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A Victim of Abuse Should Still Have a Castle: The Applicability of the Castle Doctrine to Instances of Domestic Violence

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A VICTIM OF ABUSE SHOULD STILL HAVE A CASTLE: THE APPLICABILITY OF THE CASTLE DOCTRINE TO INSTANCES OF DOMESTIC VIOLENCE

Cristina Georgiana Messerschmidt*

In light of a nation-wide discussion about expanding self-defense laws, as well as an increased recognition of domestic violence, the phrases “stand your ground” and “retreat to the wall” have taken on entirely new meanings. In cases of domestic abuse, which happen largely inside the home, self-defense laws become more difficult to navigate when victims retaliate against their abusers. Generally, individuals using deadly force against their attackers cannot do so until they “retreat to the wall”—until they do everything possible to safely escape the attack and avoid taking a human life. It is then, and only then, that they are justified in using deadly force against their aggressor.

However, an age-old doctrine called the Castle Doctrine, says that an individual does not have an affirmative duty to “retreat to the wall” if that individual is assaulted in her own home.¹ Speaking more succinctly, a person can “stand her ground” in her own “castle” or home; she can use deadly force against an aggressor even if safe retreat is available to her.

* J.D., Northwestern Pritzker School of Law, 2017. B.A., University of Michigan, 2010. Thank you to my family, who has always encouraged my pursuit of law. Thank you to Tim Janas, who helped me come up with a topic that was both novel and meaningful to me. Last, but certainly not least, thank you to the editors of the *Journal of Criminal Law and Criminology*, who helped polish this piece and added diverse perspectives to the issues I discuss.

¹ Here and throughout this Comment, the pronouns “she” and “her” are used to refer to the victim-defendant and “him” and “his” to refer to the aggressor-victim. According to the National Domestic Violence Outline, 3 in 10 (29%) women and 1 in 10 (10%) men in the United States experience some form of domestic violence over the course of a year. From 1994 to 2010, roughly 4 in 5 victims of domestic violence were female. *Get the Facts & Figures*, THE NATIONAL DOMESTIC VIOLENCE HOTLINE, <http://www.thehotline.org/resources/statistics/>. Nonetheless, this Comment acknowledges that domestic abuse is not a one-way street; men can be abused by women just as women can be abused by men.

When it comes to violence between cohabitants, the applicability of the Castle Doctrine is neither clear nor consistent. Traditionally, courts have been reticent in applying this doctrine to cases where the victim and the offender share the same “castle.” Some states still require individuals who are attacked in their own home by a cohabitant to “retreat to the wall,” instead of “standing their ground” against their attacker. As such, some victims of domestic violence find themselves in a precarious situation, having to retreat farther than they would have to if they were being attacked by a stranger.

This Comment analyzes and critiques the applicability of the Castle Doctrine to instances of domestic violence. It begins by analyzing the way the Castle Doctrine has evolved, from its introduction into American law to the modern day. It concludes that a number of courts still struggle in situations where the victim and the aggressor share the same “castle,” often requiring victims of domestic violence to retreat further than they are able to. More so, a number of state legislatures have either not addressed this issue in their laws, or have explicitly identified cohabitant violence as an exception to the Castle Doctrine. This Comment critiques the errors and misconceptions that have led to this misapplication of the Castle Doctrine. Finally, the Comment offers some recommendations that take into account the precarious nature of domestic violence and suggest a more homogenous method for applying the Castle Doctrine to such cases.

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INTRODUCTION

Imagine two scenarios.² In the first scenario, Billy and his wife Sue are sleeping soundly in their second-floor bedroom, when they are woken up by the sound of broken glass on the first floor. Billy grabs his gun, which he keeps in his night stand, and rushes towards the stairs. He sees movement and the shadow of an intruder. At this point, Billy has two choices: he can either safely retreat to his bedroom and call the police (who will be there in a matter of minutes), or he can rush down the stairs, ambush the trespasser, and shoot him. Billy chooses the second option and kills the intruder. The police show up minutes later. Billy is arrested and later charged with second-degree murder. At trial, Billy argues that he had acted in self-defense—in defense of life and property, to be more exact—and that he had no choice but to shoot the intruder.

At the conclusion of his trial, the judge informs the jury that an individual is justified in using deadly force if that individual does so while trying to prevent a felony from being committed against himself or his dwelling.³ More specifically, the judge tells the jury that an individual is justified in using deadly force only if he believes that the force is necessary to prevent “imminent death or great bodily harm to [himself] [herself] while resisting: 1. another’s attempt to murder [him] [her], or 2. any attempt to commit (applicable felony) upon [him] [her], or 3. any attempt to commit (applicable felony) upon or in any dwelling occupied by [him] [her].”⁴ However, since Billy was upstairs, where he and his family could have safely locked themselves in the bedroom and waited for the police, the judge also discusses an individual’s “duty to retreat” before taking another person’s life.⁵ Despite this affirmative duty, the judge concludes by discussing the Castle Doctrine, which says that an individual does not have an affirmative duty to retreat if he is attacked in his own dwelling, as Billy was on the night in question.⁶ Billy is ultimately acquitted by the jury.

² The two scenarios used in this Comment are purely fictional. The facts have been doctored to reflect issues that will be addressed in this Comment. Any semblance to real-life situations or cases that have been tried in United States courts is purely coincidental.

³ FLA. STAT. ANN. § 782.02 (West 1997) (“The use of deadly force is justifiable when a person is resisting any attempt to murder such person or to commit any felony upon him or her or upon or in any dwelling house in which such person shall be.”); Fla. Std. Jury Instr. (Crim.) 3.6(f).

⁴ Fla. Std. Jury Instr. (Crim.) 3.6(f).

⁵ Robert Hall Smith, *The Retreat to the Wall Doctrine of Self-Defense*, 39 KY. L.J. 353, 353–54 (1951) (“At the very beginning the so-called ‘retreat to the wall’ doctrine became a necessary part of the law of self-defense. If one murderously assailed could escape the attack by retreating, he had to do so rather than kill.”).

⁶ Fla. Std. Jury Instr. (Crim.) § 3.6(f).

The second scenario paints a picture of a different kind of couple: Bob and Mary. Although they have been married for many years, Bob often loses his temper with Mary over minor details. When this happens, he throws objects at her, berates her, hits her, and threatens to humiliate her in front of their family and friends. One night, Bob becomes irate when he comes home and does not find beer in the fridge. He yells at Mary for not being a good wife and throws a pot full of hot water at her. Luckily, Mary is able to duck out in time and is not injured. Bob then tells her that he is going to seriously hurt her if she does not go out and get him some beer.

Mary goes out, but the stores are closed. She comes back home and tells Bob that the stores were not open, but before she can say anything else, Bob charges at her, yelling and swearing. Mary rushes up the stairs and into the bedroom, where she grabs Bob's gun from his nightstand. She runs toward the bathroom, where she can safely lock herself inside and call the police, who will be there in a matter of minutes. However, as soon as she hears Bob following her up the stairs, she freezes. When he walks into the room, even though she is standing steps away from a safe retreat, Mary shoots Bob in the chest, after which she promptly calls the police. Mary is arrested and charged with second-degree murder.

At trial, Mary claims self-defense, arguing that she felt her life was threatened by Bob's repeatedly abusive behavior. At the conclusion of her trial, the judge refuses to provide the Castle Doctrine instruction (provided to Billy in the example above) because Bob and Mary were cohabitants; Bob was a lawful resident of the home in which he assaulted Mary.⁷ Since Mary's 'castle' was also Bob's home, and since the two lived together in this home, the judge denies the defense's request for the Castle Doctrine instruction.⁸ The jury finds Mary guilty and she is sentenced to ten years in prison.

If the defendant [was not engaged in an unlawful activity and] was attacked in any place where [he] [she] had a right to be, [he] [she] had no duty to retreat and had the right to stand [his] [her] ground and meet force with force, including deadly force, if [he] [she] reasonably believed that it was necessary to do so to prevent death or great bodily harm to [himself] [herself] [another] or to prevent the commission of a forcible felony.

Id.

⁷ See *supra* note 6. On its face, the jury instruction only addresses instances where the victim "unlawfully and forcibly" entered the defendant's home. In Florida, judge-made law has most recently interpreted the Castle Doctrine to apply to incidents between cohabitants, just as it does to incidents between a lawful occupant and an unlawful intruder. See *infra* Part I.

⁸ Catherine L. Carpenter, *Of the Enemy Within, the Castle Doctrine, and Self-Defense*, 86 MARQ. L. REV. 653, 654 (2003) (describing the jury instructions in *Weiland*, *infra* note 22).

It is not unfathomable to believe that, in the first scenario, Billy reacted as any reasonable man would have in his position. He felt threatened and took action to protect himself, his family, and his property by eliminating that threat. Even if Billy could have safely retreated into his bedroom and called the police, the law states that he was justified to do whatever he felt was necessary because the intrusion happened on his property.⁹ The second scenario, however, may prove more problematic to parse. Knowing all the facts, few would debate the fact that Mary must have actually felt afraid for her life not only due to Bob's actions on that particular night, but also due to his history of physical abuse. However, Mary's failure to retreat into the bathroom—unlike Billy's failure to retreat into his bedroom—may raise questions regarding Mary's choice to use deadly force against her husband, a legal co-occupant of the home where the incident happened. In some courts,¹⁰ the fact that Mary and the victim-aggressor¹¹ (Bob) were cohabitants would prevent her from presenting the Castle Doctrine instruction to the jury.

The Castle Doctrine, a long-standing concept¹² in American legal tradition, originates in English common law.¹³ In its simplest form, the Castle Doctrine permits an individual to use deadly force against her aggressor without retreating or attempting to retreat before acting against

⁹ See MODEL PENAL CODE § 3.04(2)(b)(ii)(A) (AM. LAW INST. 2015) (“[T]he actor is not obliged to retreat from his dwelling or place of work, unless he was the initial aggressor or is assailed in his place of work by another person whose place of work the actor knows it to be.”).

