

## MEN, WOMEN, AND OPTIMAL VIOLENCE

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*While both men and women can, and do, use violence against each other, men's violence against women is far more common, less justified, and more destructive than women's violence against men. One of the reasons for this asymmetry is that men do not fear retaliation for violence against women, whereas women do fear retaliation for their use of violence against men. The distribution of violence between the genders, then, is suboptimal. Society would be better off as a whole if more women were willing to engage in justified violence against men, and fewer men were willing to engage in unjustified violence against women. To that end, women's justified violence against men should be encouraged, protected, and publicized. This will require a reversal of the current trend in legal and social practices, which is to tolerate and encourage men's unjustified violence against women while discouraging and legally restricting women's violence against men. Even if encouraging an increase in women's justified violence against men may sometimes result in unjustified or disproportionate violence in individual situations, the overall effects of the redistribution of violence will be preferable to the current asymmetry.*

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## I. INTRODUCTION

While both men and women are capable of inflicting violence upon the other, they do not do so in equal numbers or in equal ways. The distribution of cross-gender violence, and its consequences, is asymmetrical. Men are far more likely, in general, to commit violence against women than women are to commit violence against men, and the negative externalities of male violence against women are greater than women's violence against men. Men's use of violence against women is, broadly speaking, more common, more severe, more harmful, and less justifiable than women's violence against men. In addition to causing harm to individual victims, men's violence against women creates net losses for society as a whole. These include the diminishment of women's equal status and participation in society, the economic costs of missed work days and medical care, and harmful social and psychological effects on families.

While only a small number of men commit violence, men are the perpetrators of most violent acts.<sup>1</sup> A significant subset of male violence is directed at women. Some forms of violence or force, whether committed

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1. Men are more than six times more likely to commit a violent crime than women. 86% of all violent offenders are male. Men perpetrated 88.8% of all homicides in the U.S. between the years 1976 and 2005. ALEXIA COOPER & ERICA SMITH, U.S. DEP'T OF JUSTICE, PRODUCT NO. NCJ 236018, HOMICIDE TRENDS IN THE UNITED STATES (2011), <http://www.bjs.gov/content/pub/pdf/htus8008.pdf>.

by men or by women, are sometimes necessary or at least justifiable, but men's violence against women is generally neither. The majority of this violence - domestic violence, rape, stalking, and sexual harassment - is gratuitous, unjustifiable, and socially damaging. Unjustified male violence against women, and the fear of such violence, traps women in destructive relationships, forces them out of workplaces and schools, restricts their freedom of movement, and undermines their sense of bodily integrity. At the same time, they produce and sustain the message that women are subordinate to men and that women's participation in society is to be determined on men's terms.

If, as this Article assumes, fear of retaliation is one factor that inhibits violence, one reason for the asymmetry between men and women in cross-gender violence is that men generally do not fear retaliation for engaging in violence against women, while women do fear retaliation for engaging in violence against men. Men may fear retaliation for engaging in violence against other men, even if that violence is justified,<sup>2</sup> but women rarely fight back against unjustified male violence, and the State does little to fight on women's behalf. At the same time, women are often punished by men or by the State for violence against men, even when their violence is justified.

In other words, if we think of violence or force as a neutral quality that can be used for good or ill, its current distribution in society is inefficient. An efficient or optimal level of violence in a society would be one in which, broadly speaking, unjustified, antisocial uses of violence are held in check by justified, pro-social uses of violence.

One uncontroversial, if simplistic, response to the violence "gender gap" is for men to reduce their use of violence. Exactly how this reduction is to take place is a far more difficult question. One solution is for the State to take men's unjustified violence more seriously, by reforming legal and social practices to effectively describe, punish, and prevent gendered violence. There is much to be said for this solution, and this Article will attempt to contribute some insights to that project. This Article rejects, however, the popular sentiment that reducing violence overall should necessarily be the primary goal. Rather, we must countenance the possibility that an increase in violence - of a very particular kind—may be necessary.

Legal and social practices must be transformed to disrupt this suboptimal status quo regarding violence, and this transformation should include focusing on encouraging women's willingness and ability to engage in responsive violence against men, as well as raising the visibility of such responsive violence, in order to drive down the incidence of male violence. To do this, we must reverse the current trend in legal and social practices, which is to tolerate and encourage men's unjustified violence

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2. See MARTHA MCCAUGHEY, *REAL KNOCKOUTS: THE PHYSICAL FEMINISM OF WOMEN'S SELF-DEFENSE* 29 (1997) ("[T]he respect with which men approach other men surely has something to do with the sense that there are consequences for treating a man disrespectfully.").

against women while discouraging and legally restricting women's violence against men. Though raising women's level of violence necessarily creates the potential for overreaction and abuse in individual cases, the overall distributional effects will be preferable to the current asymmetry.

Despite the powerfully discriminatory and disciplinary effects of male violence against women, the State generally fails to treat this subset of male violence as a serious threat to women's equality and freedom. While the letter of the law prohibits many of these acts, the State fails to adequately invest in the enforcement of these prohibitions—for example, by failing to address the vast underreporting of domestic violence and sexual assault or to properly investigate the acts that are reported—and grants perpetrators a spectrum of provocation or “heat of passion” defenses to excuse or mitigate their actions. What is more, the legal definitions of crimes against women are often underinclusive. The law continues to underestimate the harms of sexual assault, stalking, and harassment and consequently defines them in inappropriately narrow ways.

At the same time, the State strongly restricts women's responsive violence to those acts. The law and social norms discourage female victims in particular from using violence to defend themselves. This preemption and intolerance of women's private violence is not, as some might argue, an inevitable consequence of the State's general monopoly on legitimate violence,<sup>3</sup> given that men's private violence is by comparison frequently tolerated and in some cases encouraged by the State. When the State refuses to exercise its monopoly on violence on behalf of women, and both law and society tolerate private violence by men but condemn it in women, female victims of crime are effectively left with no way to respond to the violence committed against them individually, and have no way to deter men's violence against women generally. So long as the State is unwilling, and the victims unable, to respond to such violence, this status quo cannot be changed.

Men's disproportionate willingness and ability to use violence against women must be countered, at least in part, by increasing women's willingness and ability to use violence against men. This is in some ways no more than a claim that women should enjoy an equally robust right to self-defense that men have long enjoyed. Women must be encouraged to respond to violence with proportional force. This is not merely a question of justice but of social efficiency;<sup>4</sup> the more women make use of responsive, justified violence against men, the less men will make use of unjustified violence against women.

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3. See MAX WEBER, *THE VOCATION LECTURES* 33 (David Owen & Tracy B. Strong eds., Rodney Livingstone trans., Hackett Publ'g Co. 2004).

4. See, e.g., Gary Lawson, *Efficiency and Individualism*, 42 *DUKE L.J.* 53, 78 (1992) (examining various definitions of social efficiency, including as the maximization of social welfare, “a definition that can potentially serve both as a normative guide to conduct and as a way of describing events”).

More controversially, perhaps, this Article also argues that an increase in women's violence and aggression must be tolerated even if such violence violates traditional proportionality principles in individual instances. However regrettable it may be that in individual cases some women will overreact and perhaps even consciously exploit increased tolerance of their use of violence, creating fear and uncertainty about the possibility of women's retaliatory force serves the overall goal of redistributing violence. Uncertainty about irrational or disproportionate responses has at least a modest inhibiting effect on men's use of violence against other men; the same effect should obtain when women also pose this threat. This solution is justified by the excessive and pernicious nature of the status quo; the force necessary to disrupt social and legal defaults regarding men's violence against women may in some cases be extreme, and individual instances of injustice may be more than compensated by an overall shift in violence allocation. The more realistic and salient the possibility of women's violent retaliation or preemption of male violence becomes, the less male violence there will be.

This Article considers what can realistically be done, both legally and socially, to encourage women's responsive violence, acknowledging that such encouragement carries risks. Proposals to reform the legal concept of self-defense (in particular eliminating the imminence requirement to better reflect intimate partner violence), which have been made by many feminist scholars, offer a promising start. It is also important to identify and address women's lack of "violence literacy" relative to men—the gender disparities in gun ownership, in martial arts, and in sports—as well as their lack of "violence entitlement"—the different ways men and women are taught to value their bodies, their personal space, their sexuality, and their autonomy—relative to men.

Part II details law and society's indulgent approach to many forms of unjustified male violence, both hierarchical male-on-male violence (against racial and sexual minority men) and especially violence against women. The monopoly of violence by the State is one that primarily serves (certain) male interests, and men also dominate the practice of extralegal violence. Part III contrasts this to law and society's strong disapproval and restriction of violence by women, even when such violence is justified. While the State's monopoly of violence is rarely used to protect women's rights, legal and social norms militate against women's private violence as well, placing women in a double bind. Part IV describes the destructiveness of this status quo imbalance, emphasizing its physical, economic, and expressive harms. Part V offers a descriptive and normative account of the possibilities of women's corrective violence to address it. Part VI concludes.

## II. TOLERANCE OF MALE VIOLENCE

James Messerschmidt has observed that while men commit the vast majority of all forms of crime and violence, “the gendered content of their legitimate and illegitimate behavior has been virtually ignored.”<sup>5</sup> In other words, the fact that violence is primarily a male phenomenon is frequently taken for granted. This has obscured proper assessment of the ways that violence serves masculine interests as well as helped to pathologize the violence of women as aberrant. While it is true that men make up both the majority of victims of violence<sup>6</sup> as well as the perpetrators of violence—especially if one considers the vast machinery of violence inherent in the U.S. criminal justice system—the status quo allocation of violence serves hegemonic male interests.<sup>7</sup> That is, the values at the top of our current social and legal hierarchy require the subordination of both women and racial and sexual minorities. The violence of men towards other men is tolerated and encouraged so long as it is directed at “subordinate” males, that is, men whose race, sexual orientation, and/or economic status (or some combination of the three) earn them a lower rank in the social hierarchy of masculinity, while the violence of men towards women is not only tolerated, but also often encouraged as a means of preserving social order.

A. *Men’s Violence Towards Other Men: Expanding Justifications for Deadly Force*

Legal and social norms surrounding the justifiable use of deadly force highlight society’s tolerance, and even encouragement, of male violence, especially hierarchical male violence exerted by more privileged (by race, sexual orientation, and class) males against less privileged males. Under traditional self-defense doctrine, a person can use force if he reasonably believes such force is necessary to protect himself from imminent use of unlawful force. Historically, such force must be limited by the principle of proportionality. One should not use deadly force to fend off a non-deadly attack. The “Duty to Retreat” doctrine emphasizes the importance of avoiding deadly force: if a person can retreat in complete safety from the dangerous situation, he must do so instead of using deadly force. This duty to retreat has traditionally had one significant ex-

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5. JAMES W. MESSERSCHMIDT, *MASCULINITIES AND CRIME: CRITIQUE AND RECONCEPTUALIZATION OF THEORY 1* (1993).

6. As McCaughey points out, “Men’s violence against men . . . even when sexual, is usually socially recognized as violence whereas women are often blamed for precipitating, inviting, or deserving men’s violence against them.” MCCAUGHEY, *supra* note 2, at 7.

7. See R. W. CONNELL, *MASCULINITIES 77* (2d ed. 2005) (“Hegemonic masculinity can be defined as the configuration of gender practice which embodies the currently accepted answer to the problem of the legitimacy of patriarchy, which guarantees (or is taken to guarantee) the dominant position of men and the subordination of women.”).

ception, known as the “castle doctrine,” which holds that one has no duty to retreat from one’s own home.<sup>8</sup>

In recent years, however, there has been an observable trend away from proportionality and restraint in the use of deadly force, and the castle doctrine has been greatly expanded in several states.<sup>9</sup> “Stand Your Ground” laws, also sometimes referred to as “Line in the Sand” or “No Duty to Retreat” laws, have been passed in thirty-three states,<sup>10</sup> many of them modeled on Florida’s Stand Your Ground statute, which was passed in 2005.<sup>11</sup>

Florida’s law includes several innovations that run contrary to traditional limitations on self-defense. First, it greatly expands the conception of the “castle”: one is allowed to use deadly force not only in homes, but also in any “dwelling,” which is expansively defined as “a building or conveyance of any kind, including any attached porch, whether the building or conveyance is temporary or permanent, mobile or immobile, which has a roof over it, including a tent, and is designed to be occupied by people lodging therein at night,”<sup>12</sup> as well as in occupied “vehicles.”<sup>13</sup> It also applies in “any other place where he or she has a right to be,”<sup>14</sup> the feature of the law that has attracted the most attention from the media and the general public. According to the statute, any person who is not engaged in unlawful activity in any such place “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.”<sup>15</sup> As I have noted elsewhere, this particular formulation is not quite the radical break from historical self-defense law that some critics have made it out to be.<sup>16</sup> The duty to retreat was commonly understood to only apply when a reasonable person believed that he could retreat in complete safety—that is, without risking death or great bodily harm.

That being said, two features of Florida’s self-defense law arguably do undermine the criminal law’s historical discouragement of the use of deadly force whenever possible. One is the inclusion of “to prevent the commission of a forcible felony” as a legitimate grounds for deadly

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8. *But see* JEANNIE SUK, AT HOME IN THE LAW: HOW THE DOMESTIC VIOLENCE REVOLUTION IS TRANSFORMING PRIVACY 55–56 (2009).

9. *See* Mary Anne Franks, *How Stand Your Ground Laws Hijacked Self Defense*, in GUNS AND CONTEMPORARY SOCIETY: THE PAST, PRESENT, AND FUTURE OF FIREARMS AND FIREARM POLICY (Glen H. Utter ed.).

10. AM. BAR ASS’N NAT’L TASK FORCE ON STAND YOUR GROUND LAWS, PRELIMINARY REPORT AND RECOMMENDATIONS 1, 10 (2014), <http://www.abajournal.com/files/GunReport.pdf>.

11. FLA. STAT. § 776.013 (2015).

12. *Id.* § 776.013(5)(a).

13. *Id.* § 776.013(5)(c).

14. *Id.* § 776.013(3) (repealed, 2014).

15. *Id.* § 776.012(2) (repealed, 2014).

