of criminal homicide and applicable defenses.<sup>168</sup> All of the parties are required to focus on whether the facts meet the elements of the offense, which is structured in terms of discrete events.<sup>169</sup> The law may preclude witnesses from disclosing in court a contextualized story of battering, and instead authorize women who have killed their battering partners to tell only “mangled,” decontextualized stories of discrete incidents of physical violence.<sup>170</sup> Consequently, there is often a fundamental structural disconnect between incident-based legal doctrine and a woman’s experiences of living with a battering partner.<sup>171</sup>

Relation may be seen as the framework not only for patterns of

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<sup>167</sup> Tuerkheimer, *supra* note 131, at 1030 (arguing against abandoning criminal law, despite its failure to recognize and remedy harms to women); Finley, *supra* note 159, at 906-07 (asserting that, despite the dilemma of legal language, we cannot disengage from the law or legal discourse). *Cf.* GORDON KAUFMAN, IN FACE OF MYSTERY: A CONSTRUCTIVE THEOLOGY 51-52 (1993) (proposing that, as a worldview cracks, “we need a new faith, that is, a new frame of orientation, if we are to go on. Such a new frame is never simply spun out of thin air. It is always the product of rebuilding, transforming, reshaping the old categories . . . This is a precarious and dangerous project, repairing and rebuilding the very boat which keeps us afloat.”).

<sup>168</sup> DRESSLER, UNDERSTANDING, *supra* note 28, at 221, 540 (outlining elements of homicide and self-defense); Tuerkheimer, *supra* note 131, at 977 (framing the content of a prosecutor’s interview of a victim of battering by the statutory definition of assault).

<sup>169</sup> Tuerkheimer, *supra* note 131, at 976-80 (critiquing the incident-based structure of the criminal law that inattends the continuum of battering).

<sup>170</sup> *Id.* at 989-98 (noting the antipathy with which law views prior-act character evidence). *But see* Maguigan, *supra* note 18, at 383 (concluding from a survey of appellate opinions that legal doctrine does not exclude consideration of social context); *see also* JOSHUA DRESSLER, CASES AND MATERIALS ON CRIMINAL LAW 532 (3d ed. 2003) [hereinafter DRESSLER, CRIMINAL] (noting the clear judicial trend to admit battered woman syndrome evidence in cases of confrontational homicide, which explicitly requires evidence of a history of abuse).

<sup>171</sup> Tuerkheimer, *supra* note 131, at 992.

battering but also for a variety of choices made by many women who live with battering men. As rational actors, women who are battered often employ a host of strategies to attempt to stop the abuse.<sup>172</sup> In one study, women tried an average of thirteen different strategies each, including talking to the abuser, consulting with friends and family, calling the police, leaving the abuser, and trying to obtain counseling and legal assistance.<sup>173</sup>

Strategies engaged by women who live with battering men are often embedded in complex interpersonal and communal relationships.<sup>174</sup> A woman's relationship with an abusive partner may be marked by love and commitment. Explained one woman:

[M]y husband is an alcoholic. Things have been really bad these past few years. But we've been married thirteen years. And I have three children. For nine of those years, he was the best husband and father anyone could have asked for. The way I look at it, he has a disease. I *know* that when he's not drinking, he's not like this. I may have to leave. But if I do, I'm not giving up on a father for the children, and I'm not giving up on him. And I can't just throw away those nine years.<sup>175</sup>

Women with children may make decisions on the basis of

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<sup>172</sup> Fischer, *supra* note 134, at 2135-36 (discussing a study of women who obtained protective orders and thirty-one strategies they had employed to stop the violence).

<sup>173</sup> *Id.*; see also *People v. Humphrey*, 921 P.2d 1 (1996) (recounting the strategies employed to stop the abuse, such as "hiding, running away, counterviolence, seeking the help of friends and family, going to a shelter, and contacting police.").

<sup>174</sup> Mahoney, *supra* note 17, at 20.

<sup>175</sup> *Id.* at 21; Sarah M. Buel, *Fifty Obstacles to Leaving, A.K.A., Why Abuse Victims Stay*, 28-OCT COLO. LAW. 19, 21, 23 (1999) (listing fifty obstacles to leaving an abuser and noting, under "Excuses," that "[d]omestic violence is not caused by stress or substance abuse, although it can exacerbate the problem" and, under "Love," that a "victim may say [she] still loves the perpetrator, although she definitely wants to violence to stop."); see also Nan Seuffert, *Critique and Comment: Domestic Violence, Discourses of Romantic Love, and Complex Personhood in the Law*, 23 MELBOURNE U. L.R. 211, 212 (1999) (suggesting that some feminists may be uncomfortable with the assertion by some women that they love men who abuse them).

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“extended, collective, multiple self-interest.”<sup>176</sup> Mothers may conclude that their children are best served by remaining in relationships with the children’s fathers.<sup>177</sup> It may be “safer to stay” with a man who is abusive, keeping a eye on him so that a woman may protect herself and her children.<sup>178</sup>

Economic considerations may drive the choices of women who live with battering men. Financial despair is the number one reason that women return to men who batter.<sup>179</sup> Among the forms of abuse engaged by some men is financial abuse, in which women are deprived of money, access to accounts and financial records, and participation in financial decision-making.<sup>180</sup> When a woman leaves a man who batters, she may quickly be confronted with the impossibility of providing for herself and her children.<sup>181</sup> If a woman is eligible for welfare, the amount received will be woefully inadequate to support herself and her children.<sup>182</sup> Where a

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<sup>176</sup> Mahoney, *supra* note 17, at 19.

<sup>177</sup> Buel, *supra* note 175, at 20 (advising that some mothers believe that having two parents in a home is in a child’s best interests, particularly where the abuser does not assault the child, but that the women and other parties in the criminal justice system may not be aware of the harm to children of witnessing domestic violence). Male children who witness domestic violence “are many times more likely to batter their spouses.” Levine, *supra* note 18, at 63 (referring to ANN JONES, NEXT TIME SHE’LL BE DEAD 84 (1994)). Furthermore, “[a] child who witnessed domestic violence is more likely to grow into a perpetrator or victim of domestic violence than a child who was himself or herself abused.” *Id.* (citing G.T. Hotaling & D.B. Sugarman, *An Analysis of Risk Markers in Husband to Wife Violence: The Current State of Knowledge*, 1 VIOLENCE & VICTIMS 101 (1986)).

<sup>178</sup> Buel, *supra* note 175, at 25 (noting that, where an abuser has previously stalked and threatened her, a woman is very aware that the abuser is capable of finding her and the children if she tries to move away).

<sup>179</sup> *Id.* at 21 (referring to a Texas study that found that eighty-five percent of women who called hotlines, emergency rooms, and shelters had left abusers “a minimum of five times previously, with the number one reason cited for returning to the batterer being financial despair.”).

<sup>180</sup> *Id.*

<sup>181</sup> *Id.*

<sup>182</sup> The primary safety net for women who are fleeing battering men is welfare (now called Temporary Assistance for Needy Families). *Id.* Assuming eligibility, most states pay less than \$400 a month for a household of three. *Id.*



woman is employed, an abusive man may harass or terrorize her at work, long after she has separated from him. Moreover, a woman's wages may not provide her enough to make ends meet.<sup>183</sup> One survivor who later became a lawyer and a law professor explained:

I'm a single Mom, without child support and trying to go to night school and keep my job. But with minimum wage, I can't seem to pay both day care and the rent, so sometimes I think about going back, just to make sure my son has enough to eat. It hurts more to watch him eat macaroni with ketchup for the third night, than it ever did to get beaten.<sup>184</sup>

Consequently, a woman who contemplates the economics of leaving a battering relationship may balance harm to children through inadequate subsistence with the harm from maintaining the

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While welfare is an important tool for combating domestic violence, its usefulness has been undermined by measures that tie women into continuing contact with abusive men. Anna Marie Smith, *The Sexual Regulation Dimension of Contemporary Welfare Law: A Fifty State Overview*, 8 MICH. J. GENDER & L. 121, 139-40, 166 (2002); see also Joanna Alexandra Norland, *When the Vow Breaks: Why the History of French Divorce Law Sounds a Warning about the Implications for Women of the Contemporary Marriage Movement*, 17 WIS. WOMEN'S L.J. 321, 339, 342-43 (2002) (drawing on the historical precedent of France, circa 1792 to 1816, to suggest that the "contemporary Marriage Movement is intertwined with a political backlash against the rights of women," and that what is being jeopardized in the pro-marriage campaign is "women's safety and dignity, as well as their ability to protect themselves and their children from domestic violence."); Koons, *Motherhood*, *supra* note 5 (engaging a 500-year retrospective on key concepts in welfare reform to critique the marriage incentives of welfare reauthorization).

<sup>183</sup> In a survey of 379 work-reliant and welfare-reliant single mothers in four cities in the United States, sociologists Kathryn Edin and Laura Lein found that *none* of the 165 wage laborers in the survey was able to meet her expenses with income earned from employment. KATHRYN EDIN & LAURA LEIN, MAKING ENDS MEET: HOW SINGLE MOTHERS SURVIVE WELFARE AND LOW-WAGE WORK 107 (1997). Earning an average of below \$800 per month in employment income, low-income mothers in the labor force experienced a shortfall that ranged from \$295 to \$530 per month, depending on their housing. *Id.* The 214 women who were reliant on welfare experienced a shortfall that averaged \$189 to \$519 per month. *Id.* at 4.

<sup>184</sup> Buel, *supra* note 175, at 19 (quoting the author's journal, 1977).