¹⁰ Currently, the following states have statutes that impose a duty to retreat upon victims of domestic violence before meeting their aggressor's force with deadly force: Alabama, Arizona, Florida, Georgia, Kentucky, Michigan, Oklahoma, South Carolina, and Tennessee. Denise Crisafi, *No Ground to Stand Upon?: Exploring the Legal, Gender, and Racial Implications of Stand Your Ground Laws in Cases of Intimate Partner Violence* 108–09 (2016) (unpublished Ph.D dissertation, University of Central Florida) (on file with the University of Central Florida Libraries, University of Central Florida). However, case law is changing rapidly and the courts' interpretation of these statutes has been increasingly favoring victims of domestic violence. For a detailed discussion of the state of the law, see *infra* Part II (State of the Law).

¹¹ The term “victim-aggressor” is used to define individuals who, like Bob, are the initial aggressors in a confrontation, but end up as victims following a retaliation. The term will be used consistently throughout this Comment.

¹² Jeannie Suk, *The True Woman: Scenes from the Law of Self-Defense*, 31 HARV. J.L. & GENDER 237, 242–43 (2008); see also *infra* Part I (discussing the emergence of the Castle Doctrine in U.S. law as early as 1895).

¹³ Suk, *supra* note 12, at 242 (stating that “the ‘castle doctrine,’ as a self-defense rule, provided that, in his home, a man had no duty to retreat from an intruder's violence before using deadly force in self-defense”); see also EDWARD HYDE EAST, *PLEAS OF THE CROWN* 271 (P. R. Glazebrook ed., Professional Books Limited 1972).

him, but only if she is being attacked in her own dwelling.¹⁴ One of the most widely-accepted definitions of the Castle Doctrine was first penned by Edward Hyde East in *Pleas of the Crown*,¹⁵ where he stated, “[a] man may repel force by force in defense of his person, habitation, or property, against one who manifestly intends and endeavors, by violence or surprise, to commit a known felony, such as murder, rape, robbery, arson, burglary, and the like, upon either.”¹⁶ In American law, Justice Benjamin Cardozo articulated this principle in *People v. Tomlins*,¹⁷ saying,

In case a man [“]is assailed in his own house, he need not flee as far as he can, as in other cases of se defendendo, for he hath the protection of his house to excuse him from flying, as that would be to give up the protection of his house to his adversary by flight.[”] Flight is for sanctuary and shelter, and shelter, if not sanctuary, is in the home.¹⁸

The Castle Doctrine has been frequently invoked and successfully used as a defense in cases that resemble the first scenario.¹⁹ When the aggressor has been an intruder into the victim-aggressor’s home, the defense has seldom been challenged.²⁰ However, the application of the Castle Doctrine in cases involving violence among cohabitants is still highly contentious, both in public discourse and among legal scholars.²¹ Even though there is an increased acknowledgement of the prevalence of domestic violence in the United States, courts still disagree on whether a woman being attacked in her home by her husband or other male co-habitant can react the same way she would if she were being attacked by an intruder.²²

¹⁴ See *infra* Part I; see also MODEL PENAL CODE § 3.04(2) (AM. LAW INST. 2015). The concept of retreating to the wall is essential in self-defense. According to the Model Penal Code, as well as established case law, an individual is not entitled to use deadly force against another individual unless she has made all efforts to retreat to safety. *Id.* This requirement attempts to balance the aggressor’s right to life with the right of the person being aggressed to defending himself.

¹⁵ EAST, *supra* note 13 (emphasis omitted).

¹⁶ *Id.*

¹⁷ 213 N.Y. 240 (N.Y. 1914).

¹⁸ *Id.* at 243 (quoting MATTHEW HALE, 1 PLEAS OF THE CROWN 486 (1800)).

¹⁹ See, e.g., LUIS DEBONOPAULA, CASTLE DOCTRINE AND COHABITANTS: A SELECTIVE, ANNOTATED BIBLIOGRAPHY (2015) (citing cases in which cohabitants were involved in deadly conflicts with one another).

²⁰ See *id.*; see also *infra* Part I (discussing several cases in which the Castle Doctrine defense was successful, particularly when the defendant was attacked by a trespasser in his dwelling).

²¹ See DEBONOPAULA, *supra* note 19; see also *infra* Parts I–II.

²² See *Weiland v. State*, 732 So. 2d 1044, 1053 (Fla. 1999); see also *State v. Thomas*, 673 N.E.2d 1339, 1343 (Ohio 1997); Hava Dayan & Emanuel Gross, *Between the Hammer and the Anvil: Battered Women Claiming Self-Defense and a Legislative Proposal to Amend Section 3.04(2)(b) of the U.S. Model Penal Code*, 52 HARV. J. ON LEGIS. 17, 18 (2015)

Although the State—police officers, judges, prosecutors—is supposed to protect victims regardless of the place where they are victimized, the home is a highly private environment—one that keeps secrets in and intruders out.²³ Domestic violence is often hidden masterfully well, making it very difficult for victims to disclose their plight and receive adequate justice.²⁴ When domestic conflicts escalate into deadly incidents, the boundary between the private home and the public space becomes increasingly unclear.²⁵ In cases where victims of domestic violence retaliate against their partners, it is often the case that the term “victim” is questioned, because the violence has often been kept secret up to that point.²⁶ The secrets of the home, all of a sudden, come out into the public eye, forcing the State to pry into the private environment of the home.

Furthermore, our society’s increased focus on property and privacy rights proves problematic when considering the applicability of the Castle Doctrine to conflicts between cohabitants.²⁷ In a situation where the victim and the aggressor live under the same roof (i.e., own or rent the same home, enjoy the same property-related privileges, and have the same property-related obligations), it is difficult to find a justification for applying the “every man’s home is his castle” logic. After all, the ultimate question seems to be: whose castle is it? The victim’s? Or the aggressor’s?

This Comment explores the question of whether the Castle Doctrine should apply in instances of domestic violence, like that between Mary and Bob. To put the question another way: in domestic violence situations such as those depicted in the second scenario, should the defendant be entitled to a jury instruction that clearly states that the affirmative duty to retreat²⁸ does

(outlining the statistics regarding domestic violence and citing that “about 3 million women suffer each year from serious or life-threatening violence”).

²³ See generally MARTHA ALBERTSON FINEMAN & ROXANNE MYKITIUK, *THE PUBLIC NATURE OF PRIVATE VIOLENCE: THE DISCOVERY OF DOMESTIC ABUSE* (1994).

²⁴ *Id.*

²⁵ Margaret E. Johnson, *A Home with Dignity: Domestic Violence and Property Rights*, 2014 BYU L. REV. 1, 12 (2014) (“For many years, there was a sense that the home is, or should be, an inviolable place even if violence was being perpetrated by one family member against another.”).

²⁶ See Deborah King, *The Secret Shame of Domestic Violence*, PSYCHOLOGY TODAY (Oct. 23, 2014), <https://www.psychologytoday.com/blog/mining-the-headlines/201410/the-secret-shame-domestic-violence>; see also Leslie Morgan Steiner, *Why Domestic Violence Victims Don’t Leave*, TED TALKS (Jan. 2013), https://www.ted.com/talks/leslie_morgan_steiner_why_domestic_violence_victims_don_t_leave/transcript?language=en.

²⁷ See DEBONOPAULA, *supra* note 19. See generally MARK C. SCHUG ET AL., *FOCUS: UNDERSTANDING ECONOMICS IN UNITED STATES HISTORY* (2006).

²⁸ See *People v. Tomlins*, 213 N.Y. 240, 242 (N.Y. 1914) (holding that “[b]efore a man can use force and violence under the law for his own protection, the danger must be

not exist when a person is attacked in her own dwelling?

Part I of this Comment begins by investigating the origins of the Castle Doctrine, first as discussed in early English law, then through *Beard v. United States*²⁹ and *Pell v. State*,³⁰ two of the earliest instances when the Castle Doctrine was cited and analyzed in American legal discourse. The analysis aims to identify the core principles behind the Castle Doctrine as they were first introduced into American legal discourse. Focusing on the state of Florida,³¹ where courts have been inconsistent in applying the Castle Doctrine to incidents of domestic violence, this Comment then examines the development of the doctrine throughout the 1900s and into the early 2000s, concluding that the application of the Castle Doctrine in American law has changed over the course of the last 150 years. While the early opinions focus on the victim's right to defend herself, as well as the fact that she has already retreated into her sanctuary, the later courts shift their focus toward the aggressor's legal right to be in his own dwelling (which, naturally, is also the victim's dwelling), pushing the victim into the background. This change shifts the attention away from the victim's right to safety and bodily integrity in her own home, placing an already-victimized individual under enhanced scrutiny to justify her actions.

Part II provides a brief overview of the "State of the Law." It begins by analyzing where the decision in *Weiland v. State*³² has left the state of Florida in terms of courts' abilities and obligations to apply the Castle Doctrine to instances of domestic violence. It continues by summarizing the state of the law, delineating the differences between "Stand Your Ground" and "Duty to Retreat" states, as well as examining which of these states explicitly require victims of domestic violence to retreat in their own homes when attacked by their cohabitants.³³

imminent; he must have reasonable cause for believing that the danger exists, and that he must be so situated, he must be in such a position, that he cannot safely retreat. . . . We may not feel always like retreating in the face of an attack; it may not seem manly to us, but it is the law that if a man can safely retreat, and thereby escape a conflict with another, he must do so, even though it may not seem dignified and manly."); see also MODEL PENAL CODE § 3.04(2)(b)(ii)(A) (AM. LAW INST. 2015).

²⁹ 158 U.S. 550 (1895).

³⁰ 122 So. 110 (Fla. 1929).

³¹ See generally Christine Catalfamo, *Stand Your Ground: Florida's Castle Doctrine for the Twenty-First Century*, 4 RUTGERS J.L. & PUB. POL'Y 504 (discussing that in 2005, Florida, "a notoriously violent state," codified the doctrine of self-defense, as well as the Castle Doctrine, into a set of statutes known as the "Stand Your Ground Laws." This group of statutes are unparalleled in that they "appear to do away with some of the traditional considerations of necessity and proportionality.").