16. Mary Anne Franks, *Real Men Advance, Real Women Retreat: Stand Your Ground, Battered Women’s Syndrome, and Violence as Male Privilege*, 68 U. MIAMI L. REV. 1099 (2014) [hereinafter Franks, *Real Men Advance*].

force.<sup>17</sup> Given that forcible felonies under Florida law include crimes such as robbery, this seems like an explicit endorsement of property over life, which flies in the face of traditional self-defense jurisprudence. The second troubling aspect of the law is its broad immunity provision for individuals who act in self-defense: “A person who uses force as permitted . . . is justified in using such conduct and is immune from criminal prosecution and civil action for the use of such force . . . the term ‘criminal prosecution’ includes arresting, detaining in custody, and charging or prosecuting the defendant.”<sup>18</sup> Such immunity, by decreasing the likelihood of arrest or prosecution of a person using deadly force, lowers the transaction costs of using such force, which arguably makes the use of violence more appealing.

By preventing even the arrest or detainment of a person who has used deadly force, this immunity provision effectively gives police officers the power to be judge, jury, and (non-) executioner in cases where they believe an individual has acted in self-defense. While law enforcement has always had considerable discretion with regard to who gets charged and prosecuted in criminal cases, this immunity provision appears to transform that discretion into fiat. When Sanford Police Chief Bill Lee faced public criticism for failing to arrest George Zimmerman after he shot and killed an unarmed teenager named Trayvon Martin in February 2012, he issued a statement claiming that the police were not *allowed* to arrest Zimmerman given the immunity provision of Florida’s self-defense law:

When the Sanford Police Department arrived at the scene of the incident, Mr. Zimmerman provided a statement claiming he acted in self defense which at the time was supported by physical evidence and testimony. By Florida Statute, law enforcement was PROHIBITED from making an arrest based on the facts and circumstances they had at the time.<sup>19</sup>

Clearly, Chief Lee believed that Florida law prohibited even the mere investigation of a man found standing over the body of an unarmed teenager he had just shot, simply because that man gave his word that he had killed in self-defense.

After two months of public outcry, Zimmerman was charged with second-degree murder for shooting Trayvon Martin. Zimmerman claimed at trial that Martin had attacked him, and that Zimmerman shot Martin because he was in fear for his life and thought that Martin was reaching for Zimmerman’s gun.<sup>20</sup> While Zimmerman ultimately did not

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17. FLA. STAT. § 776.013(3).

18. *Id.* § 776.032(1).

19. *Chief Bill Lee Answers Questions About Investigation into Shooting of 17-year-old Trayvon Martin*, SANFORD HERALD (Mar. 17, 2012, 2:59 PM), [http://mysanfordherald.com/view/mobile\\_full\\_story/17920337/article-Chief-Bill-Lee-answers-questions-about-investigation-into-shooting-of-17-year-old-Trayvon-Martin](http://mysanfordherald.com/view/mobile_full_story/17920337/article-Chief-Bill-Lee-answers-questions-about-investigation-into-shooting-of-17-year-old-Trayvon-Martin).

20. In the aftermath of Martin’s murder, it was frequently claimed that a person who initiates a confrontation cannot claim self-defense. This is a misunderstanding of self-defense law generally, and of Florida law in particular. While it is true, according to Section 776.041, “Use or threatened use of



invoke the Stand Your Ground provision in his defense, language from the Stand Your Ground provision was used in the instructions to the jury, and juror reports suggest that the provision did influence the jury's decision to acquit Zimmerman.<sup>21</sup>

If the Florida statute, at least as interpreted by police, provides such a strong presumption of legitimate deadly force that an individual cannot even be arrested (to say nothing of being charged) when he kills another human being in a public place where both individuals had a right to be, under circumstances that can most generously be described as ambiguous, the law creates a very real incentive for men, in particular, to shoot first and ask questions later.<sup>22</sup> This was made explicitly clear in a Texas Stand Your Ground case from 2007, where a man observing two men burglarizing his neighbor's home told a 911 operator, "The laws have been changed in this country since September the first, and you know it" before he shot the two unarmed men in the back. Joe Horn was referring to Texas' version of the Stand Your Ground law, which took effect on

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force by aggressor," that the justification of the use of force "is not available to a person who . . . [i]nitially provokes the use or threatened use of force against himself or herself," there are two significant exceptions: "(a) Such force is so great that the person reasonably believes that he or she is in imminent danger of death or great bodily harm and that he or she has exhausted every reasonable means to escape such danger other than the use of force which is likely to cause death or great bodily harm to the assailant; or (b) In good faith, the person withdraws from physical contact with the assailant and indicates clearly to the assailant that he or she desires to withdraw and terminate the use of force, but the assailant continues or resumes the use of force." FLA. STAT. § 776.041. Even if Zimmerman initiated the confrontation with Martin (e.g. by demanding that he explain his presence), if Martin responded, as Zimmerman claimed, with violent force such that a reasonable person would believe he had no other option than to use deadly force, such force would still be justified.

21. See Marc Caputo, *Juror: We Talked Stand Your Ground Before Not-Guilty Zimmerman Verdict*, MIAMI HERALD, (July 16, 2013), <http://www.miamiherald.com/2013/07/16/3502481/juror-we-talked-stand-your-ground.html>; see also Franks, *Real Men Advance*, *supra* note 16, at 1117.

22. A recent national study of Stand Your Ground ("SYG") laws concluded that states with SYG laws experience roughly 7% increase in their homicide rates, which translates into more than seven victims per month. Interestingly, this study also found that this increase only applies to white male homicide victims—the impact on the number of female or black victims was statistically insignificant. This picture changes, though, depending on what kind of SYG law a state has. The above figures refer to states that have laws similar to Florida's—laws that not only strengthen the right to use deadly force in the home, but anywhere a person has a right to be. In states that only increase the robustness of the right to deadly force in the home, the number of female victims increases while the number of male victims decreases. Chandler McClellan & Erdal Tekin, *Stand Your Ground Laws and Homicides* 3–39 (Inst. for the Study of Labor, Discussion Paper No. 6705, 2012). Both this study and another recent study share the basic conclusion that SYG laws increase the net number of homicides and have no appreciable deterrent effect on crime. Cheng Cheng & Mark Hoekstra, *Does Strengthening Self-Defense Law Deter Crime or Escalate Violence?: Evidence from Expansions to Castle Doctrine*, 48 J. HUM. RESOURCES 821, 849 (2013). Even more recently, Michael Dunn, a white man, fired into a vehicle eight times after having an altercation with the vehicle's occupants over the volume of their music, killing seventeen-year-old Jordan Davis. Dunn claims he thought he saw the youths inside the vehicle point a shotgun at him, but there is no evidence that any of the teenagers had a weapon. Dunn's then-defense lawyer, Robin Lemonidis, suggested that her client had a SYG defense because all Dunn could see were "heavily tinted windows, which are up and the back windows which are down, and the car has at had least four black men in it." Leigh Owens, *Michael Dunn Claims Shotgun Was Wielded Prompting His Shooting of Jordan Davis*, HUFF. POST (Nov. 28, 2012), [http://www.huffingtonpost.com/2012/11/28/michael-dunn-claims-shotgun-wielded-n\\_2207287.html](http://www.huffingtonpost.com/2012/11/28/michael-dunn-claims-shotgun-wielded-n_2207287.html). Dunn was eventually convicted of first-degree murder for the death of Davis, as well as three charges of attempted murder. See Ray Sanchez, *Man Gets Life Without Parole for Murdering Teen Over Loud Music*, CNN (Oct. 17, 2014, 4:29 PM), <http://www.cnn.com/2014/10/17/justice/michael-dunn-sentencing/>.

September 1, 2007.<sup>23</sup> The officer who arrived on the scene in time to see Horn shoot both men in the back, and who did not dispute that he had done so, did not arrest Horn. A grand jury was convened in Horn's case, but no charges were brought against him.<sup>24</sup> Horn was hailed as a "hero" by many in Texas and elsewhere.<sup>25</sup>

A recent American Bar Association report concluded that states with Stand Your Ground laws experience overall increases in homicides, and that racial bias plays a significant role in the inconsistent application of the laws:

[T]he task force found that stand-your-ground laws carried an inherent bias against certain racial minorities due to cultural stereotypes about those groups being more threatening or violent. The task force found that in instances where a white shooter kills a black victim, that homicide was 350 percent more likely to be ruled as justified than if a white shooter killed a white person.<sup>26</sup>

The day after the ABA report was released, police officer Darren Wilson shot an unarmed black teenager, Michael Brown, at least six times after Brown refused Wilson's order to move out of the street and on to the sidewalk. This event set off intense protests in Ferguson, Missouri, where the shooting took place. The shooting was only the most recent in a spate of high-profile murders of unarmed young black men by police in recent years,<sup>27</sup> a stark contrast to law enforcement's remarkably bloodless responses to white men walking down public streets carrying shotguns,<sup>28</sup> taking sniper positions against federal officers,<sup>29</sup> or engaged in mass shootings.<sup>30</sup>

Long before Michael Brown's killing or the official passage of Stand Your Ground laws, however, the notorious case of Bernhard Goetz illustrated society's tolerance of violence against minority males in ambiguous situations.<sup>31</sup> In 1984, four young black men approached Goetz on a New York subway train, one of them demanding, "Give me five dollars."

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23. S.B. 378, 80th Leg., Reg. Sess. (Tex. 2007).

24. Adam B. Ellick, *Grand Jury Clears Texan in the Killing of 2 Burglars*, N.Y. TIMES (July 1, 2008), [http://www.nytimes.com/2008/07/01/us/01texas.html?\\_r=1&](http://www.nytimes.com/2008/07/01/us/01texas.html?_r=1&).

25. Brian Rogers et al., *Joe Horn Cleared by Grand Jury in Pasadena*, HOUS. CHRON. (June 30, 2008, 5:30 AM), <http://www.chron.com/neighborhood/pasadena-news/article/Joe-Horn-cleared-by-grand-jury-in-Pasadena-1587004.php>.

26. Victor Li, *States with Stand-Your-Ground Laws Have Seen an Increase in Homicides, Reports Task Force*, A.B.A. J. (Aug. 8, 2014, 9:40 PM), [http://www.abajournal.com/news/article/states\\_with\\_stand\\_your\\_ground\\_laws\\_have\\_more\\_homicides/](http://www.abajournal.com/news/article/states_with_stand_your_ground_laws_have_more_homicides/).

27. See Rich Juzwiak & Aleksander Chan, *Unarmed People of Color Killed by Police, 1999-2014*, GAWKER (Dec. 8, 2014, 2:15 PM), <http://gawker.com/unarmed-people-of-color-killed-by-police-1999-2014-1666672349>.

28. Tom Boggioni, *Teen Totes Shotgun Through Town Still Shaken by Mass Murder to Support 2nd Amendment*, RAW STORY (Aug. 3, 2014, 9:56 PM), <http://www.rawstory.com/rs/2014/08/03/teen-totes-shotgun-through-town-still-shaken-by-mass-murder-because-2nd-amendment/>.

29. Bob Cesca, *Two Americas: Ferguson, Missouri Versus the Bundy Ranch, Nevada*, DAILY BANTER (Aug. 14, 2014), <http://thedailybanter.com/2014/08/two-americas-ferguson-missouri-versus-bundy-ranch-nevada/>.

30. Greg Howard, *America is Not for Black People*, DEADSPIN (Aug. 12, 2014, 8:52 PM), <http://theconcourse.deadspin.com/america-is-not-for-black-people-1620169913>.

31. *People v. Goetz*, 497 N.E.2d 41 (N.Y. 1986).

None of the teenagers, whose names were Barry Allen, Troy Canty, Darrell Cabey, and James Ramseur, displayed any weapons. Goetz, who was carrying an unlicensed .38 handgun loaded with five rounds, responded by firing four shots, carefully aiming at each of the four men. He missed his last target, Cabey. Upon realizing this, Goetz said to Cabey, “you seem to be all right, here’s another” and shot him again, severing his spinal cord. Goetz then jumped on the train tracks and fled the scene.

In response to the charges of attempted murder and assault of the four youths, Goetz claimed self-defense.<sup>32</sup> Goetz testified that before any of the men approached him, he knew that “they wanted to play with me,” despite the fact that he did not believe that any of the men had a gun. Goetz claimed to have been injured in a mugging some years before, and that this was when he had started carrying his illegal weapon. Goetz’s claim of self-defense was undermined—or should have been undermined—by his startlingly candid account of his internal thoughts during the incident.<sup>33</sup> Before he started shooting, Goetz said, he planned out his pattern of fire, stating that his intention in firing was to “murder [the four youths], to hurt them, to make them suffer as much as possible”—not to save his life or defend himself.<sup>34</sup> Goetz was nonetheless acquitted of all charges except for possession of a concealed weapon. He was sentenced to one year for this charge and served eight months.<sup>35</sup>

In all three cases, the race of the victims played a significant role in the perception of the threat they posed. Media coverage of the Goetz case painted a picture of the four young men shot by Goetz as the kind of animalistic thugs that were threatening the safety of New York. Much was made of the fact that the men Horn killed were black illegal immigrants, suggesting that these characteristics somehow justified the shootings. Though the media coverage of Trayvon Martin’s case was less one-sided, efforts were made by both his defense team and by certain media outlets to portray Martin as a drug-dealing hoodlum whom Zimmerman could have reasonably thought was up to no good.<sup>36</sup> The racial issues surrounding Stand Your Ground laws are hard to ignore, especially in light of the racial issues at play in other uses of (primarily male) force, e.g. police brutality.

These examples illustrate how men’s violence against other men tends to be tolerated, even encouraged, when the targets are perceived to

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32. *Id.* at 46.

33. *Id.* at 44 (internal quotation marks omitted).

34. *Id.*

35. 2 SCOTT P. JOHNSON, TRIALS OF THE CENTURY: AN ENCYCLOPEDIA OF POPULAR CULTURE AND THE LAW, 540 (2011). One of Goetz’s victims, James Ramseur, was found dead as the result of an apparent suicide on December 22, 2011, twenty-seven years to the day he was shot by Goetz. Goetz’s attorney, Darnay Hoffman, committed suicide in 2009. John Del Signore, *Man Shot by Bernhard Goetz Found Dead After Apparent Suicide*, GOTHAMIST (Dec. 23, 2011, 9:37 AM), [http://gothamist.com/2011/12/23/man\\_shot\\_by\\_bernhard\\_goetz\\_found\\_de.php](http://gothamist.com/2011/12/23/man_shot_by_bernhard_goetz_found_de.php).

