

NOTE

A DEFENSIBLE DEFENSE?: REEXAMINING CASTLE DOCTRINE STATUTES

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I. INTRODUCTION

On the night of Wednesday, August 9, 2006, John White, a fifty-three-year-old asphalt company laborer shot and killed seventeen-year-old Daniel Cicciaro Jr. on the front lawn of White's house in suburban Miller Place, Long Island.¹

While the events that precipitated the shooting remain clouded in controversy, it is uncontested that earlier that evening Cicciaro had argued violently with White's teenage son, Aaron.² After learning from a friend's sister that she thought Aaron intended to rape her, Cicciaro had gone into a drunken rage, had threatened Aaron over the phone, and had driven with four friends (one armed with a baseball bat) to White's house.³ The elder White left his house armed with a pistol and shot Cicciaro after a heated, profanity-laced exchange.⁴

There was no allegation that Cicciaro produced a weapon,⁵ and, unlike more than twenty other states,⁶ New York does not have an expansive "castle doctrine" of self-defense on which White could rely. In other words, in New York, the fact that Cicciaro threateningly entered White's property without permission did not grant White a prima facie right to resort to deadly force.⁷ As a result, White's defense rested on convincing a Suffolk County

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¹ For a detailed account of the facts (both disputed and undisputed) of the shooting, see Calvin Trillin, *The Color of Blood: Race, memory, and a killing in the suburbs*, NEW YORKER, Mar. 3, 2008, at 30–39.

² *Id.* at 31–32.

³ *Id.* at 33.

⁴ *See id.* at 34.

⁵ *See id.* at 32.

⁶ *Cf.* National Rifle Association ("NRA") Inst. for Legislative Action, *Nebraska: Castle Doctrine*, Feb. 17, 2010, <http://www.nraila.org/News/Read/InTheNews.aspx?ID=13415>.

⁷ New York does recognize a weak form of the common law castle doctrine, but unlike more expansive recent castle law statutes, it still requires proof that the home dweller's fear of the intruder's imminent violent behavior was reasonable. *See* N.Y. PENAL LAW § 35.15 (McKinney 2004). Further, it does not presume a threat of imminent violence based on the intrusion alone. *See* § 35.15.

jury that he reasonably feared for his own (and his family's) safety.⁸ White had good reason to feel threatened, his attorney insisted, in large part because of his race.⁹ Unlike 99.5% of the population of Miller Place, and unlike Cicciaro and his friends, White was black.¹⁰ Even more important in the eyes of the defense was the fact that White's ancestors had been chased from their Alabama home by members of the Ku Klux Klan, causing White to associate the aggressive incursion of white men with a legacy of intense racial violence.¹¹

Rooted firmly in this narrative of racial conflict and raising questions of how integrated Long Island really was, the trial attracted tremendous media coverage and public attention.¹² Cicciaro's friends and family demanded vengeance and loudly denounced the allegations that race had played a significant role in the confrontation and homicide.¹³ In White's defense, civil rights activists led by Reverend Al Sharpton decried what they viewed as an attempted modern day lynching,¹⁴ while advocates of gun rights and self-defense claimed that White had been acting in the necessary defense of his and his family's lives and honor.¹⁵ In 2007, White was ultimately convicted of manslaughter by a jury with one black member and sentenced to a prison term of two to four years, which he is serving as of this writing.¹⁶

This Note does not begin its exploration of the castle doctrine with the case of John White to suggest that the doctrine would necessarily have resulted in White's exoneration. There is, in fact, reason to believe the prosecution could have successfully refuted such a defense; based on the evidence, a reasonable jury could have concluded that White went out of his way to leave his house to confront the youths, and it is unclear whether Cicciaro and his friends were actually on White's property at the time of the shooting.¹⁷ Rather, this case serves as an instructive starting point because it demon-

⁸ See Trillin, *supra* note 1, at 34.

⁹ See Nicholas Hirshon et al., *Guilty Verdict for Black Dad in Shooting Death of White Teen on Long Island*, N.Y. DAILY NEWS, Dec. 23, 2007, available at http://www.nydailynews.com/news/ny_crime/2007/12/22/2007-12-22_guilty_verdict_for_black_dad_in_shooting.html.

¹⁰ See Trillin, *supra* note 1, at 30.

¹¹ See *id.* at 35–36.

¹² See *infra* notes 14–16.

¹³ See Trillin, *supra* note 1, at 32.

¹⁴ See John Lauinger & Carrie Melago, *Sharpton, John White Rally Protesters after Long Island Race-Slay Verdict*, N.Y. DAILY NEWS, Jan. 6, 2008, available at http://www.nydailynews.com/news/ny_crime/2008/01/06/2008-01-06_sharpton_john_white_rally_protesters_aft-1.html.

¹⁵ See, e.g., Cyd Malone, *The Tragedy of John White*, NEWSLI.COM, Oct. 14, 2008, <http://www.newsli.com/2008/10/14/the-tragedy-of-john-white/>.

¹⁶ See, e.g., Selim Algar, *Dad of Slay Victim Rages: Livid at Wrist Slap*, N.Y. POST, Mar. 20, 2008, at 11. Following the rendering of the verdict, there were numerous allegations that jurors felt coerced (at times due to violent behavior by other jurors) to find White guilty. Interestingly, jurors claimed that for a long stretch before they reached consensus, the vote had been ten to two. See Patrick Whittle & Erik German, *Jury in John White Trial Boiled with Tension*, NEWSDAY, Jan. 5, 2008.

¹⁷ See Trillin, *supra* note 1, at 35.

strates the complexity of self-defense in the home and highlights the cultural and political conflicts and unexpected alliances that the debate over its application evokes.

The goal of this Note is to explore the current discourse surrounding the castle doctrine. White's case seems to subvert and perhaps even invert many of the assumptions about the doctrine. First, critics of the castle doctrine frequently argue that there is no reason to legislate a specific defense for homeowners who shoot home invaders because there is rarely support for the victims or pressure to prosecute the homeowners.¹⁸ In this case, however, Cicciaro's family and friends were some of the most vocal players in the proceeding.¹⁹ Also, in this case, the traditional victims' rights procedural element—victim impact statements at sentencing—were used to try to increase the punishment for the homeowner, making the intruder, instead of the home dweller, the victim in the victims' rights paradigm.²⁰ Finally, rather than evoking the socially conservative image of the culturally dominant white frontiersman, this case summons up the image of the Southern black besieged by a murderous posse. Here the castle doctrine serves as a potentially antimajoritarian defense, or a possible means by which the law might level the playing field between the marginalized and the marginalizer.

Despite these unusual elements, the coverage and controversy over White's conviction is far from unique in the current landscape of criminal prosecutions.²¹ The last decade has seen increased support for and adoption of castle doctrine-based laws.²² The passage of such laws and subsequent uses of the defense have captured the public imagination, prompting significant media attention, as well as skeptical and critical scholarship from the legal academic community.²³ While there has been an increase in similar

¹⁸ See, e.g., Emily Ramshaw, *Bills Would Arm Owners with Deadly Force Right*, DALLAS MORNING NEWS, Feb. 27, 2008, available at <http://www.dallasnews.com/sharedcontent/dws/news/texasouthwest/stories/022807dntexcastle.3abaea7.html> (“‘We already have excellent self-defense laws in Texas,’ said Marsha McCartney, president of the North Texas Brady Campaign, which seeks to curb gun violence. ‘They act like they’re fixing some big problem, like people defending themselves are going to jail. And that’s just not the case.’”); Nathan Thornburgh, *Looking Kindly on Vigilante Justice*, TIME, Jul. 3, 2008, available at <http://www.time.com/time/nation/article/0,8599,1820028,00.html>.

¹⁹ See, e.g., Algar, *supra* note 16.

²⁰ Compare *id.* (“Despite pleas from Cicciaro’s folks to impose the maximum, the judge opted for a lower sentence . . .”), with John Moritz, *Stronger Self-Defense Law Backed*, FORT WORTH STAR-TELEGRAM, Feb. 1, 2007, at B1 (“Crime victims [sic] rights groups and the National Rifle Association have expressed support for the [proposed castle doctrine statute], saying it would tag the intruder as the sole criminal in such matters and not the property owner.”).

²¹ See Chris Joyner, *Taking Up Arms Against Intruders: ‘Castle Doctrine’ Laws, Justifying the Use of Deadly Force on Home Turf, Gain Ground*, USA TODAY, Nov. 20, 2007, at A3.

²² See Renee Lettow Lerner, *The Worldwide Popular Revolt Against Proportionality in Self-Defense Law*, 2 J.L. ECON. & POL’Y 331, 333 (2006) (“A popular revolt against certain notions of proportionality has been underway for the past several decades in the United States, and for at least the past five years abroad.”).

²³ See, e.g., Stuart P. Green, *Castles and Carjacks: Proportionality and the Use of Deadly Force in Defense of Dwellings and Vehicles*, 1999 U. ILL. L. REV. 1 (1999); Lerner,

legislation in Europe,²⁴ the primary focus of scholarship has been on the adoption of the doctrine in the United States, specifically the South and West.²⁵ Critics have frequently focused on the conservative cultural politics of these regions, linking supporters of the castle doctrine to vigilantism and tracing their support to a reactionary frontier mythos.²⁶ Further, much of the literature surrounding these laws (from both supporters and detractors) tends to characterize enactment of castle laws as an extension of both the victims' rights movement and a theory of compensatory justice.²⁷

Considering the current prevalence of castle laws and the often polarized nature of the debate concerning their application, it is important to excavate the doctrine from the culture wars rhetoric in which it has been mired. This Note contends that the current discourse has become too firmly rooted in the overly reductive, potentially fallacious dichotomy of American political partisanship. It aims to link the castle doctrine's moral and philosophical underpinnings to those of more broadly accepted self-defense doctrines, to examine the potentially harmful and unexpected consequences of

supra note 22; Dirk Johnson, 'Make My Day': More Than a Threat, N.Y. TIMES, June 1, 1990, at A14; Editorial, *Trigger-Happy: A Gun Bill Seeks to Fix a Law that Isn't Broken*, PITTSBURGH POST-GAZETTE, Nov. 29, 2009, at B2 (arguing that a proposed Pennsylvania castle doctrine statute "would be an open invitation to needless trouble and it would complicate the lives of police officers . . . all because of the guns-are-supreme mentality pushed by the National Rifle Association (which supports the bill) and others").

²⁴ See Lerner, *supra* note 22, at 344–53 (describing analogous legislation in Europe and public demand for such laws in other countries).

²⁵ Cf. RICHARD MAXWELL BROWN, NO DUTY TO RETREAT: VIOLENCE AND VALUES IN AMERICAN HISTORY AND SOCIETY (1991) (tracing concepts of duty to retreat through a history of Western frontier gunfights and gunfighters); Denise M. Drake, *The Castle Doctrine: An Expanding Right to Stand Your Ground*, 39 ST. MARY'S L.J. 573, 577–85 (2008) (historicizing the castle doctrine in Texas in light of descriptions of the doctrine as promoting "Wild West" values); P. Luevonda Ross, *The Transmogrification of Self-Defense by National Rifle Association-Inspired Statutes: From the Doctrine of Retreat to the Right to Stand Your Ground*, 35 S.U. L. REV. 1, 18–28 (2007) (discussing Florida's and Alabama's legislative rejection of a duty to retreat and citing other mostly southern states' similar legislative actions); J.P. Neyland, Note, *A Man's Car Is His Castle: The Expansion of Texas' "Castle Doctrine" Eliminating the Duty to Retreat in Areas Outside the Home*, 60 BAYLOR L. REV. 719, 727–35 (2008) (describing the evolution of Texas's self-defense legislation).

