

No Ground on Which to Stand: Revise Stand Your Ground Laws So Survivors of Domestic Violence are No Longer Incarcerated for Defending Their Lives

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ABSTRACT

When George Zimmerman fatally shot Trayvon Martin in a Florida suburb, the event stirred national attention and outrage toward Florida's Stand Your Ground laws. Much publicity focused on how the law essentially legalizes racial profiling by excusing defendants who kill racial minorities based on "reasonable" fear. While these ideas convey significant truths about pervasive societal problems, focusing on only one horrendous case as a platform to abolish, or substantially limit, Stand Your Ground laws overlooks the adverse effects such abolition would have on women who respond to domestic violence.

Domestic violence is a serious and widespread problem in our society. Women continue to endure severe abuse at the hands of their intimate partners. Given the barriers to safe retreat, it is reasonable for many women to choose to remain in such relationships. Regardless of whether a woman in an abusive

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partnership decides to end the relationship, there may come a point when the abuser attacks her with enough force to threaten her life, forcing her to use deadly force to protect herself. When this happens, Stand Your Ground laws are often implicated both in prosecutorial decisions and in legal defenses. Such laws can be important tools for women to assert self-defense successfully. Some might argue that such justifiable killing is adequately covered under basic self-defense principles, and hence, there is no need for further privilege to stand one's ground. However, certain affirmative "stand your ground" laws can provide protection from prosecution so the defendant is not vulnerable to the fact finder's analysis of whether the lethal response was "reasonable" under the circumstances. Both judges and jurors analyze "objective" reasonableness through biased lenses. These biases include male normativity, stereotypes, myths about domestic abuse, and the tendency to blame the victim. Such biases disadvantage women, and, in particular, survivors of domestic abuse. It is time to revise Stand Your Ground laws with this vulnerable population in mind. The most just way for this law to operate is to grant immunity from criminal prosecution for those who defend themselves in their home against abusive cohabitants, and to develop a statutory presumption of fear in a defendant who has endured a history of domestic abuse.

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INTRODUCTION

A few years ago, a young woman named Natasha shot and killed her boyfriend in the apartment they were sharing.¹ He had trapped her in the bedroom and was about to launch into another of what had become weekly “beatdowns,” where he would hit her with a closed fist.² Prior to the killing, the beatings had become more severe and more frequent, as were the threats that he was going to kill her.³ As to whether there were other options available to her to escape, Natasha said, “At the time I pulled the trigger, I didn’t think so. He’d cornered me in a small bedroom with no way out except maybe jumping out a glass window or simply undergoing yet another beatdown. He was fond of beating me, then forcing me to perform oral sex on him right away. If my lips were bloody, he’d force himself into my rectum.”⁴ Natasha was charged with second-degree murder and criminal possession of a firearm (which belonged to her boyfriend).⁵ She was convicted of manslaughter and sentenced to fifteen years in prison.⁶

In February 2012, George Zimmerman, a resident of a gated community and a neighborhood watch volunteer, called 911 to report a young teen (later

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1. Sadhbh Walshe, *The Double Imprisonment of Battered Women*, THE GUARDIAN (Mar. 21, 2012, 6:30 PM) <http://www.theguardian.com/commentisfree/cifamerica/2012/mar/21/double-imprisonment-battered-women>.
 2. *Id.*
 3. *Id.*
 4. *Id.*
 5. *Id.*
 6. *Id.*

identified as Trayvon Martin).⁷ Zimmerman said Martin “looks like he’s up to no good, or he’s on drugs or something. It’s raining and he’s just walking around, looking about.”⁸ The dispatcher told Zimmerman, “just tell me if he does anything,” to which Zimmerman responded, “[t]hese assholes they always get away . . .”⁹ Martin started running, and Zimmerman started following him.¹⁰ The dispatcher told Zimmerman not to follow Martin, and that the police were on their way.¹¹ At some point, Martin was out of sight.¹² Yet, Zimmerman tracked him down, got out of his car, and approached Martin.¹³ The facts related to the altercation cannot be reliably determined, but it ended with Zimmerman fatally shooting Martin.¹⁴ Fifty-four days later, Zimmerman was charged with second-degree murder. He was acquitted.¹⁵

While the circumstances of the above situations differ greatly, the charges in both cases were acutely affected by similar laws that allow one to “Stand Your Ground”¹⁶ (SYG) and meet force with force if attacked in one’s own home or where one is legally authorized to be,¹⁷ even if there is opportunity for safe retreat. The above cases demonstrate how varying implementation of these laws

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7. *Trayvon Martin Shooting Fast Facts*, CNN.COM (Aug. 29, 2013, 1:48 PM), <http://www.cnn.com/2013/06/05/us/trayvon-martin-shooting-fast-facts/>.
 8. *Raw: 911 call Zimmerman made to Sanford police (Explicit)*, WFTV.COM, <http://www.wftv.com/videos/news/raw-911-call-zimmerman-made-to-sanford-police/vGZq9/> (last visited Jan. 18, 2015); *Transcript of George Zimmerman’s Call to the Police*, MOTHERJONES, <http://www.motherjones.com/documents/326700/full-transcript-zimmerman> (last visited Jan. 18, 2015).
 9. *Id.*
 10. *Id.*
 11. *Id.* The dispatcher attempted to retrieve Zimmerman’s location so the police could meet him. However, Zimmerman told the dispatcher that the police just call him when they arrived so he could tell the officers his location (suggesting that Zimmerman did not plan stay where he was located when after hanging up the phone). *Id.*
 12. See *Trayvon Martin Shooting Fast Facts*, *supra* note 7.
 13. *Id.*
 14. *Id.*
 15. *Id.*
 16. Some SYG supporters have critiqued the attention given to Zimmerman’s case, underscoring that his case did not actually involve Florida’s SYG law because he waived his rights of immunity from prosecution under section 776.032 of the Florida Statutes. However, the SYG doctrine does not exist only in this separate statute, which grants immunity from prosecution, but is “integral to the meaning of self-defense in the state.” Ta-Nehisi Coates, *How Stand Your Ground Relates to George Zimmerman*, THE ATLANTIC (July 16, 2013, 3:45 AM), <http://www.theatlantic.com/national/archive/2013/07/how-stand-your-ground-relates-to-george-zimmerman/277829/>. Furthermore, the jury instructions used both “stand your ground” and “no duty to retreat” language, stating that, “If George Zimmerman was . . . attacked in any place where he had a right to be, he had *no duty to retreat* and had the right to *stand his ground* and meet force with force . . .” *Id.* (emphasis added).
 17. See, e.g., FLA. STAT. ANN. § 776.013(3) (West 2005) (“A person who is not engaged in an unlawful activity and who is attacked in *any other place where he or she has a right to be* has no duty to retreat and has the right to *stand his or her ground* and meet force with force, including deadly force if he or she 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.”) (emphasis added).

creates disparate and unjust results. The SYG doctrine is arguably responsible for allowing Zimmerman—who voluntarily removed himself from the safety of his vehicle to chase down the young black teen whom he eventually fatally shot “in self-defense”—to walk free,¹⁸ while imposing a fifteen-year prison sentence on Natasha, who killed her extremely abusive and threatening boyfriend when he trapped her in the bedroom.¹⁹

Public outrage regarding both the delay in Zimmerman’s arrest²⁰ and his subsequent acquittal of murder charges²¹ put Florida’s SYG statute under national scrutiny. Numerous organizations²² began advocating for the repeal of these laws based on the common belief that they “undermine public safety, senselessly put people at risk, and enable the kind of tragedy we’ve witnessed in the case of Trayvon Martin.”²³ This article does not intend to undermine these serious and very real concerns that SYG laws may legally excuse abhorrent misconduct, as was the case with George Zimmerman. However, this article does not focus on the problems with the SYG laws that are exacerbated by social and structural racism, but rather, it focuses on how these laws affect another vulnerable²⁴ population – women in abusive relationships.²⁵ This article argues