36. Alexander Tepperman, *Marijuana’s “Dark Side”: Drugs, Race, and the Criminilization of Trayvon Martin*, 2 (2013), available at [http://scholarship.law.ufl.edu/cgi/viewcontent.cgi?article=1005&context=csrrr\\_events](http://scholarship.law.ufl.edu/cgi/viewcontent.cgi?article=1005&context=csrrr_events).

be “lower-status” males. Such an attitude is evident not only in the use of deadly force by both citizens and law enforcement against minority men, but also in other contexts. The rampant sexual, physical, and psychological abuse of men in prison is met with little or no institutional, social, and legal response.<sup>37</sup> It is not unusual to hear an unabashed assertion that such men deserve these abuses because of the crimes they committed.<sup>38</sup> In the military context, the sexual assault and harassment of soldiers perceived as gay is given similar treatment.<sup>39</sup> In these contexts, the indulgence of such male-on-male violence seems based in the belief that the victims, by virtue of being lower on the male hierarchy because of race or sexual orientation, deserve what they get. In that sense, men afforded lower status in the hierarchy of male power are treated in ways similar to women.<sup>40</sup>

### B. *Men’s Violence Towards Women: Encouraged and Indulged*

Male-on-male violence is frequently marked by differences in race, sexual orientation, and economic status between the perpetrator and the victim. Male-on-female violence is also marked by all of these, but also, of course, by gender differences. Male violence against women far outstrips female violence against men, and the history of its use is not so much one of subtle indulgence, but overt encouragement by both legal and social forces.<sup>41</sup>

The doctrine of coverture, which maintained that a married woman was “covered” by her husband under the law and thus lost most of her own rights and responsibilities, included both a “right of chastisement” and what would later come to be known as the “marital rape exemption.” In other words, until the mid 19th century—and in the case of the marital rape exemption, far into the 20th century—the law pointedly granted men *rights* of violence against women. Such baldly stated legal doctrines have largely disappeared from American law, but their influence remains.<sup>42</sup>

As William Blackstone described it, “The husband . . . (by the old law) might give his wife moderate correction. For, as he is to answer for

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37. See Rebecca Boone, *Concerns Rise Over US Anti-Prison Rape Law’s Fate*, JUST DETENTION (Jan. 5, 2015), [http://www.justdetention.org/en/jdnews/2015/01\\_05\\_15.aspx](http://www.justdetention.org/en/jdnews/2015/01_05_15.aspx).

38. See HUMAN RIGHTS WATCH, *NO ESCAPE: MALE RAPE IN U.S. PRISONS* (2001).

39. *Men Sexually Assaulted in the Military Speak Out*, MILITARY.COM (Dec. 20, 2013), <http://www.military.com/daily-news/2013/12/20/men-sexually-assaulted-in-the-military-speak-out.html> (noting also that the repeal of Don’t Ask, Don’t Tell has led to an increase in reports). One of the indirect consequences of Don’t Ask Don’t Tell was that victims of same-sex sexual assault were discouraged from reporting because it would lead to questions about their sexual orientation. *Id.*

40. See generally Mary Anne Franks, *How to Feel Like a Woman, or, Why Punishment is a Drag*, 61 UCLA L. REV. 566 (2014) (arguing, *inter alia*, that the use of feminization as punishment demonstrates society’s low valuation of women).

41. See Laurie J. Taylor, Comment, *Provoked Reason in Men and Women: Heat-of-Passion Manslaughter and Imperfect Self-Defense*, 33 UCLA L. REV. 1679, 1680–81 (1986).

42. See, e.g., Maggie Cheu, *Now and Then: How Coverture Ideology Informs the Rhetoric of Abortion*, 22 TEX. J. WOMEN & L. 113 (2012).

her misbehaviour, the law thought it reasonable to intrust him with the power of restraining her, by domestic chastisement.”<sup>43</sup> This “old law” was not overruled in American courts until the 1870s, and one might well question how far they have come since then. In 1994, a Maryland truck driver named Kenneth Peacock came home early and found his wife in bed with another man. After chasing the man away, getting drunk, and arguing with his wife, Peacock shot his wife in the head with a hunting rifle. Peacock plead guilty to voluntary manslaughter, and was sentenced to 18 months in prison. The judge who sentenced him, Robert E. Cahill, expressed his regret that he had to give Peacock any prison time at all by saying, “I seriously wonder how many men married five, four years would have the strength to walk away without inflicting some corporal punishment.”<sup>44</sup> It is telling that Judge Cahill not only personally held this view, but also felt comfortable announcing that view explicitly and publicly as a reason for his ruling.<sup>45</sup>

Men are responsible for the majority of all forms of intimate partner violence, including physical violence, sexual assault, and stalking.<sup>46</sup> Men kill women at much higher rates than women kill men, and their reasons for doing so rarely have anything to do with self-defense.<sup>47</sup> Men kill women for sleeping with someone else,<sup>48</sup> flirting with someone else,<sup>49</sup> refusing to continue a relationship,<sup>50</sup> refusing to begin a relationship,<sup>51</sup> for leaving home,<sup>52</sup> for “nagging,”<sup>53</sup> for insulting their manhood,<sup>54</sup> and the law often responds with lenience in the form of provocation defenses that reduce murder charges to manslaughter and carry relatively light sentenc-

43. WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 444 (1765).

44. Tamar Lewin, *What Penalty for Killing in Passion?* N.Y. TIMES (Oct. 21, 1994), <http://www.nytimes.com/1994/10/21/us/what-penalty-for-a-killing-in-passion.html>.

45. Following this case, Maryland legislators amended the law to exclude adultery as a sufficient ground for a provocation defense. See Kimberly Wilmot-Weidman, *After a 3-Year Fight, Murder is Finally Murder in Maryland*, CHI. TRIB. (Nov. 23, 1997), [http://articles.chicagotribune.com/1997-11-23/features/9711230114\\_1\\_spousal-maryland-law-deadly-rage](http://articles.chicagotribune.com/1997-11-23/features/9711230114_1_spousal-maryland-law-deadly-rage).

46. Across all forms of violence, the majority of female victims reported that the perpetrators were male. Male rape victims and male victims of non-contact, unwanted sexual experiences reported predominantly male perpetrators. Nearly half of male stalking victims also reported perpetration by a male. Matthew J. Breiding et al., *Prevalence and Characteristics of Sexual Violence, Stalking, and Intimate Partner Violence Victimization—National Intimate Partner and Sexual Violence Survey, United States, 2011*, CTRS. FOR DISEASE CONTROL (Sept. 5, 2014), <http://www.cdc.gov/mmwr/preview/mmwrhtml/ss6308a1.htm>.

47. VIOLENCE POLICY CTR., WHEN MEN MURDER WOMEN: AN ANALYSIS OF 2010 HOMICIDE DATA (2012), available at <http://www.vpc.org/studies/wmmw2012.pdf>.

48. See Donna K. Coker, *Heat of Passion and Wife Killing: Men Who Batter/ Men Who Kill*, 2 S. CAL. L. & WOMEN'S STUD. 71, 103–04 (1992).

49. Victoria Nourse, *Passion's Progress: Modern Law Reform and the Provocation Defense*, 106 YALE L. J. 1331, 1332–33 (1997).

50. See generally Martha R. Mahoney, *Legal Images of Battered Women: Redefining the Issue of Separation*, 90 MICH. L. REV. 1 (1991).

51. *People v. Casassa*, 404 N.E.2d 1310, 1312 (1980).

52. See Mahoney, *supra* note 49, at 6.

53. *Police: Texas Man Kills Nagging Wife*, WFMY NEWS 2, (July 7, 2012, 8:43 AM), <http://www.digitriad.com/news/local/story.aspx?storyid=235427>.

54. *Girouard v. State*, 583 A.2d 718, 719–20 (Md. 1991).

es.<sup>55</sup> By contrast, women who kill men often do so in response to physical beatings, rape, threats to themselves or their children, and rarely do so for reasons of infidelity or relationship control—and the law often responds by refusing such women self-defense or provocation instructions.<sup>56</sup>

With regard to sexual assault, the marital rape exemption had two non-mutually exclusive justifications: one, the fictive notion of “marital unity”—if man and wife are one, then the one cannot be guilty of an outrage against the other. Of course, this “unity” really only worked in one direction; women were not perceived as having the right to inflict violence (sexual or otherwise) upon their husbands. The other notion was that of a woman’s irrevocable sexual consent upon marriage: “*the husband cannot be guilty of a rape committed by himself upon his lawful wife, for by their mutual matrimonial consent and contract the wife hath given up herself in this kind unto her husband, which she cannot retract.*”<sup>57</sup> The last state to remove its formal marital rape exemption was North Carolina, which did so in 1993.<sup>58</sup> Marital rape is still considered a lesser crime than other forms of rape in most states.<sup>59</sup>

Rape, whether within marriage or not, is both extremely common and extremely under-punished. It is also a crime perpetrated mostly by men against women.<sup>60</sup> According to a study by the Centers for Disease Control and Prevention, there were nearly 1.3 million rapes of women in the U.S. in 2010,<sup>61</sup> nearly all of them committed by men.<sup>62</sup> One in five women will be raped in her lifetime; studies focusing on female college students found that their odds of being raped are one in four.<sup>63</sup> Rape is

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55. See Nourse, *supra* note 48, at 1331; Emily L. Miller, *(Wo)manslaughter: Voluntary Manslaughter, Gender, and the Model Penal Code*, 50 EMORY L.J. 665 (2001).

56. Taylor, *supra* note 40, at 1719.

57. 1 SIR MATTHEW HALE, *THE HISTORY OF THE PLEAS OF THE CROWN* 629 (Philadelphia, Robert H. Small 1847).

58. THE NATIONAL CENTER FOR VICTIMS OF CRIME, *SPOUSAL RAPE LAWS: 20 YEARS LATER* 1 (2004), available at <http://www.njep-ipsacourse.org/PDFs/NCVCspousalrapelaws.pdf>.

59. *Id.* at 3.

60. It is important to note, however, that recent research using updated (non gender-specific) definitions of sexual assault and including previously omitted institutionalized populations (e.g. prisons) indicates that there are far more male victims of sexual assault than previously believed.

61. NATIONAL CENTER FOR INJURY PREVENTION AND CONTROL, *NATIONAL INTIMATE PARTNER AND SEXUAL VIOLENCE SURVEY: 2010 SUMMARY REPORT*, at 18 (2010) [hereinafter NISVS 2010], [http://www.cdc.gov/violenceprevention/pdf/nisvs\\_report2010-a.pdf](http://www.cdc.gov/violenceprevention/pdf/nisvs_report2010-a.pdf) (putting the number at 1,270,000). This figure is considerably higher than the number reported by the National Crime Victimization Survey (NCVS), which counted 188,380 rapes in 2010. JENNIFER L. TRUMAN, U.S. DEP’T OF JUSTICE, PUB. NO. 235508, *2010 NATIONAL CRIME VICTIMIZATION SURVEY* (2011), available at <http://bjs.gov/content/pub/pdf/cv10.pdf>. There is compelling evidence demonstrating that the NCVS’s study is badly flawed (including lack of privacy controls and a definition of rape that excludes incapacitation) and thus the Centers for Disease Control study is far more accurate. See NAT’L RESEARCH COUNCIL, *ESTIMATING THE INCIDENCE OF RAPE AND SEXUAL ASSAULT* 71 (Candace Kruttschnitt et al. eds., 2014).

62. 98.1% of perpetrators were male. Men also commit 93.3% of sexual violence against men. See NISVS 2010, *supra* note 60, at 24.

63. CTRS. FOR DISEASE CONTROL, *Sexual Violence* 1 (2012), available at <https://www.cdc.gov/violenceprevention/pdf/sv-datashet-a.pdf>; Bonnie S. Fisher et al., *The Sexual Victimization of College Women*, DEP’T OF JUSTICE 10 (2000), available at <https://www.ncjrs.gov/pdffiles1/nij/182369.pdf>. The

also a very personal crime: the majority of men who rape know their victims,<sup>64</sup> and 67% of women who are raped will be raped by her intimate partner.<sup>65</sup>

Most of these sexual assaults never make it into official reports. The vast majority of rapes—more than 80%—are never reported to police.<sup>66</sup> That is, the vast majority of rapists will never be so much as questioned by police, to say nothing of being punished for their crime. The victims that do report their rapes to police often face insensitivity, skepticism, incompetence, and sometimes even outright hostility from law enforcement. Recent research by Corey Yung persuasively demonstrates that police departments around the country have been deliberately and systematically suppressing the number of reported rapes for more than a decade.<sup>67</sup> The laws of many states define rape in terms of presence of force as opposed to absence of consent, erasing the crimes against victims who cannot prove that their attackers used physical force beyond what was necessary for sexual penetration.<sup>68</sup>

Despite the widespread belief that it is easy for women to “cry rape” (going back at least 1680, when Sir Matthew Hale, Lord Chief Justice of England, claimed that rape is an accusation “easily to be made, hard to be proved, and harder yet to be defended by the party accused, tho’ never so innocent . . . ”<sup>69</sup>) many women face skepticism and even hostility for reporting assaults.<sup>70</sup> Rape investigations can be humiliating, invasive, and traumatizing; rape kits can take up to six hours to complete and cause extreme discomfort and pain.<sup>71</sup> A shockingly high number of those rape kits will never even be analyzed; there are an estimated 400,000 untested rape kits in the United States.<sup>72</sup> While two-thirds of all

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study estimated that between one in four and one in five college women experience completed or attempted rape in their college years. *Id.*

64. PATRICIA TJADEN & NANCY THOENNES, NAT’L INST. OF JUSTICE, PUB. NO. 183781, FULL REPORT OF THE PREVALENCE, INCIDENCE, AND CONSEQUENCES OF VIOLENCE AGAINST WOMEN: FINDINGS FROM THE NATIONAL VIOLENCE AGAINST WOMEN SURVEY 46–47 (2000), available at <https://www.ncjrs.gov/pdffiles/183781.pdf>.

65. *Id.* at 43.

66. See NAT’L RESEARCH COUNCIL, *supra* note 61, at 36 (“Conducted in 1989-1991, the National Women’s Study . . . collected information on rape and sexual assault. It estimated that 84% of rape victims did not report their victimization to police (Kilpatrick, Edmunds, and Seymour, 1992). Tjaden and Thoennes (2006) reported a similar percentage (81%) of nonreporting from the National Violence Against Women Survey.”).

67. Yung estimates that as many as a million rapes have gone uncounted during this period. “America is in a crisis of sexual violence that has gone undetected because police departments across the country systemically underreport rape.” Corey Rayburn Yung, *How to Lie with Rape Statistics: America’s Hidden Rape Crisis*, 99 IOWA L. REV. 1197, 1204 (2014).