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relationship.<sup>185</sup> If children are not directly threatened, a woman may choose subsistence for them rather than safety for herself.<sup>186</sup>

Race-based concerns may also guide decision-making because a woman may worry about how the police will treat a man of color.<sup>187</sup> Some women of color have reported the experience of being forced to choose between gender and race in deciding whether to contact the criminal justice system.<sup>188</sup> In those circumstances, some women of color have also reported “siding with race” because “the white-controlled criminal justice system has not attempted to address the race-based inequities reflected in the disproportionate number of men of color arrested, prosecuted, and incarcerated.”<sup>189</sup> Furthermore, some critics have observed that

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<sup>185</sup> Mahoney, *supra* note 17, at 23.

<sup>186</sup> Buel, *supra* note 175, at 19-20 (suggesting that mothers may be unaware of the impact on children of witnessing domestic violence, even if the children were not directly assaulted).

<sup>187</sup> *Id.* at 20 (stating that a woman may be more concerned about police treatment of a man of color than about her own safety).

<sup>188</sup> *Id.*

<sup>189</sup> *Id.* The codification of the castle doctrine not only exposes gender inequities, but also racial injustice, particularly when considering the role of mistake in justifiable homicide. Many jurisdictions have adopted the principle of “imperfect self-defense” in which an honest but unreasonable actor stands convicted of manslaughter rather than murder. *E.g.*, GARDNER & SINGER, *supra* note 22, at 1068. Expanding the concept of imperfect self-defense, the Model Penal Code makes the test of justification the *actor's belief* in the necessity for using force. Model Penal Code § 3.09 cmt. at 150 (1985). Consequently, where a defendant is mistaken as to the need to use force (as where the aggressor was reaching for his handkerchief), the doctrine of imperfect self-defense embodies a willingness of the criminal justice system to recognize the circumstances under which a defendant may have been required to make split-second decisions. GARDNER & SINGER, *supra* note 22, at 1068. Due to the phenomenon of unconscious racism, the statutory castle doctrine, when combined with the role of mistake in self-defense, operates to place people of color at greater risk of deadly assault. *E.g.*, Charles R. Lawrence, *The Id, the Ego, and Equal Protection*, 39 STAN. L. REV. 317, 323 (1987) (noting that much of the behavior that produces racial discrimination arises from cultural belief systems and is influenced by unconscious racial motivation). The Implicit Association Test has been developed by psychologists at Harvard and other institutions to measure implicit (or unconscious) attitudes about age, gender, race, presidents, sexuality, Arab-Muslims, weight, religion, disability, Native Americans, Asian-Americans,

many shelters and intervention programs do not reflect the racial and cultural diversity of people who are served.<sup>190</sup>

When considering relational issues on a broader scale, some communities have failed not only to protect many women but also to provide needed resources.<sup>191</sup> A woman may not be able to leave a battering man because there is no place to go.<sup>192</sup> Affordable housing is simply not available to meet the needs of poor women and children.<sup>193</sup> Studies demonstrate that approximately fifty percent of homeless women with children are fleeing violent men.<sup>194</sup> Women who leave battering relationships often immediately encounter a paucity of resources. Shelters are generally unable to fill the huge demand for services.<sup>195</sup> Moreover,

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weapons, and skin-tone. See Project Implicit, at <https://implicit.harvard.edu/implicit> (last visited May 4, 2005); see also Anthony G. Greenwald et al., *Measuring Individual Differences in Implicit Cognition: The Implicit Association Test*, 74 J. OF PERSONALITY AND SOCIAL PSYCHOL. 1464, 1464-65 (1998) (defining implicit attitudes as “actions or judgments that are under the control of automatically activated evaluation, without the performer’s awareness of that causation” and proposing that the implicit association method may reveal attitudes (including racial attitudes) of which the subjects may be unaware); see also Robert D. McFadden, *U.S. Examining Killing of Man in Police Volley*, N.Y. TIMES, Feb. 6, 1999, at A1 (reporting the controversy surrounding the death of Amadou Diallo, an unarmed West African street peddler, who was shot in a barrage of forty-one bullets by four white police officers who thought he had a gun, when he was reaching for his wallet).

<sup>190</sup> Buel, *supra* note 175, at 20 (recognizing greater use and success of services that are race- and culture-specific).

<sup>191</sup> Meier, *supra* note 17, at 1309.

<sup>192</sup> Buel, *supra* note 175, at 24 (asserting “the bleak reality that affordable housing is at a premium in virtually every community in this country, including our Tribal Nations.”).

<sup>193</sup> Beverly Balos, *A Man’s Home is His Castle: How the Law Shelters Domestic Violence and Sexual Harassment*, 23 ST. LOUIS U. PUB. L. REV. 77, 99 (2004) (noting the paradox of the denial of a fundamental right to housing and the cultural significance of “home” as a “man’s castle,” but only for those who can afford it).

<sup>194</sup> Meier, *supra* note 17, at 1311 n.52.

<sup>195</sup> Mahoney, *supra* note 17, at 62; see also Katherine M. Culliton, *Legal Remedies for Domestic Violence in Chile and the United States: Cultural Relativism, Myths, and Realities*, 94 CASE WESTERN RESERVE J. INT’L L. 183 (1994) (debunking myth that violence against women is more prevalent in Latin

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shelters may make referrals to social service agencies that do not have resources to meet basic needs for income, food, clothing, child care, health care, job training, and transportation.<sup>196</sup> One study concluded that women may leave abusive relationships and seek help from formal and informal sources, only to discover “that it was the helping professions, rather than battered women, that were afflicted with ‘helplessness.’”<sup>197</sup>

Women who kill battering men also enter into a significant relationship with the state.<sup>198</sup> The state provides the structure, process, substantive rules, counsel, timing, cultural meaning, range of permissible outcomes, and institutional punishment for women claiming self-defense. Critics of the state’s role in the tragic dynamic have cited the tendency of the criminal justice system to blame women for abuse and to deny or trivialize the violence.<sup>199</sup>

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America than in the United States by noting one million women are turned away each year in the United States because shelters are full). There are 1,500 battered women’s shelters in the United States and 3,800 animal shelters. Paladin, *supra* note 122, at 1-2 (also reciting that the first women’s shelter, Women’s Advocates, opened in St. Paul, Minnesota, in 1974).

<sup>196</sup> Mahoney, *supra* note 17, at 62.

<sup>197</sup> *Id.* at 61. “Mary,” a survivor of battering, related the story of losing custody of her four-year old son to Russ, her abusive husband: “Attorney # 3 sent me to a psychologist whose attitude reminded me of Lawyer #1. This psychologist, a woman, said ‘we’ll get him,’ referring to Russ’s psychologist. That is, the . . . key was for her to ‘win’; she did not focus on the safety or well-being of my children and me. . . . She was so self-absorbed. I can still picture her tossing her hair flirtaciously as she made remarks that destroyed me and my children.” Kathleen Waits, *Battered Women and Their Children: Lessons From One Woman’s Story*, 35 HOUS. L. REV. 29, 53, 55-56 (1998) (also characterizing the lawyers and psychologists as “very self-promoting and egotistical. It seemed as if everyone was having a good time, playing the game of litigation and psychology. All the while, my life was on the line. My children and I did not matter. I also felt like the lawyers and psychologists were running a cash register business at my expense. They were a lot more interested in my money than my welfare. The first two years of my divorce proceedings cost me more than twenty-five thousand dollars.”).

<sup>198</sup> Nourse, *Subjectivity*, *supra* note §, at 1275 (explaining that there are two different relationships that are implicated in every criminal law defense—the relationship between the defendant and the victim and the relationship between the victim and the state.”).

<sup>199</sup> Appearing before a judge to obtain an order of protection, “Mary”

One judge acknowledged “tremendous gaps” in our justice system in which the “court system has persistently overlooked domestic violence in noncriminal and criminal cases.”<sup>200</sup> Few women report incidents of violence because many think that “the police would not or could not do anything for them.”<sup>201</sup>

When women do take the step of killing abusers, in many cases the deaths take place during assaults.<sup>202</sup> To survivors of attempted intimate femicide, it may seem that the state’s response not only requires them to fit their stories into discordant legal doctrines such as *de jure* and *de facto* retreat rules, but also gives them longer prison sentences than men who kill their partners.<sup>203</sup>

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recounted: “The judge said, in a dismissive way, ‘It’s been a year and a half since he last beat you. Is last week’s threat really serious?’” Waits, *supra* note 197, at 45, 56 (also advising that the judge who heard the custody case had an outstanding protective order issued against him by his former wife). Referring to the “ideology that protects the institution of marriage and the state’s participation in subordinating women,” Mahoney noted obscurantism at two levels—the obscuring of the self-interest of a man to act violently at the individual level and the masking of male domination underlying violence against women at the state level. Mahoney, *supra* note 17, at 12-13 (citing James Ptacek, *Why Do Men Batter Their Wives*, in *FEMINIST PERSPECTIVES ON WIFE ABUSE* 155 (Kersti Yllo & Michele Bograd eds., 1988)); *see also* Maguigan, *supra* note 18, at 386-87 (arguing, due to a reversal rate of forty percent in homicide cases defended by women who were battered and an average reversal rate of 8.5 percent, that trial courts were not correctly applying long-standing principles of self-defense to prosecutions of women who kill abusive men).

<sup>200</sup> Judge Lynn Tepper, *The Court’s Role in Ending Family Violence*, 68 FLA. BAR. J. 30, 31 (1994).