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- 18. After he was acquitted of murder charges in the Martin case, Zimmerman had several encounters with the law enforcement where he battered a police officer, battered his girlfriend, and, on two occasions, threatened others with a firearm. *See Zimmerman Accused of Domestic Violence, Fighting with a Police Officer*, NBC NEWS (Mar. 27, 2012, 8:53 PM), http://usnews.nbcnews.com/_news/2012/03/27/10894561-zimmerman-accused-of-domestic-violence-fighting-with-a-police-officer (detailing how, in 2005, Zimmerman was arrested and charged with “battery against a police officer,” and his ex-fiancée obtained a restraining order against him for domestic violence); Kyle Hightower & Mike Schneider, *Zimmerman’s Wife Won’t Press Charges Despite Call*, ASSOCIATED PRESS (Sept. 9, 2013, 10:49 PM), <http://bigstory.ap.org/article/fla-police-called-george-zimmerman> (describing how, in September 2013, after Zimmerman’s acquittal for the Martin shooting, the police were called for a domestic dispute where Zimmerman punched his wife’s father in the face, and threatened him and Zimmerman’s wife with a gun); Joe Coscarelli, *George Zimmerman Arrested Again in Domestic Violence Incident [Updated]*, N.Y. MAG. (Nov. 11, 2013, 11:33 AM), <http://nymag.com/daily/intelligencer/2013/11/george-zimmerman-arrested-domestic-violence-gun.html> (detailing how, in November 2013, Zimmerman was arrested for yet another domestic violence assault involving a shotgun against his then-girlfriend).
 - 19. Walshe, *supra* note 1.
 - 20. Michael Saba, *And Justice for All?: Debating the Zimmerman Arrest and Race in America*, CNN.COM (Apr. 13, 2012, 1:45 PM), <http://www.cnn.com/2012/04/13/us/zimmerman-reax-irpt/>. A “national outcry” spurred thousands of protesters and activists to “tak[e] to the streets in ‘Million Hoodie’ marches, demanding that formal charges be filed against Zimmerman.” *Id.*
 - 21. Rachel Martin, *Zimmerman Acquitted of Murder Charges*, NAT’L PUB. RADIO (July 14, 2013, 8:00 AM), <http://www.npr.org/templates/story/story.php?storyId=202011011>.
 - 22. *See, e.g., Petitions Against Stand Your Ground Reach over 500,000 Names*, END STAND YOUR GROUND (Feb. 9, 2014), <http://endstandyourground.wordpress.com/2014/02/09/petitions-against-stand-your-ground/> (listing over a dozen online petitions from various organizations that call for an end to Stand Your Ground laws in several states).
 - 23. Rashad Robinson, *End “Stand Your Ground Laws”*, MOVEON.ORG PETITIONS, <http://petitions.moveon.org/sign/end-stand-your-ground> (last visited Feb. 12, 2014).
 - 24. Women may be “vulnerable” in multiple senses of the word. As victims of domestic

that lawmakers should consider the impact these laws have on women who survive abusive relationships before eagerly repealing all forms of SYG laws. For women like Natasha who kill their abusers in self-defense after years of sustaining physical, emotional, sexual, and/or financial abuse, permitting a small category of legally justifiable violence via SYG protection could more adequately preserve justice for certain oppressed populations.

This article examines the effect of SYG laws on domestic violence survivors,²⁶ whose situations differ from others in which a person feels threatened by a stranger. Given the circumstances of the abusive relationship, when a battered woman feels threatened, she does not usually have a reasonable opportunity to retreat from an episode of domestic violence. Part I examines background information on the theories explaining the dynamics of domestic abuse, as well as the birth and evolution of SYG laws. This Part provides a backdrop for understanding the situation in which a survivor finds herself prior to using deadly force, and explains the various SYG statutes that may affect her case. Part II analyzes the problems that SYG laws (versus the duty to retreat) create for battered defendants, namely, whether they are in fact protected by SYG immunity from prosecution. This Part also examines how fact finders' gender biases and misperceptions about domestic violence cause them to inappropriately apply SYG laws. Lastly, Part III proposes the following solutions: (1) retain affirmative SYG laws in a limited capacity; (2) limit SYG privilege²⁷ so that it is available only while inside the home; and (3) create a statutory presumption of reasonable fear where there is a history of abuse between a dominant aggressor and a more vulnerable person. These legislative changes most closely comport with a balanced system of justice, taking into account a woman's right to self-defense when faced with lethal force from an abusive partner, while avoiding potentially adverse effects of expanding a doctrine that justifies violence.

violence, women are under constant threat of attack, and such violence can often escalate to the point of death. Further, battered women who kill their batterers in self-defense face grave challenges in front of unsympathetic judges and juries.

25. This article recognizes that not *all* battered persons are women and that not all batterers are men (nor does it assume that all persons identify either as men or women). Indeed, men are sometimes victims of domestic violence, either by another man or by a woman, and likewise, women sometimes batter other women. However, for the dual purpose of clarity and recognizing the fact that the vast majority of domestic violence involves male perpetrators and female victims (with the smallest minority involving female-on-male violence), this article will use female pronouns exclusively to describe the battered person and male pronouns to describe the batterer.
26. Throughout this article, women who endure abuse in their intimate relationships will be referred to as "domestic violence survivors," "survivors," "women in abusive relationships," and at times, "battered women."
27. While facing a lethal threat, the ability to stand your ground and use force to defend yourself hardly seems like a "privilege." However, this term is one commonly used in the sources to describe the right of asserting SYG as a legal defense. This article uses privilege and right interchangeably, but favors "privilege" for clarity.

I. BACKGROUND ON THE RIGHT TO “STAND YOUR GROUND,” AND THEORIES FOR WHY WOMEN IN ABUSIVE RELATIONSHIPS DO JUST THAT

A. American Law Births the Self-Defense Doctrine, Creates the Duty to Retreat Exception, and Limits this with the “Castle Doctrine”

The law recognizes that not all homicides are blameworthy, and justifies some instances where the person who kills acts in self-defense.²⁸ This was not always the case. In thirteenth-century England, a homicide was justifiable only when the person who killed was preventing the decedent from committing a crime, and not when the person who killed was acting in self-defense.²⁹ Someone who killed in self-defense could be excused only by asking the king for a pardon.³⁰ Eventually, the formality of asking for a pardon developed into a more regular practice, and, by the year 1534, self-defense as we know it today became an affirmative defense both by statute and by Anglo-American common law.³¹ The right to self-defense, however, is not absolute. Original English common law limited this right by imposing a “duty to retreat” before using physical force.³² The law required a threatened person to retreat to the limits of her physical capabilities before taking a life.³³

An exception to the duty to retreat³⁴ exists when a person is attacked while inside his or her own home. In such a circumstance, a man³⁵ had the right to stand his ground and defend himself even if retreat were possible.³⁶ This became known as the castle doctrine: “[t]he feudal maxim ‘a man’s home is his castle’ formed the basis of the ‘defense of habitation’ doctrine, which gave rise to the modern castle doctrine.”³⁷

Much of the SYG principle has been developed and expanded through

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- 28. See, e.g., CAL. PENAL CODE § 197 (West, Westlaw through 2014 Reg. Sess.) (“Homicide is also justifiable when committed . . . in defense of habitation, property, or person . . . against one who manifestly intends and endeavors, in a violent, riotous or tumultuous manner, to enter the habitation of another . . .”).
 - 29. See Joseph H. Beale, Jr., *Retreat from a Murderous Assault*, 16 HARV. L. REV. 567, 568-69 (1903). During the thirteenth-century, homicide committed in self-defense was considered justifiable, and thus worthy of acquittal only if it were done in execution of the law (for example, to prevent a robbery). *Id.* at 568.
 - 30. *Id.*
 - 31. *Id.* at 571.
 - 32. See Ray Taylor, et al., *Self-Defense in Homicide Cases*, 42 AM. JUR. TRIALS 151, § 25 (1991).
 - 33. *Id.*
 - 34. Essentially, this is an exception within an exception. The exception to the right to self-defense is the duty to retreat, and the exception to the duty to retreat occurs when one is inside one’s own home.
 - 35. While now understood to apply unilaterally to both men and women, the original statutes and common law language used male pronouns exclusively.
 - 36. Christine Catalfamo, *Stand Your Ground: Florida’s Castle Doctrine for the Twenty-First Century*, 4 RUTGERS J.L. & PUB. POL’Y 504, 505-06 (2007).
 - 37. *Id.*

common law rather than statutorily.³⁸ For example, California's justifiable homicide statute does not mention the right to stand your ground or the duty to retreat, suggesting that no such duty exists.³⁹ The statute reads: "Homicide is . . . justifiable . . . [w]hen committed *in defense of habitation, property, or person*, . . . against one who manifestly intends and endeavors, in a violent, riotous or tumultuous manner, to *enter the habitation* of another for the purpose of offering violence to any person therein . . .".⁴⁰ Common law does, however, include such SYG/duty to retreat language, as exemplified by the California Jury Instructions for Criminal Law:

A person threatened with an attack that justifies the exercise of the right of self-defense *need not retreat*. In the exercise of [his] [her] right of self-defense a person may *stand [his] [her] ground* and defend [himself] [herself] by the use of all force and means which would appear to be necessary to a reasonable person in a similar situation and with similar knowledge; and a person may pursue [his] [her] assailant until [he] [she] has secured [himself] [herself] from danger if that course likewise appears reasonably necessary. This law applies even though the assailed person might more easily have gained safety by flight or by withdrawing from the scene.⁴¹

While all United States jurisdictions recognize the affirmative defense of self-defense, they vary significantly in their recognition of when the law imposes a duty to retreat, and conversely, what circumstances permit a person to stand his or her ground.