68. JOSHUA DRESSLER, CASES AND MATERIALS ON CRIMINAL LAW (5th ed. 2009).

69. 2 SIR MATTHEW HALE, THE HISTORY OF THE PLEAS OF THE CROWN 606 (Philadelphia, Robert H. Small 1847).

70. See Jill Smolowe, *Too High a Price?*, PEOPLE (Sept. 20, 2004), <http://www.people.com/people/archive/article/0,,20145500,00.html>.

71. Sexual Assault Information & Resources: Immediate Physical Safety and Medical Options, WHEATON COLLEGE, <http://wheatoncollege.edu/sexual-assault/home/frequently-asked-questions/relationship-violence/> (last visited May 27, 2016).

72. Hillary Hylton, *The Dark Side of Clearing America’s Rape Kit Backlog*, TIME MAG. (Sept. 7, 2013), <http://nation.time.com/2013/09/07/the-dark-side-of-clearing-americas-rape-kit-backlog/>.

rapes are committed by someone the victim knows,<sup>73</sup> acquaintance rapes are the least likely to be prosecuted and to yield convictions.<sup>74</sup> Only 37% of all reported rapes are prosecuted.<sup>75</sup> The conviction rate for the tiny number of cases that are actually reported, survive the skepticism and hostility of law enforcement, are taken seriously by prosecutors, and fit the narrow definition of rape used by most states, is 18%.<sup>76</sup>

Stalking and sexual harassment are also overwhelmingly perpetrated by men against women. One in six women will be stalked in her lifetime; 82.5% of perpetrators of stalking against women are men.<sup>77</sup> Up to 80% of women have experienced street harassment,<sup>78</sup> which can include sexual threats and groping, and is also perpetrated largely by men. Street harassment's anonymous and often fleeting nature makes it difficult for women to seek any redress, even in areas that have laws prohibiting such conduct.<sup>79</sup>

### III. INTOLERANCE OF WOMEN'S VIOLENCE: A DOUBLE BIND

One might think that the contemporary expansion of self-defense doctrine on the one hand, and the prevalence of men's violence against women on the other would lead to the legal and social encouragement of women defending themselves against the men who attack them. But the opposite has occurred, providing strong evidence that violence is perceived as the privilege of men to use even when the situation does not justify it, a privilege denied to women even when the situation does justify it.

Stand Your Ground laws have greatly expanded the so-called castle doctrine, which allows individuals to use deadly force in their own homes even if they could safely retreat. The castle doctrine reflected the social presumption that people should not be forced to retreat from their own homes when under attack. But however well-suited the castle-doctrine exception to the general duty to retreat may be for home invasions by strangers, it is profoundly unresponsive to domestic violence situations, in which victims and attackers share the same "castle." It is significant

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73. TJADEN & THOENNES, *supra* note 64, at 43.

74. Kathleen F. Cairney, Note, *Addressing Acquaintance Rape: The New Direction of the Rape Law Movement*, 69 ST. JOHNS L. REV. 291, 299 (1995).

75. University of Kentucky Center for Research on Violence Against Women, *Top Ten Things Advocates Need to Know Series*, RESEARCH TO PRACTICE BRIEF 1, 1 (Dec. 2011), available at [http://www.uky.edu/CRVAW/files/TopTen/07\\_Rape\\_Prosecution.pdf](http://www.uky.edu/CRVAW/files/TopTen/07_Rape_Prosecution.pdf).

76. *Id.*

77. See NISVS 2010, *supra* note 61, at 29. Approximately one in nineteen men will be stalked in their lifetime; of these, nearly half (44.3%) will be stalked by another male. *Id.*

78. Deborah M. Thompson, "The Woman in the Street:" *Reclaiming the Public Space from Sexual Harassment*, 6 YALE J.L. & FEMINISM 313, 314 (1994); see also STOP STREET HARASSMENT, *Unsafe and Harassed in Public Spaces: A National Street Harassment Report* (2014), <http://www.stopstreetharassment.org/wp-content/uploads/2012/08/2014-National-SSH-Street-Harassment-Report.pdf> (reporting that 57% of women had experienced street harassment) [hereinafter STOP STREET HARASSMENT].

79. Thompson, *supra* note 78, at 335.



that the castle doctrine is rarely cited as a response to, or preemption of, the inevitable question asked of battered women: “Why didn’t she leave?”<sup>80</sup> The castle doctrine, were it not so thoroughly, though implicitly, gendered, would provide a ready response, namely that “she” should not have to leave her own home to avoid violence. The question, “Why didn’t she leave,” reflects the very different ways that self-defense concepts are applied to men and women. It is difficult to imagine asking a man why he “didn’t just leave” when someone broke into his house and threatened him —so difficult, in fact, that the question is effectively foreclosed by the castle doctrine. Yet, the question is routinely asked of women who are attacked in their own homes.<sup>81</sup>

Thus, one way to correct the historical deficiencies of the castle doctrine would be to take domestic violence explicitly into account and remove its gendered presumptions. That, however, has not been the approach taken by Stand Your Ground proponents. Women using deadly force against cohabitants still continue to be denied the protections of the castle doctrine, and the expansion of the exception to retreat, which is often referred to as the “true man rule,” has lived up to its name.<sup>82</sup>

By removing the duty to retreat not just from confrontations inside the home, but confrontations anywhere, Stand Your Ground laws are hard to square with traditional conceptions of self-defense. Even more significantly, those who agitate for and take advantage of Stand Your Ground laws are primarily white, heterosexual men<sup>83</sup>—the group that is, objectively speaking, least likely to experience unjustified intrusions on their liberty in public spaces. Women, along with racial and sexual minority men, experience far higher levels of public harassment than straight, white men.<sup>84</sup> As such, these groups have a far more compelling claim to expanding the use of force in self-defense. Yet they are *not* the groups clamoring for increased rights of to carry weapons or inflict serious injury, and in fact their use of violence is *less* likely to be indulged or encouraged by law or society, as this section will detail.<sup>85</sup>

Domestic violence is a widespread phenomenon marked by gender asymmetry. One in four women experience domestic violence in her life-

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80. See Diane Rosenfeld, *Why Doesn't He Leave? Restoring Liberty and Equality to Battered Women*, in *DIRECTIONS IN SEXUAL HARASSMENT LAW* 340 (Catherine MacKinnon & Reva Siegel eds., 2003).

81. MCCAUGHEY, *supra* note 2, at 48 (“[T]he legal burden to retreat, as well as the ‘true man’ exception to it, reinforce manly behavior in manly fights.”).

82. *Id.*

83. Stand Your Ground laws are largely the brainchild of the National Rifle Association (“NRA”). While the NRA does not release membership demographics, its Board of Directors is 93% white and 87% male. Dave Gilson, *Meet the NRA's Board of Directors*, MOTHER JONES (Jan. 16, 2013, 6:06 AM), <http://www.motherjones.com/politics/2013/01/nra-board-members-selleck-nugent>.

84. For women and gay men, the harassment is frequently perpetrated by private citizens; for black and Hispanic men, much harassment is perpetrated by law enforcement. See STOP STREET HARASSMENT, *supra* note 78, at 14–15; NEW YORK CIVIL LIBERTIES UNION, *Stop and Frisk: Report on 2011 Findings*, available at <http://www.nyclu.org/files/stopandfrisk-factsheet.pdf>.

85. See Franks, *How Stand Your Ground Hijacked Self-Defense*, *supra* note 9.

time.<sup>86</sup> Women account for 85% of all victims of intimate partner violence.<sup>87</sup> In 2000, 1,247 women were killed by an intimate partner, compared 440 men.<sup>88</sup> In 2007, 45% of all murders of women are committed by intimate partners, compared to 5% of all murders of men.<sup>89</sup> According to at least one study, 60% of all restraining orders are violated, yet only 16% of violators are ever jailed.<sup>90</sup> More than three women a day are killed by domestic violence.<sup>91</sup> Women in abusive relationships essentially have two options: rely on the State to protect them, or engage in self-help. Frequently, however, the State will not effectively intervene on their behalf to stop the violence. This lack of response can range from failure to enforce protective orders or to make arrests to lenient sentences for domestic abuse, thus failing to provide either deterrence or protection. When a battered woman, often precisely because of this lack of response, resorts to the option of self-help, the State frequently metes out harsh punishment.<sup>92</sup>

To illustrate this double bind, let us consider the cases of Jessica Lenahan and Judy Norman. Lenahan and Norman both faced extreme and unjustified physical violence from men; Lenahan chose to rely on the State to end the violence (behaving as a “good” battered woman should), whereas Norman chose to engage in self-help (behaving as a “bad” battered woman).

#### A. *Relying on the State for Protection: The “Good” Battered Woman*

After Jessica Lenahan married Simon Gonzales in 1990, Simon became increasingly abusive and violent. For several years, he beat and sexually assaulted Jessica, and threatened to kidnap their children.<sup>93</sup> After Jessica separated from Simon in 1999, he stalked her at home and at work.<sup>94</sup> Jessica obtained a temporary restraining order against Simon that required him to stay at least 100 yards away from her and her home.<sup>95</sup> She was told to keep the order with her at all times, and that the police

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86. NISVS 2010, *supra* note 61, at 2.

87. Callie Marie Rennison, INTIMATE PARTNER VIOLENCE, 1993-2001 1 (2003), available at <http://www.bjs.gov/content/pub/pdf/ipv01.pdf>.

88. *Id.*

89. Shannon Catalano et al., FEMALE VICTIMS OF VIOLENCE 4 (2009), available at <http://www.bjs.gov/content/pub/pdf/fvv.pdf>.

90. Andrew R. Klein, *Re-Abuse in a Population of Court-Restrained Male Batterers: Why Restraining Orders Don't Work* 208, in DO ARRESTS AND RESTRAINING ORDERS WORK?.

91. Katie Sanders, *CBS Sports' James Brown: 'More Than 3 Women Per Day' are Killed by Their Partner*, PUNDITFACT (Sept. 16, 2014, 4:40 PM), <http://www.politifact.com/punditfact/statements/2014/sep/16/james-brown/cbs-sports-james-brown-more-3-women-day-are-killed/>.

92. See generally Leigh Goodmark, *When is a Battered Woman Not a Battered Woman? When She Fights Back*, 20 YALE J.L. & FEMINISM 75 (2008).

93. Decl. of Jessica Roth Lenahan (Gonzales), at 1, ¶¶ 5–6, *Gonzales v. United States & Colorado*, Case 12.626. Inter-Am. Comm'n on H.R., Report No. 52/07, OEA/Ser.L/V/II.130, doc. 22 (2007) (Pet. No. P-1490-05).

94. *Id.* at 4, ¶¶ 12–13.

95. *Id.* at 4–5, ¶ 14.

were required by law to arrest Simon if he violated it.<sup>96</sup> Accordingly, when Simon broke into Jessica's house, changed her locks, and violated the order in numerous other ways, Jessica informed the police. Their response was to ignore her and, in some cases, scold her for bothering them.<sup>97</sup>

A few months later, a judge made the restraining order permanent. This order gave Jessica full custody of the three girls Jessica and Simon had together, allowing Simon visitation on alternate weekends and one prearranged dinner visit during the week.<sup>98</sup> About three weeks later, Jessica looked into her yard where her daughters had been playing and saw that they were gone.<sup>99</sup> Jessica called the police, telling them she thought Simon had taken the girls. Since Simon had not prearranged a visit that day, this would be a violation of the restraining order. She was told that an officer would come to her house.<sup>100</sup> After two hours went by and no one came, Jessica called the police again. Two officers came to her house, and Jessica showed them the restraining order. The officers told her, "he's their father, it's okay for them to be with him."<sup>101</sup> The officers told her they couldn't do anything at that point, and told her to call back at 10:00 p.m. if the children had not returned.<sup>102</sup> Shortly after the officers left, Simon's girlfriend called Jessica to tell her that Simon had called her and threatened to drive off a cliff. The girlfriend asked Jessica if he had a gun and whether he might hurt the children.<sup>103</sup>

Jessica finally reached Simon on his cell around 8:30 p.m. that night. Simon informed Jessica that he had taken the girls to an amusement park forty minutes away in Denver.<sup>104</sup> Jessica called the police immediately with this information. She was told that there was nothing they could do because Denver was out of their jurisdiction. Jessica pleaded with the police to issue a missing child alert or get in touch with the Denver police, but they refused. One officer told Jessica that this was a matter for "divorce court," and reassured Jessica "at least you know the children are with their father."<sup>105</sup> Jessica continued to call the police repeatedly. At 10:00 p.m., the dispatcher scolded her for her continued calls.<sup>106</sup> At mid-

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96. *Id.* at 5–6, ¶ 16.

97. *Id.* at 9, ¶ 21.

98. *Id.* at 10, ¶ 23.

99. *Id.* at 15, ¶ 37.

100. *Id.* at 16, ¶ 39.

101. *Jessica Gonzales' Statement Before the IACHR*, ACLU (Mar. 2, 2007), <https://www.aclu.org/human-rights-womens-rights/jessica-gonzales-statement-iachr>. The officer's response is an example of the state disregarding, and thereby tacitly legitimizing, the violence that Simon Gonzales had already inflicted against his ex-wife, as though such violence did not undermine Gonzales' rights or capabilities as a father.

102. *Id.*

103. *Id.*

104. *Id.*

105. *Id.* Again, the police focused only on the fact that Gonzales was the children's biological parent, ignoring his history of violence and the fact that he was, by taking the children, breaking the law at that very moment.