³² 732 So. 2d 1044 (Fla. 1999).

³³ Cristafi, *supra* note 10, at 92 (stating that twenty-three states have Stand Your Ground

Part III analyzes secondary literature on the topic and sorts the academic arguments into three categories: general principles of self-defense law, discussion of power and gender dynamics, and discussion of property rights in the context of marriage and cohabitation. The secondary literature analysis shows a similar trend to the case analysis performed in Part I—that the current justifications for some courts’ refusal to read the Castle Doctrine jury instruction in domestic violence situations come from inappropriate applications of the Castle Doctrine, which display an increased focus on property rights and stray away from the right to safety and self-defense in the home.³⁴ Furthermore, much of the secondary literature points out what courts often fail to acknowledge: that a victim of domestic violence has already retreated as far as she can go, according to the underlying rationale of the Castle Doctrine.

Part IV hones in on the applicability of the Castle Doctrine to instances of domestic violence. It argues that the Castle Doctrine jury instruction should be granted as a matter of course in cases such as *Mary’s*. A refusal to grant this jury instruction runs contrary to the baseline principles of the Castle Doctrine, as they were stated in early English law and early cases in American law. In jurisdictions where the Castle Doctrine is not applied in domestic violence scenarios, its principles are misapplied; the focus is misplaced on property rights, even though the original Castle Doctrine focused on the protection of one’s personal space and physical integrity, in a place where one was legally entitled to exist.

Finally, Part V addresses the helplessness of domestic violence victims by looking at two different theories: Battered Woman Syndrome and the Survivor Theory. This Comment argue that a battered woman’s helplessness makes her unable to flee her home, that she has retreated as far as she can go, and that requiring her to further retreat is not only contrary to the principles behind the Castle Doctrine, but downright impossible. However, given the criticism that these psychological and sociological theories have been met with by the legal community, this Comment identifies this as a topic for future research.

I. HISTORICAL OVERVIEW OF THE CASTLE DOCTRINE IN FLORIDA

Part I of this Comment begins by discussing the historical origins of the Castle Doctrine, analyzing the earliest U.S. Supreme Court case that

Statutory Law, ten states have Stand Your Ground Case Law, and seventeen states have a Duty to Retreat); *id.* at 108–09 (stating that, of the states that have Stand Your Ground laws, eight currently require a “Duty to Retreat” for victims of domestic violence, intimate partner violence, or family violence).

³⁴ See generally FINEMAN & MYKITIUK, *supra* note 23.

tackled the doctrine, and then focusing on the development of the doctrine in the state of Florida.³⁵ This historical overview hones in on the language in the opinions, as well as the progression of various courts' interpretations of the Castle Doctrine.

The origins of the Castle Doctrine come from English self-defense law. At the time *Beard* was decided in the late 1800s—one of the first American legal cases interpreting the Castle Doctrine—East's *Pleas of the Crown* was one of the leading authorities on English law.³⁶ In his book, East clearly outlines the parameters of self-defense: that a person may repel force against his “person, habitation, or property” through force, against an aggressor who intends “to commit a known felony.”³⁷ Francis Wharton's *Criminal Law* cites the same three types of crimes—against person, habitation, or property—as instances where the victim of the attack does not have to retreat: “[The victim] is not obliged to retreat, but may pursue his adversary *till he find himself out of danger*; and if, in a conflict between them, he happen to kill, such killing is justifiable.”³⁸

These early sources of English law focus on *defense* as the main principle behind the Castle Doctrine. According to these authorities, an attack on one's bodily integrity, one's dwelling, or one's property justifies the victim's attack on his intruder, as far as it would remove the victim from danger, regardless of the consequences on the intruder's life.³⁹ This early approach brings to the forefront the victim's right to feel safe and be free of danger.⁴⁰ In fact, the victim is given license to pursue the intruder in his home until *he* finds himself out of danger.

At its inception, the Castle Doctrine focused on the rights of the person whose dwelling, property, or bodily integrity was being compromised. However, the modern version of the Castle Doctrine places less emphasis on these rights and more emphasis on the definition of an individual's castle, the relationship between victim and aggressor, and legal property rights. This modern interpretation of the Castle Doctrine proves particularly problematic in instances of domestic violence, when the aggressor and the victim-aggressor are cohabitants.

The first case in American legal discourse to address the Castle

³⁵ See *supra* note 31 and accompanying text (discussing the reason why Florida was chosen as the state for this limited case analysis).

³⁶ EAST, *supra* note 13.

³⁷ *Id.* at 271.

³⁸ 2 FRANCIS WHARTON, A TREATISE ON THE CRIMINAL LAW OF THE UNITED STATES § 1019 (Phila., Kay and Brother 1874) (emphasis added).

³⁹ See EAST, *supra* note 13.

⁴⁰ *Id.*

Doctrine directly was *Beard* in 1895.⁴¹ In *Beard*, the defendant shot and killed a man who provoked and assaulted him on his property, although not in his house.⁴² The victim was a trespasser who had been warned by multiple people to stay away from the defendant and off his property.⁴³ *Beard* made its way to the Supreme Court because the lower courts imposed a duty to retreat upon the defendant, who could have safely done so and thus avoided taking another man's life.⁴⁴ However, the majority, in an opinion written by Justice Harlan, disagreed with the lower courts.⁴⁵ Justice Harlan identified the imposition of the duty to retreat as an error of a serious character, arguing that:

[t]he accused being where he had a right to be, on his own premises, constituting a part of his residence and home at the time the deceased approached him in a threatening manner . . . [the accused] had at the moment he struck the deceased, reasonable grounds to believe, and *in good faith believed, that he could not save his life or protect himself from great bodily harm except for doing what he did . . .*⁴⁶

In the opinion, Justice Harlan brought up two essential concepts. First, that according to the laws of self-defense, an individual “must avoid taking life if he can with due regard *to his own safety*.”⁴⁷ Second, that there is “one place where [the individual] need not retreat *any further*, where he need not go away from the danger, and that is in his dwelling house.”⁴⁸ These two points are essential in understanding the role of the Castle Doctrine in cases of domestic violence. Consistent with existing self-defense principles, Justice Harlan points out that in a conflictual situation, regardless of the location, an individual must only retreat if he can *safely* do so, implying that if the individual does not feel that he can *safely* do so, he is not obligated to retreat. Furthermore, Justice Harlan used the phrase “any further” to talk about individuals who are attacked in their own homes, implying that they have essentially already retreated as far as they can go (i.e., “to the wall”).

A second prominent case, *Danford v. State*,⁴⁹ was among the first cases to address the Castle Doctrine in the state of Florida. In this case, the defendant shot a sixteen-year-old boy on a public road that was

⁴¹ 158 U.S. 550 (1895).

⁴² *Beard*, 158 U.S. at 553.

⁴³ *Id.* at 552–53.

⁴⁴ *Id.* at 555.

⁴⁵ *Id.* at 551.

⁴⁶ *Id.* at 560 (emphasis added).

⁴⁷ *Id.* at 556 (emphasis added).

⁴⁸ *Id.* at 555.

⁴⁹ 53 Fla. 4 (Fla. 1907).

approximately 250 yards north of the defendant's house.⁵⁰ Justice Hocker of the Florida Supreme Court assigned several errors to the lower court's holding for the defendant,⁵¹ including the lower court's failure to recognize the defendant's affirmative duty to retreat, since the altercation had not occurred on his premises.⁵² The Florida Supreme Court's decision in this case was astoundingly clear on the matter, recognizing the Castle Doctrine as an established principle in American law, while stating that since the altercation did not occur on the defendant's premises, "if [the defendant] foresaw that he was to be attacked, as he says he did, then it seems to us, under the circumstances, he was under obligations to use reasonable efforts to avoid the necessity of killing [the victim]."⁵³

While the Court did not find Danford's actions to be justified under the Castle Doctrine, Justice Hocker's opinion supported Justice Harlan's holding in *Beard*, maintaining that an individual has an affirmative duty to retreat "if he may do so *without apparently exposing himself to death or great bodily harm.*"⁵⁴ Since Danford was on a public road, away from his physical dwelling, the implication in *Danford* is that the defendant *could* have retreated into his physical dwelling, without compromising his safety.

Pell v. State,⁵⁵ another Florida Supreme Court case, marks the moment when the Castle Doctrine was first introduced into jury instructions. In this case, the defendant, Pell, was called to the back of his house, where he found his brother engaging in an altercation with Officer Walker, the victim.⁵⁶ Officer Walker claimed that he had a warrant to search the premises, but refused to provide this warrant, all the while cursing, punching, and threatening that he would shoot Pell's brother.⁵⁷ Upon seeing the abuse and hearing the threats, the defendant shot Officer Walker in an attempt to save his brother's life.⁵⁸ The Florida Supreme Court found error in the lower court's decision ruling against the defendant, stating that:

[A] man violently assaulted in his own house or on his premises near his house is not obliged to retreat, but may stand his ground and use such force *as may appear to him*

⁵⁰ *Id.* at 6.

⁵¹ *Danford*, 53 Fla. at 11.

⁵² *Id.*

⁵³ *Id.* at 20.

⁵⁴ *Id.* (emphasis added).

⁵⁵ 122 So. 110 (Fla. 1929).

⁵⁶ *Id.*

⁵⁷ *Id.* at 114.

⁵⁸ *Id.*

as a cautious and prudent man to be necessary to save his life or to save himself from great bodily harm.⁵⁹

Justice Brown's opinion in *Pell* seems to indicate that an individual's belief that he can retreat to safety is subjective; that it is up to the victim to determine what is necessary to save her own life. This subjective state of mind is important when considering the abused woman's belief that she will never be able to truly retreat to safety.