<sup>201</sup> HARBOR HOUSE, *supra* note 111, at 1 (referring to the National Violence Against Women Survey (July 2000) for data that one-fourth of physical assaults against women by intimate partners were reported to police); *see also* Paladin, *supra* note 122, at 5 (reporting that police were more likely to respond within five minutes if the offender were a stranger than if an offender were known to the woman who was battered and citing a Department of Justice survey, Ronet Bachman, *Violence Against Women: A National Crime Victimization Survey Report* 9 (Jan. 1994)).

<sup>202</sup> Maguigan, *supra* note 18, at 384 (advising that “over seventy percent of all battered women who kill do so when faced with either an ongoing attack or the imminent threat of death or serious bodily injury” and that the figure may be closer to ninety percent).

<sup>203</sup> The National Coalition Against Domestic Violence and the Pace

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To understand the apparent disparity in these prison sentences as something other than a disturbing anomaly requires an understanding of the way that the law is constituted. From a constitutive perspective, the state reads relational social norms into the law.<sup>204</sup> The norms instantiate a quiet and deadly gender hierarchy that is disclaimed by other stated legal norms.<sup>205</sup> Yet, the gender hierarchy is pervasive.<sup>206</sup> The prison sentences of women

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University Battered Women's Justice Center estimate that women who kill an intimate partner receive sentences of fifteen to twenty years while men who kill intimate partners receive sentences of two to six years. *Developments, supra* note 31, at 1574 n.3 (referring to Michael Dowd, Director, Pace University Battered Women's Justice Center); Wendy Keller, *Disparate Treatment of Spouse Murder Defendants*, 6 S. CAL. REV. L. & WOMEN'S STUD. 255, 284 n.3 (1996) (also referring to estimates by the National Coalition Against Domestic Violence). Two reports from the Department of Justice indicated that women faced shorter sentences for killing a spouse. *Id.* at 258-59 (citing Patrick A. Langan & John M. Dawson, *Spouse Murder Defendants in Large Urban Counties* (1995) and Bureau of Justice Statistics, *Violence Between Intimates* (1994)). Those studies, which do not appear on the list of Bureau of Justice Statistics publications from 2005 to 1994, have been criticized as failing to account for legally relevant variables, such as level of severity of crime, prior criminal records, and lack of provocation. *Id.* at 259; *see* VICTIM CHARACTERISTICS, BUREAU OF JUSTICE STATISTICS PUBLICATIONS, at [http://www.ojp.usdoj.gov/bjs/cvict\\_v.htm#publications](http://www.ojp.usdoj.gov/bjs/cvict_v.htm#publications).

<sup>204</sup> Nourse, *Subjectivity, supra* note §, at 1283, 1287.

<sup>205</sup> *Id.* at 1238, 1268 (demonstrating how law absorbs social meaning "and thus constitutes gender inequity."); *cf.* LEILA AHMED, *WOMEN AND GENDER IN ISLAM* 245 (1992) (arguing that Western cultures are not less androcentric or misogynist than Middle Eastern societies, "but that women in Western societies were able to draw on the political vocabularies and systems generated by ideas of democracy and the rights of the individual, vocabularies and political systems developed by white male middle classes to safeguard their interests and not intended to be applicable to women.").

<sup>206</sup> Lorber, *supra* note 108, at 40, 53 (describing how gendered people emerge from the social order, beginning with assignment to a sex category at birth, which becomes a gender status through naming, dress, and other gender markers).

Once a child's gender is evident, others treat those in one gender differently from those in the other, and the children respond to the different treatment by feeling different and behaving differently . . . . Adolescent boys and girls approach and avoid each other in an elaborately scripted and gendered mating dance. Parenting is gendered,

who kill abusive men, like the retreat rules, may be seen as manifestations of relations of domination and subordination. They reflect the ways in which the law and the legal system are constructed to meet the needs and interests of the prototypical human being—a male batterer—not a woman who lives with a battering man.<sup>207</sup>

*C. The Norms: Self-Defense for Women Who Kill Battering Men*

In the next turn of the hermeneutic, the normative principles that constitute the law of self-defense are interrogated. The claim of self-defense by a woman who has killed a battering man is structured by doctrines that often are hostile to her experiences. Four main issues in the jurisprudence of self-defense are as follows: 1) the reasonableness of the defendant's actions; 2) the proportionality of the force employed; 3) the defendant's duty to retreat, if required; and 4) the temporal proximity or imminence of the danger.<sup>208</sup> As presently constituted, for women who kill abusive men, the defense is nearly impossible to prove.<sup>209</sup>

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with different expectations for mothers and fathers, and people of different genders work at different kinds of jobs.

*Id.* at 40.

<sup>207</sup> Meier, *supra* note 17, at 1302 (observing that men who batter frequently test within the normal range on psychiatric tests, while victims are typically seen as pathological); *see also* HERMAN, *supra* note 18, at 75 (noting that Adolph Eichmann, who had committed terrible crimes against humanity, had been certified as normal by a half a dozen psychiatrists); Koons, *Making Peace*, *supra* note 13, at 35-40 (decentering the normative center of the law that protects the interests of White, Euro-American, heterosexual men of privilege).

<sup>208</sup> Maguigan, *supra* note 18, at 385; *see also* DRESSLER, UNDERSTANDING, *supra* note 28, at 221-23 (outlining the elements of self-defense as including necessity, proportionality, and a reasonable-belief rule “that is based on reasonable appearances, rather than on objective reality.”).

<sup>209</sup> Douglas A. Orr, *Weiland v. State and Battered Spouse Syndrome: The Toothless Tigress Can Now Roar*, 74 FLA. BAR. J. 14, 16 (2000).

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*1. The Reasonableness of the Defendant's Actions*

As part of the first issue in a claim of self-defense—the reasonableness of the defendant's actions—evidence of the battered woman syndrome has been held by many states to be relevant to the reasonableness of a woman's belief that she was in imminent danger of death or serious injury.<sup>210</sup> Developed by Dr. Lenore Walker in 1979, the battered woman syndrome was conceived as a behavioral condition that arose out of prolonged exposure to an ongoing three-stage cycle of abuse: the “tension-building” phase that includes verbal and psychological abuse in conjunction with less extreme physical abuse; the “acute battering incident” stage in which uncontrolled battering occurs; and the “loving contrition” phase in which the battering man expresses remorse and attempts reconciliation.<sup>211</sup> Walker proposed that the unpredictability and intermittency of the battering cycle have long-term effects on a “battered woman.”<sup>212</sup> To explain why some

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<sup>210</sup> “[A] person is justified in using force to protect himself if he subjectively believes, and has objectively reasonable grounds for believing, that such force is necessary to repel an imminent unlawful attack, even if appearances prove to be false” DRESSLER, UNDERSTANDING, *supra* note 28, at 222. The purpose of evidence of the battered woman syndrome is to “explain to jurors why the defendant *subjectively* believed that the decedent was about to kill her (when he may have been asleep or otherwise passive); and to demonstrate that this belief was *objectively* reasonable to a person suffering from the syndrome.” *Id.* at 242. In some cases, women who kill battering men may raise the defense of Extreme Mental or Emotional Disturbance (EMED) to the charge of murder and be found guilty of the lesser offense of manslaughter. *Id.* at 541-43 (noting the subjective component of the defense (the extreme mental or emotional disturbance) and the objective component (a reasonable explanation or excuse for the EMED)).

<sup>211</sup> LENORE WALKER, THE BATTERED WOMAN SYNDROME 95-96 (1984) [hereinafter WALKER, SYNDROME]; *see also* LENORE WALKER, THE BATTERED WOMAN (1979) [hereinafter WALKER, WOMAN]; LENORE WALKER, TERRIFYING LOVE (1989).

<sup>212</sup> Walker defined a “battered woman” as a woman “in an intimate relationship with a man who repeatedly subjects . . . her to forceful physical and/or psychological abuse.” WALKER, SYNDROME, *supra* note 211, at 203 (defining “abuse” in six ways, from life-threatening violence to “extreme verbal harassment and expressing comments of a derogatory nature with negative value



women do not leave battering relationships, Walker applied the psychological construct of “learned helplessness.”<sup>213</sup>

Judicial reception of the battered woman syndrome has reformed the law of domestic violence.<sup>214</sup> While applauding the progress that has been wrung from Walker’s work, particularly expanding the base of relevant evidence, a number of critics have taken issue with the battered woman syndrome and the principle of learned helplessness.<sup>215</sup> For example, the battered woman

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judgments.”).

<sup>213</sup> The psychological theory of learned helplessness was developed by Martin Seligman based on laboratory experiments conducted on caged dogs who were given random electrical shocks and who eventually became passive and refused to leave their cages even when it became possible for them to do so. *See* WALKER, WOMAN, *supra* note 211, at 45-48 (discussing Seligman’s theory); *see also* Martin Seligman et al., *Alleviation of Learned Helplessness in the Dog*, 73 J. ABNORMAL PSYCHOL. 256 (1968). Walker applied Seligman’s theory of learned helplessness to women who had been battered, noting that when women “are operating from a belief of helplessness, the perception becomes reality and they become passive, submissive, “helpless.”” *Id.* at 48; *see also* Mahoney, *supra* note 17, at 38-43 (observing that learned helplessness is described by courts “with varying degrees of sophistication as a deficiency in perceiving escape possibilities or a psychological adjustment to economic dependence, love, and the failure of the legal system to respond adequately to the problem.”).