106. *Id.*

night, Jessica went to Simon's apartment, but he was not there. She called the police again and was promised that an officer would come. None did.<sup>107</sup> Jessica drove to the police station to tell yet another officer about the restraining order and that the children had been gone for seven hours. This officer then left for a two-hour dinner and never contacted Jessica again. In all, Jessica asked the police for help nine separate times that night.<sup>108</sup>

At some point in the evening after he had taken the girls, Simon purchased a semi-automatic weapon.<sup>109</sup> Why he was permitted to do this despite a federal law prohibiting the sale of guns to individuals subject to domestic violence restraining orders has never been made clear. At 3:20 a.m., Simon drove up to the Castle Rock Police Station and opened fire.<sup>110</sup> The police returned fire. When the shooting stopped, the bodies of Jessica's three little girls were found inside Simon's truck.<sup>111</sup> Jessica heard about the shooting from Simon's girlfriend, who called Jessica at 3:25 a.m. to say she thought the girls were dead.<sup>112</sup> When Jessica rushed to the station, the police refused to tell her whether the girls were alive or dead, instead interrogating Jessica for twelve hours.<sup>113</sup>

Jessica filed a § 1983 claim against the Castle Rock police department, arguing that the police had deprived her of her due process rights by failing to enforce the restraining order.<sup>114</sup> Relying in part on *Deshaney v. Winnebago*,<sup>115</sup> the Supreme Court ruled seven to two that citizens have no personal entitlement under the due process clause to enforcement of a restraining order.<sup>116</sup> *Deshaney* held that a cause of action exists only if the State illegitimately discriminates in providing its protection, or if the State has a "special relationship" to the individual.<sup>117</sup> The majority in *Castle Rock* apparently did not think that failing to enforce protective orders, which are most often taken out by women against men, constituted discrimination on the basis of gender; nor did it seem to think that the State had created a "special relationship" with Jessica by issuing a protective order that purported to mandate arrest in the event of violation. But *Deshaney* does not dictate such an outcome. In *Deshaney*, Chief Justice Rehnquist wrote that "[t]he affirmative duty to protect arises not from the State's knowledge of the individual's predicament or from its expressions of intent to help him, but *from the limitation which it has imposed on his freedom to act on his own behalf.*"<sup>118</sup> The Court cited as ex-

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107. *Id.*

108. *Id.*

109. *Id.*

110. *Id.*

111. *Id.*

112. *Id.*

113. *Id.*

114. *Castle Rock v. Gonzales*, 545 U.S. 748, 749 (2005).

115. *DeShaney v. Winnebago Cnty. Dep't of Soc. Servs.*, 489 U.S. 189 (1989).

116. *Castle Rock*, 545 U.S. at 757.

117. *DeShaney*, 489 U.S. at 119–200.

118. *Id.* at 200 (emphasis added).

amples prisoners, involuntarily committed mental patients, and people injured by police while in custody. What all of these groups have in common is that they were involuntarily subjected to limitations on their freedom by the State, and thus the State has a special obligation towards them. But when the State promises, both in general social contract terms via the monopoly on violence and (at least here) in the specific form of a permanent restraining order with a mandatory arrest provision, that it will act on behalf of a citizen facing a serious threat to herself or her children, and then repeatedly fails to do so, has it not also imposed a limitation on freedom?

Jessica, aided by (among others) the University of Miami School of Law Human Rights Clinic, brought her case before the Inter-American Commission of Human Rights.<sup>119</sup> The Commission issued a ruling in 2011 that stated:

The Commission has identified the duty of State parties to adopt legal measures to prevent imminent acts of violence, as one side of their obligation to ensure that victims can adequately and effectively access judicial protection mechanisms. The Commission has identified restraining orders, and their adequate and effective enforcement, among these legal measures. According to this principle, the failures of the State in this case to adequately and effectively organize its apparatus to ensure the implementation of the restraining order also violated the right to judicial protection of Jessica Lenahan and Leslie, Katheryn and Rebecca Gonzales.<sup>120</sup>

Unfortunately, this ruling has no direct effect on U.S. law.

Jessica Lenahan did everything a law-abiding woman is ostensibly supposed to do. When her husband became physically violent, she left him, even though he continued to threaten and stalk her. She sought and received restraining orders, enlisting the lawful protection of the State instead of attempting to meet private violence with private violence. By issuing restraining orders that required police to arrest her ex-husband if he violated their terms, and by a judge's assurances that this would in fact be done, the State invited—in effect, forced—Jessica to rely solely on its protection. Jessica forsook any option of private violence when she put her faith in the legal system. Her reward was an utter failure of State action, leaving her, in the end, to grieve over the dead bodies of her three children.

### *B. Violent Self-Help: The “Bad” Battered Woman*

We turn now to the case of Judy Norman. Over their twenty-year relationship, John Thomas Norman, known as “J.T.,” beat, raped, and prostituted his wife, Judy, as well as threatened her repeatedly with muti-

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119. Jessica Lenahan (Gonzales) et al. v. United States, Case 12.626, Inter-Am. Comm'n H.R., Report No. 80/11, OEA/Ser.L/V/II.142, doc. 7 ¶ 1 (2011).

120. *Id.* at ¶ 117.

lation and death, threatened her family and friends, and treated her literally like an animal, forcing her to bark like a dog and eat out of dog bowls.<sup>121</sup> Two days before the events that led to Judy Norman's arrest, J.T. Norman was arrested for driving under the influence. When Judy's mother bailed him out the next morning, he was angrier and more aggressive than before.<sup>122</sup> He demanded that Judy make him a sandwich, which he then threw on the floor. He demanded another, which he also threw on the floor, and told her she needed to make one without touching it. He took this third sandwich, which Judy wrapped in paper towels, and smeared it on her face. He then took Judy's cigarette and put it out on her neck. Around 8:00 p.m. that evening, police responded to a domestic call at the Norman residence.<sup>123</sup> Judy, whose face was bruised, told the officers her husband had been beating her all day and that she could not take it anymore. The officers told Judy to file a complaint, but Judy expressed her fear that if she did so, her husband would kill her.<sup>124</sup> The officers left, only to be called back less than an hour later. Judy had swallowed an entire bottle of pills and needed emergency assistance. Her husband threatened to kill Judy's mother and grandmother upon discovering what she had done. He tried to interfere with the paramedics, telling them to "[l]et the bitch die."<sup>125</sup> Officers were finally able to chase her husband into the house long enough to get Judy into an ambulance. Judy spoke with a therapist that night about the possibility of charging her husband and having him committed to a mental health center. She was released in the middle of the night and stayed at her grandmother's house.<sup>126</sup>

The next day, Judy told her husband about the possibility of having him committed, and he responded, "If you do, I'll see them coming and before they get here, I'll cut your throat."<sup>127</sup> He made Judy drive him and a friend to a nearby town, and began slapping her when he thought she was following a truck too closely. He poured his beer over her head. At one point he stretched out in the front seat as though he were going to take a nap, and kicked her in the head. It was the third day he had not let Judy eat any food.<sup>128</sup> Also that day, Judy's husband followed her to the social services office and interrupted her attempt to get welfare benefits. He threatened to kill and maim her, and beat her severely with his fists and with other objects.<sup>129</sup> That evening, when Judy tried to lie down on one of the two beds in their room, her husband told her she had to sleep on the floor: "Dogs don't lay in the bed. They lay in the floor."<sup>130</sup> Not

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121. State v. Norman, 378 S.E.2d 8, 10, 17 (N.C. 1989).

122. *Id.* at 10.

123. *Id.* at 19 (Martin, J., dissenting).

124. *Id.*

125. *Id.*

126. *Id.* at 10 (majority opinion).

127. *Id.* at 20 (Martin, J., dissenting).

128. *Id.*

129. *Id.* at 11 (majority opinion).

130. *Id.* at 20 (Martin, J., dissenting).

long after this, the couple's daughter asked J.T. if Judy could watch her baby. J.T. agreed and fell asleep. The baby started to cry, and Judy, afraid that the noise would wake up J.T., crept out of her house and went to her mother's.<sup>131</sup> While she was there, she asked her mother if she had any pain pills, and her mother replied that she had some in her purse. When Judy looked into the purse, she saw a gun in it.<sup>132</sup> Judy took the gun, went back to her house, and shot her sleeping husband three times in the back of the head.<sup>133</sup>

At trial, Judy requested a jury instruction of self-defense.<sup>134</sup> According to common law, a person can use deadly force in self-defense only when it is necessary, proportionate, and the danger is imminent.<sup>135</sup> The Supreme Court of North Carolina overturned a lower court ruling that had allowed Norman to receive a jury instruction on self-defense, holding that Norman did not have "a reasonable fear of imminent death or great bodily injury."<sup>136</sup> According to the Court, Norman was "not faced with an instantaneous choice between killing her husband or being killed or seriously injured. . . . [Norman] had ample time and opportunity to resort to other means of preventing further abuse by her husband."<sup>137</sup> It is difficult to know what the Court meant by "other means," considering the fact that J.T. had told her he would kill her before anyone would be able to help her, that he had made threats against her family, that J.T.'s previous stint in jail had left him angrier and even more violent, and that the police had never even bothered to show up after Norman's mother had called the police before the shooting took place.<sup>138</sup>

The Court was clearly alarmed by the prospect of battered wives seeking violent retaliation: to grant Norman an instruction on self-defense, it claimed,

would tend to categorically legalize the opportune killing of abusive husbands by their wives solely on the basis of the wives' testimony concerning their subjective speculation as to the probability of future felonious assaults by their husbands. Homicidal self-help would then become a lawful solution, and perhaps the easiest and most effective solution, to this problem.<sup>139</sup>

As the dissent observed, however, it is possible for *any* self-defense claim to be misused. There was no reason to single out self-defense claims by battered spouses, as they are not unique in allowing for the possibility of

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131. *Id.*

132. *Id.*

133. *Id.* at 13 (majority opinion).

134. *Id.* at 9.

135. *See, e.g.,* JOSHUA DRESSLER, *CASES AND MATERIALS ON CRIMINAL LAW* 500–07 (5th ed. 2009).

136. *Norman*, 378 S.E.2d at 9.

137. *Id.* at 13.

138. *Id.* at 10, 13; *see also id.* at 19–20 (Martin, J., dissenting).

139. *Id.* at 15 (majority opinion). Though the Court obviously wished to sound a cautionary note in claiming that homicidal help would become the "easiest and most effective solution" to the problem of severe and prolonged domestic abuse, one way of stating my argument is to say that this claim is exactly right—not only descriptively, but normatively. *Id.*

the “peril of fabricated evidence.”<sup>140</sup> Even more to the point, the dissenting judge noted that the record in Norman’s case “contain[ed] no reasonable basis to attack the credibility of evidence for the defendant.”<sup>141</sup>

The outcome of *State v. Norman* is shocking in itself; it is all the more so compared to *People v. Goetz*, discussed above. Recall that in *Goetz*, a man who tried to kill four young men he had never met before, but somehow “knew” were dangerous to him, was granted a self-defense instruction and acquitted of all attempted murder and assault charges. In *Norman*, a woman who shot the man that had terrorized, beaten, prostituted, and threatened her for twenty years was denied a jury instruction on self-defense and convicted of voluntary manslaughter.<sup>142</sup> When men use deadly force against lower-status men based on no more than speculation that they might pose a threat, the State accommodates this violence; when women uses deadly force against men who have actually and repeatedly committed violence against them, the State condemns this violence.

### C. *Can Women Stand Their Ground?*

As detailed above, legal and social norms are shifting towards an expanded vision of justifiable deadly force, but this emerging indulgence of violence seems to be primarily reserved for men, and primarily for men at the top of the race and class hierarchy. Stand Your Ground laws ostensibly strengthen citizens’ rights to protect themselves both in public and in the home: Florida’s law, for instance, adds certain presumptions of reasonableness to confrontations occurring inside the home. One might reasonably surmise that such laws might in part be aimed at correcting the imbalance just described, wherein battered spouses (mostly women) who resort to deadly force against their abusive partners are treated more harshly than people (mostly men) who use preemptive violence against strangers.

The case of Marissa Alexander, a Florida Stand Your Ground case that received far less attention than George Zimmerman’s, casts this proposition into serious doubt.<sup>143</sup>

Marissa Alexander, an African-American mother of three, was estranged from her husband, Rico Gray, who had been abusive towards

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140. *Id.* at 16 (Martin, J., dissenting).

141. *Id.* Norman’s sentence was ultimately commuted to time served by the governor of North Carolina. *Sentence Commuted*, TIMES-NEWS, July 8, 1989, at 5, available at <http://news.google.com/newspapers?nid=1665&dat=19890708&id=mKIbAAAAIbAJ&sjid=R04EAAAAIbAJ&pg=5346,1536168>.

142. These two cases often appear back-to-back in criminal law casebooks, with accompanying notes implying that those who think Norman should have received an instruction on self-defense must support the outcome in *Goetz*—a misleading implication, if not an outright false equivalence.

143. For a more detailed analysis of the Marissa Alexander case, see Franks, *Real Men Advance*, *supra* note 16, at 1118–19.



Alexander during their relationship.<sup>144</sup> Gray had been arrested twice before on misdemeanor charges of domestic battery, and Alexander had once obtained a protection order against him.<sup>145</sup> On August 1, 2010, a few days after giving birth to a child fathered by Gray, Alexander invited Gray to her home to see pictures of their child on her cell phone.<sup>146</sup> Gray had brought his son with him, and the interaction was amicable until Alexander got up to use the bathroom and Gray began looking at text messages on her phone. Upon finding some messages from Alexander's ex-husband, Gray flew into a rage.<sup>147</sup> The two fought, and Alexander told Gray to leave. He refused, and Alexander tried to leave through the garage. Upon realizing that the door would not open, Alexander returned to the kitchen with the lawfully possessed gun she had left her truck.<sup>148</sup> According to Alexander, Gray threatened her life upon her return, and she fired a shot into the ceiling to scare Gray into leaving. In a sworn deposition, Gray himself confirmed that Alexander's version of what happened was true, though he later retracted this.<sup>149</sup>

After Gray left the house, he called the police, who arrested Alexander immediately arrested upon arrival at her home.<sup>150</sup> Though her husband admitted that he had threatened Alexander and the shot harmed no one, Alexander was denied Stand Your Ground immunity.<sup>151</sup> At her first trial, she was convicted of three counts of aggravated assault with a deadly weapon (her husband's two sons were in the home at the time of the shooting) and sentenced to twenty years.<sup>152</sup> Alexander was granted a new trial because of erroneous jury instructions, but was once again denied Stand Your Ground immunity.<sup>153</sup> Alexander eventually agreed to a plea deal that would allowed her to be released in January 2015, by which point she had spent 1,095 days in prison.<sup>154</sup>

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144. Mitch Stacy, *Marissa Alexander Gets 20 Years for Firing Warning Shot* (VIDEO), HUFFINGTON POST (May 19, 2012, 4:31 PM), [http://www.huffingtonpost.com/2012/05/19/marissa-alexander-gets-20\\_n\\_1530035.html](http://www.huffingtonpost.com/2012/05/19/marissa-alexander-gets-20_n_1530035.html).

