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*Domestic Violence and Self-Defense:
Respecting Women's Autonomy by Creating a Woman-
Centered Law of Self-Defense*

By: Caroline Gillis

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I. Introduction

In 2006, the state of Tennessee convicted Cyntoia Brown (now Brown Long) of first-degree murder and sentenced her to life in prison. Brown Long was only eighteen years old when the state convicted her. At only sixteen years old, Brown Long had killed a man who had solicited her for sex when she thought he was reaching for a gun. Brown Long had been in an abusive relationship with her boyfriend, who had forced her into prostitution. After enormous public pressure, Tennessee's governor granted clemency to Brown Long in 2019.¹ The state of Tennessee had imprisoned Cyntoia Brown Long for fifteen years.

Studies estimate that up to ninety percent of women in prison for killing men had previously been battered by those men.² What circumstances make juries convict survivors of abuse of murder? An eighteen-year-old survivor of abuse like Cyntoia Brown Long? If one believes that Cyntoia Brown Long was acting in self-defense in every non-legal sense, how did the law of self-defense fail her?³ How can the law of self-defense be modified for the benefit of survivors like Brown Long?

The state of New York convicted Nicole Addimando of second-degree murder in 2019. Addimando killed her husband in 2017 after a long and horrific history of abuse. Addimando's husband frequently abused her physically, including biting her and burning her with hot spoons. He also abused her sexually, including sexually assaulting her with a gun and frequent rapes that

¹ "Cyntoia Brown Released After 15 Years In Prison For Murder." Allyn, Bobby. <https://www.npr.org/2019/08/07/749025458/cyntoia-brown-released-after-15-years-in-prison-for-murder>. 2019.

² Allison Bass, "Women Far Less Likely to Kill Than Men; No One Sure Why," The Boston Globe, February 24, 1992, p. 27.

³ "[A] person who is not engaged in unlawful activity and is in a place where the person has a right to be has no duty to retreat before threatening or using force intended or likely to cause death or serious bodily injury, if:

(A) The person has a reasonable belief that there is an imminent danger of death or serious bodily injury;

(B) The danger creating the belief of imminent death or serious bodily injury is real, or honestly believed to be real at the time; and

(C) The belief of danger is founded upon reasonable grounds." Tenn. Code § 39-11-611(b)(2).

"When a person is assaulted, by the [use of force] [attempted use of force], in such a way as to create in [his] [her] mind a reasonable belief that [he] [she] is in imminent and actual danger of [death] [serious bodily injury], [he] [she] will be justified in [threatening] [using] force to defend [himself] [herself] even to the extent of killing another human being. The [threat] [use] of force can only be to the degree reasonably believed to be immediately necessary to protect against the other's [use] [attempted use] of unlawful force. The danger creating the belief of imminent [death] [serious bodily injury] must be real, or honestly believed to be real at the time, and must be founded upon reasonable grounds." Tennessee jury instructions for self-defense. T.P.I. Criminal 40.06(a).

he would film and upload to online porn websites. Addimando testified that she shot her husband after he threatened to kill her and then himself. The prosecution argued that the killing was not justified by self-defense because Addimando had killed her husband while he slept.⁴

If Nicole Addimando was unable to successfully claim self-defense in court after experiencing such horrific abuse and a verbal death threat, is there *any* woman who can? Studies show that seventy-five to ninety percent of incarcerated women are survivors of abuse.⁵ How is it that the justification of self-defense is not accessible for survivors like Addimando who suffer horrific abuse, but other classes of defendants benefit from self-defense justifications? If one believes that Addimando was acting in self-defense in every non-legal sense, how can the legal definition of self-defense be changed to help survivors like her?

A. Domestic Violence in Context

To understand and appreciate the notions put forth in this paper, one must understand three important concepts. First, this paper is about male-perpetrated violence against women because most situations of domestic violence are male-perpetrated towards women.⁶ Studies estimate that up to ninety-seven percent of abusers are men who have a female partner.⁷ In a given year, more

⁴ “When Can a Woman Who Kills Her Abuser Claim Self-Defense?” Snyder, Rachel Louise. <https://www.newyorker.com/news/dispatch/when-can-a-woman-who-kills-her-abuser-claim-self-defense>. 2019.

⁵ 1. A person may, subject to the provisions of subdivision two, use physical force upon another person when and to the extent he or she reasonably believes such to be necessary to defend himself, herself or a third person from what he or she reasonably believes to be the use or imminent use of unlawful physical force by such other person, unless:

(a) The latter’s conduct was provoked by the actor with intent to cause physical injury to another person; or

(b) The actor was the initial aggressor; except that in such case the use of physical force is nevertheless justifiable if the actor has withdrawn from the encounter and effectively communicated such withdrawal to such other person but the latter persists in continuing the incident by the use or threatened imminent use of unlawful physical force...

2. A person may not use deadly physical force upon another person under circumstances specified in subdivision one unless:

(a) The actor reasonably believes that such other person is using or about to use deadly physical force. Even in such case, however, the actor may not use deadly physical force if he or she knows that with complete personal safety, to oneself and others he or she may avoid the necessity of so doing by retreating; except that the actor is under no duty to retreat if he or she is:

(i) in his or her dwelling and not the initial aggressor.” N.Y. Penal Law § 35.15. No jury instructions are available.

⁶ 75% OF WOMEN IN PRISON ARE DOMESTIC VIOLENCE SURVIVORS. HOW DID THEY GET THERE? UltraViolet, 2015, http://www.ncdsv.org/images/UV_75-percent-of-women-in-prison-are-DV-survivors_8-2015.pdf.

⁷ “Most studies show that the majority of IPV is perpetrated by males towards their female partners. A 2002 review reported that more than 90% of “systematic, persistent, and injurious” violence is perpetrated by men primarily in their efforts to maintain control.” Maryland Department of Health and Mental Hygiene, Women’s Health, Maternal and Child Health. [Intimate Partner Violence \(IPV\): A guide for health care providers](http://www.dhmdh.org/Intimate-Partner-Violence-IPV-A-guide-for-health-care-providers). January 2013.

⁸ Office for the Prevention of Domestic Violence (New York). [Information for Professionals: Understanding Domestic Abusers](http://www.opdv.org/information-for-professionals-understanding-domestic-abusers).

than eighty percent of spousal homicides are committed by the male spouse.⁸ Second, there is *nothing* a woman can do to deserve domestic violence. Domestic violence is the fault of the perpetrator only, who uses physical, emotional, sexual, reproductive, and financial abuse to control his partner. Finally, women and men employ aggression for different reasons and in different ways. Women are more likely to kill in self-defense and in situations of extreme stress, while men are more likely to kill as a show of aggression or strength.⁹ A wealth of cases demonstrate that women often respond to violence in a nonconfrontational manner – meaning they wait for the violent episode to end before responding.¹⁰ This is presumably due to the physical size and strength disparities between men and women.

In its 2019 census, the National Network to End Domestic Violence estimated that one in three women will experience rape, physical violence, and/ or stalking by an intimate partner in their lifetime.¹¹ The likelihood that a woman will experience domestic violence in her lifetime is compounded by factors like race, immigration status, and socioeconomic status. A 2011 study by the Institute for Women’s Policy Research found that forty-one percent of black women and fifty-one percent of native women in the United States reported physical violence by an intimate partner in their lifetime, compared to thirty percent of white women.¹² In 2019, the United States

⁸ Of spousal homicides, 83.1% were committed by the male spouse and 16.9% were committed by the female spouse. Of nonmarital intimate homicides, 74.6% were committed by the boyfriend and 25.4% were committed by the girlfriend. Bureau of Justice Statistics. *Family Violence Statistics*. Table 3.2, page 19. 2005.

⁹ “Women view their aggression as often coming from excessive stress and a loss of self-control. Males often view aggressive acts as an exercise in control over others, brought on by a challenge to their self-esteem or integrity.” Campbell, Anne and Stephen J. Muncer. *Models of Anger and Aggression and the Social Talk of Women and Men*. Journal for the Theory of Social Behavior. July 2007.

“Compared to men, women more frequently kill intimates and kill in situations in which their victim initiated the physical aggression.” Jurick, Winn R. *Gender and Homicide: A Comparison of Men and Women Who Kill*. Violence Vict. 1990 Winter 5(4): 227-42.

“[W]omen are more likely to kill in self-defense, as an extreme reaction to their victimization, and (or) to protect children... Battered women may kill their abusers in reaction to a perceived sense of danger or out of fear of future harm.” Bourget, Dominique and Pierre Gagne. *Women Who Kill Their Mates*. Behav. Sci. Law 30: 598, 614 (2012).