B. Expansion of the Right to Stand Your Ground: Beyond the Home, the Presumption of Fear, and Prosecutorial Immunity

The majority of states have expanded the SYG doctrine beyond its limitations under the common law. For example, SYG laws have been expanded to apply the privilege where the defendant was in a public place, or in other words, anywhere the defendant had a legal right to be at the time of the altercation.⁴² This broadened the traditional SYG doctrine, which originally

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38. See, e.g., *State v. Thomas*, 673 N.E.2d 1339, 1343 (Ohio 1997) (holding that "there is no duty to retreat from one's own home before resorting to lethal force in self-defense against a cohabitant with an equal right to be in the home."); *Com. v. Commander*, 260 A.2d 773, 777 (Pa. 1970) ("where one free from fault in bringing on the difficulty is dangerously assaulted in his own dwelling by one not a member of the household, he need not retreat, but may stand his ground and meet deadly force with deadly force to save his own life or to protect himself from great bodily harm.").
 39. CAL. PENAL CODE § 197 (West, Westlaw through 2014 Reg. Sess.) (emphasis added).
 40. *Id.* (emphasis added).
 41. CALJIC No. 5.50 (West, Westlaw 2014) (emphasis added).
 42. Jeannie Suk, *The True Woman: Scenes from the Law of Self-Defense*, 31 HARV. J.L. & GENDER 237, 243 (2008); see, e.g., FLA. STAT. ANN. § 776.031 (West, Westlaw through 2014 2d Reg. Sess.) ("A person . . . does not have a duty to retreat . . . if the person . . . is in a

protected a defendant who stood his or her ground against an attacker only where the incident occurred within the defendant's home.

Perhaps the most significant way in which lawmakers expanded the doctrine was by creating a statutory presumption of reasonable fear when an intruder attacks a defendant in the defendant's own home. California Penal Code section 198.5 provides one example, as it creates a presumption of "a reasonable fear of imminent peril of death or great bodily injury to self, family, or a member of the household" in a person who uses force against an intruder who unlawfully and forcibly enters his or her residence.⁴³ This presumption, however, applies only when the intruder is "not a member of the family or household." *Id.*

Florida is notorious for the way in which it strengthened the right to stand one's ground by enacting affirmative SYG legislation.⁴⁴ Such affirmative legislation granted immunity from criminal prosecution and from civil liability, beyond merely providing a defense to such prosecutions and claims.⁴⁵ Pursuant to section 776.032 of the Florida Statutes, a person who uses force as permitted under Florida's self-defense laws, and who is justified in doing so, "is immune from criminal prosecution and civil action for the use of such force."⁴⁶

More than twenty states have adopted similar affirmative SYG laws.⁴⁷ This article examines the effects of this expansion and the shortcomings of the duty to retreat for women like Natasha, who use the only means available to save their lives, but who might otherwise lack protection from being re-victimized by the criminal justice system.

C. "Battered Woman's Syndrome" and the Survivor Theory: Competing Frameworks for Understanding Domestic Violence and Why Women in Abusive Relationships May Not Leave

There are two leading theories that attempt to explain why women remain in abusive relationships despite repeated instances of violence and why most survivors of domestic violence make several attempts to leave before ending the relationship for good.⁴⁸ Both theories arrive at the similar conclusion that any potential "opportunity" to retreat is unreasonable for women living in abusive

place where he or she has a right to be.").

43. CAL. PENAL CODE § 198.5 (West 2005).

44. "Affirmative" legislation is called such for its nature of creating a right, rather than carving out an exception or a defense. Throughout this piece, "affirmative SYG laws" refer to those laws that stand independent of the doctrines regarding justifiable homicide, and create immunity from criminal and civil liability.

45. See, e.g., FLA. STAT. ANN. § 776.032 (West 2005).

46. See *id.*

47. Zachary L. Weaver, Note, *Florida's "Stand Your Ground" Law: The Actual Effects and the Need for Clarification*, 63 U. MIAMI L. REV. 395, 397 (2008).

48. See, e.g., Walshe, *supra* note 1 ("Like many abused women, Natasha had made several attempts to escape the relationship, only to be brought back [by the boyfriend] to face harsher beatings and more death threats.").

relationships. However, they offer competing rationales as to whether women stay in abusive relationships because of psychological impairment⁴⁹ or because of a rational risk-assessment.⁵⁰

Dr. Lenore Walker developed the “Battered Woman’s Syndrome”⁵¹ (BWS) concept in 1979 in her controversial book *The Battered Woman*,⁵² to explain her theory on the psychological and behavioral effects of violence on women who remain in abusive relationships after repeated incidents of escalating violence.⁵³ There are two elements to BWS: first, the abusive relationship follows a cycle of violence; second, the victim exhibits symptoms of a phenomenon known as “learned helplessness.”⁵⁴ The learned helplessness theory hypothesizes the following principle:

If an organism experiences situations which cannot be controlled, then the motivation to try to respond to such events when they are repeated will be impaired. Even if, later on, the organism is able to make appropriate responses which do control events, the organism will have trouble believing that the responses are under its control and that they really do work.⁵⁵

American psychologist Martin Seligman hypothesized and tested⁵⁶ this learned helplessness theory by studying how dogs react to stress.⁵⁷ Seligman placed dogs in cages and administered repeated electric shocks at random.⁵⁸ The animals learned that they could not control the shock no matter how they responded, and this “noncontingent negative reinforcement” caused a loss in motivation to attempt escape, even though they had initially tried to escape.⁵⁹ The dogs “became compliant, passive, and submissive,” and even after the researchers left

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49. See generally LENORE E. WALKER, THE BATTERED WOMAN (1979).
 50. See EDWARD W. GONDOLF & ELLEN R. FISHER, BATTERED WOMEN AS SURVIVORS: AN ALTERNATIVE TO TREATING LEARNED HELPLESSNESS (4th ed. 1988).
 51. This term is no longer used in many jurisdictions. See, e.g., CAL. EVID. CODE § 1107 (using instead the phrase “intimate partner battering and its effects”). The National Institute of Justice released a report in 1996 urging all states to enact such changes in their statutes. See U.S. DEP’T OF JUSTICE, THE VALIDITY AND USE OF EVIDENCE CONCERNING BATTERING AND ITS EFFECTS IN CRIMINAL TRIALS (1996) [hereinafter BATTERING AND ITS EFFECT], available at <https://www.ncjrs.gov/pdffiles/batter.pdf>.
 52. See WALKER, *supra* note 49.
 53. Some women, of course, are separated from their partners only by death or incarceration.
 54. Melanie Frager Griffith, *Battered Woman Syndrome: A Tool for Batterers?*, 64 FORDHAM L. REV. 141, 165 (1995) (citing LENORE E. WALKER, TERRIFYING LOVE: WHY BATTERED WOMEN KILL AND HOW SOCIETY RESPONDS, 42, 50-51 (1989)).
 55. WALKER, *supra* note 49, at 44-45.
 56. This theory has been repeatedly tested on a variety of species, including cats, fish, rodents, birds, and humans, and the results support Dr. Walker’s theory that humans may react similarly to the dogs in the experiment (albeit a demoralizing application of the theory). *Id.*
 57. WALKER, *supra* note 49, at 45-47.
 58. *Id.* at 46. This degree of animal abuse would not likely be permitted under ethical standards for scientific research today.
 59. *Id.*

the cage door open, the dogs did not attempt to escape or avoid the shocks.⁶⁰ It took repeated dragging of the dogs to the exit to teach them how to respond voluntarily again.⁶¹

Walker adopts the theory of learned helplessness to describe how women respond to repeated abuse. According to Walker, battered women's behavior can be understood in this way because the women similarly endure repeated brutal attacks, often at random, and there is nothing they can do to end the violence.⁶² Women who have learned to expect battering have learned they cannot influence its occurrence or nonoccurrence, often impeding the ability to appreciate other options.⁶³ This feeling of powerlessness results in women staying with their abusive partners in order to retain some hope of control, even if this means controlling the mere time and place of the inevitable beatings.⁶⁴ Walker further theorizes that, because battered women do not believe their behavior could deter the abuse, they often feel less anxiety remaining in the relationship than they would feel if they attempted to leave and live apart from their abuser.⁶⁵

Scholars have vehemently criticized Walker's concept of BWS, and its learned helplessness component in particular, for portraying a stereotypic image of battered women as helpless, passive, or psychologically impaired, who can successfully escape their situation only if they are dragged out of their virtual cages.⁶⁶ Each battered woman is unique, and perpetuating a stereotypic image of such a person inaccurately conflates a diverse population.⁶⁷ Likewise, abusive relationships do not match a uniform pattern.⁶⁸ Criticism also stems from the "syndrome" terminology Walker uses, which carries a connotation of pathology or disease and creates the false perception that a battered woman suffers from a mental disorder,⁶⁹ when the focus for correction ought to be placed on the batterer, whose behavior is contrary to both morality and the law.⁷⁰

Sociologists Edward Gondolf and Ellen Fisher have developed an alternative theory to BWS, which they call the "Survivor Theory," to explain the

60. *Id.*

61. *Id.*

62. *Id.* at 45; see also Sarah M. Buel, *Fifty Obstacles to Leaving, A.K.A., Why Victims Stay*, 28 COLO. LAW. 19 (1999) (presenting a list of fifty reasons why domestic violence victims stay in the relationship, based on the experiences of the author's clients, as well as her own).