<sup>214</sup> “The clear trend is to permit syndrome evidence in cases of confrontational homicides . . . , assuming that the defendant presents evidence of a history of abuse. Courts are divided on how to deal with nonconfrontational cases.” DRESSLER, CRIMINAL, *supra* note 170, at 532. In a survey of 223 homicide cases defended by women who were battered, Holly Maguigan calculated that seventy-five percent of the incidents involved confrontations, twenty percent were nonconfrontational (with four percent as contract killings, eight percent sleeping-man cases, and eight percent in which the defendant was the initial aggressor during a lull in the violence). Maguigan, *supra* note 18, at 396-97 (also noting that five percent of the appellate opinions did not include a discussion of the factual basis of the offense).

<sup>215</sup> Mahoney, *supra* note 17, at 41-42 (opting not to discard “such a major tool in the effort to explain women’s experience in court, just because it has proved vulnerable to distortion in culture and law”); *see also* Meier, *supra* note 17, at 1305-11 (recognizing the battered woman syndrome as a “watershed in social and legal understandings of domestic violence” and that the syndrome “has not always advanced justice for battered women.”); Alafair S. Burke, *Rational Actors, Self-Defense, and Duress: Making Sense, Not Syndromes, Out of the Battered Woman*, 81 N.C.L. REV. 211, 216 (2002) (arguing that the

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syndrome has been characterized as creating a “narrow stereotype of the archetypal woman entitled to claim victimization.”<sup>216</sup> Women who deviate from the image of the “perfect victim,” including women who demonstrate capacity for action, aggression, or independence, continue to be convicted of murder and manslaughter for killing their abusers.<sup>217</sup> Critics have noted that Walker’s findings (primarily based on the experiences of white, middle class women) pose particular problems for women of color and women who are poor.<sup>218</sup> Juries may be especially unlikely to see African American women, who have long been depicted as strong and aggressive, as coming within the image of “helplessness.”<sup>219</sup>

More significantly, perhaps, the syndrome has been challenged as pathologizing women who have been battered by reinforcing oppressive images of women as weak and crazy, rather than recognizing women as rational actors who acted reasonably to save their lives.<sup>220</sup> Because the battered woman syndrome points to helplessness and incapacity to reason, it undermines the “logic of self-defense,” which is based on an ability to reason and to react when in danger.<sup>221</sup> Consequently, the battered woman syndrome

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battered woman syndrome “does nothing to jettison the faulty doctrinal rules that formed the impetus for the syndrome theory as a litigation strategy.”)

<sup>216</sup> Meier, *supra* note 17, at 1306.

<sup>217</sup> *Id.*

<sup>218</sup> *Id.* at 1307 n.33; see also Theresa Raffaele Jefferson, Note, *Toward a Black Feminist Jurisprudence*, 18 B.C. THIRD WORLD L.J. 263, 290 (1998) (relaying story of “Debra,” whose “identity as a Black lesbian problematized the battered woman’s syndrome defense.”).

<sup>219</sup> *Id.* One of the cultural images of African-American women is that of “mules uh de world.” PATRICIA HILL COLLINS, BLACK FEMINIST THOUGHT 43 (1991) (quoting from Nanny, an elderly African-American woman who was explaining the “place” of Black women to her granddaughter in ZORA NEALE HURSTON, THEIR EYES WERE WATCHING GOD 16 (1937)).

<sup>220</sup> Mahoney, *supra* note 17, at 4, 42 (proposing that the battered woman syndrome and explanations that emphasize “helplessness: can “perpetuate existing oppressive stereotypes of battered women.”); Burke, *supra* note 215, at 218 (advocating a “rational actor approach” that recognizes battered women as autonomous and competent decision-makers and their necessary use of force as justified, not excused).

<sup>221</sup> Jill E. Adams, *Unlocking Liberty: Is California’s Habeas Law the Key*

may create an internal inconsistency that undermines proof of the first aspect of the claim of self-defense.<sup>222</sup>

## 2. *The Proportionality of the Force Employed*

The second question in a claim of self-defense, the proportionality of the force employed, poses an additional interpretive hurdle for women who kill battering men.<sup>223</sup> Even women who use force in response to an immediate attack may be excluded from a narrow definition of self-defense because they use deadly force to respond to an attack that judges and juries do not see as posing a deadly threat.<sup>224</sup> In many of these cases, the woman used deadly force when the battering man was threatening verbally or with his fists.<sup>225</sup> One study found that, of 223 cases defended by women who killed battering men, only five percent of the cases involved the man's use of a weapon other than his hands; in each

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*to Freeing Unjustly Imprisoned Battered Women?*, 19 BERKELEY' WOMEN'S L.J. 217, 224 (2004) (relaying critique of the battered woman syndrome as "signaling incapacity to employ reason" and citing DONALD ALEXANDER DOWNS, MORE THAN VICTIMS: BATTERED WOMEN, THE SYNDROME SOCIETY, AND THE LAW 6-7 (1996)); Mahoney, *supra* note 17, at 4 (contrasting feminist explanations of women acting rationally under oppression with a simpler version told through the lens of cultural stereotypes of women as too helpless or dysfunctional to take reasonable action); *see also* Burke, *supra* note 215, at 247 (arguing that the syndrome fails to explain why a woman kills an abusive partner in a non-confrontational situation: "The heightened and prolonged fear, cognitive impairment, and submissiveness described by the syndrome theory are inconsistent with a sudden decision to act at all, let alone with deadly force.").

<sup>222</sup> Meier, *supra* note 17, at 1314-22 (discussing newer psychological approaches—post traumatic stress disorder, "redefined" battered woman syndrome, and entrapment or social control theories—that explicitly take social context into account).

<sup>223</sup> DRESSLER, UNDERSTANDING, *supra* note 28, at 222 (advising that "a person is *never* permitted to use deadly force to repel a *nondeadly* attack").

<sup>224</sup> *Developments*, *supra* note 31, at 1577; *see also* Fischer, *supra* note 134, at 2120 (explaining that seemingly innocent gestures—a nose scratch, a look, a drawn line gesture—are part of patterns of domination and are properly interpreted as "threatening symbols" by a woman who lives with a battering man).

<sup>225</sup> *Id.*

case, the woman used a weapon.<sup>226</sup>

### 3. *The Defendant's Duty to Retreat*

The third inquiry in self-defense, whether the defendant retreated to the greatest degree possible, sets up a normative faultline for women who have killed battering men. In particular, to require a woman to demonstrate that leaving the room was “not reasonably possible without increasing her own danger of death or great bodily harm” unfairly burdens her with disproving one of the great myths of intimate violence—that she could have left.<sup>227</sup> “Why didn’t she leave?” has plagued cases in which women claim self-defense in killing a battering man.<sup>228</sup> The question is legitimated when the law frames her defense in terms of an implicit duty to retreat.

By posing the “leaving question” in a jury instruction, the law establishes a normative assumption that exit is the appropriate response to violence and hides the strategies that women have engaged to avoid or stop the battering.<sup>229</sup> The question wrongly

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<sup>226</sup> Maguigan, *supra* note 18, at 416 n.131; *see also* State v. Wanrow, 559 P.2d 548 (Wash. 1977) (reversing murder conviction of a mother who killed a child sex offender because the jury instruction established an objective standard that implied that the case were to be judged as if it were an altercation between two men).

The impression created—that a 5’4” woman with a cast on her leg and using a crutch must, under the law, somehow repel an assault by a 6’2” intoxicated man without employing weapons in her defense . . . —constitutes a separate and distinct misstatement of the law and, in the context of this case, violates respondent’s right to equal protection of the law.

*Id.*; *see also* Leti Volpp, *On Culture, Difference, and Domestic Violence*, 11 AM. U.J. GENDER SOC. POL’Y & L. 393 (2003) (discussing the exclusion of Ms. Wanrow’s Native American heritage from her defense).

<sup>227</sup> *Weiand v. State*, 732 So. 2d 1044, 1057 (Fla. 1999) (adopting interim jury instruction); *see also* Standard Jury Instructions—Criminal Cases (Castle Doctrine), 789 So. 2d 954 (Fla. 2000) (authorizing edited jury instruction).

<sup>228</sup> Tuerkheimer, *supra* note 131, at 1026 (characterizing the question of leaving as a “depressingly perennial inquiry”).

<sup>229</sup> Fischer, *supra* note 134, at 2136 (relaying data from a study that women

implies not only that leaving is possible, but also that it will bring safety.<sup>230</sup>

Ignoring the reality of the dynamics of battering, the law sometimes overtly places on women who kill battering men the burden of proving that they could not retreat without increasing the danger of death or great bodily harm.<sup>231</sup> With the case oriented around such a normative center, jurors will be invited to question why a defending woman could not undertake the “simple act” of leaving the room.<sup>232</sup> Because a judge may not permit a full evidentiary exploration of the battering relationship, jurors may not have sufficient information to understand why leaving a room may be dangerous.<sup>233</sup>

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who were battered tried an average of thirteen strategies to stop the violence); Mahoney, *supra* note 17, at 81 (proposing that separation assault affirms the difficulties of exiting and the rationality of a woman’s perception of the danger of exiting).

<sup>230</sup> Most women who live with battering men *do* leave at some point. Meier, *supra* note 17, at 1311 n.52. However, their leaving does not end the violence. *Id.* Violence often increases when a woman attempts to leave. Anderson, *supra* note 152, at 93 (offering results of a study showing that “women who leave suffer significantly more violence than women who never leave.”); Mahoney, *supra* note 17, at 64-65 (noting that “[a]t least half of women who leave their abusers are followed and harassed or further attacked by them.”).