The next important case in the Supreme Court of Florida came in 1965. In *Hedges v. State*,⁶⁰ a woman was convicted of manslaughter after killing her "paramour" in her home.⁶¹ The lower court refused to grant the defendant's request to include complete instructions on justifiable and excusable homicide in the jury instructions.⁶² More specifically, the judge failed to inform the jury that Hedges did not have an affirmative duty to retreat, since she had been attacked in her own home.⁶³ The rationale for this, according to the lower court, was that the Castle Doctrine exception "is not available when, as here, the attacker does not enter as a trespasser."⁶⁴

The Florida Supreme Court's opinion, however, flat-out rejected this rationale and focused on the victim's duty—or lack thereof—to retreat when she is assaulted in her own home.⁶⁵ The Florida Supreme Court cited *Pell v. State* to reiterate that, "when one is violently assaulted in his own house or immediately surrounding premises, he is not obligated to retreat but may stand his ground and *use such force as prudence and caution would dictate as necessary to avoid death or great bodily harm.*"⁶⁶ Like *Pell*, the *Hedges* opinion also gives great significance to the subjective necessity of the victim's actions. The standard here does not seem to be reasonableness, but rather subjective belief of imminent harm on the part of the victim. Furthermore, the *Hedges* court makes another important conclusion: Every person's home is her "ultimate sanctuary" and "[w]hen in [her] home [she] has 'retreated to the wall.'"⁶⁷ Reminiscent of *Beard*, this court returned to the fundamental belief that the proverbial "wall" to which

⁵⁹ *Id.* at 116 (emphasis added).

⁶⁰ 172 So. 2d 824 (Fla. 1965).

⁶¹ *Id.* at 825. The word "paramour" was used to describe the defendant's lover, with whom she had a longstanding relationship, but who was not living with her at the time of his death. On the day of the incident, Hedges invited her "paramour" onto her property; he did not enter her home illicitly.

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Id.* at 826.

⁶⁵ *Id.*

⁶⁶ *Id.* at 827 (emphasis added).

⁶⁷ *Id.*

an individual may have to retreat in order to preserve his attacker's life is, in fact, that individual's home. In essence, the *Hedges* court made a grand statement, that the home is the ultimate wall, beyond which one can no longer retreat.

Nonetheless, the next important case in Florida, which reached the courts in 1982, seemingly turned previous courts' rationales on their heads and ignored root principles of the Castle Doctrine.⁶⁸ In *State v. Bobbitt*,⁶⁹ the lower courts refused to include the Castle Doctrine jury instruction in charges against a wife who killed her husband in their home, after he had attacked her without provocation.⁷⁰ The Supreme Court of Florida affirmed the trial court's decision, holding "that when an assailant and the victim are legal occupants of the same home, the [C]astle [D]octrine does not apply."⁷¹

Interestingly, the *Bobbitt* court discussed both *Pell* and *Hedges*, but rejected both courts' arguments by misappropriating the principles behind the Castle Doctrine. Regarding *Pell*, the court states, "[i]n our earlier decision . . . we held that where one is not the aggressor and is violently assaulted on his own premises by a trespasser, he is not obliged to retreat but may stand his ground[]." ⁷² Although the *Pell* court had not emphasized the initial assailant's identity as a trespasser, but rather the defendant's rights to protect his and his brother's bodily integrity, the *Bobbitt* court took the facts in *Pell* and shifted the *Pell* court's rationale.⁷³ By doing this, the *Bobbitt* court introduced the legality of the initial assailant as a central question to be resolved when deciding whether to grant the Castle Doctrine instruction.⁷⁴

The *Bobbitt* court also addressed *Hedges*, once again misplacing the initial facts that the *Hedges* court emphasized.⁷⁵ The court conceded that *Hedges* established no duty to retreat on the part of a defendant who is attacked in her own home, but emphasized that even though the lover in *Hedges* was not a trespasser, he was also not a "legal co-occupant of the premises" and therefore, "his initial lawful presence in *Hedges*' home was rendered unlawful by his assault upon her."⁷⁶ Even though the *Hedges* court—while acknowledging *Hedges*' lover was not a trespasser in her

⁶⁸ See *infra* note 70.

⁶⁹ 415 So. 2d 724 (Fla. 1982).

⁷⁰ *Id.* at 725.

⁷¹ *Id.* at 724 (internal quotations omitted).

⁷² *Id.* at 725.

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Id.* at 726.

⁷⁶ *Id.*

home—clearly did not view this fact as dispositive in its decision, the *Bobbitt* court erroneously chose to focus on it.⁷⁷ Even more disturbingly, the court’s rationale for why the Castle Doctrine does not apply to cohabitants focuses on property rights, rather than the right to feel safe in one’s home.⁷⁸ More importantly, the *Bobbitt* court does not acknowledge an important principle set out in *Hedges* and *Beard*—the idea that a person who is attacked in her own home has already retreated as far as she can. The majority’s opinion holds “that the privilege not to retreat, premised on the maxim that every man’s home is his castle which he is entitled to protect from invasion, does not apply here where both *Bobbitt* and her husband had equal rights to be in the ‘castle’ and neither had the legal right to eject the other.”⁷⁹

In 1999, the Florida Supreme Court remedied its mistake in *Bobbitt* in *Weiland v. State*.⁸⁰ In *Weiland*, a wife was charged with first-degree murder of her husband, having shot him during a violent argument in their apartment.⁸¹ The wife claimed self-defense and presented ample evidence to show she was suffering from Battered Woman’s Syndrome.⁸² Nonetheless, when her defense counsel asked for the Castle Doctrine jury instruction to be included in her charge, the trial court refused to grant it due to the Florida Supreme Court’s decision in *Bobbitt*.⁸³ Furthermore, the prosecutor used *Weiland*’s supposed duty to retreat as a central argument in his closing statement, stressing that because *Weiland* had not exhausted every reasonable way to retreat—even though she was in her own home—she could not successfully argue for justifiable homicide.⁸⁴

The *Weiland* court took into consideration multiple aspects of the Castle Doctrine before overturning *Bobbitt* for two main reasons: the first, a disagreement with “*Bobbitt*’s minority view that relies on concepts of property law and possessory rights”; and second, an “increased understanding of the plight of victims of domestic violence in the years since [the court’s] decision in *Bobbitt*.”⁸⁵ The court’s first reason for

⁷⁷ *Bobbitt*, 415 So. 2d at 726.

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ 732 So. 2d 1044 (Fla. 1999).

⁸¹ *Id.* at 1048.

⁸² *Id.* (discussing, among other things, the several reasons why *Weiland* was unable to retreat from the apartment on that particular night: “she had just given birth seven weeks earlier; she had been choked unconscious; she was paralyzed with terror; and experience had taught her that her threats of leaving only made her husband more violent”).

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ *Id.* at 1051.

overturning *Bobbitt* was correct in criticizing the *Bobbitt* court's misplaced emphasis on property rights, rather than on the rights of the victim being assailed in her own home.⁸⁶ As discussed above, shifting the focus away from the victim's right to safety toward a consideration of shared property rights is not only dangerous, but runs contrary to general principles of criminal law.⁸⁷ Human life, along with the preservation of bodily integrity, is *the* central theme running throughout all cases discussed above.⁸⁸ Additionally, the *Weiland* court—citing *Pell*—acknowledged that a victim who finds herself attacked in her home has already “retreated to the wall.”⁸⁹

The *Weiland* court's second reason for overturning *Bobbitt*—the plight of victims of domestic violence—is an important policy point that will be discussed in Parts III and IV. Not applying the Castle Doctrine to victims of domestic violence who ultimately become aggressors in their own home is especially problematic given psychological and sociological research that indicates victims of repeated abuse are often unable to leave the cycle of violence.⁹⁰

In concluding this section, another look at the progression of the Castle Doctrine from early English law to the modern day is necessary. As discussed above, early English principles focus on the victims' rights to protect their bodily integrity and property.⁹¹ Early cases in American law, as exemplified through Florida Supreme Court cases, stay true to these principles and develop the idea that a person attacked in her own home has retreated as far as she can go; there is no safer place than her home—her sanctuary.⁹² These cases, too, focus on the victim and her right not to retreat when being attacked in a place where she has a legal right to exist.⁹³

II. STATE OF THE LAW

The Florida Supreme Court's *Bobbitt* decision illustrates what this Comment argues is a logical flaw in refusing to apply the Castle Doctrine to instances of domestic violence between any type of cohabitants. Its misplaced emphasis on property rights, rather than the right of the victim to preserve her bodily integrity, set a dangerous precedent within the

⁸⁶ *Id.* at 1052.

⁸⁷ See *supra* notes 47–48 and accompanying discussion.

⁸⁸ The exception to this statement is *Bobbitt*, a case this Comment argues places a greater emphasis on property rights than the right to life.

⁸⁹ *Weiland*, 732 So. 2d at 1050.

⁹⁰ See *id.* at 1053; see also *infra* Parts III, IV.

⁹¹ See *supra* notes 15, 27.

⁹² See, e.g., *Beard v. United States*, 158 U.S. 550 (1895).

⁹³ See, e.g., *id.*

American legal system and granted less protection to a vulnerable group of individuals, in a place that is meant to be their sanctuary. Although *Bobbitt* was remedied by the *Weiland* decision, its deeply flawed logic is emblematic of the modern-day discourse that is still prevalent when it comes to violence among cohabitants. Additionally, even though *Weiland* set a victim-friendly precedent for cases in Florida, the statute itself has not been amended to take into account the concerns discussed by the *Weiland* court.⁹⁴ The failure to amend the statute to explicitly apply the Castle Doctrine to instances of domestic violence has resulted in broad discretion, which courts often use to place a higher burden on those assaulted in their own homes, by their cohabitants.⁹⁵

In Spring of 2016, Denise Crisafi published a doctoral dissertation that set out to provide a summary of “stand your ground” laws in cases of intimate partner violence.⁹⁶ According to Crisafi, “one of the primary goals of [her] study [was] to clarify the basic requirements of self-defense as expressed through formal statutes that allows individuals to ‘stand their ground’ as a means of protecting themselves from imminent harm.”⁹⁷ As briefly discussed above, a change in case law does not necessarily mean a change in the state’s statute. The *Weiland* decision in Florida, for example, no longer precludes the Castle Doctrine defense from being applied to instances of domestic violence. However, it does not automatically grant it either. According to Douglas A. Orr, the *Weiland* court did not go so far as to adopt the permissible standards of the *Hedges* court.⁹⁸ The holding in *Weiland*, although specifically stating that there is no duty to retreat *from* the residence, also stated that there is a limited duty to retreat *within* the residence, “to the extent reasonably possible.”⁹⁹

According to Crisafi, the state of the law is similar in many other “stand your ground” states.¹⁰⁰ Of the twenty-three states that currently have

⁹⁴ FLA. STAT. ANN. § 776.013 (West 2014).