63. WALKER, *supra* note 49, at 45; but see *infra* Part I.D (detailing that survivors may also stay because they lack financial and community resources, or because leaving may escalate the violence).

64. WALKER, *supra* note 49, at 52-53.

65. *Id.*

66. See, e.g., & FISHER, *supra* note 50.

67. *See id.*

68. *Id.*; see also BATTERING AND ITS EFFECT, *supra* note 51.

69. BATTERING AND ITS EFFECT, *supra* note 51.

70. The law prohibits beating any person, particularly an intimate partner. See, e.g., CAL. PENAL CODE § 273.5(a) ("Any person who willfully inflicts corporal injury resulting in a traumatic condition upon a victim described in subdivision (b) is guilty of a felony . . .").

behavior of women subjected to abuse in a way that does not portray a narrow image of battered women as passive and helpless victims.⁷¹ Leigh Goodmark explains the Survivor Theory as follows:

[The Survivor Theory] recast[s] the battered woman as a survivor who actively takes measures to protect herself and her children from within the relationship, rather than the passive victim immobilized by the failure of past efforts to forestall the violence and unable to leave her abuser. 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.⁷²

This approach underscores the difficulty a woman in an abusive relationship faces in finding safety outside the home, not because she has given up on attempting to escape based on a history of failed attempts,⁷³ but rather because she has made a conscious and fact-based determination that remaining in the relationship provides a higher chance of short-term safety.⁷⁴ Additionally, the community resources available to her may not be adequate to improve her long-term safety.⁷⁵

D. “Why Doesn’t She Just Leave?” (Separation Assault and the Lack of Resources)

There are numerous reasons⁷⁶ why a woman in an abusive relationship does not “just leave” both during times of an attack and when there is a lull in the violence, such as when the abuser is sleeping or out of the house. Some common reasons for her decision to not leave include: lack of financial resources, lack of community resources available to her, and the risk that separation from her partner will escalate the violence.⁷⁷ Even if she were able to run out the front door and away from the batterer’s imminent physical strikes, “[w]here will she go if she has no money, no transportation, and if her children are left behind in the ‘care’ of an enraged man?”⁷⁸

The Survivor Theory explains that women who have been repeatedly abused in their own homes might be well aware that “retreating” from the home

71. See generally GONDOLF & FISHER, *supra* note 50.

72. Leigh Goodmark, *When is a Battered Woman Not a Battered Woman? When She Fights Back*, 20 Yale J.L. & Feminism 75, 85 (2008).

73. *Contra* WALKER, *supra* note 49; see Walshe, *supra* note 1.

74. See *infra* Part II.D.

75. *Id.*

76. See Buel, *supra* note 62.

77. See Walshe, *supra* note 1. This is, by no means, an exhaustive list. See Buel, *supra* note 62. These are merely reasons commonly recognized by the courts and the most relevant to the following discussion.

78. State v. Thomas, 673 N.E.2d 1339, 1343 (Ohio 1997).

would not make her safer, but in fact, would likely cause the violence to escalate.⁷⁹ In other words, a battered woman's experience may lead her to make the statistically-accurate assessment that violence will only escalate upon separation from her partner.⁸⁰ Studies show that women who leave abusive relationships face a greater risk of harm than if they remained in the relationship due to the heightened likelihood of attack after separation.⁸¹ The harm from separation assault could be lethal, as “[t]he batterer would often rather kill, or die himself, than separate from the battered woman.”⁸² Indeed, a batterer is seventy-five percent more likely to murder a victim who flees than one who stays.⁸³ A California study that reviewed domestic homicide cases found that forty-five percent of women homicide victims were killed when they were recently separated or in the process of separating from their abuser.⁸⁴ Similarly, a San Diego report states that pending or actual separation was the most common risk factor for domestic homicide.⁸⁵ Interestingly, separation has been identified as a risk factor for domestic homicide even in relationships where there is no documented history of abuse.⁸⁶ Even where a survivor of abuse obtains a restraining order against the abuser, such an order is sometimes no more effective in deterring a batterer than the paper on which it is written.⁸⁷

Apart from the above-mentioned dangers of separation assault, the lack of community resources often makes the option of leaving the relationship effectively impossible. Financial dependence on the abuser makes it difficult for a woman to temporarily or permanently leave her abuser.⁸⁸ In addition, abusers

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79. See Hart, *National Estimates and Facts About Domestic Violence*, VOICE, Winter 1989, at 12.
 80. *Id.*
 81. Molly Dragiewicz & Yvonne Lindgren, *The Gendered Nature of Domestic Violence: Statistical Data for Lawyers Considering Equal Protection Analysis*, 17 AM. U. J. GENDER SOC. POL'Y & L. 229, 255 (2009) (“A larger portion of domestic homicides are likely properly conceived as separation assault in cases occurring during separation but prior to divorce, or at the time a woman announces her intention to separate. A California study that reviewed domestic homicide cases found that 45% of women were killed when they were recently separated or in the process of separating from their abuser.”).
 82. WALKER, *supra* note 49, at 50-51.
 83. Buel, *supra* note 62.
 84. Dragiewicz & Lindgren, *supra* note 81.
 85. *Id.*
 86. *Id.* (“In 49% of our surveyed murder cases involving a non-abusive relationship, the victim had recently separated herself from the perpetrator, the perpetrator suspected the victim was having an affair or was jealous of a new intimate relationship and/or the perpetrator was experiencing serious financial difficulties.”)
 87. Walshe, *supra* note 1 (“[R]estraining orders and such are about as effective as the paper they're written on, when it comes to deterring a determined batterer . . .”).
 88. Tamara L. Kuennen, *Analyzing the Impact of Coercion on Domestic Violence Victims: How Much Is Too Much?*, 22 Berkeley J. Gender L. & Just. 2, 4-5 (2007) (“[F]inancial pressure is one of the most prevalent means used by batterers to control victims, and has been found to be a primary reason victims do not separate from batterers.”); see Buel, *supra* note 62; WALKER, *supra* note 49, at 52; Walshe, *supra* note 1 (“[L]eaving is financially impossible, especially when there are children involved . . .”).

often control their partners financially by forbidding their partners from opening their own bank account, managing their money, earning money, or having any access to financial resources.⁸⁹ Societal factors also play a role in women having fewer economic resources, such as women's persistently lower income and greater participation in childcare.⁹⁰

Additionally, a domestic violence survivor's isolation from her friends and family—often an element of the abuse⁹¹—reduces or eliminates the number of places to where she can retreat in order to live safely for the short term.⁹² While staying at a shelter seems like a viable option, she may still face several obstacles, such as: lack of shelter availability, especially in rural areas; inability to gain transportation to the shelter; lack of cultural competence on the part of the shelter staff; and language barriers between herself and the shelter staff.⁹³

Furthermore, these “options” provide only temporary relief from danger. A survivor often lacks the necessary education, experience, and/or financial resources to earn a living to support herself (and often her children) in the long term.⁹⁴ In the 1980s and 1990s, courts began to explicitly recognize these significant barriers to a woman's freedom to retreat, which may put her in the unavoidable situation where she must use force in order to save her life.⁹⁵ As courts became familiar with the plight of domestic violence survivors, the SYG

- 89. Susan L. Pollet, *Economic Abuse: The Unseen Side of Domestic Violence*, N.Y. St. B.J., February 2011, at 40-41; Maria L. Imperial, Self-Sufficiency and Safety: Welfare Reform For Victims of Domestic Violence, 5 Geo. J. on Fighting Poverty 3, 10 (1997) (discussing how batterers sabotage their victims' ability to obtain an education, job training, and to maintain a job), *See also Domestic Violence Facts (“Power and Control Wheel”)*, NATIONAL COALITION AGAINST DOMESTIC VIOLENCE (NCADV), available at [http://www.ncadv.org/files/DomesticViolenceFactSheet\(National\).pdf](http://www.ncadv.org/files/DomesticViolenceFactSheet(National).pdf) (last visited Nov. 23, 2014) (“Economic Abuse: Preventing her from getting or keeping a job. Making her ask for money. Giving her an allowance. Taking her money. Not letting her know about or have access to family members.”).
- 90. Dragiewicz & Lindgren, *supra* note 81, at 244-45; *see generally* Robert H. Cohen, *Pay-Equity: A Child of the 80s Grows Up*, 63 FORDHAM L. REV. 1461 (1995) (discussing wage disparities between men and women).
- 91. Orly Rachmilovitz, *Bringing Down the Bedroom Walls: Emphasizing Substance over Form in Personalized Abuse*, 14 Wm. & Mary J. Women & L. 495, 507 (2008); *see also Power and Control Wheel*, *supra* note 89.
- 92. Buel, *supra* note 62.
- 93. *See, e.g.*, Pamela L. Mulder & Alice F. Chang, *Domestic Violence in Rural Communities: A Literature Review and Discussion*, J. RURAL COMMUNITY PSYCHOL. (1997), http://www.marshall.edu/jrcp/vole1/vol_e1_1/Mulder_Chang.html (“[Domestic violence] [v]ictims who seek assistance in rural areas are hampered by the lack of adequate services. . . . [E]mergency shelters are usually few in number and are typically difficult to access because of distance or other geographic barriers. Rural service agencies often lack funding and tend to be staffed by less qualified personnel than those in more urban regions”); Walshe, *supra* note 1 (discussing how shelters are often full).
- 94. Such educational and financial barriers are often a product of the abuse itself (stemming from financial manipulation, reproductive abuse, isolation from the community, etc.). *See* Imperial, *supra* note 89, at 10; Pollet, *supra* note 89, at 40-41; Rachmilovitz, *supra* note 91, at 507.
- 95. *See infra*, Part II.A (discussing the evolving law in this area).

laws—as they applied to attacks by cohabitants—have changed in important ways. This is the subject of Part II.