145. Franks, *Real Men Advance*, *supra* note 16, at 1118.

146. Deposition of Rico Gray at 15, *State v. Alexander*, No. 2010-CF-8579 (Fla. Cir. Ct. Nov. 22, 2010).

147. *Id.* at 12–16.

148. *Id.* at 27–28.

149. Irin Carmon, *Can Women Stand Their Ground? Depends on the Target*, MSNBC (Mar. 20, 2014, 3:05 PM), <http://www.msnbc.com/msnbc/can-women-stand-their-ground>.

150. Kirsten Powers, *Prosecuted for Standing Her Ground*, DAILY BEAST (July 19, 2013, 4:45 AM), <http://www.thedailybeast.com/articles/2013/07/19/angela-corey-s-overzealous-prosecution-of-marissa-alexander.html>.

151. Irin Carmon, *Marissa Alexander Denied New Stand Your Ground Hearing*, MSNBC (Jan. 27, 2015, 11:52 PM), <http://www.msnbc.com/msnbc/marissa-alexander-denied-new-stand-your-ground-hearing>.

152. Steven Nelson, *Marissa Alexander Now Faces 60 Years for 'Warning Shot' at Abusive Husband*, U.S. NEWS & WORLD REPORT (Mar. 3, 2014, 1:11 PM), <http://www.usnews.com/news/articles/2014/03/03/marissa-alexander-now-faces-60-years-for-warning-shot-at-abusive-husband>.

153. Angela Corey, the prosecutor in Alexander's case—the same prosecutor as in Zimmerman's case—has announced her intention to have Alexander's sentence increased to sixty years (twenty years for each of the counts to be served consecutively instead of concurrently). *See id.*

154. *Marissa Alexander Out of Jail After Plea Deal in Warning Shot Case*, BAY NEWS 9 (Jan. 28, 2015, 9:37 AM), <http://www.baynews9.com/content/news/baynews9/news/article.html/content/news/>

The privilege of self-defense is denied to women not only when they are in their own homes but also when the person against whom force is used is a known and credible threat. It is denied even when the force used does not result in death or even injury. Jessica Lenahan attempted to respond to her situation through reliance on the law; after recognizing the indifference and futility of law enforcement efforts, Judy Norman finally took matters into her own hands. The law punished both of them—in Lenahan’s case by its refusal to exercise the force it had promised her and on which she had relied, and in Norman’s case by punishing her for using her own force. Similarly, Marissa Alexander was initially sentenced to twenty years in prison for firing warning shots to ward off the man who was trying to strangle her, while George Zimmerman, who shot an unarmed black teenager at point blank, was acquitted of any wrongdoing.

These cases illustrate the double bind in which victims of male violence are caught: they are denied the State’s violence on their behalf, and they are prohibited from using their own violence. How is a female victim to be empowered under such conditions, and how is a violent male to be deterred?

#### IV. THE COSTS OF VIOLENCE

Violence can be justified or unjustified, socially beneficial or socially harmful, efficient or inefficient. Male violence towards women is, in the main, unjustified, socially harmful, and inefficient. These three characteristics are interrelated and mutually reinforcing.

The most compelling justification for violence is defense of self or others. The fact that the vast majority of male violence against women is not premised on any threat to men’s physical wellbeing is significant. Male violence against women is rarely used in response to women’s use of force.<sup>155</sup> Nor can male violence against women generally be explained, to say nothing of justified, as mutual combat,<sup>156</sup> protection of property, or what is known in criminal law as “imperfect self-defense.” Imperfect self-defense is a common law defense available to defendants who use force in the honest but mistaken belief that it was necessary.<sup>157</sup> When we con-

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articles/cfn/2015/1/28/marissa\_alexander.html (stating that the plea agreement includes two years of house arrest).

155. While men certainly are sometimes victims of women’s violence (and perhaps far more often than statistics can yet tell us, given the stigma that accompanies such an admission), statistically speaking men are overwhelmingly likely to be the instigators of violence against women rather than the other way around. *But see* Joan Arehart-Treichel, *Men Shouldn’t Be Overlooked as Victims of Partner Violence*, *PSYCHIATRIC NEWS* (Aug. 3, 2007), <http://psychnews.psychiatryonline.org/doi/full/10.1176%2Fpn.42.15.0031a> (“In fact, when it comes to nonreciprocal violence between intimate partners, women are more often the perpetrators.”).

156. With the exception of some small percentage of domestic violence situations. *But see id.* (“Although more men than women (53% versus 49%) had experienced nonreciprocal violent relationships, more women than men (52% versus 47%) had taken part in ones involving reciprocal violence.”).

157. *See* CYNTHIA LEE, *MURDER AND THE REASONABLE MAN*, 134 (2003).

sider the principal forms of men's violence against women—domestic battering, sexual assault, stalking, and sexual harassment—it is clear that such violence is for the most part both gratuitous and unilateral.

Men's violence against women imposes significant costs on victims. The spectrum of male aggression towards women causes an array of negative consequences. Domestic violence can cost victims their jobs, their financial stability, their children, their family and social support systems, and their lives. The trauma of sexual assault can last a lifetime, undermining victims' ability to work, receive an education, and form and maintain intimate relationships. Stalking victims often live their whole lives in fear, never knowing when their stalker might reappear or what he may do when he does. Many stalking victims have to relocate, change jobs, or even change their names to try to elude their abusers. Street harassment provokes fear, anger, and discomfort in women,<sup>158</sup> which restricts their personal liberties (including their choice of what to wear and when and where to walk) and undermines their sense of safety and right to access public spaces.<sup>159</sup>

These injuries are not limited to the victims themselves. Violent men often also target victims' children, family members, friends, peers, and intimate partners. Men who kill their partners, or ex-partners, not infrequently also kill or injure the co-workers or family members. The psychological effect on children, other family members, and bystanders forced to witness violence is another significant cost. Studies show that children who witness domestic violence suffer a range of psychological and developmental problems, and that growing up in a violent home is the “single best predictor of children becoming either perpetrators or victims of domestic violence later in life.”<sup>160</sup>

These forms of violence also cause serious economic costs: health care expenses, legal expenses, law enforcement and court resources, lost wages, lost labor, lost parenting hours, and lost productivity. According to a 2003 study on Intimate Partner Violence (“IPV”) by the Centers for Disease Control and Prevention,

The costs of intimate partner rape, physical assault, and stalking exceed \$5.8 billion each year, nearly \$4.1 billion of which is for direct medical and mental health care services. The total costs of also in-

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158. See STOP STREET HARASSMENT, *supra* note 78, at 6, 10.

159. See Cynthia Grant Bowman, *Street Harassment and the Informal Ghettoization of Women*, 106 HARV. L. REV. 517, 542 (1993) (“[T]he continuation and near-general tolerance of street harassment has serious consequences both for women and for society at large. It inflicts the most direct costs upon women, in the form of fear, emotional distress, feelings of disempowerment, and significant limitations upon their liberty, mobility, and hopes for equality. It also increases distrust between men and women and reinforces rigid gender roles, hierarchy, and the confinement of women to the private sphere. Street harassment thus performs a function as a social institution that is antithetical to the acceptance of women into American public life on terms equal to men.”); Olatokunbo Olukemi Laniya, *Street Smut: Gender, Media, and the Legal Power Dynamics of Street Harassment, or ‘Hey Sexy’ and Other Verbal Ejaculations*, 14 COLUM. J. GENDER & L. 91 (2005).

160. See UNICEF, BEHIND CLOSED DOORS: THE IMPACT OF DOMESTIC VIOLENCE ON CHILDREN 7 (2006), available at <http://www.unicef.org/protection/files/BehindClosedDoors.pdf>.

clude nearly \$0.9 billion in lost productivity from paid work and household chores for victims of nonfatal IPV and \$0.9 billion in lifetime earnings lost by victims of IPV homicide. The largest proportion of the costs is derived from physical assault victimization because that type of IPV is the most prevalent. The largest component of IPV-related costs is health care, which accounts for more than two-thirds of the total costs.<sup>161</sup>

Individual economic costs are furthermore often part of a vicious cycle: the fewer financial resources a woman has, the fewer options she has to exit an abusive relationship.

All of these costs also sustain and exacerbate gender inequality. Violence, especially ongoing violence, renders victims less competitive in every sense. The experience or anticipation of violence traps women in destructive relationships, restricts their freedom of movement, inhibits their performance in workplaces and schools, and drives many women away from certain jobs, opportunities, and spaces altogether. Male violence towards women promotes toxic presumptions of male superiority, sexual entitlement, and female subordination. Domestic violence, rape, stalking, and sexual harassment communicate harmful expressive messages<sup>162</sup> about women's subordination to men.

Yet instead of correcting this monstrously unjust and destructive status quo, the majority of legal and social norms support and perpetuate it. Violence against women is routinely treated as though it were natural, deserved, or trivial, or some combination of the three. Far from restraining male violence against women, the law indulges it through a lack of formal legal prohibition of many of its forms (e.g. street harassment, online harassment, many forms of sexual assault and reproductive interference)<sup>163</sup> under-investigation and under-prosecution of the crimes that do exist (e.g. rape kit backlog<sup>164</sup> and longstanding "arrest avoidance" in domestic violence cases),<sup>165</sup> and the infrequent and/or lax punishment of perpetrators that are brought before a court (e.g. excuse defenses based

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161. DEP'T OF HEALTH AND HUMAN SERVS., COSTS OF INTIMATE PARTNER VIOLENCE AGAINST WOMEN IN THE UNITED STATES 2 (2003), available at <http://www.cdc.gov/violenceprevention/pdf/ipvbook-a.pdf>. It is significant to note that these are not even the sum total of all unjustified male violence against women, but only an assessment of violence perpetrated by intimate partners.

162. See Elizabeth S. Anderson & Richard H. Pildes, *Expressive Theories of Law: A General Restatement*, 148 U. PA. L. REV. 1503, 1525 (2000) ("[E]xpressive meanings are public constructions. It is not that the public interpretation is infallible or definitive of what a practice means, but that a proposed interpretation must make sense in light of the community's other practices, its history, and shared meanings.").

163. See discussion *supra* Part II; see also Duncan Kennedy, *Sexual Abuse, Sexy Dressing and the Eroticization of Domination*, 26 NEW ENG. L. REV. 1309, 1314–20 (1992) (describing the "tolerated residuum" of sexual abuse and its consequences).

164. See Bill Piper, *Thousands of Rapists Are Not Behind Bars Because Cops Focus on Marijuana Users*, HUFFINGTON POST (June 17, 2014, 3:18 PM), [http://www.huffingtonpost.com/bill-piper/rape-kit-backlog\\_b\\_5504287.html](http://www.huffingtonpost.com/bill-piper/rape-kit-backlog_b_5504287.html).

165. Martin L. O'Connor, *From Arrest Avoidance to Mandatory Arrest: Some Historic, Social, and Legal Forces that Have Shaped Police Spouse Abuse Policies in the United States*, in WOMEN AND JUSTICE 165–85 (Roslyn Muraskin, ed., 1999).

on the “provocative” actions of women).<sup>166</sup> Men who kill, rape, and harass women are granted a wide range of cover for their actions.

At the same time, as discussed above, the law condemns and restricts women’s use of violence, so that women are discouraged from engaging in responsive violence that could also serve to deter future violence against them.<sup>167</sup> The overuse and tolerance of unjustified male violence, and the corresponding underuse and intolerance of justified female violence, sends an expressive message to the victims as well as to society as a whole. That message is, first, that using force to discipline women as punishment for exerting autonomy is acceptable.<sup>168</sup> When women are targeted for male violence because they end or refuse to enter relationships, or do not behave in the way that their controlling partners think they should behave, they are being punished for exercising intimate or other personal choices. When the response to sexual assault so often involves no examination of the choices made by the perpetrators, but rather focusing on the victims’ conduct—what she was wearing, whether she flirted, if she was drinking, where she walked—it sends the message that women must sacrifice their liberty to avoid being victimized, despite the fact that there is no evidence that such measures will actually reduce their chances of being assaulted. When men aggressively sexualize women who walk past them on the street or enter a bar or work in the next office, they send the message that women shouldn’t be in those places, or at least that non-consensual sexualization is the price they must pay for being in those places.<sup>169</sup> Killings, beatings, rapes, and harassment all send the message that women must be kept in their place, and the law’s lack of effective response to this violence suggests the State’s tacit approval of this message.<sup>170</sup> The men who perpetrate violence against women have no reason to fear or any incentive to change their behavior: women rarely fight back, and the State will not fight for them.

## V. FIGHTING BACK: ENCOURAGING WOMEN’S RESPONSIVE VIOLENCE

This radically unequal, unjust, and suboptimal state of affairs cannot be adequately addressed with platitudes bemoaning violence generally and calling for its overall reduction. Violence is not a general phenomenon, and it is certainly not a gender-neutral one. Violence is not neces-

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166. See discussion *supra* Part IV.

167. See MCCAUGHEY, *supra* note 2, at 3–4 (“Women’s uses of weapons and their own bodies for self-defense are publicly scrutinized in a way that husbands . . . are not—probably because they injure men, and because they provide women with greater autonomy while restricting men’s behavior, rather than the opposite.”).

168. See Robin L. West, *The Difference in Women’s Hedonic Lives: A Phenomenological Critique of Feminist Legal Theory*, 15 WIS. WOMEN’S L.J. 149, 189 (2000).

169. CATHARINE A. MACKINNON, SEXUAL HARASSMENT OF WORKING WOMEN 40 (1979).

170. See Danielle Keats Citron, *Law’s Expressive Value in Combating Cyber Gender Harassment*, 108 MICH. L. REV. 373, 375 (2009); Mary Anne Franks, *Sexual Harassment 2.0*, 71 MD. L. REV. 655 (2012).

sarily negative, and it in fact can serve beneficial ends. If men's unjustified violence towards women is a problem, then it is this particular violence—not violence in general—that must be reduced. It is reasonable to assume women's infliction of responsive violence against men, or at least the credible threat of such violence, can reduce men's unjustified violence. If that is the case, we should not condemn women's responsive violence. In fact, we should celebrate it, encourage it, and increase its visibility.

Focusing on increasing women's justified, responsive violence is of course not the only way to reduce men's violence against women. Another approach that many scholars have advanced is for the State to take men's unjustified violence more seriously, reforming legal and social practices to effectively describe, punish, and prevent gendered violence. This is an important and valuable effort. The approach urged in this Article is by no means meant to be exclusive. The encouragement of women's violence can and should occur alongside legal and institutional change.