²⁶ See, e.g., Jason W. Bobo, *Following the Trend: Alabama Abandons the Duty to Retreat and Encourages Citizens to Stand Their Ground*, 38 CUMB. L. REV. 339, 363–65 (2007); Elaine M. Chiu, *Culture in Our Midst*, 17 U. FLA. J.L. & PUB. POL'Y 231, 244–47 (2006); Dan M. Kahan, *The Secret Ambition of Deterrence*, 113 HARV. L. REV. 413 (1999); Steven P. Aggergaard, Case Note, *Retreat from Reason: How Minnesota's New No-Retreat Rule Confuses the Law and Cries for Alteration—State v. Glowacki*, 29 WM. MITCHELL L. REV. 657, 659–62, 693 (2002); Michelle Jaffe, Note, *Up in Arms Over Florida's New "Stand Your Ground" Law*, 30 NOVA L. REV. 155, 156 (2005).

²⁷ See, e.g., Green, *supra* note 23; *Local Officials Applaud Castle Doctrine*, TENNESSEAN, June 15, 2007 ("[NRA lobbyist Chris] Cox said the legislation is a victim's rights measure that puts the law on the side of victims 'who don't have the luxury of time when confronted by a criminal.'"); Roland Paolucci, Letter to the Editor, *Shoot First, Ask Questions Later*, AKRON BEACON J., June 1, 2005, at B3 (arguing that Ohio should pass a castle doctrine statute and declaring that "[i]t is time for Ohio to protect its residents and change the focus back to victim's [sic] rights, instead of coddling criminals.").

its elimination, and to challenge its cultural framing in current politically-tinged legislative debates and ideological mappings.

The Note will proceed in four Parts. Part II describes the current state of the castle doctrine. To contextualize, Part II will briefly trace the doctrine's roots in the history of American duty to retreat jurisprudence and will then examine the distinct types of criminal statutes that are often classified as "castle laws." In doing so, Part II will attempt to draw distinctions between those laws that are more prevalent and consistent with a broader pattern of self-defense jurisprudence and those that are less common, more extreme, and largely fall outside of the scope of this discussion.

Part III addresses the ideological underpinnings of and justifications for the castle doctrine. It will discuss normative theories of moral philosophy that underlie the castle doctrine and mark the poles of debate between supporters and opponents of the doctrine. By situating the doctrine within the ideological framework of other, less controversial self-defense laws, this Note aims to reject the victims' rights sensibilities of castle doctrine proponents.

Part IV confronts and questions the widely accepted cultural narrative that has helped shape popular perception of the castle doctrine. It will reexamine the ideological packaging of the castle doctrine with the victims' rights movement and other traditionally "socially conservative" stances. Part IV will then return to John White and, using the language of cultural theory and cultural history, suggest that the attempt to neatly categorize the doctrine into a bipolar liberal/conservative framework wrongly disregards alternative ideological mappings and risks a myopic failure to examine the effects of having or not having a castle doctrine.

Finally, the Note will focus on the important consideration any discourse on the castle doctrine should give to societal effects. Using a legal realist framework, the Note will argue that because the debate over the castle doctrine does not adequately examine the doctrine's effects, the debate is deficient. While this Note does not propose that social scientific studies of the impact of the doctrine would be determinative, it will argue that an honest, effective discussion about the castle doctrine is impossible without examining the potentially perverse results of abolishing the doctrine.

II. THE DUTY TO RETREAT AND THE HISTORICAL ROOTS OF THE CASTLE DOCTRINE

A. *The Fall of the Duty to Retreat*²⁸

An understanding of the historical roots of the castle doctrine requires an understanding of a related self-defense doctrine: the duty to retreat. This

²⁸ For more detailed historical accounts of the duty to retreat, see generally BROWN, *supra* note 25, at 3–38; JEANNIE SUK, *AT HOME IN THE LAW: HOW THE DOMESTIC VIOLENCE*

duty was part and parcel of the reluctance of English common law to legitimize defensive killing and the right of self-defense.²⁹ Until the thirteenth century, the only justifications for homicide under English common law were a writ of authorization from the King or the “authority of a custom by which a thief . . . an outlaw, or perhaps other manifest felons, might be taken by force without a warrant.”³⁰ The only justifiable homicide, therefore, was one committed under the auspices of the state, or at least in clear furtherance of the state’s interests. In addition to these justifiable killings, there was also an excuse for homicide in self-defense available to a man³¹ whose life had been threatened.³² To trigger this defense, however, the man who committed the homicide must have first retreated until his back was to the wall.³³ Thus a man had a duty to retreat before resorting to deadly force. Self-defense was not viewed favorably by English jurists, and as a result, the duty to retreat became solidified in the common law.³⁴

The duty to retreat can be seen as a statement of societal values that held the preservation of human life and the prevention of violence paramount. Even though “[a] man may kill his enemy . . . for self-defence,”³⁵ Blackstone was adamant that “it is an untrue position, when taken generally, that by the law of nature or nations, a man may kill his enemy.”³⁶ While this description of the law as a codification of humanistic values certainly seems to be significant to the development of the doctrine, it is importantly accompanied by a concern for the preservation of the supremacy of the state over the individual. Just as in earlier eras, the state wanted to maintain a monopoly on the use of force.³⁷ As Blackstone stated:

The law requires, that the person, who kills another in his own defence, should have retreated as far as he conveniently or safely can, to avoid the violence of the assault, before he turns upon his assailant; and that, not fictitiously, or in order to watch his opportunity, but from a real tenderness of shedding his brother’s blood

REVOLUTION IS TRANSFORMING PRIVACY 58–65 (2009).

²⁹ See, e.g., Joseph H. Beale, Jr., *Retreat from a Murderous Assault*, 16 HARV. L. REV. 567 (1903).

³⁰ *Id.* at 568; see also FREDERICK POLLOCK AND FREDERIC WILLIAM MAITLAND, *THE HISTORY OF ENGLISH LAW BEFORE THE TIME OF EDWARD I*, 477 n.1 (Cambridge: At The University Press, 2d ed. 1899) (1898) (“so late as 1328 it was argued that a plea of the dead man’s outlawry was a sufficient answer to an indictment for slaying him”).

³¹ This Part uses “man” instead of person, as that is the language of the laws and commentary of these historical periods. Further, it is not clear whether these defenses were in fact available to women, or whether there is any case law on the subject.

³² BROWN, *supra* note 25, at 4. Unlike a justifiable homicide, excusable homicide carried with it an element of guilt. That said, the punitive weight attached to this guilt was slight, and by the time of Blackstone’s *Commentaries*, there was rarely any penalty levied for such homicides. *Id.*

³³ *Id.*

³⁴ *Id.* at 3.

³⁵ WILLIAM BLACKSTONE, 4 COMMENTARIES *423.

³⁶ *Id.*

³⁷ See BROWN, *supra* note 25, at 4; SUK, *supra* note 28, at 58.

. . . yet between two fellow subjects the law countenances no such point of honour: Because the king and his courts are the vindices injuriarum, and will give to the party wronged all the satisfaction he deserves.³⁸

By imposing this duty, therefore, the state was not only preventing conflict among individuals, but was also discouraging a culture in which individuals might trespass on the state's monopoly on violence.

Despite the significant precedent establishing the duty to retreat in the English and Anglo-American common law, there was a dramatic movement to abandon the duty in the United States during the late nineteenth century.³⁹ Scholars see this shift in many states' laws as resulting from a feeling that the English common law tradition clashed with ideals held by "the American mind,"⁴⁰ and from a conception of honor central to frontier states, particularly in the West and South (the "true man" justification).⁴¹ The Indiana Supreme Court offered the "American mind" justification in *Runyan v. State*, a case about a fight between neighbors.⁴² The Ohio Supreme Court offered the "true man" justification in *Erwin v. State*, where the court concluded that it would not enforce the "coward[ly]" (English) values of retreating in the face of conflict.⁴³ After decades of occasionally conflicting judicial opinions on the duty to retreat, the U.S. Supreme Court in 1921 effectively discarded the duty to retreat in *Brown v. United States*.⁴⁴ Writing for the Court, Justice Holmes eschewed discussion of cultural values in favor of an analysis of choices and concluded that "[d]etached reflection cannot be demanded in the presence of an uplifted knife."⁴⁵ Thus, although states

³⁸ WILLIAM BLACKSTONE, 4 COMMENTARIES *184–85. The choice of the word "satisfaction," with its implication of vengeance, may suggest that Blackstone is referring less to situations where a homicide was committed as an instinctive defensive act than to situations where homicide was chosen. Indeed, the phrase *vindices injuriam* translates as either the "avengers" or "punishers" of injury. The statement therefore suggests that the law and the state act not to prevent injury (or act before it has occurred), but rather to punish or act afterwards.

³⁹ See, e.g., BROWN, *supra* note 25, at 5; SUK, *supra* note 28, at 59–60; Christine Catalfamo, *Stand Your Ground: Florida's Castle Doctrine for the Twenty-First Century*, 4 RUTGERS J.L. & PUB. POL'Y 504, 507–11 (2007).

⁴⁰ See also BROWN, *supra* note 25, at 16–17 (citing *Runyan v. State*, 57 Ind. 80, 83 (1877) ("The tendency of the American mind seems to be very strongly against . . . requiring a person to flee when assailed.")).

⁴¹ See SUK, *supra* note 28, at 59–60; see, e.g., BROWN, *supra* note 25, at 17–20, 31, 39–47.

⁴² 57 Ind. at 83. For a narrative account of the facts and procedural posture of the case, see BROWN, *supra* note 25, at 10–17.

⁴³ 29 Ohio St. 186, 195, 199–200 (1876).

⁴⁴ 256 U.S. 335 (1921).

⁴⁵ *Id.* at 343. In his discussion of cultural values and their impact on debates about legal doctrine, Professor Dan Kahan suggests that Justice Holmes was motivated by a rationale similar to that of the "true man" espoused in *Erwin*. See Kahan, *supra* note 26, at 429–35. While it certainly may be that Justice Holmes's reliance on the language of deterrence masks a strongly expressive or culturally motivated interpretation of the law's role in home invasion cases, it is significant that an alternative to the "true man" justification was not only provided, but was the alternative the Supreme Court embraced.

have differing versions of it, the no duty to retreat doctrine enjoys a general degree of legal and social acceptance.

For the purposes of this Note, it is particularly important to bear in mind the widely accepted “monopoly on violence” rationale for the duty to retreat espoused by Blackstone.⁴⁶ In addressing the moral and philosophical underpinnings of the castle doctrine, Part III will return to the role of the state, which has not been adequately recognized in the current moral and philosophical debate.

B. *The Rise of the Castle Doctrine*

While English jurists held firmly to the duty to retreat as a seminal concept, the common law did recognize an exception to the duty when a man faced an attack in his own home.⁴⁷ This exception combined two defenses: self-defense and the “defense of habitation.”⁴⁸ These two doctrines, although distinct, were combined in rationale and effect in the formulation of the castle doctrine. The common law rule that a man could kill an intruder to prevent a violent felony—defense of habitation—is paralleled by the self-defense rule that a man owes no duty to retreat in his own home from an intruder intending to cause death or serious bodily harm.⁴⁹ Rooted in the conviction that “a man’s home is his castle,” the common law rule allowing deadly force against intruders became known as the castle doctrine.⁵⁰ The home is therefore distinguished from the public space, creating a dichotomy between the public and private spheres and the law that applies in each. According to Blackstone, the home was valued highly enough in the cultural consciousness not only to be likened to a castle, a place where safety from enemies should be guaranteed, but also to confer a certain degree of immunity from the state.⁵¹ As Professor Jeannie Suk explains, “intrusion into the

⁴⁶ See SUK, *supra* note 28, at 58–59. A century before Blackstone’s *Commentaries*, Lord Hale set forth an identical rationale for the duty to retreat. See MATTHEW HALE, *HISTORY OF THE PLEAS OF THE CROWN* 481 (P. R. Glazebrook ed., Professional Books Ltd. 1971) (1678) (“[I]n cases of hostility between two nations it is a reproach and piece of cowardice to fly from an enemy, yet in cases of assaults and affrays between subjects under the same law, the law owns not any such point of honour, because the king and his laws are to be the *vindices injuriarum*, and private persons are not trusted to take capital revenge one of another.”).