II. HOW STAND YOUR GROUND LAWS AFFECT SURVIVORS OF DOMESTIC VIOLENCE WHO KILL THEIR ABUSERS AS THE ONLY MEANS FOR PROTECTING THEIR LIVES

A. The Application of Stand Your Ground Laws to Women Who Defend Against an Attack from a Cohabitant

Some SYG jurisdictions have limited the application of the defense to only those situations where an *intruder* attacked the defendant, depriving domestic violence survivors of the SYG privilege when their attacker is an intimate partner or a cohabitant. For example, in *State v. Bobbitt*, the Supreme Court of Florida did not apply the SYG privilege to the defendant because her attacker was her co-occupant husband.⁹⁶ The court said that the castle doctrine did not apply because the defendant's husband had an equal right to be in the home, thus basing its decision on the principles of property rights rather than her reasonable fear for her life.⁹⁷ The court reasoned that, in SYG's original applications, legislatures considered attacks only from external aggressors,⁹⁸ and presumably, that legislative intent should be honored. The court validates this distinction by analogizing to an altercation between a mother and son in the kitchen, and “see[s] no reason why [the] mother should not retreat.”⁹⁹ Requiring the mother to retreat would not render her defenseless, they argue, because she would still be justified in using violence if retreat were not safely possible.¹⁰⁰

Justice Overton's dissenting opinion in *Bobbitt* explains that the majority created “artificial legal distinctions and disparate results.”¹⁰¹ He stated that distinguishing between an intruder and a cohabitант “does not recognize the realities of life.”¹⁰² He proposed a limited duty to retreat as “an appropriate middle ground that recognizes both the duty to retreat and the sanctity of the home.”¹⁰³ Overton’s ideal doctrine would require a defendant who “was attacked in [his/her] own home, or on [his/her] own premises, by a cotenant, family member, or invitee . . . to retreat to the extent reasonably possible *but is not*

96. *State v. Bobbitt*, 415 So. 2d 724, 726 (Fla. 1982) (holding 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”).

97. *See id.*

98. *Id.*

99. *Id.*

100. *Id.*

101. *Id.* at 728 (Overton, J., dissenting).

102. *Id.*

103. *Id.*

*required to flee [his/her] home and has the lawful right to stand [his/her] ground*¹⁰⁴

A statute such as this would not require a survivor of domestic violence to flee from her home when attacked by a co-tenant, but it unwarrantedly assumes that she could reach safety by going into another room of the house. While her retreat to another room may, in some instances, stop or temporarily cease the violence, nothing prevents the assailant from following her to another room and recommencing the attack. Furthermore, this hypothetical statute could prove detrimental to any woman who killed her abuser when the altercation took place entirely in one room, or where she did not first try to flee to each room in the house until finally responding with lethal force. Overton criticized the majority for failing to “recognize the realities of life,” while creating a hypothetical law that seems to senselessly do the same.¹⁰⁵

Seventeen years after the *Bobbitt* decision, the Supreme Court of Florida, in *Weiand v. State*, adopted Overton’s dissent as new authority.¹⁰⁶ The defendant in *Weiand* shot her husband during a violent argument in their apartment.¹⁰⁷ The defendant asserted self-defense, testifying that her husband had beaten and choked¹⁰⁸ her throughout their relationship, and had threatened further violence if she left him.¹⁰⁹ The court did not deny her the privilege to stand her ground even though her husband had an equal right to be in the home. It stated two reasons for not following *Bobbitt*:

First, we can no longer agree with *Bobbitt*’s minority view that relies on concepts of property law and possessory rights to impose a duty to retreat from the residence. Second, based on our increased understanding of the plight of victims of domestic violence in the years since our decision in *Bobbitt*, we find that there are sound policy reasons for not imposing a duty to retreat from the residence when a defendant resorts to deadly force in self-defense against a co-occupant.¹¹⁰

The court went on to note that its increased understanding of the plight of domestic violence victims includes the fact that the attacks are repeated over time, making escape from the home without the risk of great bodily harm or death nearly impossible.¹¹¹

104. *Id.* (emphasis added).

105. *See id.*

106. *Weiand v. State*, 732 So. 2d 1044, 1048 (Fla. 1999) (holding that the defendant had no duty to retreat if attacked in her own home, though not adopting Overton’s middle-ground doctrine that would require a defendant to retreat only to another room in the home).

107. *Id.*

108. This type of violence can also be described as non-fatal strangulation.

109. *Weiand*, 732 So. 2d at 1048.

110. *Id.* at 1051 (internal citations omitted).

111. *Id.* at 1053.

The *Weiand* court explained that imposing the duty to retreat on a battered woman “who finds herself the target of a unilateral, unprovoked attack in her own home is inherently unfair.”¹¹² Upholding the distinction between intruder and cohabitant would unfairly disadvantage her where “as long as it is a stranger who attacks her in her home, she has a right to fight back and labors under no duty to retreat,” but she must retreat “if the attacker is her husband or live-in partner.”¹¹³ This result is senseless, as “[t]he threat of death or serious bodily injury may be just as real (and, statistically, is more real) when her husband or partner attacks her in home [sic].”¹¹⁴ The court thereby recognized that a woman in an abusive relationship has learned that safe retreat is not possible, because “during repeated instances of past abuse, she has ‘retreated,’ only to be caught, dragged back inside, and severely beaten again.”¹¹⁵

This decision, following a growing majority of jurisdictions,¹¹⁶ took an appropriately progressive step toward justice for battered defendants. The above analysis underscores that court’s appreciation of domestic violence survivors’ real, and not-so-real, options for retreat. As such, the legal system has begun to recognize the right of battered defendants to use force even if the attacker is a cohabitant.

In subsequent years, other jurisdictions followed Florida in abolishing the distinction between an intruder and co-occupant when evaluating whether the defendant could invoke the SYG defense.¹¹⁷ For example, the Supreme Court of Minnesota justified its decision to no longer distinguish an intruder from a cohabitant by recognizing the impossible decision a domestic violence survivor faces.¹¹⁸ She is “forced to choose between staying in the home and acquiescing to the abuse[;] staying in the home and defending herself, knowing that she will not have a legal defense under the law[;] or abandoning her children and retreating.”¹¹⁹

112. *Id.* (citing State v. Gartland, 694 A.2d 456, 570-71 (N.J. 1997) (quoting Maryanne E. Kampmann, *The Legal Victimization of Battered Women*, 15 WOMEN’S RTS. L. REP. 101, 112-113 (1993))).

113. *Id.*

114. *Id.*

115. *Id.; see also* Walshe, *supra* note 1. Furthermore, even “if she manages to escape, other hurdles confront her. Where will she go if she has no money, no transportation, and if her children are left behind in the ‘care’ of an enraged man?” *Weiand*, 732 So. 2d at 1053.

116. See State v. Thomas, 673 N.E.2d 1339, 1343 (Ohio 1997) (“The majority of jurisdictions in the United States have held that there is no duty to retreat when one is attacked in one’s own home, regardless of whether or not the assailant has a right to be in the home equal to that of the one being assailed.”).

117. See, e.g., State v. Glowacki, 630 N.W.2d 392 (Minn. 2001); State v. Harden, 679 S.E.2d 628, 631 (W. Va. 2009). When Nebraska followed the trend, the court emphasized the logic underlying the decision in *Weiand*, and embraced the new rule as the sensible way to uniformly apply the duty to retreat doctrine. See State v. White, 819 N.W.2d 473, 476 (Neb. Ct. App. 2012).

118. *Glowacki*, 630 N.W.2d at 392.

119. *Id.*

Other courts chose to follow precedent that upheld the distinction between cohabitants and intruders, but urged legislatures to revise the doctrine to abolish the distinction.¹²⁰ For example, recognizing that the judiciary has no power to define crimes and provide for their punishment,¹²¹ the Supreme Court of New Jersey “commend[ed] to the legislature consideration of the application of the retreat doctrine in the case of a spouse battered in her own home.”¹²² Responsive to this request, the New Jersey Legislature proposed a revision to eliminate the duty to retreat in all cases where the person was in his or her own home and was not the initial aggressor. The New Jersey Assembly Judiciary Committee Statement explained the provisions of the introduced bill:

The Senate bill as introduced, would have provided that a person who has been the victim of domestic violence who is attacked by a cohabitant spouse or cohabitant household member has no duty to retreat in the shared dwelling. As amended by the Senate Judiciary Committee, this bill now provides that the duty to retreat by a person attacked in the person’s home would be eliminated in all cases except if the person instigated the altercation.¹²³

New Jersey revisions to this doctrine are currently pending.¹²⁴

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 SYG even where their actions should be justified.