<sup>231</sup> *E.g.*, *Weiland*, 732 So. 2d at 1057 (setting forth interim jury instruction that articulated a “duty to retreat to the extent reasonably possible without increasing [his / her] own danger of death or great bodily harm.”).

<sup>232</sup> *Id.* at 1044-49, 1054 (noting the key role of retreat in the closing arguments of the prosecuting attorney—“that the killing could not be considered justifiable homicide unless *Weiland* had exhausted every reasonable means to escape the danger”).

<sup>233</sup> Tuerkheimer, *supra* note 131, at 985 (noting that jurors typically have not been given the evidence needed to understand motivation, which is critical to making sense of domestic violence cases); Mahoney, *supra* note 17, at 43 (arguing that “[e]videntiary rules and courtroom bias . . . continue to skew the image of women in the self-defense cases, and these cases continue to contribute to cultural images that in turn shape law.”). *But see* Maguigan, *supra* note 18, at 383 (arguing that a survey of homicide cases defended by women who were battered did not support the assumption that existing legal definitions excluded judicial consideration of social context).

#### 4. *The Temporal Proximity or Imminence of the Danger*

The fourth consideration in the law of self-defense asks whether the defendant was responding to an imminent threat.<sup>234</sup> While it appears to be an “objective” standard (for example, the time lag between the threat and the response), imminence is actually a fuzzy concept that incorporates social norms about women’s relationships with men.<sup>235</sup> That imminence has a mercurial nature is illustrated by the varying directions and proximities to which it points. In some cases, it asks whether *danger* is imminent; in others it asks whether the closer notion of a *threat* is imminent; in others it asks whether an *attack*, closer still, is imminent; in others it switches perspective and asks whether the *harm* to defendant or another is imminent; in still others it asks the defendant to assess whether a *forcible felony* is imminent.<sup>236</sup> Illustrating the shift in perspective from attacker to defendant is the Model Penal Code, which does not focus on the threat, but on the *response* of the defendant (as being “immediately necessary”).<sup>237</sup>

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<sup>234</sup> DRESSLER, UNDERSTANDING, *supra* note 28, at 222 (advising that imminence is an aspect of the necessity component of self-defense).

<sup>235</sup> Nourse, *Subjectivity*, *supra* note §, at 1238, 1267; *see also* Rosen, *supra* note 20, at 381 (discussing imminence as a translator and inhibitor of necessity).

<sup>236</sup> *E.g.*, *Rasley v. State*, 878 So. 2d 473, 476 (Fla. 1st Dist. Ct. App. 2004) (noting rules applicable to self-defense, including a demonstration by a defendant of circumstances causing a reasonable prudent person to believe that danger was imminent); *Developments*, *supra* note 31, at 1576 (advising that most jurisdictions permit force to be used to prevent imminent threat of unlawful physical force); Standard Jury Instructions—Criminal Cases (Castle Doctrine), 789 So. 2d at 955 (predicating “defense of home” instruction on an attack); The Florida Bar Re: Standard Jury Instructions Criminal Cases, 477 So. 2d. 985, 999 (Fla. 1985) (authorizing instructions for justifiable use of deadly force, including imminent death or great bodily harm and imminent commission of forcible felony).

<sup>237</sup> The Model Penal Code states: “[T]he use of force upon or toward another person is justifiable when the actor believes that such force is immediately necessary for the purpose of protecting himself against the use of unlawful force by such other person on the present occasion.” MODEL PENAL CODE § 3.04(1) (1985). Two changes were made by the Model Penal Code to traditional self-defense theory: 1) not requiring that defendant’s belief be reasonable; and 2) focusing on defendant’s belief that the use of force is

Imminence absorbs meanings of immediacy, as well as mediacy.<sup>238</sup> When viewed as “immediate,” imminence functions in lock-step with an incident-based notion of battering, erasing the context of a battering relationship.<sup>239</sup> Furthermore, in separation assault, it is the separation itself which is being attacked, with assault taking place over a period of time.<sup>240</sup> Consequently, when imminence is read as “immediate,” the consequences are devastating to women who have survived in a climate of pervasive battering.<sup>241</sup>

The most insidious norms absorbed by imminence are those that reflect social views that women should leave battering relationships. When read into imminence, a standard is created that, in effect, requires women to leave, not just a confrontation, but a relationship *before* a confrontation takes place.<sup>242</sup> In this sense, imminence functions as a *pre-retreat* rule.<sup>243</sup> Requiring pre-retreat is clearly specious, as no rule would stand that, for example, required a man to leave a bar before a fight broke out.<sup>244</sup> Yet, even

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immediately necessary. E-mail from Mark Summers, Professor of Law, Barry University School of Law, to Judith E. Koons, Associate Professor of Law, Barry University School of Law (Aug. 16, 2005, 5:18 PM EST) (on file with author). Due to these changes (adopting a wholly subjective standard and shifting the emphasis from the victim to the defendant), the Model Penal Codes definition of self-defense “more easily accommodates the domestic violence paradigm.” *Id.*

<sup>238</sup> Mahoney, *supra* note 17, at 84 (criticizing decisions that confuse imminence and immediacy); *see also* Hunter v. State, 687 So. 2d 277, 278 (Fla. 5th Dist. Ct. App. 1997) (defining imminent as “near at hand, mediate rather than immediate, close rather than touching,” quoting Linsley v. State, 101 So. 273 (Fla. 1924)).

<sup>239</sup> Tuerkheimer, *supra* note 131, at 972.

<sup>240</sup> Mahoney, *supra* note 17, at 65-66 (noting, too, that the attack on the separation usually is not recognized).

<sup>241</sup> *Id.* at 84.

<sup>242</sup> Nourse, *Relational*, *supra* note 108, at 37-38.

<sup>243</sup> *Id.* at 37 n.56.

<sup>244</sup> Nourse, *Subjectivity*, *supra* note §, at 1284 (stating that a “man who goes for the fiftieth time to the violent gang-bar is not deprived of his self-defense claim because he “should have left’ before the violence erupted.”). Kimberly Rasley was convicted of second-degree murder and sentenced to a twenty-five year minimum mandatory sentence for use of a firearm in

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where the law has rejected a *de jure* duty to retreat, jurors may be invited to consider, through the lens of imminence, whether the defendant had time to go out the door (or leave the relationship) before an incident of abuse took place.<sup>245</sup>

The normative power of the law should support a woman's right of self-defense, not mandating that she fit the reality of gender domination into an inhospitable legal framework.<sup>246</sup> Furthermore, the normative power of the law should establish the value of personal safety, rather than a fictional and dangerous act of retreat.<sup>247</sup> Influencing all interactions between people, the law shapes the identities, goals, and actions of people.<sup>248</sup> Establishing a duty for women to first attempt leaving, even a room, is teaching women to disregard their own safety.

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commission of the offense of killing her abusive husband after he had pushed her violently into the bedroom wall, left the house, and returned shortly thereafter. *Rasley v. State*, 878 So. 2d 473, 475 (Fla. 1st Dist. Ct. App. 2004). He came through a double-locked door and, despite her entreaties to stop, continued to advance toward her until she shot him 24 to 42 inches away. *Id.* at 475. Although she stated the belief that, if she had not obtained and used the weapon, he would have beaten her to death, the court affirmed the conviction and sentence because there was sufficient evidence from which the jury could conclude that she "had other reasonable options besides that of deadly force to avoid the danger posed by her husband's advance, including retreat . . ." *Id.* at 475, 477.

<sup>245</sup> *Id.* at 1247, 1268; *see also* *Weiland v. State*, 732 So. 2d 1044, 1048-49 (Fla. 1999) (quoting prosecutor's closing argument: "She had to exhaust every reasonable means of escape prior to killing him. Did she do that? No. Did she use the phone that was two feet away? No. Did she go out the door where her baby was sitting next to? No.").

<sup>246</sup> Tuerkheimer, *supra* note 131, at 960, 962 (discussing "flawed paradigms" that structure the criminal justice system's response to the harms suffered by women who live with battering men).

<sup>247</sup> Wheatcroft, *supra* note 146, at 559-60 (noting the policy decision made by non-retreat jurisdictions, "not with a cavalier disregard for the value of human life but, rather," to protect the victim and enable her to use force necessary to save her life).

<sup>248</sup> Tuerkheimer, *supra* note 131, at 1018 n.315, 1019 (discussing how the law influences human behavior, interactions, and identity and assuming "a mutating, bi-directionally permeable border between law and society"); Nourse, *Subjectivity*, *supra* note §, at 1293 (explaining that the "law constitutes us and our relationship to the political order.").



While some women who live with battering men may be apprised of the danger of leaving, other women may not be aware that forms of leaving may place them at significant risk.<sup>249</sup> In one study, half of the survivors of femicide attempts reported that they were “completely surprised by the attack.”<sup>250</sup> One woman broke up with a “gentle giant” who had no history of abuse.<sup>251</sup> After she agreed to meet with him as friends, he tied her up and beat her for twelve hours.<sup>252</sup> In response to the assertion that “women should be more aware,” the woman asserted: “Excuse me. If there are no signs to you—no previous throwing, hitting, screaming—how are you supposed to know what’s going to happen?”<sup>253</sup>

The precipitating event in most of these homicidal attacks was the attempt by women to end the relationships.<sup>254</sup> According to one woman’s description:

I sit on my bed and he looks and me and says, ‘So what you are telling me is that you do not love me anymore.’ I said, ‘No.’ ‘You want me out of the house?’ I said, ‘I do.’ He says, ‘O.K., well then I am going to kill you.’ That is when he lunged at me.<sup>255</sup>

Another woman who survived a femicide attempt stated: “I didn’t really realize what big trouble I was in until I was to the point of where I thought I was going to die.”<sup>256</sup> The unpredictability, complexity, and variety of abuse reported by women support the premise that the law should not set a normative baseline of leaving, whether it be a room, residence, or

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<sup>249</sup> Nicolaidis, *supra* note 130, at 791.