¹⁰ “In many cases in which a battered woman kills her abuser, she does so during a lull in the violence either after a confrontation or in anticipation of a confrontation.” (Browne 1987; Ferraro 2003, 2006; Kasian et al.1993). Studies about why women kill in nonconfrontational manners are hard to find, but a wealth of cases demonstrate that women do kill their abusers in nonconfrontational manners.

¹¹ Domestic and Sexual Violence Factsheet. The National Network to End Domestic Violence, 2019, [nnedv.org/wp-content/uploads/2019/07/Library_General_DV_SA_Factsheet.pdf](https://www.nnedv.org/wp-content/uploads/2019/07/Library_General_DV_SA_Factsheet.pdf).

¹² Lifetime Prevalence of Physical Violence and Psychological Aggression by an Intimate Partner Among Women by Race/Ethnicity. The Institute for Women’s Policy Research, 2011, <https://statusofwomensdata.org/women-of-color/spotlight-on-women-of-color-violence-safety/>.

Citizenship and Immigration Service received nearly 12,000 petitions for the VAWA Self-Petition from spouses of abusive citizens or permanent residents.¹³

A woman's awareness of societal stereotypes about domestic violence affects her decision to report abuse or stay with her abuser. Once a woman reports experiencing domestic violence, she confronts the biases of every person she encounters in the civil or criminal legal systems.¹⁴ A survivor of domestic violence encounters the legal system through protection orders (restraining orders), divorce and child custody, housing, immigration, and the criminal justice system as a complaining witness, victim, or defendant.

Statistics suggest that our criminal justice system lacks an understanding of how to interact with survivors of domestic violence. It is common for police to over- or underreact to calls about domestic violence, including arresting the victim.¹⁵ When a survivor of domestic violence kills her abuser, jurors commonly cite well-known tropes about women and domestic violence as reasons for conviction.¹⁶ In my own survey in which respondents were asked to act as mock jurors for three

¹³ [Number of Form I-360, Petition for Amerasian, Widow\(er\), or Special Immigrant, With a Classification of VAWA Self-Petitioner By Fiscal Year, Quarter, and Case Status Fiscal Years 2010-2019](#). The United States Citizenship and Immigration Service, 2020. Statistics about immigrant women as survivors of domestic violence are scarce, likely due to underreporting because of fear of negative immigration consequences. The Violence Against Women Act (VAWA) created a path to permanent residence (commonly known as a green card) for people whose immigration status is dependent upon an abusive spouse. Of course, not all of these 12,000 petitioners can be women, but statistics from other demographics indicate that the majority of petitioners are likely women.

¹⁴ I do not have hard evidence for this, but I have life experience from working in criminal law. Every person who works in a legal profession brings with them their own biases and life experiences. Together, those individual people create our legal system.

¹⁵ Studies have found that only 47% of calls about intimate partner rape and 28% of calls about intimate partner assault resulted in arrest. [Law Enforcement, Justice System, and Domestic Violence](#). DomesticShelters.org, A Service of Theresa's Fund, 2006.

¹⁶ "In some cases, dual arrests may be the result of legislation, department policies, or both failing to require officers to identify the primary aggressor. In addition, when such provisions are present, police may lack the training or information needed to identify the primary aggressor when responding to a domestic violence assault. This situation may be compounded by batterers who have become increasingly adept at manipulating the criminal justice system, and may make efforts to "pre-empt" victims from notifying police in order to further control or retaliate against them." Hirschel, David et al. *Domestic Violence and Mandatory Arrest Laws: To What Extent Do They Influence Police Arrest Decisions*. 98 J. Crim. L. and Criminology 1 (2007).

¹⁶ "... 22% of participants cited their reason for a manslaughter verdict was because of the perceived reality of the threat to the defendant's safety... 31% of participants said they chose a manslaughter verdict because they felt the situation lacked the imminence needed for a self-defense verdict. 29% of participants stated that their reason for a manslaughter verdict was related to the belief that the defendant should have pursued alternative options... jurors who convicted the defendant of murder cited two primary reasons for their choice of verdict. 33% of the participants said that the defendant should have pursued alternatives to killing, such as leaving or calling police. For example, one mock juror stated, "if she needed to be protected she could [have] gone to the police." 38% of the participants who rendered guilty did so because the victim was not actively attacking the defendant during the killing and that the killing occurred during a brief lull in the violence." Hodell, Emily et al. [Mock Juror Gender Biases and Perceptions of Self-Defense Claims in Intimate Partner Homicide](#). J. Fam. Viol. (2014) 29: 495-506.

fictional defendants, forty-six percent of respondents convicted at least one fictional defendant of murder.¹⁷

B. Common Law Self-Defense and Its Problems

“The right of self-defense is the first law of nature.”¹⁸ The law of self-defense in the United States is derived from British common law, which arose from ancient Norman morals.¹⁹ Generally, defensive homicides were split into two categories: justifiable and excusable. Justified homicides, for which no guilt was assigned, were private action on behalf of the King for the public good, like killing a thief or a felon. Excusable homicides included those committed in private self-defense and required a petition for pardon from the King.²⁰ In early America, the distinction between killing for the public good and private self-defense blurred into one general concept of self-defense, retaining the notions of justification and excuse.²¹ Today most states, while receptive to the idea of the natural right of self-defense,²² maintain the distinction between killings in pure self-preservation and morally superior killings for the public good.²³

Generally, for a defendant to benefit from a self-defense claim, the defendant must have used force in the face of an imminent threat of death or serious bodily harm. In general, the elements of self-defense are as follows: 1) reasonable fear of; (2) an imminent threat of death or serious bodily harm; (3) to which the defendant responded with proportional force.²⁴ If the

¹⁷ Gillis, Caroline. [Survey: Domestic Violence and Self-Defense and Responses](#). 2020.

¹⁸ Quote from [St. George Tucker](#), an early American lawyer who helped develop Virginia’s court system.

¹⁹ Miller, Darrell. [Self-Defense, Defense of Others, and the State](#). *Journal of Law and Contemporary Problems*, page 87. 2017.

²⁰ “A person who killed another, even to preserve his own life, had to seek pardon from the sovereign. Whatever the moral quality of self-defense, the common law tilted in favor of the preservation of human life and the maintenance of public order.” *Id.* at 88-89.

²¹ *Commonwealth v. Selfridge* (Mass. 1807). “[It] is the first case—and certainly the first American case—to use the term ‘self defense’ to describe what up until that point in legal history was characterized as a justifiable prevention of felony.” Richard Singer, *The Resurgence of Mens Rea: II-Honest but Unreasonable Mistake of Fact in Self Defense*, 28 B.C.L. Rev. 459, 477 (1987).

²² “[T]he natural right of resistance and self-preservation,” quoting Blackstone. *District of Columbia v. Heller*, 554 U.S. 570, 594 (2008).

²³ “Justifiable homicide deserved no punishment or condemnation; excusable homicide retained at least a shadow of suspicion “to caution men how they venture to kill another upon their own private judgment.”” Miller, *Self-Defense* at 93.

²⁴ Model Penal Code § 3.04(1): “[T]he use of force upon or toward another person is justifiable when the actor believes that such force is immediately necessary for the purpose of protecting himself against the use of unlawful force by such other person on the present occasion.” All 50 states and the territories have their own definitions of self-defense that generally follow this structure.

34 states reformed their criminal codes after the publication of the Model Penal Code in 1962. Dubber, Markus and Paul Robinson. [The American Model Penal Code: A Brief Overview](#). 10 Crim. L. Rev. 3: 319, 327 (2007).

defendant satisfies these three elements, her actions are considered justified by complete self-defense and she will not be punished for them. The law in Maryland follows this general structure, but breaks it into four elements as follows:

Self-defense is a complete defense, and you are required to find the defendant not guilty, if all of the following four factors are present:

- (1) the defendant was not the aggressor [or, although the defendant was the initial aggressor, [s/he] did not raise the fight to the deadly force level];
- (2) the defendant actually believed that [s/he] was in immediate or imminent danger of death or serious bodily harm;
- (3) the defendant's belief was reasonable; and
- (4) the defendant used no more force than was reasonably necessary to defend [him/herself] in light of the threatened or actual force.²⁵

If the defendant does not satisfy all the elements, she may qualify for the defense of partial self-defense. A defendant who successfully argues partial self-defense commonly receives a manslaughter conviction for the killing instead of a murder conviction. The law in Maryland follows this general structure and reads as follows:

Voluntary manslaughter is an intentional killing, which is not murder because the defendant acted in partial self-defense. Partial self-defense does not result in a verdict of not guilty, but rather reduces the level of guilt from murder to manslaughter.²⁶

Female survivors of domestic violence commonly receive manslaughter convictions when their actions are perceived as unreasonable or in the face of a threat that was not imminent.²⁷ In these circumstances, women who act in self-defense in every common sense of the word are not found to have acted according to legal self-defense doctrines. Legal scholars have proposed various legal maneuvers to remedy these issues, including the Castle Doctrine, Stand Your Ground, and Battered Woman Syndrome. The Maryland judiciary addressed these issues in 2017

²⁵ Maryland jury instructions. MPJI-Cr 4:17.2.