This Article does insist that more dramatic and immediate changes will be necessary to truly disrupt the status quo, and that a pragmatic, efficiency-based approach to violence is key to this disruption. Violence can and should be put in the service of justice when other means prove to be ineffective. One reason powerful groups are willing and able to inflict unjust violence against less powerful groups is that they do not fear retaliation. For example, while legal reform and evolving social mores did much to advance the cause of civil rights, the willingness and ability of black people to use violence when necessary also played a key role.<sup>171</sup> If men will not refrain from the use of unjust violence against women, and the State refuses to restrain them, then women themselves must be equipped to prevent and preempt this violence.

To move the use of violence between men and women closer to optimal level, women must increase their willingness and ability to use violence against men. The goal here is not only justice, but social efficiency:<sup>172</sup> the more responsive, justified violence women use against men, the less unjustified violence men will use against women. In some respects, this proposition should be non-controversial; women should be able to enjoy the same robust right to self-defense as men, encouraged and protected when they use proportional force in response to credible threats.

The more controversial aspect of the approach is that law and society should be willing to tolerate, though not encourage, even disproportionate uses of violence by women against men. That more force than is strictly necessary may sometimes be used in individual confrontations is

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171. See generally CHARLES E. COBB JR., *THIS NONVIOLENT STUFF'LL GET YOU KILLED: HOW GUNS MADE THE CIVIL RIGHTS MOVEMENT POSSIBLE* (2014).

172. See, e.g., Gary Lawson, *Efficiency and Individualism*, 42 DUKE L. J. 53, 78 (1992) (examining various definitions of social efficiency, including as the "maximization of social welfare, a definition that can potentially serve both as a normative guide to conduct and as a way of describing events.").

regrettable, but inevitable. The law currently makes room for such mistakes through doctrines such as imperfect self-defense and, more recently, by codifying enlarged presumptions in self-defense doctrine through Stand Your Ground laws. This indulgence currently redounds primarily to the benefit of men. If women's responsive violence against men is increased, this gender asymmetry will shift. However regrettable it may be that in individual cases some women will overreact, and even consciously exploit increased tolerance of their use of violence, there is a benefit even to this excess. This redistribution of violence will create fear and uncertainty about the possibility of women's retaliatory force, which will inhibit men's general use of violence against women. Uncertainty about irrational or disproportionate responses has an inhibiting effect on men's use of violence against other men. The same effect should obtain when women also pose this threat. The extreme asymmetries of violence in the status quo justify this result; the force necessary to disrupt social and legal defaults regarding men's violence against women may in many cases be extreme.

Accordingly, the discussion below will consider what can realistically be done both legally and socially to encourage women's ability and willingness to use responsive violence, while acknowledging that such encouragement carries risks. In addition to current proposals by many domestic violence scholars to reform the legal concept of self-defense (in particular eliminating or reforming the imminence requirement to better reflect intimate partner violence),<sup>173</sup> we must identify and address the "gender gap" in both "violence literacy"—the gender disparities in gun ownership, martial arts, and in sports—and "violence entitlement"—the different ways men and women are taught to value their bodies, their personal space, their sexuality, and their autonomy. Closing this gap may well lead to overreactions in individual interactions between men and women, but even these inefficiencies should be tolerated for the beneficial inhibition of men's violence they will likely inspire. Considering how few women are likely to take the risk (legal, physical, and other) of responding to violence, the larger impact of those who do, even if imperfect, should be tolerated.

A. *Closing the Violence Gender Gap: Violence Literacy and Violence Entitlement*

If we think of violence as a resource, access to violence and to physical force generally is heavily influenced by gender. As a general rule, men and boys have greater basic knowledge and perceptions of their bodies as (non-sexually) physical, competitive, and defensive objects, and

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173. As McCaughey notes, "because the imminence requirement fails to take into account many of women's self-defense situations, feminist lawyers explain[.]" "The crucial point to be conveyed to the judge and jury is that, due to a variety of societally based factors, a woman may reasonably perceive imminent and lethal danger in a situation in which a man might not." MCCAUGHEY, *supra* note 2, at 49.

have greater access to the resources of violence.<sup>174</sup> This is due in large part to gender stereotypes about physical aggression, namely, the expectation of women and girls to be compliant and docile, and the expectation of men and boys to be forceful and aggressive. Women are discouraged from aggressive physical activity by a narrow and restrictive social conception of “femininity.” “Women’s aggression is treated as an unnatural and distasteful transgression because aggression is a marker of sexual difference, which is made meaningful in a hierarchy of social power.”<sup>175</sup>

The *ability* to use force is often a prerequisite for feeling *entitled* to use force. In the best case scenario, being literate about violence can inspire a heightened sense of bodily integrity, self-respect, and self-reliance. As the author Colette Dowling puts it, “Until women are able to experience strength, endurance, and *pleasure* in their bodies, whatever social freedom we achieve will be limited. We will withdraw from physical challenge, coddling ourselves in a misguided belief in our frailty . . . We will live out our lives as if our bodies needed protection.”<sup>176</sup> Martha McCaughey echoes this sentiment in her book on women’s self-defense: “[T]he fighting spirit . . . transforms the way it feels to inhabit a female body. It changes what it means to be a woman.”<sup>177</sup> Given that women are generally subjected to more forms of physical control than men—by the fear of physical violence, by cultural expectations and judgments about their appearance, by social expectations of sexual availability and objectification—it is all the more disheartening to observe that they are less likely to have access to training and resources that might counteract these forms of control.<sup>178</sup>

One of the most lethal, and arguably thus one of the most effective, ways of protecting oneself is through gun ownership. Guns are, at least in theory, great equalizers: having a lethal weapon can more than make up for differences in size, strength, and gender. But while the NRA and other gun activist groups have cynically touted guns as the (only) answer to the victimization of women,<sup>179</sup> overwhelming evidence demonstrates that

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174. See Iris Marion Young, *Throwing Like a Girl*, in *THROWING LIKE A GIRL AND OTHER ESSAYS IN FEMINIST PHILOSOPHY AND SOCIAL THEORY* 141, 147 (1990) (“[Women] feel as though we must have our attention directed upon our bodies to make sure they are doing what we wish them to do, rather than paying attention to what we want to do *through* our bodies.”).

175. MCCAUGHEY, *supra* note 2, at 57.

176. COLETTE DOWLING, *THE FRAILTY MYTH: REDEFINING THE PHYSICAL POTENTIAL OF WOMEN AND GIRLS* (2000).

177. MCCAUGHEY, *supra* note 2, at 2.

178. “[T]he philosophy of self-defense goes beyond the individual’s ability to protect herself against attack. It goes straight to the heart of made-up femininity and of the inequality between the sexes that the concept of gender has so insidiously supported. Physical equality . . . puts an end to domination. This, it has become increasingly clear, is the final stage of women’s liberation. By making themselves physically equal, women can at last make themselves free.” DOWLING, *supra* note 176, at 259.

179. For more on why NRA’s solicitude towards female victims of crime is hypocritical and misleading, see Mary Anne Franks, *Stand Your Ground’s Woman Problem: Laws Expanding Self-Defense Raise Questions About Gender as Well as Race*, HUFFINGTON POST (Mar. 3, 2014), [http://www.huffingtonpost.com/mary-anne-franks/stand-your-grounds-woman-\\_b\\_4886650.html](http://www.huffingtonpost.com/mary-anne-franks/stand-your-grounds-woman-_b_4886650.html).



guns actually increase, rather than decrease, the odds that a woman will be killed or injured by an abuser:

the presence of a firearm in a domestic violence situation increased the risk of homicide by 500 percent for women . . . . [W]omen were more than three times more likely to be murdered when there was a gun in their household, even when domestic abuse wasn't a factor.<sup>180</sup>

The fact that gun ownership in the U.S. is on the rise has been met with strong feelings on both sides of the firearms debate. The stark disparities of gender (as well as race) in gun ownership have received less attention.<sup>181</sup> While the gap between men and women in gun ownership has narrowed in recent years, from five times as many men owning guns as women several years ago, to twice as many men as women currently,<sup>182</sup> this remaining gap is still significant. While pro-gun organizations may treat the rise in gun ownership as an indication that upright citizens are increasingly willing to take up arms against unsavory elements, the real story is likely more complex. When one considers the rates of violence of men against women, especially against intimate partners, the gender differential is a particular cause for concern. Add to this the fact that in a substantial number of households where a gun is present, only the men know that it is.<sup>183</sup> That men often keep such vital information from their female spouse or partner raises serious questions about the usefulness of guns for women's self-defense.

Empirical data on gun club memberships and visits to shooting ranges also indicate that women are significantly less likely to use guns recreationally, or to receive as much training as men are.<sup>184</sup> There are many problems with the suggestion that guns are the answer to violent crime, and the exploitation of women's vulnerabilities by gun advocates is both cynical and superficial.<sup>185</sup> It is nonetheless important to note the gender disparity in gun ownership and use, and the impact it has on the relationships between men and women.

There is also a gender gap in activities such as martial arts training. Men and boys are more likely to enroll in classes like karate, jiu-jitsu, Krav Maga, and other self-defense forms that impart potentially deadly

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180. Hannah Groch-Begley, *Guns Make Domestic Violence Deadlier*, MEDIA MATTERS FOR AMERICA (Apr. 18, 2014), <http://mediamatters.org/blog/2014/04/18/guns-make-domestic-violence-deadlier/198942>.

181. With some exceptions: Anna Inge Larish, *Why Annie Can't Get Her Gun: A Feminist Perspective on the Second Amendment*, 1996 U. ILL. L. REV. 467 (1996).

182. Lydia Saad, *Self-Reported Gun Ownership in U.S. is Highest Since 1993*, GALLUP (Oct. 26, 2011), <http://www.gallup.com/poll/150353/Self-Reported-Gun-Ownership-Highest-1993.aspx?version=print>.

183. Jens Ludwig et al., *The Gender Gap in Reporting Household Gun Ownership*, 88 AM. J. PUB. HEALTH 1715, 1717 (1998).

184. Margaret Shaw, *Too Close to Home: Guns and Intimate Partner Violence*, SMALL ARMS SURVEY 2013, at 30, available at <http://www.smallarmssurvey.org/fileadmin/docs/A-Yearbook/2013/en/Small-Arms-Survey-2013-Chapter-2-EN.pdf>.

185. See Mary Anne Franks, *Facts, Not Feelings, About Guns*, MOVING TARGETS (Dec. 3, 2015), <http://maryannefranks.com/post/134463540158/facts-not-feelings-about-guns>.

knowledge of how to use of one's body as a weapon.<sup>186</sup> Moreover, increases in women and girl's participation in martial arts has often been accompanied by extreme sexual harassment.<sup>187</sup> Considered in isolation, men's greater propensity to train in martial arts may be a neutral—even positive—phenomenon, but against the background of male violence against women it can have more ominous implications.<sup>188</sup>

Though Title IX and other efforts to encourage women and girls' participation in sports have in many ways changed the landscape of school athletics and professional sports organizations, men continue to dominate the playing field.<sup>189</sup> Sport can teach important lessons about how to relate to one's body—lessons that do not focus on how others perceive the attractiveness or sexual availability of one's body, but rather on skill, speed, and the joy of physical movement.<sup>190</sup> The fact that there are still fewer opportunities for and less encouragement of women and girls to participate in sports relative to men and boys means that women and girls are missing out on meaningful and useful physical activity.

To address the gender gap in the ability and willingness to use force to protect oneself and engage in healthy physical activity, Title IX should be rigorously and aggressively used to ensure equal opportunities in athletic training and competition. The State should subsidize social initiatives that seek to increase women and girls' participation in sports and martial arts. Sexual harassment and other forms of gender discrimination should be consistently and severely punished, and artificial divisions between men and women's sporting activities (reinforced by advertising) should be broken down.

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186. See Alex Channon, *Towards the "Undoing" of Gender in Mixed-Sex Martial Arts and Combat Sports*, 4 *SOCIETIES* 587, 590–91 (2014).

187. See David Mayeda, *Fighting for the Right to Fight: Part III – Blatant Sexism Tolerated*, *THE GRUMPY SOCIOLOGIST* (Aug. 11, 2009, 12:29 AM), <http://thegrumpysociologist.blogspot.com/2009/08/fighting-for-right-to-fight-part-iii.html>.

188. DALE C. SPENCER, *ULTIMATE FIGHTING AND EMBODIMENT: VIOLENCE, GENDER, AND MIXED MARTIAL ARTS* 3 (2013); James MacDonald, *Explaining the Growth and Popularity of Women's Mixed Martial Arts*, *BLEACHER REPORT* (July 31, 2014), <http://bleacherreport.com/articles/2148497-examining-the-growth-and-popularity-of-womens-mixed-martial-arts>.

189. “[W]hile Title IX has opened up the playing fields, women and girls still lag behind men and boys in participation, resources and coaching.” In 2003-2004, women made up only 43% of college and university athletes even though they made up 57% of the student population. Female college athletes were the recipients of only 37% of sports operating funds and 32% of recruitment funds. *NAT'L COAL. FOR WOMEN AND GIRLS IN EDUC., TITLE IX AT 35: BEYOND THE HEADLINES*, at I, 3 (2008) available at <http://www.feminist.org/education/TitleIXat35.pdf>.

190. “[T]he quest for equal opportunity in school sports has always been about the educational, physiological, sociological and psychological benefits of sports and physical activity. Research studies have found that girls who play sports are more confident, have higher self-esteem and better body images, are less likely to get pregnant or be involved with drugs, and are more likely to graduate from high school than girls who do not play sports.” *Id.* at 7.

*B. Women's Responsive Violence*

In general, women drastically under-respond to the spectrum of male aggressive behavior, from street harassment to domestic violence. This under-response is the product of many factors, not least the cultural taboo against women's aggression and simultaneous celebration of male aggression. As Martha McCaughey writes: "Cultural ideals of manhood and womanhood include a cultural, political, aesthetic, and legal acceptance of men's aggression and a deep skepticism, fear, and prohibition of women's."<sup>191</sup> This double standard must change. At a minimum, law and society must encourage women to respond proportionally and effectively to violence and aggression by men. This requires the end to the double standard at work in responses to men and women's respective violence. Women who fight back with proportional force against unjustified violence should be praised, not condemned. More controversially, law and society must tolerate even some measure of non-proportional responses by women to unjustified violence by men. This is necessary for two reasons. The first is that women, no less than any male victims of violence, will necessarily make some errors about the measure of force necessary to counter the aggression they face. Women should be granted at least the same accommodation given to men who make such errors. The second, and more radical, reason is that overreaction in individual instances can have a deterrent effect on unjustified violence generally. A woman who responds to a catcaller by breaking his nose has arguably overreacted with regard to the individual instance and the individual perpetrator, but has arguably reacted proportionally with regard to either her own experiences of multiple harassment on multiple occasions by multiple individuals, and/or with regard to women's general experiences of harassment. The disparity between men's and women's violence is so great that even overreactions can sometimes be justified as potential corrective responses necessary to dramatically shift social expectations. Whether proportionate or justifiably disproportionate, women's forceful responses to men's aggression should be as public and as spectacular as possible to maximize this expressive effect. Violent men must learn to fear women's force at least as much as they fear other men's.