<sup>250</sup> *Id.*

<sup>251</sup> *Id.*

<sup>252</sup> *Id.*

<sup>253</sup> *Id.*

<sup>254</sup> *Id.*

<sup>255</sup> Nicolaidis, *supra* note 130, at 791.

<sup>256</sup> *Id.*; *see also* State v. Griffiths, 610 P.2d 522 (Idaho 1980) (recounting that the “defendant shot her husband after seeing a look in his eyes which she had seen only once before when he choked her to near insensibility.”); Waits, *supra* note 197, at 37 (discussing “the look” that Mary’s abusive husband would give her to exercise control).

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relationship.<sup>257</sup>

Although formally adopting a no-retreat stance, the Florida legislature also reinforced the standard of imminence, effectively instantiating a requirement of retreat. Retreat rules place many women in the position of negotiating for their safety. The law must recognize that safety is non-negotiable.<sup>258</sup>

*D. The Meanings: A Jurisprudence of Gendered Violence*

The final movement of the hermeneutic pauses on questions of meaning, purpose, and value. That interpretive turn will be made by evaluating the ways in which gendered violence is mapped onto dichotomies that are erected in the law.

Americans are in the grips of a love affair with violence and guns.<sup>259</sup> At the same time, narratives about crime—“emotional, contradictory, and bewildering”—occupy the center of U.S. politics.<sup>260</sup> Violence is one of the common denominators of oppression.<sup>261</sup> People whose lives are marked by oppression may live with the specter of random, unprovoked attacks that have no motive other than to harm a person out of a sense of fear or hatred of the oppressed group.<sup>262</sup> Violence may be best characterized as a “social practice” that is anticipated to reoccur because violence is “always on the horizon of social imagination, even for those who do not perpetrate it.”<sup>263</sup> Group violence is legitimated in American

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<sup>257</sup> Nicolaidis, *supra* note 130, at 793 (cautioning clinicians against pushing women to leave abusive relationships before addressing safety issues).

<sup>258</sup> Fischer, *supra* note 134, at 2153 (citing empirical work from which advocates argue that women “should never have to negotiate for their physical safety.”).

<sup>259</sup> Fine, *supra* note 118, at 16.

<sup>260</sup> *Id.*

<sup>261</sup> Oppression has been defined as “the institutional constraint on self-development.” YOUNG, *supra* note 130, at 37. Explicating a structural analysis of relations of power in society, Young identified five faces of oppression: exploitation, marginalization, powerlessness, cultural imperialism, and violence. *Id.* at 49-62.

<sup>262</sup> *Id.* at 61.

<sup>263</sup> *Id.* at 62.

society, in that it is tolerated, if not applauded.<sup>264</sup> Those who perpetrate acts of oppressive violence may receive little to no punishment.<sup>265</sup> In contrast, a violent act by a woman may touch a depth of horror that triggers sweeping retribution.<sup>266</sup>

American culture is marked by three articulated sites of violence: street violence, in which the public space in some communities is dominated by the drug markets; “state-initiated violence,” in which communities of color criticize police harassment and the flight of jobs and capital from their communities; and domestic violence, in which women are terrorized in their homes by male partners.<sup>267</sup> The widely varying accounts of the location of violence in communities by the race,

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<sup>264</sup> In a study of the life histories of 154 poor and working-class adults in Jersey City and Buffalo, one of the stories described the response of the police to a white man’s report of a break-in: “[O]ne cop said to me that it was too bad that you didn’t catch him inside the house because then you would have killed him and we wouldn’t have said anything.” Fine, *supra* note 118, at 8; *see also* DRESSLER, *CRIMINAL* *supra* note 170, at 526-27 (noting that the President declared in 2002 that we must be able to stop rogue states and terrorists before they are able to threaten or use weapons of mass destruction and questioning: “If so-called ‘preemptive self-defense’ is being conducted at the international level, is there any reason to deny the right to battered women to kill their ‘rogue’ and ‘terrorist’ partners *before* they are able to threaten, much less use, deadly force?”).

<sup>265</sup> *E.g.*, Gregory Howard Williams, *Controlling the Use of Non-Deadly Force: Policy and Practice*, 10 HARV. BLACKLETTER J. 79, 103 (1993) (noting that law enforcement agencies “have not been vigilant in punishing officers who have repeatedly used excessive force” and citing the example of Miami officials sustaining 10 of 172 excessive force complaints between 1988 and 1991, resulting in one officer’s leaving the police force of 2,457 officers); *see also* Susan Bandes, *Patterns of Injustice: Police Brutality in the Courts*, 47 BUFF. L. REV. 1275 (1999) (questioning why the story of police brutality is “anecdotalized” as unusual, an aberration).

<sup>266</sup> *E.g.*, MORRISSEY, *supra* note 18 *passim* (critiquing portrayal of women killers as victims, sufferers of mental illness, and inhuman monsters and arguing that the portrayals deny human agency); *see also* Anne Taylor Fleming, *Crime and Motherhood: Maternal Madness*, N.Y. TIMES, March 17, 2002, at 4-3 (discussing the capital murder conviction of Andrea Yates for the murder of her children and her depiction as “demon mother writ large” despite her mental illness).

<sup>267</sup> Fine, *supra* note 118, at 7.

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gender, and class of respondents demonstrate that perceptions of violence in the United States are deeply raced, gendered and classed. In one study of crime and violence in two low-income urban communities, white men offered racialized narratives of street crime while African-American men and Latinos focused on state violence, detailing examples of disproportionate arrests of men of color and increased prison construction.<sup>268</sup> White women offered scenes of pervasive male-perpetrated violence among family members while many African-American women and Latinas detailed incidents of home-based violence, street violence, and state-initiated violence, primarily in the welfare office.<sup>269</sup>

As reflected in the strengthened castle doctrine and other crime bills, public policy emphasizes street crime, but has offered inadequate redress for domestic abuse, and has been silent on state abuse.<sup>270</sup> A terrible gender irony for many women is that the home front is often more dangerous than the streets.<sup>271</sup> However, in the United States, the policy answer for violence speaks from the privileged standpoint of elite white men.<sup>272</sup> The experiences of white women and people of color are often relegated to the narrow, confusing, and contradictory margins of the law.

Race, gender, and class fissures in the law find their heritage in Western philosophy. At the dawn of modernity, Enlightenment thinkers structured their thought around binaries—reason / passion, mind / body, and public / private.<sup>273</sup> A key construct underlying

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<sup>268</sup> *Id.*

<sup>269</sup> *Id.* at 15 (offering this narrative by a Latina describing efforts to get the police to respond: “You call 911 and say, ‘‘Okay, I’m calling from such and such a building. There’s kids hanging outside. It’s 3 o’clock in the morning. I can’t sleep.’ The cops won’t come. They won’t come. They will never show up. Or, there’s a domestic fight in apartment such and such. You’ll sit there and die before they come. I mean the wife will be dead, and he’ll beat her to death before the cops ever come.”).

<sup>270</sup> *Id.* at 8, 18.

<sup>271</sup> *Id.* at 6 (observing that “[f]or poor and working-class men and women, life on the streets may be tough. But for women, life may be tougher still at home.”).

<sup>272</sup> *Id.* at 8, 18.

<sup>273</sup> The Enlightenment brought the dawning of modernity, that enormous change in European thought dating from the mid-sixteenth century which

Western philosophy and science is the subject / object binary.<sup>274</sup> In this worldview, the subject is panoptically centered while all who are “different” are viewed as “other” and marginalized.<sup>275</sup> The process of “othering” is hierarchical, in that the other is marked, subordinated, and rendered invisible.<sup>276</sup>

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rejected the dogma and substantive rationality of religious and metaphysical world-views. ELISABETH SCHÜSSLER FIORENZA, *RHETORIC AND ETHIC* 35 (1999) (defining modernity in terms of procedural rationality which gives credence to objective knowledge, moral practical insight, and aesthetic judgment and defining postmodernity as critical thought based on its modern predecessor, but posing three correctives—aesthetic (experiential concreteness and intuitive imagination are stressed over rationalist abstraction), cultural (cultural autonomy and the wisdom of particular community are emphasized over universalization), and political (power is seen as the starting point, not reason). With many of the Enlightenment thinkers, reason was associated with the male, while passion / disorder / nature were associated with the female. *E.g.*, GENEVIEVE LLOYD, *THE MAN OF REASON* 77 (2d ed. 1993) (evaluating the “maleness of Reason” in the thought of such philosophers as Jean Jacques Rousseau by explicating his view that the “disorder of women” was a “threat to the public life of citizenship” and served as a rationale for women’s exclusion from citizenship).

<sup>274</sup> YOUNG, *supra* note 130, at 99, 126, 147.

<sup>275</sup> *Id.* at 99, 147 (noting, too, that there is only one subject position). Simone de Beauvoir conceived the “Other” in 1949 as the metaphor by which women have been set aside and subordinated in a discourse constructed to protect the interests of privileged White men. SIMONE DE BEAUVOIR, *THE SECOND SEX* (1949); *see also* SEYLA BENHABIB, *SITUATING THE SELF* 158 (1992) (presenting conceptions of self as the “generalized” and “concrete” other).