²⁶ MPJI-Cr 4:17.2.

²⁷ See footnote 16 on juror biases.

in *Porter v. State*. Each legal theory of self-defense presents its own benefits and challenges for survivors of domestic violence.

This article examines the common legal forms of self-defense in the United States – the Castle Doctrine, Stand Your Ground, and Battered Women’s Syndrome – and explains how each of these legal doctrines fails to account for the unique situations of survivors of domestic violence. We will also discuss the state of the law in Maryland, which experienced a revolution in its self-defense regime in 2017, with the case *Porter v. State*. Each of the four legal doctrines of self-defense will be considered twice: once within the context of reasonability and once within the context of imminence. Finally, I will propose my own theory of self-defense. A legal presumption of self-defense is needed when a woman kills a male family member or current or former intimate partner because the reasonableness and imminence requirements of common law self-defense too often fail survivors of domestic violence who act in self-defense. This proposal is radical, but it was crafted to benefit the most survivors of domestic violence while limiting the potential interference of juror biases. To explain the mechanics of my proposal, I will apply it to the law in Maryland.

II. Reasonability

One of the elements of common law self-defense is reasonability, but jurors commonly cite reasonability when convicting survivors of domestic violence. The law is full of references to a “reasonable man.” This man makes appearances in tort law, contract law, and – perhaps most importantly – criminal law. The “reasonable man” is an objective standard meant to ensure fairness in the application of the law, a yard stick with which to measure reasonability. Every person should act as the “reasonable man” would in the same or similar circumstances.²⁸ Judges, historically

²⁸ *Brown v. Kendall*, 60 Mass. 292, 296 (1850).

white men, in their interpretations of statutes and case law, have decided what the “reasonable man” would or would not do based on their experiences of relative privilege. In the context of criminal self-defense, if the “reasonable man” would have acted in self-defense, the defendant’s actions in self-defense are justified in the eyes of the law.

Though it is meant to ensure fairness, the “reasonable man” standard has had disparate effects for women. One of the problems is right there in the name. “[I]n all that mass of authorities which bears upon this branch of the law there is no single mention of a reasonable woman. It was ably insisted before us that such an omission, extending over a century and more of judicial pronouncements, must be something more than a coincidence; that among the innumerable tributes to the reasonable man there might be expected at least some passing reference to a reasonable person of the opposite sex; that no such reference is found, for the simple reason that no such being is contemplated by the law; that legally at least there is no reasonable woman.”²⁹ Legal scholars have worked to develop a “reasonable woman” standard to narrow the bay of life experiences between the “reasonable man” and the battered woman.³⁰ In the end, a “reasonable woman” standard may serve to disempower women just as much as the “reasonable man.” The creation of a standard, ideal “reasonable woman” benefits women who are like her and harms women who are not.³¹

States have implemented the self-defense doctrines below to ensure that certain activities in self-defense will always be considered reasonable. The classic scenario is a person using self-defense against a shadowy intruder who is attempting to enter the home. As we will discuss, the

²⁹ A.P. Herbert, *Fardell v. Potts*. 1924. While this is a satirical case written by a well-known legal humorist, the sentiment is there.

³⁰ “The need for a new standard in sexual harassment and battered woman cases emerged from the divergence between women’s experiences and legal doctrines addressing these gender-specific acts, and the concept of the reasonable woman developed to “account” for the differences between these experiences and those of men in a form that the legal system could comprehend and incorporate.” Naomi R. Chan, *The Looseness of Legal Language: The Reasonable Woman Standard in Theory and in Practice*, 77 Cornell L. Rev. 1398, 1400 (1992).

³¹ “Just like a reasonable man standard, the reasonable woman standard is biased and deliberately ignores the reality that women’s experiences are diverse... In failing to address these diverse experiences, the reasonable woman standard illustrates feminists’ dilemmas over how to reconstruct the law... so that the dominant discourse is not male. Feminist challenges to the traditional stereotype of the reasonable man and its categorization of women, too often result in new stereotypes and inflexible categories of our own.” *Id.* at 1403.

focus on the shadowy intruder presents challenges for survivors of domestic violence who cohabitate with their abusers.

A. Castle Doctrine

Traditional common law self-defense required the actor to retreat from the opposing threat before use of force was considered reasonable. In 1921, the Supreme Court discarded the duty to retreat, holding that the appellant had no duty to retreat when confronted with a felonious assault in a place where he had a right to be.³² Since the late nineteenth century, American courts had been espousing the virtues of the “true man” who did not retreat, in direct conflict with settled British common law.³³ Many felt that the duty to retreat clashed with American values. “In the case of justifiable self-defense, the injured party may repel force with force in defense of his person, habitation or property, against one who manifestly intendeth and endeavoreth, with violence or surprise, to commit a known felony upon either. In these cases he is not obliged to retreat, but may pursue his adversary till he findeth himself out of danger, and if, in a conflict between them, he happeneth to kill, such killing is justifiable.”³⁴

Even in states that retained the duty to retreat outside the home, the Castle Doctrine allows a person in his home to use force in self-defense in his home without first retreating. “There is but one place where he need not retreat any further, where he need not go away from the danger, and that is in his dwelling-house.”³⁵ Rooted in the idea that “a man’s home is his castle,” the Castle Doctrine recognizes the home as a place where a lawful occupant could have a monopoly on force

³² *Brown v. United States*, 256 U.S. 335 (1921).

³³ “... a conception of honor central to frontier states, particularly in the West and South (the “true man” justification). The Indiana Supreme Court offered the “American mind” justification in *Runyan v. State*... The Ohio Supreme Court offered the “true man” justification in *Erwin v. State*, where the court concluded that it would not enforce the “coward[ly]” (English) values of retreating in the face of conflict.” 7 Harv. J. on Legis. at 529.

³⁴ *Erwin v. State*, 29 Ohio St. 186, 196 (1876).

³⁵ *Beard v. United States*, 158 U.S. 550 (1895).

formerly only possessed by the state.³⁶ Today, no person in the United States is required to retreat before using force in self-defense in his home.³⁷

In some states, the exception to the duty to retreat inside the home morphed into a presumption of reasonability when force was used in the home against an outside intruder. However, in situations of domestic violence, the person against whom force is used in self-defense is often a cohabitant in the home. At least half of states have cohabitant exceptions which expressly or impliedly interpret the presumption of reasonability against survivors of domestic violence.³⁸

Other states extend a presumption of reasonability to a cohabitant who uses force in self-defense against another cohabitant when there is evidence of domestic violence. Alabama law, which expressly denies cohabitants the presumption of reasonability when there is no protection order in effect, reads as follows:

The legal presumption that a person using deadly physical force is justified to do so pursuant to this subdivision does not apply if:

a. The person against whom the defensive force is used has the right to be in or is a lawful resident of the dwelling, residence, or vehicle, such as an owner or lessee, and there is not an injunction for protection from domestic violence or a written pretrial supervision order of no contact against that person.³⁹

The requirement that a survivor of domestic violence have a protective order or injunction (also called restraining orders or peace orders) in hand before using force in self-defense against a cohabitant is often unrealistic. To get a final protective order, a survivor is often required to go to court multiple times and provide evidence of abuse to overcome varying standards of proof.⁴⁰ Before a court will grant a final protective order, a court often requires the presence of the abuser

³⁶ 7 Harv. J. on Legis. at 530.

³⁷ Gillis, Caroline. [Chart – Castle Doctrine and Cohabitant Exceptions](#). 2020.

³⁸ Gillis, Caroline. [Chart – Castle Doctrine and Cohabitant Exceptions](#). 2020.

³⁹ Ala. Code § 13A-3-23(a)(5).

⁴⁰ “The court shall hold a hearing after the filing of a petition under this chapter upon the request of the defendant or within 10 days of the perfection of service. A final hearing shall be set at which the standard of proof shall be a preponderance of the evidence. If the defendant has not been served, a final hearing may be continued to allow for service to be perfected.” Ala. Code § 30-5-6(a).

at a hearing, which necessitates service of process.⁴¹ All of the states have separate processes and requirements for protective orders, meaning a survivor must do her own legal research to determine whether she can obtain an order.