⁹⁵ See *infra* Part III (discussing the status of the law in all fifty states, including Florida, regarding the application of the Castle Doctrine to instances of domestic violence); see also Irin Carmon, *Can Women Stand Their Ground? Depends on the Target.*, MSNBC (Mar. 20, 2014), <http://www.msnbc.com/msnbc/can-women-stand-their-ground>.

⁹⁶ Crisafi, *supra* note 10.

⁹⁷ *Id.* at 90.

⁹⁸ Douglas A. Orr, *Weiland v. State, and Battered Spouse Syndrome: The Toothless Tigress Can Now Roar*, 2 FLA. COASTAL L.J. 125, 134 (2000) (“For this reason, the Court decided to limit, or recede from *Hedges*.”).

⁹⁹ *Id.* at 135; see also *Weiland v. State*, 732 So. 2d 1044 (Fla. 1999).

¹⁰⁰ Crisafi, *supra* note 10, at 106–07. A “Stand your Ground” state is defined as a state whose laws permit individuals to use deadly force for self-protection, even if they could safely retreat. *Id.* at 90.

“stand your ground” laws incorporated into their statutes, only four (Arizona, Georgia, Kentucky, and Michigan) “were found to have incorporated language into their Stand Your Ground statutes that provide greater acknowledgement and enforcement of protections from victims of domestic violence and family violence.”¹⁰¹ More pertinent to our discussion, eight states (Alabama, Arizona, Florida, Kentucky, Michigan, Oklahoma, South Carolina, and Tennessee) require victims of domestic violence to retreat before responding with deadly force.¹⁰² The unambiguous exception to this duty is when there is an active injunction, order for protection, or other similar document.¹⁰³

Thus, examining the state of the law, we can see why it is important for there to be clear standards on this matter. If a victim of domestic violence finds herself in one of the states whose laws require her to retreat before using deadly force, she may be out of luck. Even if she finds herself in one of the other states, both case law and statutory law may be ambiguous enough that she may also be out of luck. Either way, this is not an area where shades of grey should be acceptable.

III. THE CASTLE DOCTRINE IN MODERN ACADEMIC DISCOURSE

The Castle Doctrine has been widely discussed in literature, especially as of late, due to the expansion of self-defense laws.¹⁰⁴ The themes discussed in the literature reviewed for this Comment generally fall into three categories: general discussion of self-defense principles, discussion of power and gender dynamics, and discussion of property rights in the context of cohabitation. This Comment’s treatment of the first category includes a thorough exploration of two key concepts: “stand your ground” and “retreat to the wall.” This Part then explores cultural and gender norms as they relate to differing expectations when men and women engage in physical conflicts. Finally, the consequences of domestic violence on property rights and cohabitation are examined.

GENERAL DISCUSSION OF SELF-DEFENSE PRINCIPLES

Generally, there seems to be growing concern about the expansion of

¹⁰¹ *Id.* at 112.

¹⁰² *Id.* at 108–09 (Table 3: “Stand Your Ground Statutes: Domestic Violence”).

¹⁰³ *Id.*

¹⁰⁴ See, e.g., Brandi L. Jackson, *No Ground on Which to Stand: Revise Stand Your Ground Laws so Survivors of Domestic Violence Are No Longer Incarcerated for Defending Their Lives*, 30 BERKELEY J. GENDER L. & JUST. 154 (2015) (discussing how the shooting of Trayvon Martin by George Zimmerman prompted a nation-wide discussion about “Stand Your Ground” laws).

self-defense laws in the United States.¹⁰⁵ The distinction between defense of habitation (i.e., invocation of the Castle Doctrine) and self-defense is often seen as the distinction between a threat to a person's life and a threat to a person's home or dwelling.¹⁰⁶ However, especially in cases of cohabitant violence, these two concepts cannot be divorced. Since domestic violence—as the name would dictate—takes place in the home, it is necessary to consider the victim's right to safety before balancing it against the property rights of her cohabitant.

The Model Penal Code is clear about the use of deadly force for self-protection: it can only be used if 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.”¹⁰⁷ An individual, however, cannot use deadly force for self-protection if he provoked the use of force against him during the same encounter *or* if he could have safely retreated from the conflict and did not do so.¹⁰⁸ Nevertheless, the Model Penal Code is also clear about situations in which an individual does *not* have to retreat: “the actor is not obliged to retreat from his dwelling or place of work, unless he was the initial aggressor or is assailed in his place of work by another person whose place of work the actor knows it to be.”¹⁰⁹ The language of the Model Penal Code seems to imply that individuals who are attacked in their homes by cohabitants have the same right to *not retreat* as individuals attacked in their homes by intruders. Since the Code qualifies the exception of non-retreat for individuals who *work* in the same place, but not for individuals who *live* in the same place, we must assume that this distinction was intentional.¹¹⁰

The Castle Doctrine, with all of its embodied self-contradictions, seems to find itself at the crux of the conflict between the sanctity of human life and the sanctity of the human sanctuary known as the home.¹¹¹ Catherine Carpenter, Professor of Law at Southwestern University School of Law, argues that “the Castle Doctrine allows the resident to stand ground and use deadly force against the intruder to protect the sanctity of the home

¹⁰⁵ See generally Catalfamo, *supra* note 31 (talking about the expansion and codification of “Stand Your Ground” laws in Florida); Elaine M. Chiu, *Culture in Our Midst*, 17 U. FLA. J.L. & PUB. POL’Y 231 (2006) (discussing an overall trend in American law to reject the British tradition of retreat to the wall).

¹⁰⁶ Chiu, *supra* note 105, at 247.

¹⁰⁷ MODEL PENAL CODE § 3.04(2)(b) (AM. LAW INST. 2015).

¹⁰⁸ *Id.* at § 3.04(2)(b)(i)–(ii).

¹⁰⁹ *Id.* at § 3.04(2)(b)(ii)(A).

¹¹⁰ *Id.* at § 3.04(2)(b)(ii)(A).

¹¹¹ Carpenter, *supra* note 8, at 657–58.

from the attempted atrocious felony because the duty to retreat would be incompatible with the goal of preventing the commission of the felony.”¹¹²

On one hand, opponents of the expanded view of the Castle Doctrine seem to champion the sanctity of human life, arguing that removing the affirmative duty to retreat in conflicts such as the one between Mary and Bob, places too little importance on protecting the aggressor-victim’s bodily integrity.¹¹³ They argue, essentially, that the removal of the duty to retreat may give some individuals free license to kill, when in reality they do not truly feel their life is being threatened.¹¹⁴ On the other hand, proponents of the expanded Castle Doctrine place extreme importance on the sanctity of the home; the idea that an individual should not be attacked in her safe space, her sanctuary.¹¹⁵ Like many of the Florida Supreme Court opinions discussed above, they argue that a victim who is attacked in her own home has essentially retreated as far as she can. Her home, her “sanctuary,” cannot be distinguished from the proverbial “wall.”¹¹⁶

The concept of “retreat to the wall”¹¹⁷ has been prominently discussed in relevant literature.¹¹⁸ It is especially important as it relates to the Castle Doctrine, since retreating into the home generally means that an individual has retreated as far as she can go, to the place where she is supposed to be safest.¹¹⁹ This concept becomes infinitely more important as we discuss the applicability of the Castle Doctrine to instances of domestic violence. In Mary’s case, for example, she was repeatedly attacked in her sanctuary—the place where she should have been safe, the place where she ordinarily would have retreated to escape the abuse. It follows, then, that victims of domestic violence who are required to retreat have a different wall they must retreat to. They are compelled to stay in their home, alongside their abuser, because their home is their supposed sanctuary.¹²⁰ Once they find

¹¹² *Id.* at 667.

¹¹³ See, e.g., Steven P. Aggergaard, *Criminal Law—Retreat from Reason: How Minnesota’s New No-Retreat Rule Confuses the Law and Cries for Alteration—State v. Glowacki*, 29 WM. MITCHELL L. REV. 657 (2002). But see Alexis M. Haddox, *The Ohio Castle Doctrine: Shielding Criminals With a Presumption of Self-Defense*, 41 CAP. U. L. REV. 1105 (2013).

¹¹⁴ See *id.*

¹¹⁵ Carpenter, *supra* note 8, at 660.

¹¹⁶ See *supra* notes 55, 61.

¹¹⁷ See MODEL PENAL CODE, § 3.04(2) (AM. LAW INST. 2015).

¹¹⁸ See, e.g., Carpenter, *supra* note 8; see also Chiu, *supra* note 105.

¹¹⁹ Carpenter, *supra* note 8, at 667 (arguing that, “[h]aving retreated as far as possible, the actor should not be compelled to leave the sanctuary”).