⁴⁷ See Beale, *supra* note 29, at 574–75; see also *Semayne’s Case*, (1604) 77 Eng. Rep. 194, 195 (K.B.); Catalfamo, *supra* note 39, at 505.

⁴⁸ See Catherine L. Carpenter, *Of the Enemy Within, the Castle Doctrine, and Self-Defense*, 86 MARQ. L. REV. 653, 665 (2003).

⁴⁹ See *State v. Carothers*, 594 N.W.2d 897, 900 (Minn. 1999) (quoting *State v. Touri*, 112 N.W. 422, 424 (Minn. 1907)); SUK, *supra* note 28, at 58–59; Carpenter, *supra* note 48.

⁵⁰ For a more detailed discussion of the derivation of the doctrine’s name, see Carpenter, *supra* note 48, at 656 n.10.

⁵¹ See BLACKSTONE, *supra* note 38, at *223; SUK, *supra* note 28, at 58 (in the home, the tender regard for peace of which Blackstone spoke was overridden by “tender . . . regard to the immunity of a man’s house”).

home thus placed the intruder beyond the protection of the law and suspended the state monopoly on violence.”⁵²

The evolving American jurisprudence retained the castle doctrine in its adoption of the English common law.⁵³ Yet, in the late nineteenth century, with the emergence of the “true man” doctrine and the elimination of a duty to retreat in many states, the exceptionality of the home as a place where the state did not have a monopoly on violence began to wane. In a sense, with this expansion of the new right to violence afforded to individuals, the castle doctrine became the paradigmatic case for understanding how the “true man” ought to be expected to behave.

At the same time, however, in many states that did not eliminate the duty to retreat, courts retained the castle doctrine as the primary exception to the duty to retreat.⁵⁴ In these traditional duty to retreat states, the castle doctrine was justified as a historical necessity—another artifact of the English common law retained by American courts.⁵⁵ This historical framing gave a settled quality to the doctrine, setting it apart from the general question of the duty to retreat, which remained a contested issue between states. Bishop’s treatise on criminal law identifies the castle doctrine as an ancient

⁵² See SUK, *supra* note 28, at 59.

⁵³ See, e.g., *People v. Tomlins*, 107 N.E. 496, 497 (N.Y. 1914). Judge Cardozo asserted:

It is not now and never has been the law that a man assailed in his own dwelling is bound to retreat. If assailed here he may stand his ground and resist the attack. He is under no duty to take to the fields and the highways, a fugitive from his own home. . . . Flight is for sanctuary and shelter, and shelter, if not sanctuary, is in the home. That there is, in such situation, no duty to retreat is, we think, the settled law in the United States as in England.

Id. ⁵⁴ See, e.g., *Jones v. State*, 76 Ala. 8, 16 (1884) (“It is an admitted doctrine of our criminal jurisprudence, that when a person is attacked in his own house, he is not required to retreat further The law regards a man’s house as his castle, or, as was anciently said, his *tutissimum refugium*, and having retired thus far, he is not compelled to yield further to his assailing antagonist.”); *Storey v. State*, 71 Ala. 329, 337 (1882) (“Of course, where one is attacked in his own dwelling-house, he is never required to retreat. His ‘house is his castle,’ and the law permits him to protect its sanctity from every unlawful invasion.” (internal citations omitted)); *People v. Zuckerman* 132 P.2d 545, 549–50 (Cal. Dist. Ct. App. 1942) (“California courts have definitely rejected the antiquated doctrine that a defendant will be justified in killing his assailant in self-defense only after he has used every possible means of escape by fleeing, [including] ‘retreating to the wall.’”); *State v. Middleham*, 17 N.W. 446, 447–48 (Iowa 1883) (“This instruction, as applied to the facts of this case, in so far as it makes it incumbent upon the defendant to retreat, is, we think, erroneous. The defendant at the time of the difficulty was in his own house.”); *Pond v. The People*, 8 Mich. 150, 177 (1860) (“A man is not, however, obliged to retreat if assaulted in his dwelling, but may use such means as are absolutely necessary to repel the assailant from his house, or to prevent his forcible entry, even to the taking of life.”).

⁵⁵ The nineteenth-century cases identifying the castle doctrine as a fixture of the common law frequently relied on citations to scholarly literature and treatises as opposed to cases, perhaps as a means of attempting to invoke the philosophical justifications that these earlier works had provided for the often contentious realm of self-defense and also to make the exceptional doctrine seem settled and canonical. See, e.g., *Middleham*, 17 N.W. at 448 (“In *Horrigan and Thompson’s Cases on Self Defense*, page 33, it is said: ‘A man, being in his habitation, is at the wall and in his castle, and is not obliged to retreat under any circumstances.’”).

doctrine that had evolved to meet historical and social necessity.⁵⁶ In his section on “Defence of the Castle,” Bishop explains:

In the early times, our forefathers were compelled to protect themselves in their habitation by converting them into holds of defence; and so the dwelling-house was called a castle. To this condition of things the law has conformed, resulting in the familiar doctrine that while a man keeps the door of his house closed, no other may break and enter it From this doctrine is derived another; namely, that the persons within the house may exercise all needful force to keep aggressors out, even to the taking of life.⁵⁷

Thus in the nineteenth century, the castle doctrine actually appears to have been a significantly less contentious legal concept than laws concerning the general duty to retreat in public places.

C. The Contemporary Castle Doctrine

After the period of activity in many of the nation’s courts surrounding the removal of the duty to retreat from self-defense, the twentieth century saw little change to the castle doctrine.⁵⁸ In the past few decades, however, the castle doctrine has experienced a renaissance of sorts. With the strong support of the National Rifle Association (“NRA”), state legislatures have begun to reexamine state criminal codes, amending past statutes to shore up old castle doctrine provisions⁵⁹ and passing new laws to expand the castle doctrine or to merge it with the “true man” laws that previously effectively dissolved any duty to retreat.⁶⁰ A 2005 Florida castle doctrine statute kicked

⁵⁶ See JOEL PRENTISS BISHOP, *NEW COMMENTARIES ON THE CRIMINAL LAW UPON A NEW SYSTEM OF LEGAL EXPOSITION* 517 (T.H. Flood and Company, Law Publishers ed., 8th ed. 1892).

⁵⁷ *Id.*

⁵⁸ What the latter part of the twentieth century did contribute to the realm of self-defense law was a series of doctrinal and philosophical changes relating to domestic violence. With the rise of feminism in legal scholarship and jurisprudence, gender dynamics and gender roles took on a great deal of importance in debates over when a person is permitted to resort to violence for self-preservation. There has been significant scholarship on domestic violence, the concept of the “battered woman” or “battered person,” and the use of the so-called Battered Woman Syndrome in formulating a defense. See generally SUK, *supra* note 28; Carpenter, *supra* note 48. Some of these concepts will recur later in the discussion of the possible perverse consequences of the castle doctrine.

⁵⁹ See, e.g., Act of May 6, 2006, ch. 194, § 4, 2006 Kan. Sess. Laws 1362, 1363 (codified at KAN. STAT. ANN. § 21-3212 (2008)) (general statement of castle doctrine originally drafted in 1969, but amended in 2007 to expand the language and include: “(c) Nothing in this section shall require a person to retreat if such person is using force to protect such person’s dwelling”). See generally *People v. Toler*, 9 P.3d 341, 346-49 (Colo. 2000) (discussing differences in duty to retreat laws from state to state).

⁶⁰ See, e.g., Act of Apr. 26, 2005, ch. 27, § 1, sec. 776.013(1), 2005 Fla. Laws 199, 200 (codified at FLA. STAT. § 776.013(1) (2010)). The Florida act includes relatively expansive castle doctrine language, which provides a very strong presumption in favor of the homeowner that an intruder poses an imminent threat of intended violence. To that effect, it reads: “A

off a rush of legislative activity, along with a flood of skeptical literature.⁶¹ By January 2007, at least fifteen states had passed bills that were (or purported to be) statements of the castle doctrine.⁶²

As a result, the nature, prevalence, and definition of the castle doctrine are currently in a significant state of flux. Professor Catherine Carpenter states, “[R]ather than providing a settled exception to the generalized duty to retreat, the Castle Doctrine has evolved into a confusing patchwork of rules on when, and against whom, one may assume the privilege of non-retreat.”⁶³ Self-defense in the home has become a popular topic and is frequently the subject of new legislation; however, the nomenclature has become somewhat misleading, thereby exacerbating the already confusing discrepancies between the intricacies of differing state criminal codes.⁶⁴ Perhaps simply because of a desire to create a coherent narrative for their supporters, or perhaps because it is a memorable or catchy title for legislation,

person who unlawfully and by force enters or attempts to enter a person’s dwelling, residence, or occupied vehicle is presumed to be doing so with the intent to commit an unlawful act involving force or violence.” *Id.* § 1, sec. 776.013(4), 2005 Fla. Laws at 201 (codified at FLA. STAT. § 776.013(4)). In addition, this law merges with the earlier “true man” laws eliminating a duty to retreat in public places by including:

A person who is not engaged in an unlawful activity and who is attacked in any other place where he or she has a right to be has no duty to retreat and has the right to stand his or her ground and meet force with force, including deadly force if he or she reasonably believes it is necessary to do so to prevent death or great bodily harm to himself or herself or another or to prevent the commission of a forcible felony.

Id. § 1, sec. 776.013(3), 2005 Fla. Laws at 201 (codified at FLA. STAT. § 776.013(3)).

⁶¹ See SUK, *supra* note 28, at 73–80; Sam Cook, ‘Stand Your Ground’ a Recipe for Disaster, NEWS-PRESS (Fort Myers, Fla.), Oct. 5, 2005, at B1 (“Florida’s ‘Stand Your Ground’ law . . . is an accident waiting to happen.”); Michelle Cottle, *Shoot First, Regret Legislation Later*, TIME, May 9, 2005, at 80; Debi Drewes, Letter to the Editor, *Fear Breeds Fear; Guns Breed Death*, ST. PETERSBURG TIMES (Fla.), Oct. 17, 2005, at 2 (“[W]here is the sense or intelligence in the right to shoot another being based on brief and fleeting impressions of threat or fear for safety?”); Arthur C. Hayhoe, Op-Ed., *NRA’s Magic Words*, TAMPA TRIB. (Fla.), May 20, 2005, at 13 (“We have several million untrained gun owners in Florida. If you embolden gun owners to act more aggressively, as this new bill certainly does, there will be many innocent victims.”); NPR *Day to Day: Stand Your Ground, Gun in Hand* (NPR radio broadcast Oct. 3, 2005), available at <http://www.npr.org/templates/story/story.php?storyId=4934076> (“[I]f you live in Florida, or plan on traveling there, a few key things to keep in mind so you don’t get, you know, shot. First, don’t look at anyone funny. In fact, avoid making eye contact with people.”).

Interestingly, however, despite the intense critical response that the Florida statute elicited, the statute appears in many ways to be simply a codification of the state’s strong common law commitment to the castle doctrine. See *Weiland v. State*, 732 So. 2d 1044, 1049–50 (Fla. 1999) (stating that “[i]t is not now and never has been the law that a man assailed in his own dwelling is bound to retreat,” before citing a long strand of Florida cases supporting the common law castle exception to the duty to retreat (citing *People v. Tomlins*, 107 N.E. 496, 497 (N.Y. 1914))); see also *Hedges v. State*, 172 So. 2d 824, 827 (Fla. 1965); *Pell v. State*, 122 So. 110, 116 (Fla. 1929); *Danford v. State*, 43 So. 593, 598–99 (Fla. 1907); *Wilson v. State*, 11 So. 556, 561 (Fla. 1892).

⁶² CHRISTOPHER REINHART, CONN. GEN. ASSEMBLY, CASTLE DOCTRINE AND SELF-DEFENSE 1–2 (2007), available at <http://www.cga.ct.gov/2007/rpt/2007-R-0052.htm>.

⁶³ Carpenter, *supra* note 48, at 657.