In evaluating their options, it is vital for survivors of domestic violence to understand the legal consequences of their actions. The Castle Doctrine should be applied uniformly across states so survivors of domestic violence who cohabit with their abusers know for sure whether their actions will be presumed reasonable. “[There must be] 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 Doctrine any other way treats victims of domestic violence inequitably and unfairly penalizes them for, quite literally, fighting for their lives.”⁴²

B. Stand Your Ground

The Castle Doctrine relieves the lawful occupant of the duty to retreat before using force in self-defense against an intruder in the home. In two-thirds of states, Stand Your Ground imposes no duty to retreat in any place where one has a legal right to be.⁴³ The relevant portion of the Florida statute reads as follows:

A person who uses or threatens to use deadly force in accordance with this subsection does not have a duty to retreat and has the right to stand his or her ground if the person using or threatening to use the deadly force is not engaged in a criminal activity and is in a place where he or she has a right to be.⁴⁴

⁴¹ “If it appears from a petition for a protection order... that abuse has occurred... the court may do any of the following: (2) After providing notice as required by the Alabama Rules of Civil Procedure, issue a final protection order or modify a protection order after a hearing whether or not the defendant appears.” Ala. Code § 30-5-7(a).

⁴² Christina Messerschmidt, *A Victim of Abuse Should Still Have a Castle: The Applicability of the Castle Doctrine to Instances of Domestic Violence*, 106 J. Crim. L. & Criminology 593, 624, 625 (2016).

⁴³ American Bar Association National Taskforce on Stand Your Ground Laws – [Report and Recommendations](#), page 10. 2015.

⁴⁴ Fla. Stat. § 776.012(2).

An important distinction from Castle Doctrine in seven states, Stand Your Ground provides for immunity from criminal and civil responsibility for qualifying acts of self-defense.⁴⁵ The presumption of immunity means that a person who uses self-defense in accordance with Stand Your Ground may avoid arrest and any contact with the justice system as a result of the killing. If a person is arrested, he may achieve immunity through success at a pre-trial Stand Your Ground hearing.

A person who uses force in self-defense according to Stand Your Ground is presumed to have had reasonable fear, unless the person against whom force was used is a lawful occupant of the home. Stand Your Ground, a license to use force in self-defense for so many people, limits the available options for survivors of domestic violence. The relevant portion of the Florida statute reads as follows:

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 or threatening to use defensive force that is intended or likely to cause death or great bodily harm to another...⁴⁶

The presumption... does not apply if:

(a) The person against whom the defensive force is used or threatened has the right to be in or is a lawful resident of the dwelling, residence, or vehicle, such as an owner, lessee, or titleholder, and there is not an injunction for protection from domestic violence or a written pretrial supervision order of no contact against that person.⁴⁷

The reality of obtaining a protective order is often difficult for survivors of domestic violence. The Florida statute provides no standard of proof a survivor must meet, requiring only

⁴⁵ “A person who uses or threatens to use force... is justified in such conduct and is immune from criminal prosecution and civil action for the use or threatened use of such force by the person, personal representative, or heirs of the person against whom the force was used or threatened... In a criminal prosecution, once a prima facie claim of self-defense immunity from criminal prosecution has been raised by the defendant at a pretrial immunity hearing, the burden of proof by clear and convincing evidence is on the party seeking to overcome the immunity from criminal prosecution.” Fla. Stat. § 776.032(1), (4).

FL, AL, GA, KS, KY, NC, and SC provide for civil and criminal immunity. 12 states provide for civil immunity only. ABA National Taskforce on Stand Your Ground Laws – [Report and Recommendations](#), pp. 42-43.

⁴⁶ Fla. Stat. § 776.013(2).

⁴⁷ Fla. Stat. § 776.013(3)(a).

that the petitioner have a reasonable belief of imminent danger.⁴⁸ Reasonability and imminence, two reasons often cited by jurors who convict survivors of domestic violence who use force in self-defense,⁴⁹ stand between a survivor and a protective order. To use force against a cohabitant in accordance with Stand Your Ground, a survivor must have a protective order in hand. To get a protective order, a survivor must win the losing battle of proving her reasonableness in court.⁵⁰

Nine states adopted Stand Your Ground not through statutory codification, but in case law.⁵¹ A common law landscape can make it incredibly difficult for a survivor of domestic violence to ascertain her legal rights because those rights were determined in separate court cases. An excerpt from a relevant Virginia case reads, “The rule may be briefly stated thus: If the accused is in no fault whatever, but in the discharge of a lawful act, he need not retreat, but may repel force by force, if need be, to the extent of slaying his adversary. This is justifiable homicide in self-defense. But if a sudden fight is brought on, without malice or intention, the accused, if in fault, must retreat as far as he safely can, but, having done so and in good faith abandoned the fight, may kill his adversary, if he cannot in any other way preserve his life or save himself from great bodily harm.”⁵²

To determine the legal implications of using force in self-defense against a cohabitant in common law states, a survivor of domestic violence would almost certainly need to consult a lawyer. It is vital Stand Your Ground statutes be applied uniformly across participating states and available in plain language, so survivors of domestic violence know exactly where *they* stand.

⁴⁸ “[E]ither the victim of domestic violence as defined in s. 741.28 or has reasonable cause to believe he or she is in imminent danger of becoming the victim of any act of domestic violence, has standing in the circuit court to file a sworn petition for an injunction for protection against domestic violence.” Fla. Stat. § 741.30(1)(a).

⁴⁹ See note 14 above on juror perceptions.

⁵⁰ Jurors do not participate in hearings for protective orders, but surveys of jurors are illustrative of biases and misconceptions held by the public, including judges who have the power to grant protective orders.

⁵¹ ABA National Taskforce on Stand Your Ground Laws – [Report and Recommendations](#), page 13.

⁵² *McCoy v. Commonwealth*, 125 Va. 771, 776 (1919). This is Virginia’s Stand Your Ground law. It divides situations of self-defense into justification and excuse, justification being the only situation in which Stand Your Ground applies. After an hour of research, I have no idea whether a survivor of domestic violence may use force in self-defense against a cohabitant.

C. Battered Woman Syndrome

Lenore Walker created Battered Woman Syndrome in the late 1970s after studying survivors of domestic violence in her capacity as a psychologist. Battered Woman Syndrome is a psychological, not a legal, explanation of a woman's actions that, theoretically, allows a jury to find the actions reasonable for the purposes of a self-defense claim. The fulcrum of Battered Woman Syndrome is the concept of learned helplessness taught by the cycle of abuse. The cycle of abuse is characterized by periods of abuse coupled with periods of positive interaction.⁵³ Learned helplessness makes the female partner feel that she cannot leave the abusive relationship.

A reasonable course of action for one survivor of domestic violence may not be reasonable for another. A survivor's decision making is based in her unique life experiences, but Lenore Walker's research was expressly non-intersectional. Walker specifically studied cis straight white women, necessarily precluding the possibility of finding a theory that is accessible for all female survivors. Walker responded to criticism that her theory ignores the circumstances of black and brown women by remarking that data was not available at the time.⁵⁴

“While battered woman's syndrome furthers the interest of some battered women, the theory incorporates stereotypes of limited applicability concerning how a woman would and, indeed, should react to battering. To successfully defend herself, a battered woman needs to convince a jury that she is a "normal" woman - weak, passive, and fearful. If the battered woman deviates from these characteristics, the jury may not associate her situation with that of the stereotypical battered woman... Race certainly plays a major role in the cultural distinction between the "good" and "bad" woman.”⁵⁵ Can Battered Woman Syndrome be modified for the

⁵³ Lenore Walker. *The Battered Woman Syndrome*. 3rd ed. New York, NY: Springer Pub. Co., 2009. Print. Page 91.

⁵⁴ *The Battered Woman Syndrome*, page 5.

⁵⁵ Allard, Sharon. RETHINKING BATTERED WOMAN SYNDROME: A BLACK FEMINIST PERSPECTIVE, 1 *UCLA Women's L.J.* 191, 193-194.

benefit of black women and other women of color? Battered Woman Syndrome has utility for women who fit the mold of the “ideal battered woman” but, as long as there are women who do not fit the mold, it will not be sufficient for all survivors. Some advocates recommend modifying Battered Woman Syndrome to make it intersectional,⁵⁶ but offer no idea for how the modified theory would look. I contend that, if a theory of self-defense for female survivors of domestic violence takes an intersectional approach to explain her actions as reasonable, it is not a modification of Battered Woman Syndrome, but a totally new theory.