<sup>276</sup> Euro-English language is shot through with binaries that are hierarchical dyads—right / wrong, tall / short, fast / slow, good / bad, happy / unhappy—with preferred and disfavored polarities. MARY BELENKY ET AL., *A TRADITION THAT HAS NO NAME: NURTURING THE DEVELOPMENT OF PEOPLE, FAMILIES, AND COMMUNITIES* 21 (1997) (featuring the work of psychologists and linguists to explain the gendered nature of the binaries that constitute our language). Linguists found that, with each binary, there is a pole that is “unmarked” and a pole that is “marked.” *Id.* The positive or unmarked pole denotes the entire scale and is associated with men, while the marked pole only refers to the negative end of the pole and is associated with women. *Id.* The unmarked pole, reserved for men, is the favored dyad, while the marked pole is tainted with “girl stain.” *Id.* “Mankind” is an unmarked term and operates to identify men as well as all of humanity. *Id.* at 22. “Womankind” is marked and, because of the taint of gender, is too polluting to include men. *Id.* Male language

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In Western philosophy, the other serves as the object for the subject.<sup>277</sup> When human beings become objects, violence against them is justified: “Underlying all violence is a human being that has been reduced to the status of an object.”<sup>278</sup> Consequently, the binarist structure of law and philosophy, with the paradigmatic centering of the elite white male subject and the othering of subordinated people, serves as the structural basis of race, gender, and class violence.

The public / private binary is also a key feature in the landscape of domestic violence and the law. In the mid-1700s, Enlightenment philosopher Jean-Jacques Rousseau gave primacy to a gendered division between public and private spheres.<sup>279</sup> Also conceptualizing distinctions between reason and nature, Rousseau considered the closeness of women to nature and passion to justify their exclusion from citizenship.<sup>280</sup> The “disorder of women” served as a threat to public citizenship.<sup>281</sup> Rousseau solved the riddle by making men good citizens in the public sphere while locating women as good persons in the private domain.<sup>282</sup> Linking the spheres, Rousseau viewed the private domain as “the nursery” in which women would raise good citizens who would animate

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that is offered as “generic” is actually linguistically coded language that represents the interests of men. *Id.*; see also YOUNG, *supra* note 130, at 59 (describing the paradox of cultural imperialism is that it not only *marks* out certain groups, it also renders the groups *invisible*).

<sup>277</sup> YOUNG, *supra* note 130, at 136.

<sup>278</sup> Fr. John Kavanaugh, *Challenging a Commodity Culture*, COMMONWEAL 606, 608 (Nov. 1984) (proposing that alternatives to the hegemony of commodification must be lived in a full dialectic that embraces interiority, relationships, social commitments, simplicity, and compassion).

<sup>279</sup> LLOYD, *supra* note 273, at 78 (noting, in Rousseau’s thought, the “complementarity between male and female character is mapped onto the public-private distinction”); see also Carole Pateman, *Feminist Critiques of the Public / Private Dichotomy*, in *THE DISORDER OF WOMEN* 118, 118-40 (1989) (critiquing the patriarchal character of liberalism and tracing the liberal theoretical division between the public and private to JOHN LOCKE, *TWO TREATISES OF GOVERNMENT* (1689)).

<sup>280</sup> LLOYD, *supra* note 273, at 77.

<sup>281</sup> *Id.*

<sup>282</sup> *Id.*

public life.<sup>283</sup>

Wife abuse in the private sphere was condoned at common law.<sup>284</sup> Blackstone advised:

The husband also (by the old law) might give his wife moderate correction. For, as he is to answer for her misbehavior, the law thought it reasonable to intrust him with this power of restraining her, by domestic chastisement, in the same moderation that a man is allowed to correct his servants or children.<sup>285</sup>

In the United States, the “discourse of affectional privacy” undergirded the refusal of courts to interfere with a husband’s moderate correction of his wife.<sup>286</sup> Affirming the trial court’s decision that a man who whipped his wife with a switch was not guilty of battery as a matter of law, the North Carolina Supreme Court reasoned that it would not disturb “family government in trifling cases” because:

[H]owever great are the evils of ill temper, quarrels, and even personal conflicts inflicting only temporary pain, they are not comparable with the evils which would result from raising the curtain, and exposing to public curiosity and criticism, the nursery and the bed chamber.<sup>287</sup>

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<sup>283</sup> *Id.* at 77-78.

<sup>284</sup> Tuerkheimer, *supra* note 131, at 969.

<sup>285</sup> BLACKSTONE, *supra* note 29, at 1:432 (also asserting: “But, with us, in the politer reign of Charles the second, this power of correction began to be doubted . . . . Yet the lower rank of people, who were always fond of the old common law, still claim and exert their antient privilege: and the courts of law will still permit a husband to restrain a wife of her liberty, in case of any gross misbehaviour.”); *see also* Hazel D. Lord, *Husband and Wife: English Marriage Law From 1750*, 11 S. CAL. REV. L. & WOMEN’S STUD. 1, 53 (2001) (debunking as a “myth” that the right of moderate correction included the “rule of thumb,” whereby a husband could beat his wife with a stick as long as its diameter was no thicker than his thumb and noting the possible origins of this legend in a statement made by Sir Francis Buller in 1792, for which he was excoriated).

<sup>286</sup> Reva B. Siegel, *The Rule of Love: Wifebeating as Prerogative and Privacy*, 105 YALE L.J. 2117, 2119 (1996).

<sup>287</sup> *State v. Rhodes*, 61 N.C. 453, 457 (N.C. 1868) (questioning, too, what standards of provocation would be appropriate for the “hovel,” the middle class, and the “higher ranks.”); *see also* Jill Elaine Hasday, *Contest and Consent: A*

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The split between the public and private domains was squarely challenged by second wave feminists in their charge that the “personal is political.”<sup>288</sup> The woman’s movement made public issues out of practices—including domestic violence—that had been considered too private or trivial for political and public discussion.<sup>289</sup> Due to contemporary public policies that effect broad cutbacks for people who are poor, commentators have suggested that women are being “swept into the corners of a reinstitutionalized ‘private’ sphere” without adequate resources.<sup>290</sup> These critics also forecast that, with the shrinking of the public sphere, “women will get beaten with more regularity, with fewer options and more muzzled critiques.”<sup>291</sup>

Violence against women in their homes continues to have legitimacy due to a gendered division between the public and the private spheres. One study posited that, as men in low-income urban communities lost economic power due to the shrinkage of public sector and unionized jobs, they attempted to assert power in

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*History of Marital Rape*, 88 CAL. L. REV. 1373 (2000) (noting that “[a] majority of states still retain some form of the common law regime” that exempts husbands from prosecution for raping their wives: “They criminalize a narrower range of offenses if committed within marriage, subject the marital rape they do recognize to less serious sanctions, and/or create special procedural hurdles for marital rape prosecutions.”).

<sup>288</sup> YOUNG, *supra* note 130, at 120. COLLINS, *supra* note 219, at 47 (observing that women of color have “never fit” the model of the dichotomous split between work (public) and family (private)). The slogan, “the personal is political,” was coined by Carol Hanisch in a duplex on N.W. 3rd Place in Gainesville, Florida, in March of 1968. Carol Giardina, *Action Knowledges: Radical Feminism in Gainesville, Florida, 1964-89*, Address at the “Cultivating Knowledges” Twenty-fifth Anniversary Symposium of the Center for Women’s Studies and Gender Research at the University of Florida (Oct. 26, 2002) (notes on file with the author) (noting, too, that the phrase was related to the work of Beverly Jones and Judith Benninger Brown, whose paper, *Toward a Female Liberation Movement*, was published in the spring of 1968).

<sup>289</sup> YOUNG, *supra* note 130, at 120.

<sup>290</sup> Fine, *supra* note 118, at 10.

<sup>291</sup> *Id.* (also forecasting that women will be held in the violence of the private sphere “by the hollowing of the economy and the retreat of public sector services for women and children.”).



the domestic sphere.<sup>292</sup> Stories told by these men were stories of loss—the loss of privilege—that were situated in a discourse of property rights.<sup>293</sup>

The obsession of Americans with private property rights adds another layer of “justification” to gendered intimate violence. Cases that uphold the duty to retreat for cohabitators are often based squarely on the primacy of property rights.<sup>294</sup> Placing property rights over personal safety has absurd and deadly consequences. In one case, a man described as a “withdrawn workaholic” had moved out of the marital home but then began stalking his wife, leading to the following incident:

One night he went through her home with a sledgehammer, chainsaw, and toxic chemicals, destroying everything the family owned. Though neighbors called the police, *the police felt they could not intervene as he was an owner of the house* and there was no restraining order against him. The next morning, he was waiting for her in the house with a loaded crossbow.<sup>295</sup>

Sheltered by the rhetoric of private property, *de jure* and *de facto* duties to retreat serve to insulate intimate male violence from legal accountability.<sup>296</sup>

## CONCLUSION

For many women who defend themselves in their homes and in the courts, the law supports and conceals an elaborate system of domination, subordination, and control.<sup>297</sup> While this system is

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<sup>292</sup> *Id.* at 8; *see also* DISTRICT OF COLUMBIA, *supra* note 112, at 1, 5 (reporting that, while domestic violence is statistically consistent across racial and ethnic categories, “past and current victims of domestic violence are over-represented” among women who receive welfare).

<sup>293</sup> Fine, *supra* note 118, at 8.