⁶⁴ For a discussion of the distinctions between different states’ statutory schemes, see *infra* notes 67–76.

the NRA, as well as critics of the doctrine, have continued to refer to a wide swath of no duty to retreat bills as “castle laws” or “castle doctrine” laws.⁶⁵ This has resulted in a merging of the debates over two fundamentally different sets of laws.

Some castle laws, like the Maine statute,⁶⁶ effectively restate the English common law castle doctrine. For example, Alaska’s self-defense statute, which was revised as recently as 2006, establishes that:

A person may not use deadly force under this section if the person knows that, with complete personal safety and with complete safety as to others being defended, the person can avoid the necessity of using deadly force by leaving the area of the encounter, except there is no duty to leave the area if the person is

(1) on premises

(A) that the person owns or leases;

(B) where the person resides, temporarily or permanently; or

(C) as a guest or express or implied agent of the owner, lessor, or resident⁶⁷

Similarly, in enacting castle doctrine legislation in 1994, the North Carolina legislature explicitly announced its adherence to the doctrine’s historical roots by including specific language to establish that the castle law was “not intended to repeal, expand, or limit any other defense that may exist under the common law.”⁶⁸

These statutes frequently provide something beyond a codification of common law principles by altering the presumption of reasonableness in a home invasion to favor the home dweller.⁶⁹ In other words, instead of the home dweller needing to prove that his or her decision to resort to deadly force was reasonable, the state would have the burden at trial of proving that the decision was unreasonable. Under California’s statutory scheme, for instance:

Any person using force intended or likely to cause death or great bodily injury within his or her residence shall be presumed to have held a reasonable fear of imminent peril of death or great bodily injury to self, family, or a member of the household when that

⁶⁵ See NRA Inst. for Legislative Action, *Fortifying the Right to Self-Defense*, Feb. 6, 2006, <http://www.nraila.org/Issues/FactSheets/Read.aspx?id=188> [hereinafter *Fortifying the Right to Self-Defense*]; NRA Inst. for Legislative Action, *This Train Keeps a Rollin’*, July 28, 2006, <http://www.nraila.net/Issues/Articles/Read.aspx?ID=199>; cf. Carpenter, *supra* note 48, at 657 (specifying that the “castle doctrine” refers only to a certain situation in which duty to retreat is removed).

⁶⁶ See ME. REV. STAT. ANN. tit. 17-A, § 104(3)(B)(1) (West 2009).

⁶⁷ Act of June 15, 2006, ch. 68, § 3, 2006 Alaska Sess. Laws 1, 3–4 (codified at ALASKA STAT. § 11.81.335(b) (2008)).

⁶⁸ N.C. GEN. STAT. § 14-51.1 (2009).

⁶⁹ See, e.g., CAL. PENAL CODE § 198.5 (Deering 2008).

force is used against another person, not a member of the family or household, who unlawfully and forcibly enters or has unlawfully and forcibly entered the residence and the person using the force knew or had reason to believe that an unlawful and forcible entry occurred.⁷⁰

However, although these laws vary in their requirements of reasonableness⁷¹ and in their definitions of what behavior (e.g., trespass, burglary, etc.) triggers the right to use deadly force, they share as a central tenet an emphasis on the home as the *sole* space where the duty to retreat is abrogated.

The second group of laws, which has also come under the banner of “the castle doctrine,” includes those that abolish the duty to retreat more broadly.⁷² Florida’s controversial statute, for example, establishes that an individual behaving lawfully in a place that he or she has a right to be “has no duty to retreat and has the right to stand his or her ground and meet force with force, including deadly force.”⁷³ These laws, which are also (and more accurately) dubbed “stand your ground” laws, generally represent a restatement of the expansive “true man” doctrine rather than the narrower common law castle doctrine. In other words, while many of these statutes share the same concern for safety in the home as the narrower castle doctrine statutes, they also represent a much broader rejection of the English common law’s duty to retreat.

Whereas the Alaska justified homicide statute and many of the previously discussed state statutes attempt to craft narrowly tailored rules (e.g., specifying whether the castle doctrine applies to renters as well as owners),⁷⁴ the “stand your ground” laws tend to be much broader. For example, as amended in 2006, Kentucky’s “stand your ground” law simply states, “[a]

⁷⁰ *Id.*

⁷¹ Compare *id.* (shifting the burden to the prosecution), and R.I. GEN. LAWS § 11-8-8 (2002) (“In the event that any person shall die or shall sustain a personal injury in any way or for any cause while in the commission of any criminal offense enumerated in §§ 11-8-2 – 11-8-6, it shall be rebuttably presumed as a matter of law in any civil or criminal proceeding that the owner, tenant, or occupier of the place where the offense was committed acted by reasonable means in self-defense and in the reasonable belief that the person engaged in the criminal offense was about to inflict great bodily harm or death upon that person or any other individual lawfully in the place where the criminal offense was committed.”), with CONN. GEN. STAT. ANN. § 53a-20 (West 2007 & Supp. 2008) (“A person in possession or control of premises, or a person who is licensed or privileged to be in or upon such premises, is justified in using reasonable physical force upon another person when and to the extent that he reasonably believes such to be necessary to prevent or terminate the commission or attempted commission of a criminal trespass by such other person in or upon such premises; but he may use deadly physical force under such circumstances only (1) in defense of a person as prescribed in section 53a-19, or (2) when he reasonably believes such to be necessary to prevent an attempt by the trespasser to commit arson or any crime of violence, or (3) to the extent that he reasonably believes such to be necessary to prevent or terminate an unlawful entry by force into his dwelling as defined in section 53a-100, or place of work, and for the sole purpose of such prevention or termination.”).

⁷² See *supra* note 60 and accompanying text.

⁷³ FLA. STAT. ANN. § 776.013(3) (LexisNexis Supp. 2010).

⁷⁴ ALASKA STAT. § 11.81.335(b)(1) (2008).

person does not have a duty to retreat if the person is in a place where he or she has a right to be.”⁷⁵ Similarly, in Arizona after 2006, when faced with a plausible threat of any of a range of violent crimes, “[t]here is no duty to retreat before threatening or using physical force or deadly physical force.”⁷⁶ While in these states the home still remains the “paradigmatic place” where no duty to retreat exists (as evidenced by the continued use of the “castle doctrine” or “castle law” moniker for the legislation and the statutes’ construction),⁷⁷ the narrow exception has swallowed the rule in the “stand your ground” statutes, making them much more the progeny of *Runyan* or *Erwin*, than of Blackstone. As a result, the group of laws that has as an underlying assumption the exceptionality of the home, rather than the broader “stand your ground laws,” are the ones that truly represent the castle doctrine. Thus, when this Note refers to the castle doctrine, it is invoking the former.

III. MORAL AND PHILOSOPHICAL UNDERPINNINGS OF THE CASTLE DOCTRINE

In the current debate, castle doctrine proponents such as the NRA generally justify their position by invoking the strictly retributive view that, by virtue of breaking the law, the intruder forfeits his or her rights and deserves the consequences that result from his or her action.⁷⁸ This Part will suggest that the grounding of the castle doctrine in the retributive theory has led to the doctrine’s association with the victims’ rights movement and has created a philosophical and ideological backlash that has prevented a realistic evaluation of the doctrine. This Part will further suggest that the doctrine should actually be viewed as grounded in non-retributive self-defense law and thus recognized as historically, normatively, and ideologically distinct from the controversial tenets of the victims’ rights movement, which is often focused on vengeance.⁷⁹

The strictly Kantian retributive view that breaking the law leads to the forfeiture of an individual’s rights tends to dominate the rhetoric of castle doctrine supporters.⁸⁰ The central concept of the forfeiture theory is that, although all persons have certain inalienable rights, an individual who breaks the law (i.e., invades a house) forfeits these rights to the person whose rights have been infringed upon (i.e., the home dweller).⁸¹ As a result,

⁷⁵ Act of Apr. 21, 2006, ch. 192, § 4, 2006 Ky. Acts 707, 708 (codified at KY. REV. STAT. ANN. § 503.080(3) (West 2009)).

⁷⁶ Act of Apr. 24, 2006, ch. 199, § 3, 2006 Ariz. Sess. Laws 626, 627 (codified at ARIZ. REV. STAT. ANN. § 13-411(B) (2009)).

⁷⁷ See SUK, *supra* note 28, at 61.

⁷⁸ See GEORGE FLETCHER, *RETHINKING CRIMINAL LAW* 855–59 (Little Brown ed. 1978).

⁷⁹ See *infra* note 89 and accompanying text.

⁸⁰ See, e.g., FLETCHER, *supra* note 78, at 60–75; Fortifying the Right to Self-Defense, *supra* note 65.

⁸¹ See Hugo Bedau, *The Right to Life*, 52 *MONIST* 550, 568 (1968) (quoting W. DAVID ROSS, *THE RIGHT AND THE GOOD* 60–61 (1930)).

the intruder has effectively willed his or her punishment.⁸² Within academia, Professor George Fletcher has been a vocal proponent of this forfeiture theory as an important justification for defensive killings.⁸³ In the political arena, the NRA has stressed the importance of protecting the rights of “law-abiding citizens” instead of “criminals.”⁸⁴ The NRA’s lobbying effort to enact a castle statute in West Virginia, for example, revolved around the rhetorical framing of the law as a means of “allowing law-abiding citizens to stand their ground to protect themselves and their family.”⁸⁵

By eliminating any rights of the intruder and by focusing on the rights of the home dweller or victim, the retributive justification also creates a strong alliance between the castle doctrine and the victims’ rights movement⁸⁶—a movement that supports capital punishment, sentencing enhancement, and similar measures that emphasize rights of victims over the rights of defendants as an important aspect of criminal justice.⁸⁷ Practically and

⁸² See *id.* Stuart Green provides a useful outline of the various philosophical justifications for defensive killings. See Green, *supra* note 23, at 19–25. For his discussion of “moral forfeiture,” see *id.* at 20.

⁸³ See George P. Fletcher, *Proportionality and the Psychotic Aggressor: A Vignette in Comparative Criminal Theory*, 8 ISRAEL L. REV. 367, 380 (1973).

⁸⁴ See, e.g., *Fortifying the Right to Self-Defense*, *supra* note 65 (“Without doubt, Florida’s recently enacted ‘Castle Doctrine’ law is good law, casting a common-sense light onto the debate over the right of self-defense. It reverses the pendulum that for too long has swung in the direction of protecting the rights of criminals over the rights of their victims.”).

Some scholars have leveled strong criticism at the forfeiture theory. See, e.g., SUZANNE UNIACKE, *PERMISSIBLE KILLING: THE SELF-DEFENCE JUSTIFICATION OF HOMICIDE* 191 (1994) (“A theory which maintains that an unjust aggressor forfeits the right to life cannot [ground] the justification of homicide in self-defence [sic.]”); Bedau, *supra* note 81; Jeffrie G. Murphy, *Marxism and Retribution*, 2 PHIL. & PUB. AFF. 217 (1973). There is a systemic critique of the forfeiture theory, for instance, that relies on an objection to the concept of a social contract between citizens of the state. See, e.g., Murphy, *supra*; Tom Dannenbaum, Note, *Crime Beyond Punishment*, 15 U.C. DAVIS J. INT’L L. & POL’Y 189, 201–202 (2009); Bailey Kuklin, Article, “*You Should Have Known Better*,” 48 KAN. L. REV. 545, 578 n.109 (2000).

In the context of racially disproportionate enforcement and prosecution, this line of argument has been focused on the relationship between blacks and the American social contract. Professor Paul Butler, in suggesting that black jurors should practice nullification to prevent over-incarceration of black defendants, writes that the form of “democracy” represented by the American social contract “has betrayed African Americans far more than they could ever betray it.” Paul Butler, *Racially Based Jury Nullification: Black Power in the Criminal Justice System*, 105 YALE L. J. 677, 693 (1995). For a broader discussion of the critique of the social contractual approach to criminal culpability, see also RANDALL KENNEDY, *RACE, CRIME, AND THE LAW*, 295–310 (1997).