Other advocates argue for relaxing the elements of Battered Woman Syndrome (cis straight woman) to focus on fulfilling the intent behind the theory: Explaining why survivors reasonably felt the need to use force in self-defense.⁵⁷ Lesbian, gay, and transgender survivors face challenges that cis straight survivors do not, the effects of which have not been sufficiently studied. The more the survivor faces obstacles unlike the “ideal battered woman,” the less likely she is to benefit from Battered Woman Syndrome. Some scholars advocate for a class of experts whose testimony will allow LGBT+ survivors to benefit from Battered Woman Syndrome.⁵⁸ However, Lenore Walker expressly excluded LGBT+ survivors from her research and theory. Again, I would argue that any theory that embraces the experiences of LGBT+ survivors is not Battered Woman Syndrome, but a totally different, more inclusive theory of self-defense.

⁵⁶ 1 UCLA Women's L.J. 191, 198

⁵⁷ Pertnoy, Leonard. SAME VIOLENCE, SAME SEX, DIFFERENT STANDARD: AN EXAMINATION OF SAME-SEX DOMESTIC VIOLENCE AND THE USE OF EXPERT TESTIMONY ON BATTERED WOMAN'S SYNDROME IN SAME-SEX DOMESTIC VIOLENCE CASES, 24 St. Thomas L. Rev. 544

⁵⁸ “First, we must provide a new and comprehensive same-sex domestic violence research study, examining the causes and prevalence of same-sex domestic violence. Second, we must provide more funding and additional social services to same-sex domestic violence victims. Finally, we must create a new expert testimony designed to explain BWS and how it pertains to victims of same-sex domestic violence.” *Id.* at 568.

D. Maryland and Porter v. State

Maryland is a common law self-defense state that imposes a duty to retreat before using force in self-defense outside the home.⁵⁹ A defendant benefits from complete self-defense if she satisfies all the common law elements of self-defense.⁶⁰ A defendant qualifies for partial self-defense when she actually believed it was necessary to use force in self-defense, and there is no requirement for objective reasonableness.⁶¹ The difference between perfect and imperfect self-defense in Maryland comes down to an objective versus a subjective evaluation of the defendant's actions.⁶² Maryland allows the use of expert testimony of Battered Woman Syndrome to attempt to explain why a defendant's actions were reasonable.⁶³ Maryland also provides for civil immunity in cases of justified self-defense for injury or death of an individual who enters a person's home or business.⁶⁴

In *Porter v. State*, a woman hired a contract killer to kill her abusive husband. At trial, the Court gave the following jury instruction for partial (imperfect) self-defense: “If the Defendant actually believed that she was in immediate and imminent danger of death or serious bodily harm, *even though a reasonable person would not have so believed*, and the Defendant used no more force than was reasonably necessary to defend herself in light of the threatened or actual force, and that retreat from the threat was unsafe, and that she was not the aggressor, the Defendant's actual, though unreasonable belief, is a partial self-defense and the verdict should be guilty of voluntary manslaughter rather than murder.”⁶⁵ On appeal, the Court held that the jury instruction was a

⁵⁹ “[A]n attempted battery may be met by resisting force with force provided no unnecessary violence was used and proper measures were taken to avoid the conflict and escape from shedding blood; and that it was the duty of the defendant to retreat or avoid danger if such means were within his power and consistent with his safety.” *Bruce v. State*, 145 A.2d 428 (1958).

⁶⁰ “(1) Defendant subjectively believed it necessary to kill the deceased to save himself from death or great bodily harm; (2) Defendant's belief was objectively reasonable; (3) Defendant was not the aggressor in bringing on the affray, i.e., he did not aggressively and willingly enter into the fight without legal excuse or provocation; and (4) Defendant did not use excessive force. *Faulkner* at 764.

⁶¹ *State v. Smullen*, 844 A.2d 429 (Md. 2004).

⁶² “[T]he key difference between perfect and imperfect self-defense [is] the shift from an objective standard to a subjective one.” *Porter v. State*, 166 A.3d 1044, 1064 (Md. 2017).

⁶³ Md. Code, Cts. & Jud. Proc. § 10-916.

⁶⁴ Md. Code, Cts. & Jud. Proc. § 5-808.

⁶⁵ *Porter* at 1051.

harmful error because imperfect self-defense requires only that the defendant subjectively believed her belief in imminent danger was reasonable, not that an objectively reasonable person would agree.⁶⁶

There are positive indicators in *Porter v. State* that courts are beginning to recognize the harmful effects of the reasonableness requirement for women. However, in Maryland today, even if a court understands those things, a woman is only entitled to a partial self-defense instruction. A survivor of domestic violence deserves a complete self-defense justification when she, a woman capable of rational decision-making like a man,⁶⁷ acts in self-defense of a threat she perceives from her experiences with her abuser. *Porter v. State* does not give this complete self-defense justification to women.

III. Imminence

Common law self-defense requires that force be used only in the face of an imminent threat of violence or an ongoing attack. As part of the imminence requirement, all fifty states have a nonaggressor provision. A person cannot use force in self-defense if that person started the altercation. The relevant portion of Maryland law reads as follows:

Self-defense is a complete defense, and you are required to find the defendant not guilty, if all of the following four factors are present:

- (1) *the defendant was not the aggressor* [or, although the defendant was the initial aggressor, [s/he] did not raise the fight to the deadly force level];
- (2) the defendant actually believed that [s/he] was in *immediate or imminent danger* of death or serious bodily harm;
- (3) the defendant's belief was reasonable; and
- (4) the defendant used no more force than was reasonably necessary to defend [him/herself] in light of the threatened or actual force.⁶⁸

⁶⁶ *Porter* at 1064.

⁶⁷ Friesdorf, Rebecca et al. [Gender Differences in Responses to Moral Dilemmas: A Process Dissociation Analysis](#). *Personality and Social Psychology Bulletin* 41(5):696-713. April 2015.

Villines, Zawn. [Study Dispels Gender Myths About Emotion and Rationality](#). April 13, 2015.

⁶⁸ Maryland jury instructions. MPJI-Cr 4:17.2.

In theory, the nonaggressor provision makes sense. Without it, a person could theoretically go after another person for any manner of reasons, kill that person, and claim self-defense.

However, when women kill, it is likely in nonconfrontational circumstances, meaning they are not actively being attacked. Under common law self-defense, a woman who kills in nonconfrontational circumstances commences the attack in the face of no imminent threat, even if the woman's experiences with her abuser cause her to rationally decide that there is a persistent, ongoing threat of violence.⁶⁹ The law asks women to wait until a man is actively attacking her before using force in self-defense, a fight that women too often lose.

Additionally, there is debate over what "imminent" actually means. Courts in different states have adopted different definitions over the years. Even for someone who is legally trained, there is great potential for confusion. *Webster's Dictionary* defines "imminent" as "ready to take place, happening soon."⁷⁰ The Washington state supreme court defined "imminent" as "hanging threateningly over one's head" or "menacingly near."⁷¹ Questions abound. To use force in self-defense, how sure must a person be that the threat will come to fruition? If the abuser utters a verbal threat, how quickly must a person act in self-defense? Within an hour? A day? Theoretical musings are well and good, but a woman in an abusive situation needs concrete answers now.

States have attempted to solve for the ambiguities of the imminence requirement by implementing the self-defense doctrines below. Each doctrine presents its own benefits and challenges for survivors of domestic violence.

⁶⁹ "[A survivor of abuse] is able to recognize a threat of imminent danger from conduct that would not appear imminently threatening to someone who had not been subjected to that repetitive cycle." *State v. Smullen*, 844 A.2d 429, 450 (Md. 2004).

⁷⁰ "Imminent." Merriam-Webster.com Dictionary, Merriam-Webster, <https://www.merriam-webster.com/dictionary/imminent>.

⁷¹ *State v. James*, 850 P.2d 495, 506 (1993).

A. Castle Doctrine

Traditionally, the elements of common law self-defense as required someone to retreat, if possible, before using force in self-defense. The policy behind the retreat requirement was to avoid killing unless there was an ongoing attack from which the defendant could not retreat.⁷² “The law requires, that the person, who kills another in his own defence, should have retreated as far as he conveniently or safely can, to avoid the violence of the assault, before he turns upon his assailant; and that, not fictitiously, or in order to watch his opportunity, but from a real tenderness of shedding his brother's blood... yet between two fellow subjects the law countenances no such point of honour: Because the king and his courts are the vindices injuriarum, and will give to the party wronged all the satisfaction he deserves.”⁷³

The Castle Doctrine, intended for use against the felonious intruder,⁷⁴ has not always been applied for the benefit of survivors of domestic violence. A minority of states do not allow a cohabitant to use force in self-defense against another cohabitant without first retreating.⁷⁵ “What this exception means for a battered woman is that 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. If the attacker is her husband

⁷² “Even though “[a] man may kill his enemy... for self-defence,” Blackstone was adamant that “it is an untrue position [that]... a man may kill his enemy.” While this description of the law as a codification of humanistic values certainly seems to be significant to the development of the doctrine, it is importantly accompanied by a concern for the preservation of the supremacy of the state over the individual. Just as in earlier eras, the state wanted to maintain a monopoly on the use of force.” Levin, Benjamin. *A Defensible Defense?: Reexamining Castle Doctrine Statutes*. 47 Harv. J. on Legis. 523, 528 (2010).