¹²⁰ The next part of this Comment will contain a lengthier discussion of the implications of the phrase “retreat to the wall” in cases of domestic violence.

themselves in a situation where they need a place of safe retreat, this place becomes nearly impossible to find. Essentially, these victims are held to a more stringent standard than the rest of the population, even though they are generally more vulnerable.¹²¹ Elaine Chiu, Associate Professor of Law at St. John's University School of Law, has argued that "contemporary statements of the rule of retreat no longer incorporate references to *the wall*."¹²² This trend further blurs the boundaries between "the wall" of the abused woman and "the wall" of the ordinary citizen being attacked. If the obligation is simply *to retreat*, then the question that begs an answer is: where? If the answer is *anywhere* (irrespective of the fact that those attacked in their own homes have already retreated), then *how far* is an abused woman supposed to retreat? Chiu believes that "[t]he obligation to retreat whenever one has an available safe option can have troubling consequences."¹²³

This survey of the literature seems to indicate that while there is a growing concern for the expansion of self-defense laws in the United States, these laws have not been expanded to address instances of domestic violence. While cases such as Trayvon Martin's have gained national notoriety due to a misuse of expanded self-defense laws, cases where domestic violence leads the victims to murder have continued to fall through the cracks and have not benefitted from this expansion.

DISCUSSION OF POWER AND GENDER DYNAMICS

Theoretically, the discourse behind Stand Your Ground rules in general and the Castle Doctrine in particular should be appealing to women. As Mary Ann Franks points out, "Stand Your Ground rhetoric is very seductive, and perhaps particularly to a feminist perspective."¹²⁴ Proponents of such self-defense laws often invoke the image of a defenseless woman getting raped by a stranger in a dark alley in order to illustrate the need for doctrines that will allow her to fight her attacker with deadly force.¹²⁵ However, the reality is that stranger rape is low on the list of violent acts a woman is likely to experience in her lifetime; most rape victims are raped by someone they know, in a familiar place that can be considered their

¹²¹ For a more in-depth discussion of the vulnerability of victims of domestic violence, see *infra* Parts III and IV.

¹²² Chiu, *supra* note 105, at 242.

¹²³ *Id.* at 242.

¹²⁴ Mary Ann Franks, *Real Men Advance, Real Women Retreat: Stand Your Ground, Battered Women's Syndrome, and Violence as Male Privilege*, 68 U. MIAMI L. REV. 1099, 1108 (2014).

¹²⁵ *Id.*

castle (e.g., house, college dorm, or car).¹²⁶ As such, in a world where the Castle Doctrine does not cover cohabitant violence, women seem to have less recourse in the place where they are most vulnerable—their homes.

The concept of “being a man” is tightly connected to one’s right to defend his home and property, as well as not retreat from unprovoked attacks.¹²⁷ Stand Your Ground laws, which include the Castle Doctrine, are often seen as the “true man” doctrine: an assumption that a true man would not and should not be obligated to retreat in the face of an attacker.¹²⁸ On the contrary, a “true man” should face the challenge, meet force with force, and even kill if necessary.¹²⁹

For women, however, the Castle Doctrine has presented problems in its applicability to domestic violence.¹³⁰ As discussed in Part IV, abused women are often asked why they don’t leave their abuser and why they do not escape the cycle of violence.¹³¹ Implicit in this question is an inapplicability of the Castle Doctrine to women—the idea that they, unlike their male counterparts, do not have a right to meet an attack happening in their home with deadly force.¹³²

Not surprisingly, the laws governing self-defense were written by men.¹³³ These laws, which focus on the doctrine of equal force, are realistically only applicable to men with comparable physical force, not to conflicts between men and women, most of which are not physically equitable.¹³⁴ A woman who is repeatedly abused by her husband most likely does not have the physical tools to repel his force with equal bodily force; most women tend to be physically weaker than their male counterparts. In this situation, her only option is to grab an external object (gun, baseball bat, etc.) and give herself at least some of the force necessary to repel her attacker. “Responding to his abuse with proportional force is not an option

¹²⁶ *Id.*

¹²⁷ Chiu, *supra* note 105, at 245 (discussing the rule of retreat being equated to cowardice, not “bravery, honor, and true masculinity”).

¹²⁸ Carpenter, *supra* note 8, at 655; *see also* Suk, *supra* note 13.

¹²⁹ *See generally* Franks, *supra* note 124.

¹³⁰ *Id.* at 1111.

¹³¹ *See generally infra* Part IV.

¹³² Franks, *supra* note 124, at 1111.

¹³³ *See discussion infra* Part I (discussing books and judicial opinions written by male academics and judges).

¹³⁴ *See* Orr, *supra* note 98, at 136. Orr argues that the doctrine of equal force evolved because men had a “wide range of weapons and abilities from which [they could] select a degree of force proportional to that of [their] attacker. However, because women are generally physically smaller and weaker than men, the equal force requirement is impractical in the context of domestic abuse and self-defense.” *Id.*

for her, so she must rely on the next best thing – a greater force.”¹³⁵ Most women cannot repel a man’s physical attack without the use of an external object.¹³⁶

This inherent difference between men and women puts another wrench into the discussion about the reasonableness of responding to conflict as Mary did in the second scenario. The laws of self-defense say that Mary should have responded to Bob’s attack with equal force, but nothing more. Now, suppose Bob is a six-foot man who weighs two hundred pounds. Mary, on the other hand, is five feet two inches and weighs one hundred and thirty pounds. Is there any scenario in which she could have responded to her husband’s threats by not using a deadly weapon?

DISCUSSION OF PROPERTY RIGHTS IN THE CONTEXT OF MARRIAGE OR COHABITATION

Property laws have become relevant in the discussion surrounding the Castle Doctrine since courts have attempted to use the classification of the victim-aggressor as a determinant for instructing the jury on the defendant’s affirmative duty to retreat.¹³⁷ One of the primary goals behind owning property is enjoying the rights that come with it. Among them is the right to exclude others from the said property—the right to keep individuals deemed as trespassers off the territory where one enjoys possessory rights.¹³⁸ When a piece of property is commonly owned by two individuals, and particularly when these individuals are legally bound to one another (through marriage or civil union), neither individual enjoys the right to exclude the other from enjoying the said property.¹³⁹ As such, no intrusion can be established.¹⁴⁰

It is often the case that the victim-aggressor’s property rights rival the victim’s rights to defend herself.¹⁴¹ Since in situations of domestic violence in these cases, the site in question is often the home of both the aggressor and the victim, in the eyes of the law, both individuals have a right *not to retreat* from their castle. However, in the case of domestic violence, this

¹³⁵ *Id.* at 137.

¹³⁶ *See Orr, supra* note 98, at 136–37.

¹³⁷ Carpenter, *supra* note 8, at 69.

¹³⁸ *See generally* Thomas W. Merrill, *Property and the Right to Exclude*, 77 NEB. L. REV. 730 (1998).

¹³⁹ *See* D. Benjamin Barros, *Legal Questions for the Psychology of Home*, 83 TUL. L. REV. 645, 650–51 (2009).

¹⁴⁰ *Id.* at 651.

¹⁴¹ *See generally* Jackson, *supra* note 104.

right becomes an impediment to self-defense.¹⁴²

The question of property rights in the context of domestic violence is intimately connected to the Castle Doctrine.¹⁴³ It is not coincidental that most early sources address the Castle Doctrine by defining the home as the man's castle.¹⁴⁴ Traditionally, the home was seen as the place "where the male head of household could govern the inhabitants as he saw fit."¹⁴⁵ The castle was the property of the man; the woman was the inhabitant who had to conform to the rules set by her husband.¹⁴⁶

Today, not much has changed. Domestic violence is closely connected to homelessness.¹⁴⁷ Being a victim of domestic violence forces many abused women to flee the home.¹⁴⁸ In fact, "domestic violence is a leading cause of homelessness nationally."¹⁴⁹ This fact speaks to the argument that, as far as shared property is concerned, not much has changed since the days of the man's castle.¹⁵⁰ This particular point is relevant as an indicator in the discussion of gender dynamics, to illustrate the fact that many men and women are still not on equal footing when it comes to their "castles." It would not be a stretch to assume that those women who choose homelessness over continued domestic violence feel vulnerable in their homes—that they do not feel secure enough in their proprietary interests to eject their abuser instead of ejecting themselves. This conclusion is yet another indicator of the vulnerability of domestic violence victims.

The three themes discussed above—self-defense, power and gender dynamics, and property rights—all speak to one common argument: that the abused woman is vulnerable from multiple points of view. Firstly, her sanctuary is repeatedly violated by her abuser, leaving her with no safe option for retreat. Secondly, unlike the "true man," she grows to believe that a "true woman" does not meet force with force. Even if she wanted to,

¹⁴² *Id.* at 178 (arguing that "requiring an abused partner to retreat from her home while under attack by a person who has an equal legal right to be in the home shifts the focus from the person claiming self-defense to the attacker. . . . The *batterer's* relative possessory rights should not impede on the fact finder's conclusion that she felt imminently threatened, and that her actions were justified.").

¹⁴³ Johnson, *supra* note 25, at 11–12.

¹⁴⁴ See *infra* Part I (discussing cases where the phrase "a man's home is his castle" is used repeatedly).

¹⁴⁵ Johnson, *supra* note 25, at 12.

¹⁴⁶ See Johnson, *supra* note 25.

¹⁴⁷ *Id.* at 13.

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

¹⁵⁰ See generally Johnson, *supra* note 25 (discussing the fact that the laws of property are disadvantageous to abused women).

she often cannot. Thirdly, even though legally she may be entitled to half of the marital property, she may not believe that she has these rights. To her, an escape may be synonymous with further abuse, societal scrutiny, and homelessness. This means that the Castle Doctrine must be applied to conflicts between cohabitants, so that victims of domestic abuse can enjoy the minimum amount of safety that is generally afforded to victims of stranger crimes.