⁸⁵ Press Release, NRA Inst. for Legislative Action, West Virginia Governor Signs ‘Castle Doctrine’ Legislation! (Mar. 14, 2008), available at <http://www.nraia.org/Legislation/Read.aspx?id=3672>.

⁸⁶ See Marion P. Hammer, Letter to the Editor, *Anti-Gun Groups Mislead on Self-Defense Laws*, FLA. TODAY (Melbourne, Fla.), Oct. 15, 2005, at A10 (praising a recently passed Florida statute codifying castle doctrine, saying that it puts “Florida law . . . on the side of law-abiding victims rather than criminals. And that is the way it is supposed to be”); *Fortifying the Right to Self-Defense*, *supra* note 65 (arguing that the Florida castle law “gives rights back to law-abiding people and forces judges and prosecutors to focus on protecting victims”); see also *supra* note 27.

⁸⁷ See generally Douglas E. Beloof, *The Third Wave of Crime Victims’ Rights: Standing, Remedy, and Review*, 2005 B.Y.U. L. REV. 255, 265–73 (2005); Vik Kanwar, *Capital Punish-*

philosophically, however, there is a fundamental difference between the victims' rights movement and the castle doctrine. Central to the victims' rights movement is the focus on granting more power to victims via the state. Most proposed victims' rights statutes focus on after-the-fact procedural tools to assist the victim by enhancing state power, particularly prosecutorial power.⁸⁸ Whereas the victims' rights movement represents a willingness to increase state power, propounding a compensatory, punitive system,⁸⁹ the castle doctrine actually rejects state-based punishment or expansive state-sponsored vengeance and instead recognizes the right of an individual to act to preserve him or herself. Indeed, historically the castle doctrine was exceptional because it recognized the rare instance in which the state does not preserve its monopoly on violence.⁹⁰ The castle doctrine addresses a situation where there is an immediate concern, not for punishment, but rather for the preservation of self, in a context where the state has absolutely no ability to act in a preventative capacity.

The misplaced coupling of the castle doctrine and the victims' rights movement that has arisen by grounding the doctrine in retributivism and forfeiture should be reexamined. The autonomy and right to self-preservation of the home dweller make for an alternative, more compelling foundation. Granted, it is possible to read Rhode Island's castle doctrine statute, which provides that "[t]here shall be no duty on the part of an owner, tenant, or occupier to retreat from any person engaged in the commission of any [specified] criminal offense,"⁹¹ as suggesting that a person acting criminally has forfeited some rights. There is an existing body of scholarship, however, that asserts an alternative justification: that impeding the right of self-defense when one party is innocent would also be an unjustifiable challenge to

ment as "Closure": *The Limits of a Victim-Centered Jurisprudence*, 27 N.Y.U. REV. L. & SOC. CHANGE 215, 222-37 (2002); Paul H. Robinson, *Should the Victims' Rights Movement Have Influence Over Criminal Law Formulation and Adjudication?*, 33 MCGEORGE L. REV. 749, 755-57 (2002); Shannon Brownlee et al., *The Place for Vengeance*, U.S. NEWS & WORLD REP., June 16, 1997, at 24; Alan Turner, *Making Life Miserable for Felons*, HOUSTON CHRON., June 11, 2000, at A35.

⁸⁸ See Belooof, *supra* note 87, at 262-74; see, e.g., ALASKA STAT. § 12.61.010 (1984); Stephen E. Branchflower, *The Alaska Office of Victims' Rights: A Model for America*, 21 ALASKA L. REV. 259 (2004).

In empowering the victim, victims' rights efforts also empower the state. While the rights conferred by victims' rights legislation are ostensibly rights granted to the victim against the defendant, they require state action to enforce and are therefore rights granted to the state against the defendant in the Hohfeldian or legal realist sense. The right to restitution, for example, necessarily empowers the state to compel restitution.

⁸⁹ See Bruce Shapiro, *Victims & Vengeance: Why the Victims' Rights Amendment Is a Bad Idea*, NATION, Feb. 10, 1997, at 11, 12-16 (arguing that a focus on vengeance has become the politically dominant strand in the victims' rights movement); cf. Marshall N. Perkins, *Beyond the Roar of the Crowd: Victim Impact Testimony Collides with Due Process*, 27 U. BALT. L.F. 31, 36 (1997) (arguing that victim impact statements are "more appropriately analyzed in terms of personal revenge rather than retribution").

⁹⁰ See *supra* note 38 and accompanying text.

⁹¹ R.I. GEN. LAWS § 11-8-8 (2002).

the individual's autonomy.⁹² To deny the right to resort to force would compel the individual to cede his or her autonomy to some other party, whether to the intruder at the time of the invasion or to the state after the fact.⁹³ Requiring some sort of threat or imminence calculus during a home invasion, particularly in emotionally charged situations where delay may not be an option, may effectively force a home occupant to value the well-being of the intruder more highly than his or her own safety.⁹⁴ This would violate traditional principles of self-defense, particularly those espoused by the Model Penal Code.⁹⁵

In fact, in its sections on the use of force in self-defense, the Model Penal Code focuses almost exclusively on the defender's preservation of self as opposed to the aggressor's culpability.⁹⁶ A person is generally allowed to resort to force not when another person is behaving unlawfully, but when another person poses an imminent threat.⁹⁷ The statutory focus on the reasonableness of the home dweller's belief that the intruder poses a threat—whether proof of reasonableness is required, as in Connecticut,⁹⁸ or assumed, as in California⁹⁹—also speaks to the focus on the home dweller rather than the intruder. In other words, the statutes are concerned with the mens rea and the reactivity of the home dwellers, not of the home invaders. Thus, the castle doctrine is, in fact, logically situated in the broader context of neces-

⁹² See FLETCHER, *supra* note 78, at 860–75; Green, *supra* note 23, at 24; see, e.g., John Q. La Fond, *The Case for Liberalizing the Use of Deadly Force in Self-Defense*, 6 U. PUGET SOUND L. REV. 237, 243–44, 279 (1983).

⁹³ See, e.g., La Fond, *supra* note 92, at 243–44.

⁹⁴ It is essential to stress that the debate regarding whose rights to favor in the context of the castle doctrine is not the same as a debate over the recognition of property rights (as to who has a Hohfeldian right/no right to enter property); rather, this is an issue of a right to self-preservation. This is yet another reason why it seems so important to differentiate among the statutes referred to as castle laws. There is an uneasy tension between property law and criminal law in the discussion of the castle doctrine that can create the impression that, as a legal concept, the castle doctrine is geared towards preservation of property ownership rather than life. While some castle doctrine-type statutes may emphasize property rights, those that truly operate within the framework of the castle doctrine as a common law principle are explicit in permitting defense of self as opposed to property. See, e.g., Wesley Newcomb Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 26 YALE L.J. 710 (1917).

For an example of a property-centered statute, see KY. REV. STAT. ANN. § 503.080 (LexisNexis 2008 & Supp. 2009). For an example of a statute that focuses on preservation of life as opposed to protection of property, see HAW. REV. STAT. ANN. § 703-304 (LexisNexis 2007 & Supp. 2009).

⁹⁵ See MODEL PENAL CODE § 3.02 (1985) (choice of evils); *id.* § 3.04(1)(c) (“[T]he use of force upon or toward another person is justifiable when the actor believes that such force is immediately necessary for the purpose of protecting himself against the use of unlawful force by such other person on the present occasion.”).

⁹⁶ See, e.g., *id.* § 3.04.

⁹⁷ See, e.g., *id.*; see also *id.* §§ 3.04(1), 3.05(1). It is true that the Model Penal Code specifies that the force that triggers the right to self-defense must be “unlawful,” but this is in no way the same as allowing the use of force in response to any unlawful behavior. Indeed, the Model Penal Code prescribes special requirements of “necessity” and “imminence” to suggest that this is a general right that should be recognized narrowly.

⁹⁸ CONN. GEN. STAT. ANN. § 53a-20 (West 2007 & Supp. 2009).

⁹⁹ CAL. PENAL CODE § 198.5 (Deering 2008).

sity defenses as an affirmation of a fundamental societal concern for the preservation of life, as opposed to being grounded in a retributive philosophy that criminals should be dealt with violently.

In addition to the Model Penal Code's recognition of self-defense as a right independent of a belief in forfeiture, a broader literature of political philosophy suggests that the castle doctrine need not be rooted in retributive arguments. Rights-based theories legitimizing state authority concede that the individual maintains a moral right to protect him or herself against aggression by means of deadly force.¹⁰⁰ According to such theories, citizens of the state submit to the state's monopoly on the use of force in exchange for stability and the state's protection.¹⁰¹ When it is impossible for the state to protect its citizens, however, it is both fair and logical that individuals should be able to resort to violence when necessary for self-defense. Although this right to resort to violence is generally viewed by proponents of the forfeiture theory as a right against the intruder,¹⁰² such a reading is flawed by its failure to recognize the state's monopoly on violence and the reasoning that supports this monopoly.¹⁰³ The right against the intruder is more correctly viewed as a right that the home dweller has against the state for protection against violence and exercises on behalf of the state in the state's absence.¹⁰⁴

In a situation where two (possibly) armed individuals meet in an enclosed space, any discussion of preservation of life is heavily influenced by a hindsight bias. Should a panicked home occupant really be expected or morally required to conduct a calculus of the imminence of physical damage? The most terrifying characteristic of a home invasion is that it presents a situation where preventative state involvement is usually impracticable. Moreover, the almost involuntary reactive fear referred to by Holmes in *Brown* makes defensive killing practically impossible to deter, even when it turns out that the invader posed no real threat.¹⁰⁵

¹⁰⁰ See, e.g., Sanford H. Kadish, *Respect for Life and Regard for Rights in the Criminal Law*, 64 CAL. L. REV. 871, 885 (1976) (identifying this right against the state based on the natural rights language of Locke, Hobbes, and Rawls); see also UNIACKE, *supra* note 84, at 156–60 (describing an analogous “unlawful aggression” definition to the one espoused by Dean Sanford Kadish); Green, *supra* note 23, at 22 (identifying Kadish as one of the primary proponents of this theory of “the right to resist unlawful aggression”).

¹⁰¹ See Kadish, *supra* note 100, at 885 (“[T]he individual's surrender of prerogative to the state yields a quid pro quo of greater, not lesser, protection against aggression than he had before.”).

¹⁰² See Fletcher, *supra* note 83, at 380 (“[A]ggression breaches an implicit contract among autonomous agents, according to which each person . . . is bound to respect the living space of all others. The intrusion upon someone's living space itself triggers a justified response.”); see also Green, *supra* note 23, at 24.

¹⁰³ See, e.g., *supra* note 38 and accompanying text.

¹⁰⁴ See Green, *supra* note 23, at 22; see, e.g., Kadish, *supra* note 100, at 895.

¹⁰⁵ See *Brown v. United States*, 256 U.S. 335, 343 (1921); see also *supra* notes 44, 45 and accompanying text. Professor Fletcher poses a hypothetical in which a “psychotic aggressor,” who intends no harm but who in fact poses a great threat, attacks another individual. Fletcher concludes that at the moment of the attack the culpability of the aggressor is inconsequen-

IV. RESITUATING THE CASTLE DOCTRINE'S CULTURAL FRAMING

The current discourse on the legitimacy, desirability, and importance of the castle doctrine in American society has mostly focused on the law's ideological and cultural underpinnings.¹⁰⁶ As a culturally-laden and contentious issue, the castle doctrine has taken on great expressive and symbolic significance. While the expressive role of castle doctrine is important, this cultural and expressive framing should be reexamined in conjunction with a focus on both the philosophical justifications and the effects of the doctrine.