“He may be upon his own premises, and if a man, while so situated and upon his own premises, can do that which would reasonably put aside the danger short of taking life, if he can do that, I say, he is called upon to do so by retreating, by getting out of the way if he can, by avoiding a conflict that may be about to come upon him, and the law says that he must do so, and the fact that he is standing upon his own premises away from his own dwelling-house does not take away from him the exercise of the duty of avoiding the danger if he can with a due regard to his own safety by getting away from there or by resorting to some other means of less violence than those resorted to. *Beard v. United States*, 158 U.S. 550, 555 (1895).

⁷³ William Blackstone, 4 Commentaries 184-85.

⁷⁴ “[T]he common law rule allowing deadly force against intruders became known as the castle doctrine.” *Id.*

⁷⁵ Linda A. Sharp, *Homicide: Duty to Retreat Where Assailant and Assailed Share the Same Living Quarters*, 67 A.L.R. 5th 637 (1999).

“In recognition of the demise of the solitary fortress and the great value of human life the drafters of the Restatement (Second) of Torts have adopted the minority view. “The privilege [to defend oneself against another by force intended or likely to cause death or serious bodily harm] exists although the actor correctly or reasonably believes that he can safely avoid the necessity of so defending himself by (a) retreating if he is attacked within his dwelling place, which is not also the dwelling place of the other... The privilege... does not exist... in a place which is also the dwelling of the other.” We adopt the codweller retreat rule set forth by the Restatement. A minority of jurisdictions have long recognized it.” *State v. Shaw*, 441 A.2d 561, 568 (1981).

“A reasonable belief exists when the actor, to protect himself or a third person, was in his own dwelling at the time of the offense or was privileged to be thereon and the encounter between the actor and intruder was sudden and unexpected, compelling the actor to act instantly.” N.J. Stat. § 2C:3-4(c)(2). Under (c)(1), an “intruder” is unlawfully in the dwelling.

or live-in partner, however, she must retreat. The 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 her home, but she still must retreat.”⁷⁶ The requirement to retreat within the home leaves survivors of domestic violence with essentially no options. If she leaves the home, she cannot benefit from the Castle Doctrine; and if she remains in the home, she still cannot benefit from the Castle Doctrine.

Fourteen states do not impose additional requirements when a survivor of domestic violence is in her own home, even when she uses force in self-defense against an abusive cohabitant.⁷⁷

No matter where the state stands on Castle Doctrine, a woman cannot benefit if she killed in a nonconfrontational manner because she will be considered the aggressor.

B. Stand Your Ground

Reasonability and imminence are often intertwined in Stand Your Ground laws. For example, the Florida presumption of reasonableness provision reads, “A person is presumed to have held a reasonable fear of imminent peril.”⁷⁸ Thus, for the same reasons Stand Your Ground is inaccessible for survivors of domestic violence on the reasonability prong, it is inaccessible on the imminence prong.

The presumption of reasonableness in Stand Your Ground laws has allowed some people to use force when there is no imminent threat. Stand Your Ground laws have been embraced in disturbing ways by people who have committed racially motivated killings.⁷⁹ In 2012, Sanford, FL teenager Trayvon Martin was walking through the neighborhood where George Zimmerman lived. Zimmerman, disturbed by Trayvon’s presence, followed Trayvon into the street, leaving his

⁷⁶ Maryanne E. Kampmann, *The Legal Victimization of Battered Women*, 15 Women’s Rts. L. Rep. 101, 112-113 (1993).

⁷⁷ Gillis, Caroline. [Chart – Castle Doctrine and Cohabitant Exceptions](#). 2020.

⁷⁸ Fla. Stat. § 776.013(2).

⁷⁹ ABA National Taskforce on Stand Your Ground Laws – [Report and Recommendations](#), page 13.

property. Zimmerman, ignoring the instructions of the 911 operator with which he was speaking, continued to follow until Trayvon confronted him. At that time, Zimmerman shot Trayvon multiple times.⁸⁰ Because of the immunity provision in Florida's Stand Your Ground law, Zimmerman avoided arrest that day. Zimmerman, who has since been arrested multiple times for domestic violence, was eventually acquitted for the murder of Trayvon.⁸¹

C. Battered Woman Syndrome

Lenore Walker's concept of learned helplessness, which is used to explain is reasonability of the female partner's actions, is also meant to explain why the female partner killed outside of the context of an ongoing fight. She also knows that she cannot win a physical fight. The only way to eliminate the looming threat of the abusive partner is to kill him when he is vulnerable, like when he is sleeping.⁸²

To use Battered Woman Syndrome to explain why she killed in a nonconfrontational manner, a defendant must admit to having a series of undesirable characteristics. First, it is called a "syndrome," implying something wrong with the women who try to use it in court. "[Battered Woman Syndrome] relieves the accused woman of the stigma and pain of criminal punishment only if she embraces another kind of stigma and pain: she must advance an interpretation of her own activity that labels it the irrational product of a 'mental health disorder.'"⁸³

Second, the concept of learned helplessness upon which the Syndrome rests paints a picture of a weak woman who cannot control her actions. The defendant did not rationally decide to use self-defense in a nonconfrontational setting, but was unable to control herself. Third, Lenore Walker lists a series of humiliating symptoms of Battered Woman Syndrome, like sexual intimacy

⁸⁰ CNN Editorial Research. [Trayvon Martin Shooting Fast Facts](#). CNN. Feb. 16, 2020.

⁸¹ Holley, Peter. [George Zimmerman back in court after domestic violence incident](#). The Washington Post. Jan. 10, 2015.

⁸² *The Battered Woman Syndrome*, page 14.

⁸³ Coughlin, Anne. *Excusing Women*, 82 Calif. L. Rev. 1, 4-5 (1994).

issues and low self-esteem.⁸⁴ For a survivor of abuse to use Battered Woman Syndrome to explain why she killed in a nonconfrontational setting, she must admit to having these symptoms, which degrades her further. Finally, the requirements of Battered Woman Syndrome create an “ideal battered woman” who is weak, timid, and used violence as a last resort instead of as a justified response to abuse. The more like the “ideal battered woman” the woman is, the more likely she is to benefit from Battered Woman Syndrome, which takes the agency from survivors. To benefit from Battered Woman Syndrome, a survivor must act when and how Lenore Walker thinks she should, which is not necessarily the best choice for her.

D. Maryland and Porter v. State

Survivors of domestic violence often use force in self-defense in nonconfrontational settings – meaning there is not an ongoing attack or threat of an imminent attack.⁸⁵ When survivors are precluded from benefitting from complete self-defense, it is often because the harm they feared is not perceived as imminent. A 2017 case from Baltimore allows for hope that courts will one day recognize the harm of the imminence requirement to survivors of domestic violence.

In *Porter v. State*, a woman hired a contract killer to kill her abusive husband. The Court, relying on the Maryland statutory definition of Battered Woman Syndrome,⁸⁶ found that the defendant was entitled to partial self-defense because she was not disqualified by the imminence requirement.⁸⁷ The Court held that “imminence” need not mean immediate danger of harm because

⁸⁴ “Abuse Cycle is known also as a Battered Women Syndrome which consists of these symptoms: re-experiencing the battering as if it were recurring even when it is not; attempts to avoid the psychological impact of battering by avoiding activities, people, and emotions; hyper arousal or hyper vigilance; disrupted interpersonal relationships; body image distortion or other somatic concerns; sexuality and intimacy issues.” Rakovec-Felser, Zlatka. *Domestic Violence and Abuse in Intimate Relationship from Public Health Perspective*. Health Psychol Res. 2014 Nov 6; 2(3): 1821.

⁸⁵ See note 9 above

⁸⁶ Md. Code, Cts. & Jud. Proc. § 10-916.