IV. ADVOCATING FOR APPLICATION OF THE CASTLE DOCTRINE TO INSTANCES OF DOMESTIC VIOLENCE

As briefly mentioned above, there is a strong argument to be made for the applicability of the Castle Doctrine to instances of domestic violence, where the victim-defendant and the aggressor-victim are legal cohabitants of the same dwelling. Nonetheless, only one study to date has addressed whether application of the Castle Doctrine to domestic violence situations is actually beneficial to women by clarifying often-contested elements such as reasonableness and imminence.¹⁵¹ Although the law in most states no longer makes an explicit distinction between the applicability of the Castle Doctrine to men who are attacked in their homes and women who are abused by their cohabitants, “strong traces of it remain in the decisions of many courts (of both law and public opinion) to expect a woman to leave her home if she is being abused.”¹⁵²

As such, this Comment advocates for the applicability of the Castle Doctrine in instances where the defendant is the victim of domestic violence. First, excluding these victims from benefitting from the Castle Doctrine jury instruction in cases where they cohabit with their abuser is a misunderstanding and misapplication of the doctrine as it was first introduced in the American legal system. The Castle Doctrine did not focus

¹⁵¹ See generally STEVEN JANSEN & M. ELAINE NUGENT-BORAKOVE, NAT’L DIST. ATTORNEYS ASS’N, EXPANSIONS TO THE CASTLE DOCTRINE: IMPLICATIONS FOR POLICY AND PRACTICE 5 (2007); Judith E. Koons, *Gunsmoke and Legal Mirrors: Women Surviving Intimate Battery and Deadly Legal Doctrines*, 14 J.L. & POL’Y 617 (2006).

¹⁵² Franks, *supra* note 124, at 1112 (arguing that “[i]n other words, while men, whose violent confrontations inside the home are likely to involve strangers, are allowed to stand and fight, women, whose violent confrontations inside the home are likely to involve cohabitants, are effectively expected to retreat”); see Elizabeth M. Schneider, *Equal Rights to Trial for Women: Sex Bias in the Law of Self-Defense*, 15 HARV. C.R.-C.L. L. REV. 623, 628 (1980); see also Jackson, *supra* note 104, at 171 (“While both statutory and case law have progressed in recognizing and addressing the plight of domestic violence survivors, the disparities that result from prosecutorial discretion, and the implicit biases and stereotypes about domestic abuse, inhibit survivors’ ability to benefit from [Stand Your Ground laws] even where their actions should be justified.”).

on property and possessory rights, but rather on the right to defend oneself in one's dwelling. Since generally, victims of domestic violence are doing exactly that when they kill or seriously injure their abusers, they should benefit from receiving the Castle Doctrine jury instructions.

The second argument explores the power dynamics between victims and aggressors. Mainly, it looks at the power differential between these two parties and attempts to explain how, given these circumstances, a victim of domestic violence has already "retreated to the wall," given the context in which she is abused. Given these considerations, imposing an affirmative duty to retreat on the victim-defendant becomes an almost nonsensical contention, asking an individual to do something that is virtually impossible.¹⁵³

The discourse surrounding the Castle Doctrine in jurisdictions other than Florida is informative in examining both arguments. Until recently, New Jersey law, for example, allowed an individual to defend herself against intruders without imposing a duty to retreat, but required the same individual "to retreat from her home before using deadly force against her cohabitant attacker."¹⁵⁴ The victim-aggressor had a perverse social status; she was expected to react vehemently against a burglar who might have been looking to steal her jewelry or television set, but she was not allowed to act with the same force against her cohabitant, the person who arguably embodies her biggest threat.¹⁵⁵

In Minnesota, a duty to retreat exists as a general rule, but this duty does not apply in the case of a home intrusion.¹⁵⁶ The issue of the applicability of the Castle Doctrine in the case of cohabitant violence was addressed in *State v. Glowacki*,¹⁵⁷ where the Minnesota Supreme Court "surveyed the probable effect [of not applying the Castle Doctrine to cohabitants] on women who face domestic violence, and asserted that a parent facing attack should not have to abandon her children."¹⁵⁸ The Court emphasized the importance of safety in one's home, stressing that the concept of retreating in self-defense necessarily includes a safer place to

¹⁵³ Melissa Wheatcroft, *Duty to Retreat for Cohabitants—In New Jersey a Battered Spouse's Home is Not Her Castle*, 30 RUTGERS. L.J. 539, 556–57 (1999) (discussing that although each abusive relationship is unique, they all "often share a common characteristic: the victim of the batterer remains in the relationship with her batterer for some period of time despite the abuse. Demanding retreat from a cohabitant who has lived with abuse for an extended period is asking the impossible.").

¹⁵⁴ *Id.* at 542.

¹⁵⁵ *Id.* at 553.

¹⁵⁶ See Aggergaard, *supra* note 113, at 675–76.

¹⁵⁷ 630 N.W.2d 392 (Minn. 2001).

¹⁵⁸ Aggergaard, *supra* note 113, at 681.

retreat—usually one’s home.¹⁵⁹ However, when the violence occurs precisely in that safe space, it would be fundamentally unfair to force a cohabitant to retreat.¹⁶⁰

In Ohio, when applying the Castle Doctrine to violence among cohabitants, courts must take into account the fault requirement.¹⁶¹ For example, in *State v. Thomas*,¹⁶² the Supreme Court of Ohio reversed the defendant Thomas’ conviction for shooting and killing her live-in boyfriend because she did not have a duty to retreat in her own home.¹⁶³ However, had the deceased boyfriend managed to wrestle the gun away from Thomas and subsequently killed her, he would not have been able to invoke the Castle Doctrine because he was the one who caused the situation.¹⁶⁴

Finally, in Pennsylvania, the Supreme Court has clearly stated that the duty to retreat does not apply to cohabitants acting in self-defense.¹⁶⁵ In *Commonwealth v. Derby*,¹⁶⁶ the court “noted a recent shift from protecting the rights of the deceased to protecting the rights of the individual acting in self-defense, as laid out by the drafters of the Model Penal Code.”¹⁶⁷

After surveying the progression of the Castle Doctrine in various jurisdictions, with a particular focus on Florida and the cases discussed in Section I, it becomes starkly obvious that the Castle Doctrine should not be qualified in instances where the victim and the aggressor are cohabitants.

First, this qualification draws focus away from the victim’s right to feel safe in her own home, and places an inappropriate amount of emphasis on the victim-aggressor’s property rights; an emphasis that is inconsistent with its English roots, but also with early American cases such as *Beard*, discussed in Part I of this Comment. The only way in which the cohabitant exception could make sense would be in a world where property rights take priority over human life; otherwise, there would be no reason to limit this long-standing doctrine.

Second, requiring victims of domestic violence to retreat before using

¹⁵⁹ *Id.* at 682.

¹⁶⁰ *Id.* at 681.

¹⁶¹ See Haddox, *supra* note 113, at 1112 (arguing that the “no-fault requirement serve[s] as a safeguard because it mandate[s] further inquiry into the circumstances”).

¹⁶² 673 N.E.2d 1339 (Ohio 1997).

¹⁶³ *Id.* at 1343; see also Haddox, *supra* note 113, at 1111.

¹⁶⁴ *Thomas*, 673 N.E.2d at 1343.

¹⁶⁵ Joshua G. Light, *The Castle Doctrine – The Lobby is My Dwelling*, 22 WIDENER L.J. 219, 231 (2012) (“In rejecting the trial court’s instructions, the Superior Court of Pennsylvania held that . . . the duty to retreat does not apply to an individual acting in self-defense against another individual where both individuals reside in the same dwelling.”).

¹⁶⁶ 678 A.2d 784 (Pa. Super. Ct. 1996).

¹⁶⁷ Light, *supra* note 165 at 231; see also *Derby*, 678 A.2d at 785–86.

deadly force to defend themselves in their own homes breaks with the entire concept of “retreat to the wall” because an abused partner has no place to retreat; she has retreated as far as she can,¹⁶⁸ and it is in her place of retreat that she continues to be abused. Jurisdictions that do not grant this defense to victims of domestic violence place a high burden on them—the burden of retreating to a non-existent wall, or attempting an escape that, paradoxically, might end her life quicker than it would save it.¹⁶⁹

V. THE BATTERED WOMAN’S CASTLE

The concept of helplessness can be analyzed through psychological and sociological research to shape a more focused argument for why denying victims of domestic violence the Castle Doctrine instruction is inherently wrong. Women who have been repeatedly abused have a permeating feeling of helplessness, which essentially makes it impossible for them to leave the home in which they are being abused. Since they cannot meet their partner’s force with equal force,¹⁷⁰ they are effectively faced with two choices: to continue accepting the abuse or to meet their partner’s force with deadly force and face a prison sentence without recourse. It is true that some women do actually leave their abusers. According to the Domestic Violence Intervention Program, more than 50% of women leave their abusive partners.¹⁷¹ However, the same organization states that “leaving a battering partner may be the most dangerous time in that relationship”, since “women are 70 times more likely to be killed in the two weeks after leaving than at any other time during the relationship.”¹⁷² As such, it is important to view these statistics in light of the discussion that follows, and consider why it is fundamentally unfair to require women to leave.

Battered Woman Syndrome (BWS) was first introduced into the legal profession by Lenore Walker, in the late 1970s.¹⁷³ According to Walker, a

¹⁶⁸ See *infra* Part I (discussing opinions that view the home as the ultimate place of retreat).

¹⁶⁹ See *supra* Parts I–II (discussing that some jurisdictions do not allow or have not allowed the Castle Doctrine in cases of domestic violence among cohabitants, “assume that a ‘safe retreat’ can actually exist for a victim of battering and that escaping alive from this particular episode of violence is the equivalent of ‘safely retreating’”).

¹⁷⁰ See *supra* Part II.

¹⁷¹ *Myths and Facts About Domestic Violence*, DOMESTIC VIOLENCE INTERVENTION PROGRAM, <http://www.dvpiowa.org/myths-facts-about-domestic-violence> (last visited Oct. 4, 2016).