Despite its limited and infrequent application, the castle doctrine has recently attracted extensive media coverage and has elicited fierce opposition. Perhaps, as others have suggested, duty to retreat laws and the castle doctrine are outgrowths of a particular way of thinking, a general cultural consciousness as opposed to a particular philosophy of punishment.¹⁰⁷ Perhaps, like the rejection of the English common law concept of duty to retreat, castle laws are indicative of a rugged, quintessentially American individualism that can be seen in the cultural historical narrative beginning with westward expansion, moving from the films of John Ford and John Wayne to Vietnam, and more recently to what has been called the "cowboy democracy" of the Bush administration.¹⁰⁸ Whether the emphasis is placed on legal doctrine or on some broader cultural mythos, tracing this trope of the "true man" through American history is not uncommon.¹⁰⁹ The narrative of an American West that values individualism and self-reliance may in cer-

tial. Fletcher, *supra* note 83, at 371. Now imagine a rule requiring the home dweller to assess the aggressor's moral culpability. While one might conceive of a motivation for such a rule other than to value the rights of the aggressor more highly than the rights of the home dweller, such a rule might well reflect this prioritization in its application.

¹⁰⁶ See, e.g., Cottle, *supra* note 61, at 80 ("It's as if the text of a real bill somehow got transposed with dialogue from a 1970s Dirty Harry paean to vigilantism."); Thornburgh, *supra* note 18 (discussing the way the castle doctrine relates to Texas's "gun-nut reputation").

¹⁰⁷ See, e.g., BROWN, *supra* note 25, at 6 ("In the realms of both peace and war, it is not in the nature of America to approve retreat"); *id.* at 158 ("It is obvious that the legal and individual doctrine of no duty to retreat is highly cognate with the broad social theme of conquest." (emphasis added)).

¹⁰⁸ See, e.g., *id.* at 166 ("A Texan with a family background deeply rooted in the embattled nineteenth-century pioneer era of Texas, [President Lyndon B.] Johnson thought naturally in terms of concepts strongly held in Texas: no duty to retreat, standing one's ground, and I'll die before I'll run." (footnote omitted)); SUK, *supra* note 28, at 84–85 (analogizing the attacks of September 11, 2001 to the invasion of the home, and drawing a parallel between the rise in popularity of the castle doctrine and the War on Terror rhetoric of defending the home front).

¹⁰⁹ See generally RICHARD SLOTKIN, THE FATAL ENVIRONMENT: THE MYTH OF THE FRONTIER IN THE AGE OF INDUSTRIALIZATION, 1800–1890 (1985) [hereinafter THE FATAL ENVIRONMENT] (deconstructing the myth of the frontier and outlining how frontier culture affected development of mass culture and politics); RICHARD SLOTKIN, GUNFIGHTER NATION: THE MYTH OF THE FRONTIER IN TWENTIETH-CENTURY AMERICA (1992) (tracking these themes' development into the twentieth century); WILL WRIGHT, SIX GUNS AND SOCIETY: A STRUCTURAL STUDY OF THE WESTERN (1975) (exploring the Western film genre, as well as the political and social implications of the Western as a cultural construction); BOWLING FOR COLUMBINE (United Artists 2002) (discussing links between imperialism, racism, gun violence, and the frontier in United States history and culture).

tain situations be useful in providing insights into the development of legal doctrines. But an attempt to suggest a direct correlation between the castle doctrine and the image of the action-oriented, stereotypically masculine American codes the doctrine as clearly or inherently “conservative.” Such an attempt errs in its oversimplification of competing ideologies, as well as in its focus on the expressive function of the law at the expense of considering the effects of the law.

Because the United States’s political system is effectively bipartite, Americans tend to map their political and legal positions on a fairly unambiguous bipolar axis. Thus, various laws are readily labeled as right or left, conservative or progressive, or some other similar formulation. Current thinking has firmly placed the castle doctrine among conservative legislation, even situating it alongside capital punishment.¹¹⁰

Thus, and not surprisingly, legal, political, and social discourse relating to the castle doctrine seems preoccupied with presenting the doctrine as belonging to a package of beliefs and views that are firmly situated in the ideological right.¹¹¹ Kahan, like other commentators,¹¹² has analyzed the duty

¹¹⁰ See, e.g., Roger Croteau, *Leadership Raised as Issue in Race for Hill Country Seat*, SAN ANTONIO EXPRESS-NEWS, Feb. 25, 2008, at B1 (describing a congressman’s “strong, conservative representation” of his district as epitomized by his co-authoring a castle doctrine law and supporting mandatory minimum prison terms for child sex offenders); Michael Brendan Dougherty, *Plain Right*, AM. CONSERVATIVE, Mar. 9, 2009, at 6, 8 (“Sanford’s conservative credentials compare favorably to anyone else mentioned as a 2012 presidential contender. He calls the public-education system ‘a Soviet-style monopoly.’ He promoted school choice through tax rebates to avoid the appearance of government control. He passed a ‘Castle doctrine’ bill that was supported by the NRA. He favors a law-and-order approach to immigration, but opposed REAL ID on civil liberties grounds. Though he avoids showy displays of piety, he is reliably pro-life.”); Chris Joyner, *State’s Castle Doctrine Puts Power in Hands of Victims*, *Advocates Say*, CLARION-LEDGER (JACKSON, MISS.), Nov. 5, 2007, at A1 (“Mississippi’s castle doctrine law was met with wide popular acclaim in this conservative, gun-friendly state”); Rebecca León, *Senate Panel Kills ‘Castle Doctrine’ Bill*, ALTAVISTA J., Mar. 8, 2010, <http://www.wpcva.com/articles/2010/03/08/chatham/news/news37.txt> (“[the Virginia castle doctrine bill] was struck down by the Senate Courts of Justice Committee on a 9-6 party-line vote Wednesday. All of the Democrats on the panel voted to kill the bill; all of the Republicans wanted to keep it alive.”); Kelsey Palmer, Op-Ed., *Chuck Hopson is a Conservative*, JACKSONVILLE PROGRESS, Feb. 27, 2010, <http://jacksonvilleprogress.com/opinion/x1834678612/Chuck-Hopson-is-a-conservative> (“The idea that Chuck is not conservative is ridiculous! From coauthoring the Castle Doctrine to sponsoring small business tax exemptions, Chuck has been for limited government involvement in our business and personal lives.”); Mannix Porterfield, *Senator Confident About ‘Castle Doctrine’ Bill*, FAYETTE TRIB., Oct. 4, 2007, <http://www.fayettetribune.com/local/x211932306/Senator-confident-about-castle-doctrine-bill?%20target=> (“‘You have some very liberal individuals who don’t want that bill at all’”) (quoting a state representative); Anthony J. Sebok, *Florida’s New “Stand Your Ground” Law: Why It’s More Extreme Than Other States’ Self-Defense Measures, and How It Got That Way*, FINDLAW, May 2, 2005, <http://writ.news.findlaw.com/sebok/20050502.html> (“[The Florida statute’s] real purpose seems to be the capital punishment of property-criminals.”); cf. Kahan, *supra* note 26, at 435–36.

¹¹¹ See, e.g., Leah Rupp, *Candidates in District 29 Race Discuss Education, Experience*, CLARION-LEDGER (JACKSON, MISS.), Oct. 14, 2007, at B1 (“‘He voted for right-to-life, the Castle Doctrine, balanced budgets,’ the interim Byram mayor said. ‘Just about any issue you can think of, he’s voted for the conservative side of it.’”); Kelley Shannon, *Bill Strengthens Texans’ Right to Use Deadly Force*, HOUSTON CHRON., Mar. 20, 2007, <http://www.chron.com/disp/>

to retreat against a backdrop of clear dichotomous distinctions between left and right. Kahan identifies as individualist a set of values, principles, and policies that are key elements of Republican political views, while he identifies competing stances widely aligned with liberal Democrats as evidence of an antithetical communitarian philosophy concerned with a greater social good.¹¹³

But the impulse to classify stances into two ideological camps is often problematic because it risks missing crucial elements of legal and sociopolitical debates. Such is the case with debates concerning the castle doctrine. Situating the castle doctrine in a neat left or right category risks self-definition. As opposed to being the polar opposites of each other, the two alternative views can often become each other's supplements in the Derridean sense, such that the "liberal" position becomes diacritical with the "conservative" one. Each ideological position can become defined solely by the existence of the other, rather than by ideology or experience.¹¹⁴

What can be characterized as the standard left/right ideological mapping, as exemplified by Kahan's work,¹¹⁵ is outlined below:

Liberal	Conservative
Democrat	Republican
Values the group/community	Values the individual
Believes that all have rights that the state must protect—that the law is there to protect all	Believes that some forfeit their rights through unlawful behavior—that the law is there to protect those who obey it
Opposes the death penalty	Supports the death penalty
Opposes the castle doctrine	Supports the castle doctrine

story.mpl/metropolitan/4647268.html ("The bill, pushed by Republican lawmakers and backed by the National Rifle Association, states that a person has no duty to retreat from an intruder in his or her home."); cf. Kahan, *supra* note 26, at 441, 489.

While identifying left or right on a political spectrum is far from the purpose of Kahan's piece, the logic of the article, much like the discourse on the castle doctrine or no duty to retreat statutes, seems preoccupied with presenting dichotomous relationships predicated upon (occasionally inconsistent) packages of beliefs and views. In creating his groupings, which are generally descriptive and based on social scientific data, Kahan concedes that "no necessary [philosophical] link" exists between, say, a view on abortion and the death penalty. *Id.* at 440. In his own grouping of "citizens who support egalitarianism and civic solidarity" and "citizens who support hierarchy and individualism," however, there is an implicit identification of shared values, motives, and ideals that underlie certain political positions. *See id.* at 489.

¹¹² See *supra* notes 110-111.

¹¹³ See Kahan, *supra* note 26, at 489 (identifying the distinctions between "[c]itizens who support egalitarianism and civic solidarity" and "citizens who support hierarchy and individualism," while linking these groups to opposing views on hot-button social issues).

¹¹⁴ See, e.g., JACQUES DERRIDA, *OF GRAMMATOLOGY* 141-64 (Gayatri Chakravorty Spivak trans., Johns Hopkins Univ. Press 1976) (1967).

¹¹⁵ See generally Kahan, *supra* note 26. While Kahan does discuss the "true man" doctrine and situates its proponents on the conservative side, he does not mention the castle doctrine. However, proponents of "true man" laws tend to also support castle doctrine laws, so much so that the two concepts tend to merge. *See supra* note 65 and accompanying text.

But it is not obvious why Kahan's categories are the only ones available. Once the discussion has broken free of its binary left/right prison and has shifted its focus instead to the doctrine's philosophical justifications and effects, possible alternative ideological mappings begin to emerge.¹¹⁶ One alternative would imagine the question of the authority of the state as a vehicle of force to be the central question:

Statist	Libertarian
Values order and stability	Values personal liberties
Believes that the state must preserve its monopoly on violence	Believes that the state does not have the authority to use force
Supports the death penalty	Opposes the death penalty
Opposes the castle doctrine	Supports the castle doctrine

Another possible alternative ideological mapping could be formed around the axis of criminalization. In this mapping, opposing the castle doctrine can be coded as supporting the explicit criminalization of certain conduct (i.e., the use of deadly force without retreat in the home):

¹¹⁶ The alternatives proposed here do not necessarily describe the way most people situate themselves politically, but a consideration of the alternative narratives or ideological schemas may cause people to reconsider their views on various doctrines. As noted above, Kahan draws much of his framework from surveys and social scientific data, which are intended to represent the way people actually think about these different policy issues. *See supra* note 111. That said, it is also important to note the limited sample size of any such survey. *Cf.* James E. Bartlett, II et al., *Organizational Research: Determining Appropriate Sample Size in Survey Research*, 19 INFO. TECH., LEARNING & PERFORMANCE J. 43, 43–44 (2001). Indeed, one of the primary flaws in the dichotomous right/left, Democrat/Republican schema in considering political ideology in the United States is the low rate of voter turnout and the statistically unimpressive number of people registered as members of the two major parties. *See* Editorial, *Extreme Partisanship Isn't Serving the Public*, GREELEY TRIB. (Colo.), Feb. 3, 2010, available at <http://www.greeleytribune.com/article/20100203/OPINION/100209923&parentprofile=search> ("There are about 55 million registered Republicans, 72 million registered Democrats and 42 million registered independents. . . ."); *cf.* Press Release, Ctr. for the Study of the Am. Electorate, Am. Univ., African-Americans, Anger, Fear and Youth Propel Turnout to Highest Level Since 1964 (Dec. 17, 2008), available at http://timeswampland.files.wordpress.com/2008/12/2008turnout-report_final11.pdf ("The turnout level [in the 2008 presidential election] was 63 percent of eligibles, a 2.4 percentage point increase over 2004 and the highest percentage to turn out since 64.8 percent voted for president in 1960.").