⁸⁷ “When a woman uses physical force to defend against her abuser, expert witness testimony explaining the effects of battered spouse syndrome can be crucial to a successful self-defense claim. In *Smullen*, the Court explained why such testimony is relevant to an assertion of self-defense... In an abusive relationship, we explained, “the victim becomes able to sense the escalation in the frequency and intensity of the violence and thus becomes more sensitive to the abuser’s behavior.” Thus, we continued, she “is in a position to know, perhaps with greater certainty than someone attacked by a stranger, that the batterer’s threat is real and will be acted upon.” She is able to “recognize a threat of imminent danger from conduct that would not appear imminently threatening to someone who had not been subjected to that repetitive cycle of violence.”” *Porter* at 237-238.

the purposes of the Maryland self-defense regime would not be served by requiring abuse to happen within hours or minutes of defensive action.⁸⁸ The Court wrote, “We find the temporal distinction between imminent and immediate persuasive—an imminent threat is not dependent on its temporal proximity to the defensive act. Rather, it is one that places the defendant in imminent fear for her life.”⁸⁹ To hold otherwise, the Court reasoned, would be to say that women who plan defensive action can never fear imminent harm.⁹⁰

It seems that, to succeed in claiming partial self-defense, at least, women in Maryland no longer have to wait to be attacked and gamble with their chances of winning in a physical fight against a man. However, a defendant convicted of voluntary manslaughter as a result of a partial self-defense claim can be sentenced to up to ten years in prison.⁹¹ The state of Maryland is telling women that it recognizes the inequities of the imminence requirement, but it is willing to allow women to be incarcerated for up to ten years when they kill in self-defense.

IV. A Woman-Centered Proposal

“Typically, what people mean by "irrational" behavior is a demonstration of strong emotion in a situation in which the observer does not understand why such strong emotion is warranted. Yet just because the observer doesn't understand the emotion doesn't mean that it doesn't have a perfectly reasonable explanation. The "irrational" label too often justifies and maintains ignorance, as it implies that the behavior is a product of such a fundamentally broken or flawed person that it defies - and fails to even deserve - the understanding of anyone who is reasonable.”⁹²

Until women are widely recognized as reasonable, rational beings, a woman-centered carve-out presumption of self-defense is needed. Until women are no longer the main targets of domestic violence, women need a legal presumption of self-defense. Until men are no longer the

⁸⁸ “Holding that Porter has not put forth evidence that she believed she was in "imminent or immediate danger" because she had time to pursue other options to avoid the abuse would contradict our explanation of battered spouse syndrome.” *Porter* at 248-249.

⁸⁹ *Porter v. State*, 455 Md. 220, 245 (Md. August 7, 2017).

⁹⁰ “By holding Porter's forethought against her, the Dissent takes the position that a woman who plans defensive action can never fear imminent harm.” *Porter* at 251.

⁹¹ [Maryland Sentencing Guidelines Offense Chart](#), 2019.

⁹² Baddeley, Jenna. [On the "irrationality" of women \(and men\)](#). Psychology Today. Nov. 3, 2010.

main perpetrators of violent crimes against women, women need a legal presumption that assumes self-defense when they use force against men.

Until the day our justice system provides justice for all female survivors of domestic violence, they need a legal presumption of self-defense. It would look something like this: When a woman uses force against a current or former male intimate partner or family member resulting in bodily injury or death, there is a rebuttable presumption of self-defense which may be overcome beyond a reasonable doubt. This presumption applies to currently incarcerated survivors, who are legally entitled to have their cases tried again. A presumption of self-defense would remove the requirements of “reasonability” and “imminence” which are so often impediments for survivors.

Proof

The presumption of self-defense would be brought as an affirmative defense⁹³ that the prosecution must rebut beyond a reasonable doubt. In Maryland, defendants have the burden of producing evidence that they fit within a legal exception, like self-defense.⁹⁴ Once the defendant produces evidence of a familial or intimate relationship, the prosecutor must rebut the presumption of self-defense beyond a reasonable doubt⁹⁵ by proving no familial or intimate relationship or no intent to act in self-defense. “Beyond a reasonable doubt” is the highest burden of proof in the law and instructs juries to find for innocence if there are any reasonable doubts about guilt at all.⁹⁶ Familial or intimate relationships are fairly easy to prove with birth or marriage certificates or testimony of friends or family members.

⁹³ “[An affirmative defense] is a defense in which the defendant introduces evidence, which, if found to be credible, will negate criminal liability or civil liability, even if it is proven that the defendant committed the alleged acts.” [Cornell Law School Legal Information Institute](#).

⁹⁴ “[W]hen the facts are peculiarly within the knowledge of the accused, and the prosecuting officer or grand jury could not readily obtain the information, the burden is on him to prove that he is within the exception.” *Howes v. State*, 119 A. 297, 301 (1922).

⁹⁵ “In Maryland, a defendant has the responsibility of producing ‘some evidence’ (or relying on evidence generated by the State) on the issue of self-defense or mitigation. *State v. Evans*, 278 Md. 197, 362 A.2d 629 (1976). The State then bears the burden of persuasion beyond a reasonable doubt to rebut the issue of self-defense or mitigation.” 1 MD Criminal Jury Instructions and Commentary § 1.03 (2019).

David S. Klein, *Burden of Proof of Affirmative Defenses in Criminal Cases - Gunther v. State*, 24 Md. L. Rev. 78 (1964).

⁹⁶ *Miles v. United States*, 103 U.S. 304 (1880). “The evidence upon which a jury is justified in returning a verdict of guilty must be sufficient to produce a conviction of guilt, to the exclusion of all reasonable doubt.”

Like in Stand Your Ground hearings in other states, a presumption of self-defense in Maryland could decide the issue in a pre-trial hearing. If a survivor is successful at the hearing, she will not face a criminal trial. Pre-trial presumptive self-defense hearings would need to be permitted by the Maryland state legislature because, as of now, there is no rule allowing them. Additionally, a legal trend in favor of a presumption of self-defense would require responding police officers to analyze the situation in favor of the woman before making an arrest. Like in some Stand Your Ground states, a presumption of self-defense could allow a survivor to avoid arrest.

Prosecutors as Tools for Justice

Today, a survivor of domestic violence in court fights a losing battle, not just as a target for juror biases, but against a criminal justice system that is weighted against defendants. On average, public defenders are not able to spend more than a few minutes with their clients.⁹⁷ Some defendants, unable to afford bail, spend weeks in jail without ever seeing their public defender.⁹⁸ The prosecutor, historically better staffed and funded,⁹⁹ has the ability and the duty to seek out mitigating circumstances.¹⁰⁰ Prosecutorial discretion in charging is used to negotiate plea deals for the benefit or detriment of defendant survivors in a criminal justice system where ninety percent of cases are resolved by a guilty plea.¹⁰¹ Even with the law as it stands today, prosecutors can help survivors of domestic violence through discretionary charging. Prosecutors, the holders of so much leverage in our criminal justice system, have the power to even the playing field for survivors of domestic violence.

⁹⁷ Oppel, Richard and Jugal Patel. [One Lawyer, 194 Felony Cases, and No Time](#). The New York Times. Jan. 31, 2019.

⁹⁸ Furst, Bryan. [A Fair Fight: Achieving Indigent Defense Resource Parity](#). The Brennan Center. Sept. 9, 2019. Page 1.

⁹⁹ *A Fair Fight*, page 7.

¹⁰⁰ Model Penal Code § 2.02

“[M]alice exists whenever an accountable person kills another intentionally unless the killing is justifiable or excusable or unless there is a mitigating circumstance.” *Evans v. State*, 349 A.2d 300, 335 (1975).

¹⁰¹ *A Fair Fight*, page 7.

Gramlich, John. [Only 2% of federal criminal defendants go to trial, and most who do are found guilty](#). Pew Research Center. June 11, 2019.

The police apply for charges against a person who has been arrested, but the prosecutor decides whether to pursue those charges. Typically, the office of the prosecutor has a good working relationship with the police. Police officers are more willing to work with the office of the prosecutor than a defense attorney and provide interviews, evidence, and case files. The office of the prosecutor sends officers out to speak to witnesses and collect evidence with a quick email or phone call.¹⁰² Prosecutors should recognize this relationship with the police as a tool to investigate mitigating circumstances as well as condemning evidence.

An arrest, criminal charge, and conviction change a person's life forever. A prosecutor can look at the circumstances surrounding a crime and determine that the defendant acted in self-defense – not from a legal perspective, but as a fellow human. The prosecutor has the mandate to not just prosecute crimes, but to *not* prosecute when justice requires.

Incarcerated Survivors

Accompanying my presumption of self-defense would be a mechanism allowing retrial of cases involving currently incarcerated survivors in light of the new law. Retroactive criminal laws are Constitutional when they do not create crimes or increase their punishment.¹⁰³ Evolving marijuana laws provide guidelines for applying a law retroactively.