That women's responsive violence be perceived as credible threat is more important than how often such violence actually occurs. Given this, widely broadcasting spectacular instances of women fighting back in mainstream and social media (as occurred with many of the cases below) of serves important goals of awareness and inhibition.

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191. MCCAUGHEY, *supra* note 2, at 3.

### 1. *Proportionate Responses*

In this section, I consider a few examples of women's proportional responses to male aggression in public spaces.<sup>192</sup> The first two are stories of women in the U.S. fighting back against subway sexual abusers—individuals, nearly always men, who take advantage of crowded trains to engage in non-consensual sexual acts from exhibitionism to groping. A video clip of a woman named Nicola Briggs loudly berating a man who had exposed himself to her on a New York subway train went viral in 2010.<sup>193</sup> Once Briggs became aware that the man in front of her on the train was acting suspiciously, she grabbed his messenger bag and pushed it aside to verify what he was doing. When she realized he was masturbating, Briggs proceeded to inform the man that she would be escorting him to a police station. Because of her actions, the harasser, was arrested. Briggs noted that many people in the train car offered to help once they realized what was going on.

Briggs' experience was considerably more positive than that of a Boston woman who found herself in a similar situation on that city's subway. The woman, who has so far remained anonymous, grabbed a man who had exposed himself and masturbated over her on the train as he tried to exit and held him until cops arrived. She explained, "I've had enough of being harassed on the street. I'm tired of it and I want it to end. It was the last straw."<sup>194</sup> In contrast to Briggs' experience, no one stepped in to help even after the woman shouted out what the man was doing. It was "appalling," she said. "That makes me so angry. I want everyone to know that they have to say something."<sup>195</sup>

Public transportation is a site for sexual harassment outside of the U.S. as well. In 2010, a woman named Lisa Robinson made headlines for intervening against drunken sports fans on a train in Wales. Robinson was traveling with her husband and children when the men began obscenely harassing another woman on the train. When she asked them to stop, they turned their attention to her instead, using increasingly obscene and threatening language. Robinson pulled the emergency brake and told the conductor to call the police. The conductor merely reset the brake and resumed the train's progress. At the next station, Robinson and her family got off and Robinson again asked the conductor to call the police. He again refused. At that point, Robinson "slithered down off

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192. Of course there is always the danger that women will be placed at more risk by fighting back. This is why increasing women's physical literacy and ability is key to the reallocation of violence. There will inevitably be some tragic consequences to women fighting back against male violence, but the tragic consequences of not fighting back are clear and unacceptable.

193. *Subway Hero Nicola Briggs Steps Forward*, HOLLABACK! (Nov. 5, 2010, 10:34 PM), <http://www.ihollaback.org/blog/2010/11/25/subway-hero-nicola-briggs-steps-forward/>.

194. Renee Nadeau Algarin, 'She-Hulk' Collars Alleged T Creep After Lewd Act, BOSTON HERALD.COM (Apr. 21, 2012), [https://web.archive.org/web/20120423221859/http://www.bostonherald.com/news/regional/view/20220421she-hulk\\_collars\\_alleged\\_t\\_creep\\_after\\_lewd\\_act/srvc=home&position=4](https://web.archive.org/web/20120423221859/http://www.bostonherald.com/news/regional/view/20220421she-hulk_collars_alleged_t_creep_after_lewd_act/srvc=home&position=4).

195. *Id.*

the platform on to the track.” She stood in front of the train to prevent it from moving until police were called. Robinson said,

I wanted to protect both my husband and my child and I wanted this behaviour to stop. Some of the fans got off the train and took pictures of me with mobile phones and continued to abuse me. This is my community, this is my village. We’re not going to be bullied and certainly for women and families, they should be able to travel on the train in peace and quiet and go about their business without being bullied like that.<sup>196</sup>

Men’s harassment of women in India, especially sexual harassment, is so prevalent that it has been given a unique name: “Eve-teasing.” This casual, opportunistic harassment is so common on public transportation that women-only trains have been introduced in major cities so that women can travel to work free of catcalls and groping hands.<sup>197</sup> Men who attempt to defy the women-only rule “can expect to be dragged by the hair, or often grabbed by the ears and slapped around the head, and when the train arrives at the next stop, train staff join in on the slapping in a clear bid to humiliate the men.”<sup>198</sup> In addition, women in India are enrolling in martial arts classes as a way of protecting themselves from harassment, rape, and other forms of male violence:

In India, where we are yet to enact a stringent law guarding against sexual harassment at the workplace and in public transport, self-defense programs . . . seem the only viable option left. Sexual attacks occur mostly on public transport like buses, trains and auto rickshaws where men pray [sic] on women from close proximity. Martial arts techniques of close combat like elbow jabs and chin punches are proving very effective in getting the offender to lay off. A temple punch is enough to knock a man unconscious. Here, women are taught to deliver kicks and punches with force and precision when it is most needed.<sup>199</sup>

An extraordinary video of one woman’s response to Eve-teasing drew international attention some years ago. In the video, a tall, armed soldier comes out of a shop, chased by a diminutive woman who informs all who can hear that this soldier has just groped her. The woman, Rali Faihriem, pursues the soldier down the street, picking up heavy stones and heaving them at him, striking him several times.<sup>200</sup>

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196. *Woman on Track Halts Train After Cardiff Fans’ Abuse*, BBC NEWS WALES (Oct. 5, 2010), <http://www.bbc.co.uk/news/uk-wales-11474308>.

197. Julie McCarthy, *On India’s Trains, Seeking Safety in the Women’s Compartment*, NPR (Mar. 28, 2013), <http://www.npr.org/2013/03/28/175471907/on-indias-trains-seeking-safety-in-the-women-s-compartment>.

198. Kev Hedges, *Indian Women Slapping Men Who Ride on Women-Only Carriages*, DIGITAL JOURNAL (Nov. 29, 2010), <http://www.digitaljournal.com/article/300833>.

199. Lesley D. Biswas, *Forget Pepper Spray: Indian Women Use Martial Arts to Protect Themselves*, ALTERNET (Jan. 9, 2009), [http://www.alternet.org/story/117524/forget\\_pepper\\_spray%3A\\_indian\\_women\\_use\\_martial\\_arts\\_to\\_protect\\_themselves](http://www.alternet.org/story/117524/forget_pepper_spray%3A_indian_women_use_martial_arts_to_protect_themselves).

200. Mandy Van Deven, *Woman in Assam Stones Eve Teaser*, BITCHMEDIA (Aug. 2, 2009, 4:38 AM), <http://bitchmagazine.org/post/woman-in-assam-stones-eve-teaser>.

These examples of proportional, justified responses to male aggression should be praised and widely shared. We should create legal and social norms that encourage women to develop the confidence and the training to defend themselves, not only for the benefits gained in individual situations, but also in order to communicate the larger social message that women are can and will fight back.

## 2. *Disproportionate Responses*

In the category of what might be called “disproportionate” responses to male violence, let us consider the following examples. In 2012, a woman in Turkey who had allegedly been raped and impregnated by a man in her village shot him in the head and the genitals when he returned to her home to rape her once more. The woman, Nevin Yildirim, then cut off the man’s head and carried it into the town square. “‘Don’t talk behind my back, don’t play with my honor,’ Yildirim said to the men sitting in the coffee house on the square. ‘Here is the head of the man who played with my honor.’”<sup>201</sup>

Phoolan Devi, known as India’s “Bandit Queen,” became famous in the 1980s for her participation in crime sprees with her partner, Vikram Mallah. Mallah was a low-caste villager who had taken over a prominent gang after shooting its former upper-caste leader dead for raping Devi. Eventually Mallah was assassinated by former members of the gang who objected to his lower-class status. These former gang members captured Devi and subjected her to gang rape and humiliation over several days, finally forcing her to walk naked around the village of Behmai. Devi managed to escape, and several months later she returned to Behmai, megaphone and gun in hand. She called out for the villagers to hand over the two gang members who had orchestrated her abduction and gang rape. “‘If you don’t hand them over to me, I will stick my gun into your butts and tear them apart. This is Phoolan Dev (sic) speaking’ . . . The two men could not be found. And so Devi rounded up all the young men in the village and stood them in a line before a well. They were then marched in single file to the river. At a green embankment they were ordered to kneel. There was a burst of gunfire and twenty-two men lay dead.”<sup>202</sup>

In 2013, media reports began to circulate about a blonde woman “hunting” bus drivers in Juarez, Mexico in retaliation for the hundreds of mostly unsolved rapes and murders of women in the city.<sup>203</sup> After two bus

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201. Talia Kayali, *Turkish Woman Awaits Trial After Beheading Her Alleged Rapist*, CNN (Sept. 6, 2012, 9:21 AM), <http://www.cnn.com/2012/09/05/world/europe/turkey-rape-beheading/>.

202. Luke Harding, *The Queen is Dead*, THE GUARDIAN (July 26, 2001), <http://www.theguardian.com/g2/story/0,3604,527406,00.html>. Devi went on to become a Member of Parliament, and was shot dead by three masked gunmen in 2001. *Id.*

203. See Yuri Herrera, *Diana, Hunter of Bus Drivers*, THIS AMERICAN LIFE, <http://www.thisamericanlife.org/diana-hunter-of-bus-drivers/> (last visited May 28, 2016) (“[T]he number of women who were killed just kept growing. It went from dozens of reported murders in a year, to hundreds. So

drivers were murdered in similar styles within twenty-four hours of each other in Juarez, someone calling herself “Diana the Hunter” sent an email to a news website claiming responsibility for the killings. The email read:

You think that because we are women we are weak, and that may be true but only up to a point, because even though we have nobody to defend us and we have to work long hours until late into the night to earn a living for our families we can no longer be silent in the face of these acts that enrage us. We were victims of sexual violence from bus drivers working the maquila night shifts here in Juárez, and although a lot of people know about the things we’ve suffered, nobody defends us nor does anything to protect us. That’s why I am an instrument that will take revenge for many women. For we are seen as weak, but in reality we are not. We are brave. And if we don’t get respect, we will earn that respect with our own hands. We the women of Juárez are strong.<sup>204</sup>

Some of the women raped and killed in Juarez had been assaulted by bus drivers, though there was “no evidence that the bus drivers who were killed by the blonde woman had actually committed a crime at all.”<sup>205</sup> A reporter for *This American Life* observed the following exchange between a bus driver and a female passenger while riding on the bus route on which the killings had taken place:

“What, are you Diana the Hunter?”

“No, of course not,” she replied. “What, are you afraid of me now?”

“Well yeah,” he replied. “Shouldn’t I be?”<sup>206</sup>

These acts of violence are troubling given ambiguous details and seeming lack of due process afforded to the men on the receiving end. Without praising such acts, it is important to recognize that they are partly a product of legitimate frustration with a legal and cultural status quo that thoroughly fails female victims of male violence. These acts should serve as warning signs that a given criminal justice system is broken and must be reformed to adequately address the concerns of women and girls who suffer from men’s violence. The structural inequality of violence should be taken into account when assessing acts of this nature, including the potential for such excessive or unjust violence to serve a beneficial purpose in a distributional, though not individual, sense.

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many women it was hard to count accurately. In 2010, the number peaked: at least 304 women were murdered that year.”).

204. *Id.*

205. *Id.*

206. *Id.*

## VI. CONCLUSION

In *Politics as Vocation*, Max Weber writes, the state is a relation of men dominating men, a relation supported by means of legitimate (i.e. considered to be legitimate) violence. If the state is to exist, the dominated must obey the authority claimed by the powers that be. When and why do men obey? Upon what inner justifications and upon what external means does this domination rest?<sup>207</sup>

The use of the word “men” in this passage is both misleading and illuminating. In the original German, Weber used the word “Menschen,” which was translated to English as “men.” In German, “Menschen” does not mean men as such, but rather “people.” The English translation is not inaccurate, however, because the word “men” is presumably used here in the sense of “mankind,” ostensibly referring to all of humanity. The term “men” can be universal, encompassing both men and women; the term “women” is hopelessly particular and can never be used to refer to the universal human race.<sup>208</sup> This linguistic convention reveals much about English-speaking society’s view of women; often, as here, it also inadvertently highlights how fundamental beliefs about society are thoroughly gendered.<sup>209</sup> Taken literally, “men dominating men” is actually an extremely apt characterization of the State’s use and legitimation of violence. Men make, justify, and obey (or not) the rules for other men; women are not part of the process at all. They are simply acted upon.

This radically unjust state of affairs must be disrupted. At a minimum, law and society should promote women’s proportional responses to unjustified male violence. Encouraging women and girls’ competence and confidence in using physical force is an important aspect of this goal. While this shift in norms may sometimes result in disproportionate force, this is a cost the law should absorb. Society and law has long accommodated men’s “reasonable error” when using deadly force; it should make at least as much room for women’s. Law and society should moreover tolerate some degree of disproportionate violence by women against men, given that extreme force may be necessary to reset longstanding social and legal defaults. As disturbing as disproportionate violence may be on an individual level, such violence can nonetheless be beneficial in terms of its aggregate impact on the suboptimal allocation of violence between men and women. If an increase in women’s use of violence against men will result in more equitable and efficient distribution of violence between the genders, it should be tolerated and even encouraged.

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207. WEBER, *supra* note 3, at 2.

208. See SIMONE DE BEAUVOIR, *THE SECOND SEX*, at xv (H.M. Parshley ed. & trans., Random House 1968) (1949).

209. See Mary Anne Franks, *Where the Law Lies: The Costs of Constitutional Fictions*, in *LAW AND LIES: DECEPTION AND TRUTH-TELLING IN THE AMERICAN LEGAL SYSTEM*, 34-38 (Austin Sarat, ed., Cambridge Univ. Press, 2015).