B. Do Affirmative Stand Your Ground Laws Effectively Shield Survivors of Domestic Violence from Unjustified Prosecution?

SYG laws provide defendants not only with a legal defense for homicide, particularly in refuting that abused women had a duty to retreat, but they have also been expanded to grant immunity from civil and criminal liability.¹²⁵ For example, section 776.032 of the Florida Statutes provides that a person who is permitted to use deadly force receives immunity from “criminal prosecution and civil action for the use of such force.”¹²⁶ This immunity includes immunity from arrest, detention in custody, and charges or prosecution of the individual for

120. State v. Gartland, 694 A.2d 456, 470 (N.J. 1997).

121. *Id.* at 571 (quoting State v. Cannon, 128 608 A.2d 341, 348 (N.J. 1992)).

122. *Id.* at 470.

123. *Id.*

124. Assemb. B. 1579, 216th Leg., Reg. Sess. (N.J. 2014)

125. See, e.g., Abby Goodnough, *Florida Expands Right To Use Deadly Force in Self-Defense*, N.Y. TIMES, Apr. 27, 2005, at A18; Larry Keller, *Self-Defense Law Troubles Prosecutor*, PALM BEACH POST, June 27, 2007, at 1B; Adam Liptak, *15 States Expand Right To Shoot in Self-Defense*, N.Y. TIMES, Aug. 7, 2006, at A1.

126. FLA. STAT. ANN. § 776.032 (West, Westlaw through 2014 2d Reg. Sess.)

using deadly force.¹²⁷

The immunity clause does seem to be reducing the number of cases charged by the prosecutor.¹²⁸ Russell Smith, president-elect of the Florida Association of Criminal Defense Lawyers, stated that “the real impact [of the law] has been that it’s making filing decisions difficult for prosecutors. It’s causing cases to not be filed at all or to be filed with reduced charges.”¹²⁹

The case in which Jacqueline Galas, a sex worker, shot and killed her longtime client, Frank Labieto, made headlines in Florida after prosecutors decided not to charge Galas.¹³⁰ Labiento pointed a gun at Galas, threatening to kill her.¹³¹ She was able to calm him down enough for him to set the gun on the table.¹³² When the phone rang, Labiento got up to answer it, and Galas picked up the gun.¹³³ When Labiento came towards her in a threatening manner, she shot him in the chest.¹³⁴ The altercation took place in Labiento’s residence.¹³⁵ Though prosecutors initially charged Galas with second-degree murder, they dropped the charge after further review of the facts.¹³⁶ Assistant State Attorney Michael Halkitis stated that the decision whether to prosecute Galas would have been much more difficult before the passage (eight months prior) of the new Florida statute,¹³⁷ which granted immunity from prosecution and did not impose the duty to retreat before using deadly force.¹³⁸

While the Galas’ example is not an anomaly,¹³⁹ “[t]he assertion that the law acts more as a bar to prosecution than a defense cannot be fully substantiated because statistics on the number of self-defense claims statewide, either before or after the law took effect, are not available.”¹⁴⁰ Additionally, the law could function as a bargaining chip, motivating the prosecutor to bring a lesser charge

127. *Id.*

128. See J. Taylor Rushing, *Deadly-Force Law Has an Effect, but Florida Hasn’t Become the Wild West; State Attorneys Say It Makes Filing Charges More Difficult for Prosecutors*, FLA. TIMES-UNION (July 10, 2006), http://jacksonville.com/tu-online/stories/071006/met_22294481.shtml.

129. *Id.*

130. See, e.g., *Florida’s Stand Your Ground Law*, TAMPA BAY TIMES, http://www.tampabay.com/stand-your-ground-law/cases/case_91 (last updated Aug. 10, 2013); David Sommer, *Prosecutors Drop Murder Charge Against Prostitute*, TAMPA TRIB., July 27, 2006, at 15.

131. *Florida’s Stand Your Ground Law*, *supra* note 130; see also Weaver, *supra* note 47, at 412.

132. *Florida’s Stand Your Ground Law*, *supra* note 130.

133. *Id.*

134. Weaver, *supra* note 47, at 411 (citing Sommer, *supra* note 130).

135. *Id.*

136. *Id.*

137. FLA. STAT. ANN. § 776.031 (West, Westlaw through 2014 2d Reg. Sess.).

138. Weaver, *supra* note 47 (citing Liptak, *supra* note 125).

139. *Id.* at 410-17 (describing several other cases where prosecutors chose not to bring charges against a shooter, based on the SYG laws).

140. *Id.* at 407 (citing Henry Pierson Curtis, *Gun Law Triggers at Least 13 Shootings*, ORLANDO SENTINEL, June 11, 2006, at A1.).

in hopes of securing a conviction.¹⁴¹ In any case, prosecutors' decisions not to bring charges against a shooter could help protect women who kill their abusers. This immunity from prosecution is especially significant for women, a population that otherwise would be judged by fact finder(s) who will likely determine a victim's "reasonableness" through a gender-biased lens.¹⁴²

C. If Prosecuted, Fact Finders' Implicit Gender Biases Deprive Battered Defendants of Equal Treatment Under the Law

When domestic violence survivors are prosecuted, they must rely on the perceptions of often-merciless fact finders, who impose their gender biases and misogynistic principles into the analysis of whether a battered woman acted "reasonably."

Every case where a defendant asserts the SYG privilege involves a determination by the fact finder of what a hypothetical "reasonable person" would do under the circumstances.¹⁴³ Glowacki describes this principle:

[T]he lack of a duty to retreat does not abrogate the obligation to act reasonably when using force in self-defense. Therefore, in all situations in which a party claims self-defense, even absent a duty to retreat, the key inquiry will still be into the *reasonableness* of the use of force and the level of force under the specific circumstances of each case.¹⁴⁴

The prosecution of many crimes requires jurors to apply a basic standard of reasonableness, but the way in which the "reasonable person" standard is applied is particularly harsh for women.¹⁴⁵ The doctrine was clearly established with the reasonable *man* in mind¹⁴⁶ when it emerged in nineteenth-century England.¹⁴⁷

141. See *id.* at 407.

142. See *infra* Part II.C.

143. See, e.g., FLA. STAT. ANN. § 776.012 (West, Westlaw through 2014 2d Reg. Sess.) ("A person is justified in using or threatening to use deadly force if he or she reasonably believes that using or threatening to use such force is necessary . . ."); State v. Bottenfield, 692 S.W.2d 447, 452 (Tenn. Crim. App. 1985) ("A person is under no duty to retreat in his own home, even if he can safely do so, but may stand his ground and use *reasonable* force . . ."); CALJIC No. 5.50 (West, Westlaw 2014) ("A person threatened with an attack that justifies the exercise of the right of self-defense . . . may stand [his] [her] ground and defend [himself] [herself] by the use of all force and means which would appear to be necessary to a *reasonable* person in a similar situation and with similar knowledge; and a person may pursue [his] [her] assailant until [he] [she] has secured [himself] [herself] from danger if that course likewise appears *reasonably* necessary." (emphasis added)).

144. State v. Glowacki, 630 N.W.2d 392, 402 (Minn. 2001).

145. Antonia Elise Miller, *Inherent (Gender) Unreasonableness of the Concept of Reasonableness in the Context of Manslaughter Committed in the Heat of Passion*, 17 WM. & MARY J. WOMEN & L. 249, 250-51 (2010) (describing how the "genderized" reasonable man standard is particularly harsh for women perpetrators who kill their intimate partners in the "heat of passion").

146. Wendy Keller, *Disparate Treatment of Spouse Murder Defendants*, 6 S. CAL. REV. L. & WOMEN'S STUD. 255, 265 (1996).

Criminal law “has been developed by male common law judges, codified by male legislators, enforced by male police officers, and interpreted by male judges and juries,”¹⁴⁸ and as such, the reasonableness standard is analyzed within the framework of male normativity.

This framework has resulted in more than a century of discrimination toward women.¹⁴⁹ Historically, “[i]t was commonly held that the standard did not apply to female defendants, who were thought to be incapable of reasonable, rational thought.”¹⁵⁰ Though gender biases have become more covert, societal stereotypes and prescribed gender roles continue to inform jurors’ consideration of the reasonableness of a woman defendant’s actions.¹⁵¹ Judges may treat women more harshly, based on the view that there is “a greater discrepancy between the female offender’s behavior and the expected behavior of women than between a male offender’s behavior and the expected behavior of men.”¹⁵² In other words, violent acts are further removed from the expected behavior of “passive” or “virtuous” women, and thus, seen as less reasonable than identical acts performed by men. One further bias that disadvantages women is the misogynistic view that women are “regarded as inherently less credible than men and . . . are frequently the targets for the most callous sort of victim blaming.”¹⁵³ This is especially true for women of color, whose intersectional identities of gender, race, and socioeconomic status (among others) cause them to experience a heightened degree of oppression.