<sup>294</sup> Carpenter, *supra* note 3 *passim*.

<sup>295</sup> Nicolaidis, *supra* note 130, at 791 (emphasis supplied).

<sup>296</sup> *Cf.* Balos, *supra* note at 193, 105 (arguing that it is “time for the doctrine of privacy to stop sheltering perpetrators of sexual harassment in the home.”).

<sup>297</sup> Tuerkheimer, *supra* note 131, at 985.

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veiled by race, class, and gender privilege in a discourse that naturalizes oppression, occasionally an adjustment in the law creates a shift that allows observers to catch a glimpse of deep structural flaws in legal doctrines.<sup>298</sup> The recent shifts in the retreat and castle doctrines provide a vantage point for observing the legal construction of relations of subordination and domination for women, battering men, and the legal system.<sup>299</sup>

By way of Potter's Boxes, this article has traveled into the rupture between some of the controlling legal doctrines and the experiences of many women who live with battering men.<sup>300</sup> To examine the facts of battering, the article has noted the pervasiveness of physical and non-physical abuse of women by intimate male partners. The article challenges the factual basis for duties to retreat by juxtaposing them with the well-known phenomenon of separation assault, by which patterns of violence escalate upon a decision, threat, or move to separate from an abuser.<sup>301</sup>

To explore the domain of loyalties, the article has illustrated that, while battering is experienced as part of a complex system of domination and control, the law may be structurally disabled from hearing the truth of the relational dynamics of battering. Instead, the law often decontextualizes "episodic physical violence from the battering relationship."<sup>302</sup> Jurors may be deprived of information necessary to form a coherent and reasonable story of self-defense.<sup>303</sup> Relationships on the interpersonal, as well as the

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<sup>298</sup> *Cf. id.* at 988 (noting "adjustments" that have taken place in the law regarding domestic violence: "Yet law's adjustments have, to this point, been marginal: at times doctrinally incoherent; in places theoretically untenable; in other places practically unworkable; always providing less than a remedy for the true harm of domestic violence.").

<sup>299</sup> Nourse, *Subjectivity*, *supra* note §, at 1275 (discussing the relationships implicated in every criminal law defense— "the relationship between the defendant and the victim and the relationship between the defendant and the state.").

<sup>300</sup> Tuerkheimer, *supra* note 131, at 961 (exploring the "rupture" between battering, as experienced by women, and the remedies offered by criminal law).

<sup>301</sup> *E.g.*, Mahoney, *supra* note 17 *passim*.

<sup>302</sup> Tuerkheimer, *supra* note 131, at 985.

<sup>303</sup> *Id.* (arguing that a jury cannot understand what motivates the

community and state levels, often drive the fate of women who live with battering men. Little accountability seems to be taken by communities for failing to protect or provide resources for women who live with battering men. Nor does the state answer for the failings of the criminal justice system, including creating and imposing legal doctrines that castigate and punish women for rational choices made in battering relationships.<sup>304</sup>

In the normative domain, the article notes that the elements of self-defense for women who kill battering men are all but impossible to prove. Self-defense is structured by the considerations of reasonableness, proportionality, retreat, and imminence.<sup>305</sup> Woven into the battered woman syndrome is the trope of learned helplessness, undermining the “logic of self-defense” by which a woman is judged by her capacity to react rationally when in danger.<sup>306</sup> Narrow interpretations of proportionality interfere with jurors and judges being able to apprehend the seriousness of the threat to a woman who lives with a battering man. A look or gesture, in the context of the hostage-taking that aptly describes the battering relationship, may be as dangerous as a loaded gun.<sup>307</sup>

Moreover, overt and covert retreat rules legitimize the normative imperative that a woman prove inability to leave a room, a residence, or a relationship in order to support a claim of self-defense.<sup>308</sup> Requiring retreat as a normative baseline robs

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defendant’s actions without apprehending the system of subordination and control that the law is masking).

<sup>304</sup> Carol Bohmer et al., *Domestic Violence Reforms: Reactions From the Trenches*, 29 J. SOC. & SOC. WELFARE 71 (2002) (reporting on client reactions to legal and policy reforms in the handling of domestic violence cases in the criminal justice system as decidedly mixed. Clients, particularly, do not for the most part see the criminal justice system as a solution to their problems).

<sup>305</sup> Maguigan, *supra* note 18, at 385; *see also* DRESSLER, UNDERSTANDING, *supra* note 28, at 221 (noting the necessity, proportionality, and reasonable-belief components of self-defense).

<sup>306</sup> Adams, *supra* note 221, at 224.

<sup>307</sup> Fischer, *supra* note 134, at 2120 (describing seemingly innocent gestures as “threatening symbols” in the context of a battering relationship).

<sup>308</sup> *Weiland v. State*, 732 So. 2d 1044, 1048-49 (Fla. 1999) (relaying prosecutor’s argument that emphasized a failure to retreat).

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women of their first right to safety.<sup>309</sup> The standard of imminence functions as a retreat rule by borrowing prevailing social norms, including the key unspoken norm that women leave battering relationships.<sup>310</sup> In this sense, imminence functions as a pre-retreat rule, a standard that is not discursively tolerated in any jurisdiction.<sup>311</sup> States, such as Florida, that reject duties to retreat, have effectively adopted a norm of retreat under the cloudy concept of imminence.

Giving content to controlling legal norms are norms of relation and property that disadvantage women.<sup>312</sup> The retrofitted castle doctrine may appear to be gender-neutral. However, an examination of the interplay among facts, relationships, norms, and meaning has illustrated that the legal doctrines by which women who kill battering men are judged are not neutral standards, but are infused with meaning about “fitting” relationships between men and women.<sup>313</sup> In other words, they are about power.<sup>314</sup> Because gender is part of a “stratification system” that gives unequal statuses to men and women, the gender social norms that are absorbed into the law are hostile to women.<sup>315</sup>

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<sup>309</sup> Wheatcroft, *supra* note 146, at 554 (arguing that a retreat rule “inexcusably burdens battered persons by forcing them to attempt dangerous escapes, to risk bodily harm at the hands of their batterers, or to face lengthy prison terms for acting to protect their lives.”).

<sup>310</sup> Nourse, *Subjectivity*, *supra* note §, at 1280-82.

<sup>311</sup> *Id.* at 1284-85.

<sup>312</sup> *Id.* at 1287; *see also* Carpenter, *supra* note 3, at 685, 689 (exposing the roles of property and sanctuary in the cohabitor exception to the castle doctrine).

<sup>313</sup> Nourse, *Relational*, *supra* note 108, at 38-39 (observing that the rule of imminence, due to the social norms it absorbs, replays a relation of inferiority of women to men).

<sup>314</sup> Nourse, *Subjectivity*, *supra* note §, at 1299 (proposing that the debate over subjectivity in criminal law is really about “the politics of criminal law scholarship.”).

<sup>315</sup> Lorber, *supra* note 108, at 40 (describing the social institution of gender as a process of creating social statuses, as a part of a stratification system that ranks men and women, and as an organizing structure that divides work and legitimates those in authority ); Nourse, *Relational*, *supra* note 108, at 38-39 (explaining that, while imminence is not motivated by hostility toward women, the discrimination is one of relation that “reenacts a relation of inferiority and invisibility.”).

To examine the jurisprudential dimensions of the disconnect between the law and the experience of battering, the article points to the binarist structure of law and philosophy as creating positions of subordination and privilege that support violence toward women and that release abusive men from accountability. The subject / object binary operates as a philosophical template that objectifies women and, consequently, justifies the violence that is turned toward women and other “others.”<sup>316</sup> The public / private binary attempts to sequester women in the private sphere, where private property rights often trump personal safety.<sup>317</sup>

Ultimately, the article argues that, as a consequence of the retreat and imminence doctrines, the safety of many women who live with battering men is discounted. At the same time, greater safety and legal protections for many men are bolstered by measures such as the enhanced castle doctrine that reflects prevailing norms of domination, privilege, mobility, and autonomy in the public domain.<sup>318</sup>

In one episode of *Gunsmoke*, Miss Kitty shot a man who abducted her and another woman.<sup>319</sup> In the final scene, Kitty fell into the arms of Marshall Matt Dillon, exclaiming, “I guess you can do what you have to.”<sup>320</sup> The present-day sequel to that episode, imagined in this article, asks whether the lawman really understood her claim of self-defense. Or will Miss Kitty find herself an inmate of the Dodge City jail and have to struggle for

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<sup>316</sup> Kavanaugh, *supra* note 278, at 608; DE BEAUVOIR, *supra* note 275; see also Audre Lorde, *Age, Race, Class, and Sex: Women Redefining Difference*, in *SISTER OUTSIDER: ESSAYS AND SPEECHES* 117 (1984) (advising that when white women “ignore their built-in privilege of whiteness and define *woman* in terms of their own experience alone, then women of Color become “‘other,’ the outsider whose experience and tradition is too ‘alien’ to comprehend.”).

<sup>317</sup> Carpenter, *supra* note 3, at 689 (noting disturbing issues where possessory interests are elevated to trump personal rights of protection in the sanctuary).

<sup>318</sup> Cf. Nourse, *Relational*, *supra* note 108, at 38-39 (discussing the absorption of social norms and relations of inferiority into the rule of imminence).

<sup>319</sup> *Gunsmoke: Help Me Kitty* (Nov. 7, 1964) (episode guide), at <http://www.tv.com/gunsmoke/help-me-kitty/episode/41248/summary.html>.

<sup>320</sup> *Id.*

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her life, a second time, in the frontier justice system?