Some political commentators and theorists posit that this is at least in part because most Americans fall in the center of the political spectrum. *See, e.g.*, David Postman, *Party Ties Mean Less As Voters Shift Their Allegiance*, SEATTLE TIMES, Jan. 19, 2009, at A1 (declaring that "[t]he middle is back," in discussing the importance of independent voters in the 2008 presidential election). But another possible explanation is that those who have traditionally been politically inactive may simply fall on different ideological arcs than those espoused by the major political parties. That is, instead of falling on the curve that Kahan uses to connect the plotted points of the death penalty, gun control, etc., which is described in terms of "community" or "individualism," they may fall along an alternate curve with a different philosophy or a different set of priorities.

Pro-Criminalization	Anti-Criminalization
Believes in criminal statutes as a means of enforcing societal norms and discouraging or punishing aberrant behavior	Believes that the criminal law may not be the appropriate place to address broader societal concerns and that criminalization should be a vehicle of last resort
Supports the “war on drugs”	Opposes criminal sanctions for the use or sale of narcotics
Favors strong gun control legislation	Opposes strict gun control statutes
Opposes the castle doctrine	Supports the castle doctrine

One could, of course, continue to add doctrines and contested issues to these mappings and produce alternative binaries. What is important to recognize, however, in considering the potential for indeterminacy in the alignment of ideology, sociopolitical views, and legal doctrine is that simply because one set of justifications is the current norm, it is not necessarily the only set of justifications, or even the best or most persuasive.

In addition, it is important to remain aware of what values are actually being advanced by the castle doctrine. Using Kahan’s mapping, one side of the castle doctrine debate would be characterized as egalitarian and the other as hierarchical.¹¹⁷ But once one has considered alternative ideological mappings, it becomes less clear that the anti-castle doctrine camp is the more egalitarian and the pro-castle doctrine camp is the more hierarchical. For example, assuming that there are hierarchies or inequalities inherent in the criminal justice system, then it would seem that, under the second alternative mapping offered above, the pro-criminalization camp would be the one tending to reinforce hierarchy, even though it would also be the camp favoring abolition of the castle doctrine.¹¹⁸

V. EXPRESSIVE INDETERMINACY AND THE EFFECTS OF THE CASTLE DOCTRINE

The societal understanding of the castle doctrine has been firmly rooted in a set of cultural tropes and ideological assumptions.¹¹⁹ This Part will generally discuss the risks that come with attempting to link a specific doctrine with a specific ideology or specific cultural politics—in particular, the risk of ignoring the effects of the doctrine. It will then argue for a shift in focus

¹¹⁷ See *supra* note 111.

¹¹⁸ It is also important to consider the possibility that beliefs on one side of a dichotomy may shift over time or with an alteration in the political landscape. In fact, these oppositions may even cease to be affectively descriptive with political change. See, e.g., CARL SCHMITT, *THE CONCEPT OF THE POLITICAL* 75 (George Schwab trans., Univ. of Chi. Press, 2d ed. 1996).

¹¹⁹ See *supra* Part IV.

away from ideological and cultural framing and toward the actual effects of the law and whether those effects are socially desirable.

In his exhaustive and highly politicized trilogy on the frontier myth in American society, cultural historian Richard Slotkin insists that this cultural myth, like any other, does not exist in a vacuum and does not have a single meaning.¹²⁰ The frontier myth can be manipulated by any group or ideology to achieve a desired result. As Professor Slotkin explains in discussing the role of Western myth in the 1960s,

Nor was the language of the myth the peculiar property of the “hawkish” factions of our political culture. Its terms were as familiar to left as to right, and were every bit as useful in lending political resonance and traditional justification to particular political stances and gestures [T]he adoption of “tribal” life-styles as a form of communalism untainted by political associations with communism, . . . the linkage of political and ecological concerns, the withdrawal to wilderness refuges and the adoption of an outlaw or “renegade” stance toward the larger society—all of these phenomena so special to the sixties were acted out as if they were not innovative at all, but merely repetitions of an older pattern.¹²¹

This same kind of re-appropriation is apparent today in the use of the frontier image by traditionally left-leaning environmental groups¹²² and traditionally right-wing militarist groups.¹²³ Thus, there is no reason to think that because one side of the castle doctrine debate evokes the language of the frontier, the castle doctrine must be inherently conservative. Cultural myths generally provide only a limited set of either/or choices; as a result, focusing too much on the frontier myth in the context of the castle doctrine debate brings with it the risk of becoming trapped in false dichotomies and oversimplified political rhetoric.¹²⁴

Professor Richard Brown’s history of duty to retreat laws, with its focus on the conservative uses of the “true man” doctrine, illustrates the ideological confusion that can result from an attempt to code along a single unambiguous political axis.¹²⁵ Although Brown tends to characterize duty to retreat as a more liberal/leftist/progressive doctrine than the ruggedly indi-

¹²⁰ See SLOTKIN, *THE FATAL ENVIRONMENT*, *supra* note 109, at 17–47.

¹²¹ *Id.* at 17.

¹²² See, e.g., CAMPAIGN FOR AMERICA’S WILDERNESS, LET’S LEAVE AN ENDURING LEGACY OF WILD SPACES, *available at* http://leaveitwild.org/docs/CAW_brochure.pdf (“Wilderness has long shaped us as individuals and helped build us into a strong nation.”).

¹²³ See, e.g., D.J. MULLOY, *AMERICAN EXTREMISM: HISTORY, POLITICS, AND THE MILITIA MOVEMENT* 138–39 (2004) (discussing the reliance on frontier mythos and its image of “Americanness” among members of the contemporary militia movement).

¹²⁴ See, e.g., ROLAND BARTHES, *MYTHOLOGIES* 124 (Annette Levers trans., Hill & Wang 1984) (1957); SLOTKIN, *THE FATAL ENVIRONMENT*, *supra* note 109, at 17–19.

¹²⁵ Cf. BROWN, *supra* note 25, at 161 (describing McCarthyism and anti-communist cold war attitudes as examples of the application of the no duty to retreat ethos).

vidualist “true man” concept,¹²⁶ he identifies a major standoff in the area of Mussel Slough, California¹²⁷ as one of America’s most remarkable and bloody no duty to retreat scenarios. In this conflict between small farmers and a highly corporatized national railroad, the townsfolk, refusing to retreat, stood their ground against a band of mercenaries hired by the railroad.¹²⁸ In the framework of the castle doctrine, the townspeople occupied the position of the home dweller, while the railroad occupied the position of the intruder. In this situation, it becomes very difficult to argue that there is something inherently conservative about allowing the farmers to stand up to the railroads. In other words, in this case, the left/right ideological mapping of duty to retreat doctrine does not coincide with the traditional left/right ideological mapping of perceptions of big business.

Thus, attempts at cultural mapping that seek to situate the castle doctrine in a specific political ideology are inherently flawed because they assume a particular set of immutable background conditions.¹²⁹ The castle doctrine homeowner may be John White, the grandson of Klan violence victims, or a small farmer resisting corporate bullying. The point is not that criminal law should favor one ideological group over another, but rather that it is dangerous to assume that the effects of a law will necessarily mirror the philosophical justifications or the political position of its supporters.

In the popular media and in scholarly criticism alike, the imagery associated with the castle doctrine is that of a Southern, white, gun-toting male shooting a nonwhite intruder.¹³⁰ The much-cited case of Joe Horn, the Texan who shot two Latino men whom he saw breaking into a neighbor’s home,¹³¹ does indeed provide a compelling image in support of this critical cultural narrative. But is Horn’s case the norm or an aberration?¹³² Does the fact that the few cases that captivate the public’s imagination fall along certain racial,

¹²⁶ See *id.*

¹²⁷ See *id.* at 87–127.

¹²⁸ *Id.*

¹²⁹ Cf. Robert L. Hale, *Coercion and Distribution in a Supposedly Non-Coercive State*, 38 POL. SCI. Q. 470, 472–73. Hale asserts that the scope of a given law’s effects is necessarily dependent on the law’s societal context (background conditions). See *id.* In particular, every labor contract is ultimately reliant on other background property laws that require the laborer to have money in order to live. See *id.*

¹³⁰ See, e.g., SUK, *supra* note 28, at 77 (discussing the male focus of the castle doctrine); Ross, *supra* note 25, at 35–37 (“These new statutes present potential danger for society at large, but they particularly endanger racial minorities.”); Thornburgh, *supra* note 18; *The O’Reilly Factor: Talking Points: The Deaths of Two Illegal Aliens Near Houston* (FOX News television broadcast Dec. 6, 2007) (highlighting the race and national origin of Joe Horn’s victims as the most noteworthy element of the shootings); cf. Brad Bumsted, *A Rally, a Banner, a Controversy*, PITTSBURGH TRIB. REV., Apr. 29, 2007, http://www.pittsburghlive.com/x/pittsburghtrib/news/election/s_505007.html (linking a potential threat to lynch a Latino lawmaker with a group of castle doctrine supporters).

¹³¹ See, e.g., Ralph Blumenthal, *Shootings Test Limits of New Self-Defense Law*, N.Y. TIMES, Dec. 13, 2007, at A32; Imaeyen Ibanga, *Joe Horn: Bravado, Fear Fueled My Actions*, ABC NEWS, July 2, 2008, available at <http://abcnews.go.com/GMA/story?id=5291506&page=1>; Thornburgh, *supra* note 18.

¹³² See, e.g., Blumenthal, *supra* note 131.

gender, or socioeconomic lines justify the assumption that the doctrine's application generally favors or disfavors a particular group?¹³³ Castle doctrine statute supporters have challenged this normative view by evoking scenarios of women fending off abusive partners or other situations of "weaker" law-abiding persons threatened by physically more powerful invaders,¹³⁴ and others have addressed the often perverse and undesirable consequences of the castle doctrine in the context of domestic relations.¹³⁵ Moreover, home invasions generally take place in low-income, urban areas, which are disproportionately inhabited by citizens of color¹³⁶ and where police response time may be greater than in more privileged areas.¹³⁷ Therefore, contrary to the current cultural mapping of the castle doctrine, the doctrine may in fact benefit underprivileged people more than it victimizes them.

¹³³ In his discussion of public perceptions of racially disparate impact of criminal laws and their enforcement, Professor Kennedy observes:

One must be careful to avoid speaking with undue confidence about inferences regarding law enforcement that are drawn from the character of media coverage. First, even if media coverage suggests racial selectivity, that does not necessarily mean that law enforcement officials are responding in a racially selective manner. Second, even when it is the case that a crime featuring a white victim receives considerably more media and police attention than a similar crime featuring black victims, there remains the possibility that other, nonracial factors may be playing a role in the differential treatment.

KENNEDY, *supra* note 84, at 72. Considering that most crimes in the United States are intraracial, *id.* at 23, and that low income black men are more likely to be the victims of crime than any other demographic, MICHAEL R. RAND, DEP'T OF JUSTICE, NATIONAL CRIME VICTIMIZATION SURVEY: CRIMINAL VICTIMIZATION, 2008 4 (2009), there is reason to believe that there is simply not a great appetite for reporting on such crimes, making them topics for "the back pages of the local press" as opposed to "a page-one *cause célèbre*." KENNEDY, *supra* note 84, at 72–73.