In Maryland, a person may apply for expungement of his or her criminal record three years after being found in possession of marijuana.¹⁰⁴ In March 2020, a bill to automatically shield marijuana convictions prior to 2014 reached the desk of the governor.¹⁰⁵ Oregon and California already have laws in place that automatically and retroactively reduce or remove marijuana

¹⁰² Accounts of the working relationship with the police gathered from my time working in a Maryland State's Attorney's Office.

¹⁰³ "But I do not consider any law ex post facto, within the prohibition, that mollifies the rigor of the criminal law; but only those that create, or aggravate, the crime; or encrease the punishment, or change the rules of evidence, for the purpose of conviction." *Calder v. Bull*, 3 U.S. 386, 391 (1798).

¹⁰⁴ [Maryland judiciary expungement information](#). 2018.

¹⁰⁵ Kyle Jaeger. "[Bill To Shield 200,000 Marijuana Convictions Heads To Maryland Governor's Desk.](#)" *Marijuana Moment*. March 18, 2020.

convictions.¹⁰⁶ These marijuana laws demonstrate states' ability to recognize and remedy injustice retroactively with sweeping action.

Foreseeable Criticisms

A legal presumption of self-defense may allow guilty women to go free, like guilty men have gone free in Stand Your Ground states. In Stand Your Ground states, studies found an increase in homicides after Stand Your Ground laws were enacted. Most of those homicides were found to be legally justified.¹⁰⁷ Stand Your Ground laws also precipitate an increase in legally justified racially motivated killings.¹⁰⁸

Today, too many women are incarcerated for acting in self-defense. A legal presumption of self-defense is in the spirit of *Winship*. It is far worse to convict an innocent woman than it is to let a guilty woman go free.¹⁰⁹

A legal presumption of self-defense for survivors of domestic violence would not increase racially motivated killings. This presumption is not a Stand Your Ground style carte blanche to kill. It may only be used in narrow circumstances when a woman kills a man who was a family member or a current or former intimate partner. This presumption would be used rarely because women rarely kill.¹¹⁰ One could anticipate a rise in killings in self-defense by women under this presumption, as would be their legal right. Self-defense is considered morally and legally just in American culture. It is time women's actions in self-defense, as rational beings who are capable of assessing their situations and acting in protection of their lives, are considered justified.

¹⁰⁶ Lindsay Schnell. "[Marijuana reform: New California law gives people with records a do-over.](#)" USA Today. Oct. 1, 2018.

¹⁰⁷ "Homicides increased by 8 percent, which quantitatively represents 600 additional homicides per year, a statistically significant change." ABA National Taskforce on Stand Your Ground Laws – [Report and Recommendations](#), page 11. "Nearly 70 percent of individuals that invoke Stand Your Ground receive no punishment." Page 14.

¹⁰⁸ "Defendants asserting a Stand Your Ground defense are more likely to prevail on the merits if the victim is black." ABA National Taskforce on Stand Your Ground Laws – [Report and Recommendations](#), page 14.

¹⁰⁹ "[It is] far worse to convict an innocent man than to let a guilty man go free." *In re Winship*, 397 U.S. 358 (1970).

¹¹⁰ Federal Bureau of Investigations Uniform Crime Report 2017. Table 6. <https://ucr.fbi.gov/crime-in-the-u.s/2017/crime-in-the-u.s.-2017/tables/expanded-homicide-data-table-6.xls>.

Legal scholars point out that the imminence requirement of traditional self-defense exists for a reason. Before someone uses force in self-defense, she should exhaust all options to resolve the situation peacefully. An imminence requirement ensures that a woman is about to be killed herself before she kills. Some scholars who defend the virtues of the traditional self-defense requirements, even for survivors of domestic violence, assert that killing in a nonconfrontational manner is morally wrong.¹¹¹ This assertion ignores the reality for women in situations of domestic violence. A woman is asked to wait to defend herself, to endure abuse until some moment of which hindsight would approve. Women are asked to gamble on their ability to win in a violent physical altercation, the likes of which too often claim women's lives. The moral tragedy is the law allowing men to kill women without granting women an avenue in which to fight back.

This legal presumption of self-defense is radical and would take a lot of work to implement., but our current reality is unsustainable for survivors of domestic violence. We live in a world where a woman is much more likely to be killed by someone she knows than a stranger. In a Center for Disease Control study that ended in 2014, only six percent of female homicide victims were killed by someone other than a current or former intimate partner.¹¹² According to a report from the Federal Bureau of Investigations, ninety-two percent of female homicide victims in 2017 were killed by a male they knew.¹¹³ According to the same report, only ten percent of male homicide victims were killed by women, regardless of their relationship.¹¹⁴ In a report from the Bureau of Justice Statistics, women were victims of eighty-one percent of spousal homicides,

¹¹¹ Farrah Champagne, *Nonconfrontational Self-Defense and the Imminent Threat Requirement*, 16 Crim. Litig. 5

¹¹² Petrosky E, Blair JM, Betz CJ, Fowler KA, Jack SP, Lyons BH. Racial and Ethnic Differences in Homicides of Adult Women and the Role of Intimate Partner Violence — United States, 2003–2014. *MMWR Morb Mortal Wkly Rep* 2017;66:741–746. DOI: <http://dx.doi.org/10.15585/mmwr.mm6628a1>.

¹¹³ Federal Bureau of Investigations Uniform Crime Report 2017. Table 6. <https://ucr.fbi.gov/crime-in-the-u.s/2017/crime-in-the-u.s.-2017/tables/expanded-homicide-data-table-6.xls>.

¹¹⁴ Federal Bureau of Investigations Uniform Crime Report 2017. Table 6. <https://ucr.fbi.gov/crime-in-the-u.s/2017/crime-in-the-u.s.-2017/tables/expanded-homicide-data-table-6.xls>.

while men committed eighty-three percent of spousal homicides.¹¹⁵ The reality is that women are more likely to be killed in a relationship with a man than many people realize.¹¹⁶

The reality is that when women kill in self-defense in every sense of the word, they are not given a legal theory of self-defense that appreciates their circumstances. The reality is that thousands of women are killed by intimate partners every year, and we do not allow them to fight back.

V. Conclusion

Survivors of domestic violence who kill in self-defense deserve a legal justification because their motivations are just, not malicious. Today, women who kill in self-defense are convicted for murder or manslaughter because the legal definition of self-defense does not recognize their circumstances. Women, likely to kill in nonconfrontational manners, fail to satisfy the elements of imminence and reasonability of common law self-defense. In situations of domestic violence, where a survivor cohabitates with her abuser, more than half of states impose exceptions to the Castle Doctrine or Stand Your Ground that affect the legal consequences the survivor faces.

For legal service providers to truly help survivors of domestic violence, statistics and surveys are needed. It is vital to have a comprehensive accounting of justified and unjustified killings committed by survivors of domestic violence. When an advocate argues for sweeping changes to the law, she needs to be armed with concrete statistics. Incarcerated survivors as

¹¹⁵ Bureau of Justice Statistics. *Family Violence Statistics*. Tables 3.1 and 3.2, pp. 17-19, 2005.

¹¹⁶ “Nationwide, an average of 3 women are killed by a current or former intimate partner every day.” [Domestic and Sexual Violence Factsheet](#). The National Network to End Domestic Violence, 2019.

There were 1,527 intimate partner homicides of women in 2017. – Holson, Laura. [Murders by Intimate Partners Are on the Rise, Study Finds](#). The New York Times. April 12, 2019.

680 people were killed in robberies in 2017. – [FBI crime statistics](#)

399 people were killed in plane crashes in 2017. – [Bureau of Aircraft Accidents Archives](#).

Lightning strikes kill an average of 49 people per year. – [The National Weather Service](#).

Dog bites kill between 30-50 people per year. – [Study authored by Kenneth Maniscalco et al.](#)

humans who have experienced trauma should not be forgotten. Comprehensive surveys are needed on the status of incarcerated survivors and the circumstances that led to their incarceration.

In the end, it is imperative that we view survivors not as just statistics, and not as women who are convicted, imprisoned, and forgotten. Survivors of domestic violence are layered and complicated human beings, just like the rest of us. Survivors of domestic violence are women who are entitled to exercise their agency and deserve respect as autonomous beings. It is vital to extend grace, mercy, and understanding to survivors of domestic violence as humans who have experienced pain and trauma. Finally, legal professionals must recognize their relative privilege, place themselves in the shoes of survivors of domestic violence, and ask themselves how they would want the law to treat them if they had experienced abuse at the hands of a loved one.