Although the use of the word “person” creates a façade of gender neutrality,¹⁵⁴ the legal community continues to hold women to a standard of reasonableness clearly rooted in the male experience.¹⁵⁵ Changing a word does not instantaneously eliminate the gender-biased worldview through which judges and juries operate. A large number of judges continue to hold negative biases against women,¹⁵⁶ which often leads to extremely harsh sentences for women in comparison to their male counterparts.¹⁵⁷ To illustrate: women who kill their intimate partners receive longer prison sentences on average, ranging from fifteen to twenty years in state prison, as compared to only two to six years for male defendants who kill their intimate partners.¹⁵⁸ Allowing women to serve on

147. Miller, *supra* note 145, at 265.

148. *Id.* at 254.

149. *See id.* at 265.

150. *Id.* at 265.

151. *See id.* at 251.

152. *See* Keller, *supra* note 146, at 270; *see also* Miller, *supra* note 145, at 255.

153. Keller, *supra* note 146, at 268.

154. *See* Miller, *supra* note 145, at 265.

155. *Id.* at 265; *see also* Keller, *supra* note 146, at 265.

156. Keller, *supra* note 146, at 267.

157. *Id.* at 270 (“[Gender bias] leads women to receive either extremely light or extremely harsh sentences in comparison to their male counterparts . . .”).

158. *See* Nancy Gibbs, ‘Til Death Do Us Part, TIME, Jan. 18, 1993, at 38 (referring to estimates

juries did not mitigate the effects of gender bias, as gender stereotypes condoning male dominance and aggression are so pervasive that women, too, project them.¹⁵⁹ Jurors may not even be aware of their own gender biases because the biases are so “deeply ingrained in societal norms.”¹⁶⁰

D. Fact Finders’ Victim-Blaming Mentality Grossly Distorts Their Understanding of “The Circumstances” of the Homicide

Stereotypes surrounding abuse compound the harms that gender bias visits on female defendants. A fact finder’s internalized myths and misunderstandings regarding the circumstances of domestic violence distorts their analysis of what a reasonable person would do in the defendant’s position, given the specific circumstances of the case.¹⁶¹

The problem with granting a judge or jury the power to determine what is “reasonable” in circumstances as dynamic and misunderstood as domestic abuse is that fact finders impose the reasonableness analysis on the survivor’s decision to stay in the relationship, rather than weighing the reasonableness of her actions at the moment when she uses lethal force in self-defense. Fact finders consider often-horrendous facts as an indicator that the defendant should have retreated from the relationship prior to the instance of deadly violence in question.¹⁶² When asked what a reasonable person would do, judges and jurors may believe that “a reasonable person would have left long ago.” This misinformed dialogue continues: “If she would have done the reasonable thing, she would not have

by the National Coalition Against Domestic Violence); *but see* Keller, *supra* note 146 at 257-58 (“[E]mpirical studies of sex disparities in sentencing commonly conclude that women spend less time in prison than men for committing identical crimes. However, scholars have criticized these studies on several grounds: (1) the studies commonly lack controls for legally relevant variables such as prior criminal record and offense severity; (2) variance between the sexes may depend on whether sentence severity is measured by the decision to incarcerate or by comparing sentence lengths; and (3) terms such as “violence” are often inadequately defined and aspects of criminality, such as motive, are generally not explored . . .”).

159. Miller, *supra* note 145, at 255-56 (“[W]hen making decisions, juries as a whole seem to rely on gender stereotypes that dictate that it is reasonable for a man to react hastily when he learns about his wife’s acts of adultery, suggesting that gender stereotypes condoning male dominance and aggression are so pervasive that they are internalized by both male and female jurors.”).
160. *Id.* at 266.
161. See e.g., People v. Humphrey, 921 P.2d 1, 7 (Cal. 1996) (“Although the ultimate test of reasonableness is objective, in determining whether a reasonable person *in defendant’s position* would have believed in the need to defend, the jury must consider all of the relevant circumstances in which defendant found herself.” (emphasis added)); State v. Glowacki, 630 N.W.2d 392, 402 (Minn. 2001) (“[E]ven absent a duty to retreat, the key inquiry will still be into the reasonableness of the use of force and the level of force *under the specific circumstances of each case.*” (emphasis added)).
162. Keller, *supra* note 146, at 266 (“Some have confused this duty to retreat with the notion that a woman should have left the relationship rather than use deadly force to prevent further attacks by an abusive mate.”)

placed herself in the current instance of violence.” Consequently, the conclusion is that she is to blame for not acting reasonably, even if, in the instance in question, she acted lawfully in defending herself. By engaging in this type of victim blaming, fact finders distort the duty to retreat doctrine to apply to the relationship as a whole, rather than the instance of violence at issue.¹⁶³ And since it is not commonly understood why she did not leave the relationship,¹⁶⁴ the reasonableness standard operates as a bar to justifying her violent act(s) as a necessity for survival.

The frameworks that BWS and the Survivor Theory provide for understanding “reasonableness” do not adequately address or remedy this problem. Though BWS has been successful in aiding courts in an objective analysis of a survivor’s “reasonableness” under the circumstances,¹⁶⁵ a theory so widely criticized for its disempowering and stigmatizing effect should not permeate the judicial system as the dominant tool for battered defendants.¹⁶⁶ Additionally, while the Survivor Theory can explain why a defendant did not leave the relationship sooner—which can be helpful in educating the fact finder and removing social stigma—it is important to ensure that the defendant’s decision to remain in the relationship does not negate the reasonableness of her fear at the moment she uses lethal force in self-defense.

III. PROPOSED SOLUTIONS: THE RIGHT TO STAND YOUR GROUND IN YOUR HOME OR PLACE OF DWELLING, AND IMMUNITY FROM PROSECUTION

Self-defense is a basic right that a survivor of domestic violence often does not receive. After years (and sometimes a lifetime) of abuse, she is well aware of whom to fear and how best to preserve her safety. If her batterer threatens her life to the extent that her survival demands lethal force, a society that accepts the basic notion of justifiable self-defense cannot criminalize her conduct. The law ought to reflect such a principle.

A. Stand Your Ground Laws Should Grant Immunity So Survivors of Domestic Violence Do Not Become “Defendants”

Affirmative SYG laws provide necessary protection for women in abusive relationships so that they do not become defendants in a criminal prosecution.

163. See *id.* (“As a result [of confusing the duty to retreat with the notion that a woman should have left the relationship rather than use deadly force to prevent further attacks by an abusive mate], if it is not understood why the woman remained in the relationship, and the duty to retreat is not limited to its proper scope, the use of deadly force by a woman may be viewed as excessive.”)

164. See *supra* Part II.D.

165. Griffith, *supra* note 54, at 180 (“[B]attered woman syndrome is the most often judicially recognized theory on the psychological impact of domestic abuse . . .”); *Id.* at 174 (“[A]ll fifty states have allowed battered woman syndrome evidence to be admitted in court . . .”).

166. See generally GONDOLF & FISHER, *supra* note 50; Griffith, *supra* note 54.

Why further victimize a woman through the criminal justice system when a batterer has already subjected her to extreme violence and abuse? While prosecutors have near-absolute discretion in deciding whether to bring a charge, an immunity law gives them a legal leg upon which to stand in justifying their decision not to charge in this type of case. Of course, if there is a legitimate question as to whether the decedent was abusive, or whether the moment in question required lethal force, an immunity law would not come into effect. Affirmative SYG would merely have a “pre-screening” purpose, requiring prosecutors to critically analyze a battered defendant’s self-defense assertion before having her arrested and forcing her to prove this defense in court.

Immunity from prosecution would be especially important for survivors of domestic violence, who often have children to care for at home. An immunity statute could spare a survivor the trauma and stresses of going through the criminal justice system, while also sparing her children the trauma of being separated from their mother.

Additionally, without immunity, the woman might be pressured to negotiate for a favorable, but unfair, plea bargain. She may choose to plea rather than risk a more adverse result through trial, even when she is not morally culpable of the offense. In order to avoid risking her children’s safety while left in the custody of some other person, or of the state, she may rationally conclude that agreeing to a plea bargain would be the best way to ensure the safety of her family, even if she believes she has a fair chance of acquittal at trial.

B. The Law Should Permit Battered Defendants to Benefit from Stand Your Ground Laws Regardless of the Attacker’s Property Rights

The definition of “dwelling” should not be limited to a place that a battered woman has the exclusive right to occupy, so as to grant the right to stand one’s ground to a person despite the attacker’s status as an intruder, spouse, or anyone in between. As a practical matter, providing such a strict definition of “dwelling” would eliminate protection for married women, for those who jointly rent or own with their intimate partner, and for those who live in a place where the batterer has sole legal possession.