¹⁷² *Id.*

¹⁷³ See Marina Angel, *The Myth of the Battered Woman*, 24 TEMP. POL. & C.R. L. REV. 301, 302 (2015); see also LENORE E. WALKER, *THE BATTERED WOMAN* 45–51 (1979).

battered woman is part of a cyclical relationship and does not become a battered woman until she has gone through two such cycles.¹⁷⁴ The cycle begins with escalating tension, continues with severe abuse, then concludes with loving relief.¹⁷⁵ A central part in this cycle is the concept of *learned helplessness*—an idea that the battered woman becomes more helpless as time goes by; the longer she gets abused, the harder it will be for her to leave her abuser, rendering her helpless.¹⁷⁶ “A battered woman . . . does not have to learn that she cannot escape one man’s battering, but rather that she cannot escape men’s overall coercion.”¹⁷⁷ As it connects to the earlier discussion of the Castle Doctrine, the concept of learned helplessness illustrates the most problematic aspect of the Castle Doctrine exception:¹⁷⁸ a battered woman’s helplessness does not allow her to leave her “castle,” even if she may intellectually know it is the right thing to do.¹⁷⁹

Paradoxically, one of the most frequent questions asked about abused women is: why doesn’t she just leave?¹⁸⁰ Outside observers, particularly those who have not experienced abuse themselves, struggle with understanding why abused women are so helpless; why it is that they are not able to simply escape the cycle of abuse.¹⁸¹ According to Mary Ann Dutton, this cycle of abuse is best understood “as a single and continuing entity, one whose character may change over time, but that nevertheless forever changes the nature of the relationship.”¹⁸² As such, battered women do not foresee an end in sight to the violence; they are under constant attack. This particular piece of the battered woman literature is crucial in

¹⁷⁴ WALKER, *supra* note 173, at 55–70.

¹⁷⁵ *Id.* at 55.

¹⁷⁶ *Id.* at 45 (deriving the concept of *learned helplessness* from Martin Seligman’s experiments with dogs, in which dogs that were repeatedly exposed to electric shock therapy were increasingly less likely to protest the abuse).

¹⁷⁷ *Id.* at 48.

¹⁷⁸ The “Castle Doctrine exception” here is used to refer to instances where the Castle Doctrine defense is not offered to victims of domestic violence, due to the fact that they were attacked by a cohabitant in a home that was legally co-owned.

¹⁷⁹ See WALKER, *supra* note 173, at 47.

¹⁸⁰ *Id.* at 43 (“Both the batterer and the battered woman fear they cannot survive alone, and so continue to maintain a bizarre symbiotic relationship from which they cannot extricate themselves.”).

¹⁸¹ See *id.*; see also Mary Ann Dutton, *Understanding Women’s Responses to Domestic Violence: A Redefinition of Battered Woman Syndrome*, 21 HOFSTRA L. REV. 1191, 1208 (1993).

¹⁸² See Dutton, *supra* note 181, at 1208 (“The battered woman’s fear, vigilance, or perception that she has few options may persist, even when long periods of time elapse between the physically or sexually violent episodes, and even when the abusive partner appears to be peaceful and calm.”).

understanding why battered women who are attacked in their own homes cannot retreat anywhere: for them, the attack is constant and the retreat impossible.¹⁸³ It then becomes paramount for these women, who are constantly being attacked in their own homes, to not have an affirmative duty to retreat: indeed, placing this duty upon them puts them in a situation of impossibility, since resisting their attacker is something they simply cannot do.

The Survivor Theory, an alternative to the Battered Woman Syndrome, explains a victim's inability to leave the abusive cycle differently.¹⁸⁴ Instead of looking at the battered woman as a helpless individual, the Survivor Theory sees her as an active agent.¹⁸⁵ Unlike Walker's battered woman, this individual makes a *choice* not to leave, having logically determined that no other alternative is plausible.¹⁸⁶ The Survivor Theory actively resists labeling victims who stay in abusive relationships as "passive or weak."¹⁸⁷ Leigh Goodmark, Associate Professor at University of Baltimore School of Law, says that:

[W]omen who fight back are those with the fewest other options for addressing the violence against them. They are women who lack access to resources, women who may be afraid or unwilling to turn to the police or other professionals for assistance, and women whose marginalized status may deprive them of the ability to make choices other than retaliation.¹⁸⁸

The Survivor Theory "emphasizes [the] strength, resilience, and ultimate triumph over the violence."¹⁸⁹

Regardless of which theory one finds more or less convincing, both Battered Woman Syndrome and the Survivor Theory have one important point in common: they both effectively eliminate an abused woman's ability to leave her home when it is the epicenter of her abuse. Either through complex psychological processes¹⁹⁰ or through conscious

¹⁸³ See WALKER, *supra* note 173.

¹⁸⁴ See generally EDWARD W. GONDOLF & ELLEN R. FISHER, BATTERED WOMEN AS SURVIVORS: AN ALTERNATIVE TO TREATING LEARNED HELPLESSNESS (1988).

¹⁸⁵ See Leigh Goodmark, *When is a Battered Woman Not a Battered Woman? When She Fights Back*, 20 YALE J.L. & FEMINISM 75, 85 (2008) ("Having determined that help is not available, the survivor may come to the rational conclusion that she may be more likely to survive if she suffers physical violence within the relationship than if she attempts to leave.").

¹⁸⁶ Jackson, *supra* note 104, at 165.

¹⁸⁷ Goodmark, *supra* note 185, at 84.

¹⁸⁸ *Id.* at 77.

¹⁸⁹ *Id.* at 85.

¹⁹⁰ See *supra* text accompanying note 176.

choices,¹⁹¹ it is vital to understand that abused women¹⁹² do not believe that they can retreat.

Returning to the scenario between Mary and Bob, it can be safely assumed that Mary would be classified as a battered woman, according to Walker's criteria.¹⁹³ When Bob attacks her in their home, as he has done countless times before, Mary is not likely to believe that she will be able to escape his attacks if she leaves the home. In a state where Mary's retaliation against Bob's attack would not be protected under the Castle Doctrine—a state¹⁹⁴ where a woman, abused in her own castle, has the affirmative duty to retreat before using deadly force—Mary would find herself in an impossible situation: being essentially forced to accept the abuse. If we accept either Battered Woman Syndrome or the Survivor Theory as reality, we also have to accept Mary's feeling of helplessness (which is likely to worsen with time) as a reality, deeming her powerless in the face of her husband's violence. Learned helplessness is pertinent to this Comment because it speaks to the woman's belief that she cannot safely retreat away from her abuser, that no matter what she does, she will never be safe. The impossibility of retreat is a key aspect of applying the Castle Doctrine to instances of domestic violence. If we can successfully argue that, at the time of the attack, the woman had no reasonable belief that she could safely retreat from her abuser, then the concept of "retreat" becomes moot. If, on the other hand, this aspect becomes highly contentious, it will be more difficult to argue that there was no possibility of retreat when, in fact, there might have been (i.e., the bathroom in Mary and Bob's case).

The cyclical nature of the Battered Woman is important in understanding the predictability of an abusive relationship—the idea that the same pattern will repeat, over and over again, until either the victim breaks it by leaving (a rare scenario) or the abuser breaks it by killing the victim or physically impairing her so severely that she is no longer able to keep the abuse a secret from close friends and relatives.¹⁹⁵ This concept is

¹⁹¹ See GONDOLF & FISHER, *supra* note 184.

¹⁹² When discussing abused women in this context, this Comment does not refer to women who have been victims of a single abusive episode; rather, it refers to women who can be classified as battered women according to Walker's criteria, described in more detail above.

¹⁹³ See generally WALKER, *supra* note 173.

¹⁹⁴ See *supra* text accompanying note 10; see also *supra* Part II (discussing the states where a victim of domestic violence has a duty to retreat in her own home).

¹⁹⁵ Melissa K. Slate, Domestic Violence Comprehensive, The Secret Epidemic, RN (May 2016), <http://www.rn.org/courses/coursematerial-140.pdf> ("In 2004, 1,544 deaths were attributed to domestic violence. Florida [the focus of this Comment] had 115,170 cases of domestic violence in 2006, 54% of these cases ended in an arrest.").

once again relevant for the purpose of “retreating to the wall.” If the theories behind Battered Woman Syndrome and the Survivor Theory are correct and the relationship between the victim and the abuser is cyclical, the prospect of retreat once again becomes irrelevant because a temporary retreat (i.e. leaving the apartment for a night) is just that—temporary. If we trust this research, we trust the fact that a victim will see this type of retreat as temporary, not as a solution to her overall problem. Furthermore, the victim also knows that attempting to retreat will make her abuser even angrier and more likely to seriously hurt or even kill her. In this alternative scenario, the victim may be able to contemplate a type of retreat, but quickly realizes that it would be pointless in the face of her cohabitant’s pattern of violence.

A lingering question still remains: why should the legal system not invoke justifiable homicide in cases where domestic violence victims retaliate against their abusers and end up killing them? Due to disparities among state laws, the Model Penal Code is the best tool to answer this question. The Code defines self-defense as “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.”¹⁹⁶ The words “immediately” and “necessary” are key here—elements that must be proven in order for the defense to be presented. The problem with proving these elements when it comes to domestic violence is painfully obvious—often, the only witnesses to these violent episodes are the victim and the offender. In such cases, it is nearly impossible to set forth a defense that would satisfy a reasonable jury.

Furthermore, returning to the idea that the Castle Doctrine is still alive in the United States, and that individuals attacked in their own homes by non-cohabitants are *almost always* allowed to present this defense (which is often successful), the question of inherent fairness merits one last mention. To place a *higher burden* on victims of domestic violence than on, for example, an acquaintance who attacks an individual in his own home—is downright perplexing. This vulnerable population, these victims who often simply cannot escape their abusers, should be afforded *more*, not *less* protection.

FINAL THOUGHTS

This Comment argues for a uniform application of the Castle Doctrine instructions to the jury, regardless of the cohabitation between victim and assailant. The rationale behind this argument is simple; applying the Castle

¹⁹⁶ MODEL PENAL CODE § 3.04(1) (AM. LAW INST. 2015) (emphasis added).

Doctrine any other way treats victims of domestic violence inequitably and unfairly penalizes them for, quite literally, fighting for their lives.

As discussed in Part III of this Comment, the Model Penal Code does not make a distinction between the applicability of the Castle Doctrine to incidents involving intruders and those involving cohabitants; it only qualifies its applicability in cases where the victim and the aggressor work together. This application should be adopted uniformly by jurisdictions throughout the United States, in order to avoid the inherent unfairness that comes with making abused women fight for their lives.