Extending the definition of “dwelling” to include places where someone is temporarily housed, rents the space, or shares space with the sole owner accurately represents society’s understanding of what should constitute one’s home for purposes of establishing one’s ultimate place of safe retreat. The purpose of the duty to retreat is to impose the obligation to seek safety elsewhere before resorting to violence. Originally, the law imposed the duty to “flee to a river he could not swim or a wall he could not climb before turning to kill.”¹⁶⁷ Premised on the idea that the home offers a person the safety and security that

167. Taylor, *supra* note 32.

retreat is intended to provide, expanding the definition of “dwelling” justifies the use of deadly force when attacked in one’s home. In other words, in one’s home, one has already “fled to the wall,” and our society generally agrees that a victim should not have to leave his or her home—the ultimate place of safety—to seek some other “safe” alternative. Expanding the definition of dwelling sufficiently serves that purpose, where property rights do not always mirror the average person’s expectation of what constitutes “home.”

Furthermore, 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. When the battered woman is on trial for murder, and she is claiming self-defense, the trier of fact must determine whether *she* had the duty or reasonable opportunity to retreat. 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.

C. When There Is a History of Abuse by the Decedent Toward the Defendant, the Law Should Create a Rebuttable Presumption of Fear

Perhaps one of the most significant expansions in Florida’s SYG law is the doctrine creating the statutory presumption of fear in a person who is attacked in her dwelling, residence, or vehicle by someone who unlawfully enters.¹⁶⁸ This doctrine suggests that the Florida Legislature believed this situation to be so threatening that the law would presumptively find reasonable fear before considering the individual facts of each case. The presumption that a resident would fear a stranger who entered the resident’s home is not clearly erroneous, even where the homeowner has no knowledge of the intruder’s propensity for violence. But if this presumption is accepted as rational, then the presumption that an abused woman has a reasonable fear that her abuser intends to harm or kill her should also be accepted as rational. Indeed, accepting the presumption for the intruder but not for the known abuser is nonsensical. A survivor’s fear of a cohabitant may be *more* reasonable than someone’s fear of a stranger. Furthermore, she may be aware of firearms or other weapons available to the

168. The relevant portion of the statute reads:

(1) A person is presumed to have held a reasonable fear of imminent peril of death or great bodily harm to himself or herself or another when using defensive force that is intended or likely to cause death or great bodily harm to another if: (a) The person against whom the defensive force was used was in the process of unlawfully and forcefully entering, or had unlawfully and forcibly entered, a dwelling, residence, or occupied vehicle, or if that person had removed or was attempting to remove another against that person’s will from the dwelling, residence, or occupied vehicle; and (b) The person who uses defensive force knew or had reason to believe that an unlawful and forcible entry or unlawful and forcible act was occurring or had occurred.

FLA. STAT. ANN. § 776.013 (West, Westlaw through 2014 2d Reg. Sess.) (emphasis added).

cohabitant, and thus have a greater fear of the cohabitant than of an unknown person. The cohabitant may have even threatened her with such weapons in the past. Additionally, his legal right to possession of the residence may exacerbate her fear if she understands that it will be more difficult to obtain law enforcement help to force the cohabitant, rather than a trespassing stranger, to leave.

The disparity between protections provided against an unknown intruder and those provided against a violent partner is incompatible. The law should therefore be revised to create a rebuttable presumption of reasonable fear in a person where there is a documented history of abuse by his or her partner. The history need not be extensive, as even one instance of violence should give her more reason to fear her partner than to fear an unknown intruder.

D. Response to Potentially Adverse Effects of the Proposed Statutory Changes

SYG is not an invitation to assault another person if the assaulter is in his or her own home. SYG merely provides a defense (or immunity from prosecution) where a defendant responds, with a reasonable amount of force, to an imminent threat against him or her, even if there was an opportunity to retreat. In many cases, the primary challenge for a domestic violence survivor who kills her abusive partner is proving that she was justified in failing to retreat, not whether she faced imminent death or serious bodily injury. Creating or retaining a SYG law would help overcome this obstacle, while still retaining the initial requirement that the defendant be justified in using lethal methods of self-defense.

Even where a statute is designed to protect the needs of a particularly vulnerable population, and appears to be in the best interest of justice, discretionary enforcement can produce adverse effects for that population. Elements of this proposed legislation exist in jurisdictions across the country, but jurors applying these laws still find women's behavior unjustified, even where the record includes a documented history of domestic abuse.¹⁶⁹ This can occur due to conflicting evidence, the woman not being a credible witness for herself (often because of the trauma of recounting horrific abuse in an intimidating and public courtroom), judges and juries being unsympathetic to her case (manifesting from misogyny, social constructs of womanhood, or stereotypes), or other intervening factors.¹⁷⁰ However, the fact that implementation may be

169. See, e.g., *Alexander v. State*, 121 So. 3d 1185 (Fla. Dist. Ct. App. 2013) (granting a new trial after the lower court found that the battered defendant had not proved by a preponderance of the evidence that she was justified in using deadly force in self-defense). While there was testimony regarding a history of abuse by the decedent toward the defendant, the evidence was conflicting. *Id.* at 1187, 1191.

170. See *supra* Part II.C-D.

inhibited by some factors should not bar an otherwise favorable law from existing.

Another concern is that, just as SYG principles could protect battered defendants, they could also protect a batterer who claims, after a scratch or threat by his partner, that he did not have the duty to retreat and was justified in using violence towards his victim. Prior laws were aimed at protecting women from violence, and were intended to send a message to abusers that their behavior will not be tolerated. These laws, however, have produced adverse effects for battered women. For example, advocates for abused women thought (and some still believe) mandatory arrest laws would help solve the problem of a perpetrator getting repeated warnings from police but never being arrested, and, as a result, feeling secure in his ability to continue to harass, threaten, and abuse his partner.¹⁷¹ Despite the motives to reduce domestic violence by forcing officers to arrest the dominant aggressor, mandatory arrest laws have had multiple adverse effects, including substantially higher rates of arrests of women.¹⁷²

The statutory changes this article proposes can avoid a similar fate. While it is true that a man would have the same right to stand his ground and meet force with force under the proposed doctrine, the law would still require him to produce evidence demonstrating a reasonable fear of imminent death or great bodily injury. Further, it would be difficult to imagine that a batterer could produce valid evidence alleging abuse *toward* him that would invoke the statutory presumption of fear warranting a lethal response.

Lastly, critics could be concerned that eliminating the duty to retreat increases violence and is adverse to the interests of a safe home. However, in a domestic setting, no empirical data has been presented, either through expert testimony or studies, that demonstrates any correlation between eliminating a duty to retreat from the home and an increase in incidents of domestic violence.¹⁷³

CONCLUSION

Historically, women were harmed most often by someone they knew,¹⁷⁴ and now, an estimated 1.3 million women will endure domestic violence each year.¹⁷⁵ In many cases of severe abuse, retreat is not a viable option, even in

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171. Leigh Goodmark, *Autonomy Feminism: An Anti-Essentialist Critique of Mandatory Interventions in Domestic Violence Cases*, 37 FLA. ST. U. L. REV. 1, 6 (2009).
 172. See Amy M. Zelcer, *Battling Domestic Violence: Replacing Mandatory Arrest Laws with A Trifecta of Preferential Arrest, Officer Education, and Batterer Treatment Programs*, 51 Am. Crim. L. Rev. 541, 550 (2014).
 173. Weiand v. State, 732 So. 2d 1044, 1056 (Fla. 1999).
 174. U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, CRIMINAL VICTIMIZATION, 2005, at 9 (2006).
 175. CTRS. FOR DISEASE CONTROL & PREVENTION, INTIMATE PARTNER VIOLENCE: COSTS OF

times of momentary non-violence. When violence escalates to a life-threatening degree, a woman in an abusive relationship is confronted with the choice to defend herself and very possibly go to prison, or to die at the hands of her attacker.

Cultural biases and norms inherent in the application of the law subject individuals who are situated on the intersection of “woman” and “victim of domestic abuse” to unfair prejudice, and thus, unjust application of the law. Current SYG laws need not be completely abolished when horrible cases invoke a national outcry. Rather, closely analyzing the effect of SYG laws on domestic violence survivors can lead to changes in these laws that are cognizant of the needs of women who kill their abusive partners in self-defense.

A person acting in self-defense should not be subjected to the criminal justice system in the first place. But in the case of a genuine question of fact, the SYG law ought to apply to a survivor regardless of whether her attacker is her husband, boyfriend, partner, acquaintance, or a stranger, and regardless of the attacker’s relative property rights in the location where the assault occurred. And lastly, the law should represent the rational inference that a woman who has experienced past abuse by the decedent is entitled to a statutory presumption of reasonable fear, which can be rebutted in appropriate cases. Changing the laws in such a way would be a small, yet necessary and important, step toward ending the way the criminal justice system re-victimizes women who have been abused.