¹³⁴ See, e.g., Interview by Renee Giachino with Marion Hammer, former NRA President (Nov. 3, 2005), available at http://www.cfif.org/htdocs/freedomline/current/in_our_opinion/marion-hammer-nra-interview.htm. In her defense of the Florida statute, Hammer describes weak women being threatened with rape:

The duty to retreat had been imposed by the system and essentially if someone had tried to drag a woman into an alley to rape her, the women [sic]—even though she might be licensed to carry concealed and ready to protect herself, the law would not allow her to do it.

Id.

¹³⁵ See, e.g., SUK, *supra* note 28, at 65–72, 80; Carpenter, *supra* note 48, at 669–85.

¹³⁶ See, e.g., Garland F. White, *Neighborhood Permeability and Burglary Rates*, 7 JUST. Q. 57, 64 (1990); *Home Invasions Target the Have-Nots*, INDIANAPOLIS STAR, Dec. 26, 2009, at A1 ("An Indianapolis Star analysis of crime data over the past 2 1/2 years found that the poorer the neighborhood, the more likely a home is to be the target of an armed break-in. And if a neighborhood is heavily Hispanic, home invasions are even more frequent.").

¹³⁷ See, e.g., Alexandra Natapoff, *Underenforcement*, 75 FORDHAM L. REV. 1715, 1726 (2006); Thomas B. Priest & Deborah Brown Carter, *Evaluations of Police Performance in an African American Sample*, 27 J. CRIM. JUST. 457, 462–63 (1999) (presenting a study that demonstrates generally negative perceptions of police response time in black neighborhoods); Caitlin Rother, *Oxnard: City to Study Police Response Times*, L.A. TIMES, Mar. 6, 1992, at B3 ("La Colonia-area business operators . . . say that city police often do not respond to emergency calls in the low-income neighborhood for up to an hour, if at all.").

The castle doctrine is not unusual in being difficult to assess in view of current social and racial inequities and entrenched prejudices. As discussed *supra*, in Part III, the fundamental goal of a castle doctrine law is to preserve life by guaranteeing the vulnerable home dweller the right to save him or herself in situations where the state is unable to intervene. Is the doctrine accomplishing this goal or has it disproportionately provided legitimacy to unnecessary violence? Certainly, the evidence provided by social scientific studies would be helpful in assessing castle doctrine laws.¹³⁸ Despite their flaws, such studies would add an essential component to the discourse on the castle doctrine: a focus on its effects. The doctrine, like all laws, has concrete effects, and this Note's effort to culturally remap the castle doctrine would be incomplete without addressing those actual effects.¹³⁹ In other words, producing a less draconian justification or a more appealing cultural narrative for a problematic doctrine would not be sufficient to overcome actual problematic consequences. In reshaping the discourse on the castle doctrine, it is important to consider what it means in concrete terms to have or not have the doctrine.

It is necessary, therefore, to consider the law that would govern home invasion situations absent the castle defense. As a general rule, castle doctrine statutes, like the ones passed in Rhode Island and California, create a presumption of reasonableness on the part of the defendant/home dweller, which the prosecution must overcome.¹⁴⁰ Because objective reasonableness can be difficult to prove, the home dweller is more likely to be found guilty without such a burden shift. Placing the burden on the defendant risks over-inclusiveness, but placing the burden on the prosecution results in the opposite risk and may ultimately protect violence-prone home dwellers who react with disproportionate force to an innocent or mistaken invasion.

¹³⁸ It is, of course, important to realize that statistical studies do not always have the power to persuade in the face of contrary ideas deeply embedded in culture. See, e.g., Dan M. Kahan & Donald Braman, *More Statistics, Less Persuasion: A Cultural Theory of Gun-Risk Perceptions*, 151 U. PA. L. REV. 1291 (2003). Even more importantly, statistical studies themselves are also open to interpretive biases. See BERNARD E. HARCOURT, *LANGUAGE OF THE GUN: YOUTH, CRIME, AND PUBLIC POLICY* 222–29 (2006). In his analysis of different social scientific studies, Professor Bernard Harcourt suggests that “leaps of faith” always occur as researchers attempt to make their data confirm their theory or ideology. *Id.* at 229. Harcourt, in his work, calls for a greater honesty about the existence of these leaps of faith and a recognition that social scientific data is not a universal truth and that the interpretation of such data is colored by personal ideology. *Id.* This Note's goal in evoking the possibility of empirical studies is not to express disagreement with Harcourt (or Kahan) by arguing that these data would prove conclusive or even that they would necessarily have the power to change the minds of those on either side of the castle doctrine debate. Rather, this Note suggests that situating the discussion in the framework of empirically traceable effects would at least acknowledge the possibility that expressive qualities of the law can belie antithetical results.

¹³⁹ See generally Robert Cover, *Violence and the Word*, 95 YALE L.J. 1601 (1986), reprinted in *THE CANON OF AMERICAN LEGAL THOUGHT* 753–75 (David Kennedy & William W. Fisher III eds., 2006) (arguing that the law has life and death consequences and that legal interpretation that focuses on law in the abstract and neglects its effects is both unrealistic and insufficient).

¹⁴⁰ See *supra* notes 69–71 and accompanying text.

But what is often missing from the discussion of the castle doctrine is recognition that reliance on the reasonable person standard can also have a price. The reasonable person standard often means the standard of the dominant majority. Consequently, it has been criticized for exacerbating racial and social distinctions and inequalities.¹⁴¹ It may be, for instance, that Joe Horn, as a member of the culturally dominant group, would have been judged a “reasonable person” when he shot two non-white strangers and would have been acquitted under either the standard or the castle doctrine rule. As a result, the abolition of the castle doctrine would not necessarily affect the frequency of convictions for killings with this racial and socioeconomic composition. But would John White—faced with racial fears unfamiliar to his white jurors—also be considered to have acted “reasonably?” In other words, does the presence of a castle doctrine statute provide a check on racial biases in these situations?

An instinctive reaction might be that even if castle doctrine legislation were to provide such a check, such a check is undesirable. Perhaps, as many critics conclude, society should not devalue human life by lowering the bar on when deadly force is acceptable.¹⁴² The strongest version of such an argument, pointing to the Model Penal Code, would assert that without a castle doctrine, the duty to retreat would only apply when the home dweller “knows that he can avoid the necessity of using . . . force with complete safety by retreating.”¹⁴³ Many castle law states have adopted statutes making such a standard the default for determining whether retreat is required in situations outside of the home. For example, Hawaii’s penal code section on “[u]se of force in self-protection,” borrows the Model Penal Code’s language and states that “[t]he use of deadly force is not justifiable under this section if . . . [t]he actor knows that he can avoid the necessity of using such

¹⁴¹ See, e.g., Kevin Jon Heller, *Beyond the Reasonable Man? A Sympathetic but Critical Assessment of the Use of Subjective Standards of Reasonableness in Self-Defense and Provocation Cases*, 26 AM. J. CRIM. L. 1 (1998).

¹⁴² See, e.g., G. Todd Butler, *Recipe for Disaster: Analyzing the Interplay Between the Castle Doctrine and the Knock-and-Announce Rule After Hudson v. Michigan*, 27 MISS. C. L. REV. 435, 435 (2008) (“[L]egislators should opt to protect human life by declining to provide citizens with a ‘shoot first, ask questions later’ mentality.”); Tresa Baldas, “Shoot First” Laws Hit Courtrooms, DAILY REP. (FULTON COUNTY), July 11, 2006, at 10 (“Hagel opposes shoot-first laws; he feels that such laws can lead to deadly mistakes ‘Common law has always said we always value human life more than your sense of manhood,’ said Hagel.”); Mary Elen Klas, *Law Would Expand the Right to Shoot*, MIAMI HERALD, Feb. 24, 2005, at B1 (“Florida is a state that ‘has been very vigilant in preserving and valuing human life’ but the legislation ‘flies in the face of that value. This really encourages people to shoot first and ask questions later.’” (quoting an assistant state attorney)); Rene Thompson, Letter to the Editor, “Shoot First” Bill Allows Fear To Determine Value of a Life, CIN. POST, Mar. 22, 2006, at A15 (“The Kentucky Legislature wants to change that doctrine and, with it, the value of a human life in the commonwealth.”).

¹⁴³ MODEL PENAL CODE § 3.04(2)(b)(ii) (1985). The Model Penal Code does include a castle doctrine provision, but this section refers to the general duty to retreat outside of the home as a means of demonstrating what the duty for the home dweller would be in a state that had not adopted a castle law statute. See *id.*

force with complete safety by retreating.”¹⁴⁴ On its face, the “complete safety” standard appears to be a very high threshold for when the home dweller is required to retreat instead of resorting to deadly force.¹⁴⁵ However, the concept of “complete safety” may be more ambiguous in practice¹⁴⁶ and may again lead to concerns about standards and their impact on socially non-dominant groups.

One of the essential elements of complete safety would necessarily be the ability to contact law enforcement and remain safe until officers arrived.¹⁴⁷ If, for instance, John White could have retreated to a safe room in his house from which he would have been able to call the police, this would appear to fulfill a complete safety requirement—as long as there was reason to believe that police officers would respond promptly. In John White’s case, there is no reason to believe that quick police response was impossible, and in Joe Horn’s case, police were actually en route to Horn’s house when he shot Hornando Torres and Miguel Antonio DeJesus.¹⁴⁸ However, there is significant evidence that in the low-income, predominantly black inner-city neighborhoods where the majority of burglaries occur,¹⁴⁹ police are perceived as being less prompt or responsive to calls for help.¹⁵⁰ Under a reasonableness analysis, therefore, the ability to call the police should not negate the ability to resort to force if calling the police is not considered “completely safe” by those who are most likely to invoke a castle law’s protection.

Granted, the inadequacy of police responsiveness in inner-city neighborhoods may not lead one to conclude that residents should be allowed to resort to violence quickly and with impunity. But it is important to recognize police responsiveness as a concern to be addressed by anti-castle doctrine arguments. Because inhabitants of inner-city neighborhoods are often under-represented on juries,¹⁵¹ rejecting the expansive presumptions of the home dweller’s reasonableness that are central to many of the new castle doctrine statutes may well result in guilty verdicts for inner-city defendants even if they behave in ways that are reasonable in the context of their communities.

All of this is not to say that the existence of castle laws is necessarily positive or that opponents of the doctrine are necessarily incorrect in their objections. Rather, this Note argues that the rejection (or, for that matter, the

¹⁴⁴ HAW. REV. STAT. ANN. § 703-304(4) (2007).

¹⁴⁵ See generally SANFORD H. KADISH ET AL., CRIMINAL LAW AND ITS PROCESSES 780–81 (8th ed. 2007) (providing a series of hypothetical situations in which a person could easily retreat instead of killing an aggressor in his or her home but is not legally obligated to do so).

¹⁴⁶ See, e.g., *Culverson v. State*, 797 P.2d 238, 240 (Nev. 1990) (declining to impose a duty to retreat because of the potential difficulty faced by jurors in determining “complete safety”).

¹⁴⁷ See generally KADISH ET AL., *supra* note 145, at 80.

¹⁴⁸ See Blumenthal, *supra* note 131.

¹⁴⁹ See, e.g., *supra* note 136.

¹⁵⁰ See *supra* note 137; KENNEDY, *supra* note 84, at 71.

¹⁵¹ See KENNEDY, *supra* note 84, at 232–37.

adoption) of castle doctrine laws may have far more complicated effects than the current political debate suggests. Even the observations about the racial and economic politics of the castle doctrine lead to another round of difficult questions. For example, some might argue that, even if the reasonable person standard leads to disproportionate incarcerations of members of low-income communities, such incarcerations might provide those very low-income communities with an offsetting benefit by encouraging a generally more peaceful environment.¹⁵² But without actual study of the castle doctrine's application to various demographic populations, such questions are too easily brushed aside in favor of broad assumptions drawn from cultural politics. For those who oppose the castle doctrine and who are uncomfortable with "the wrong side" of the artificial ideological framings presented *supra*, in Part III, it is important to consider these questions, to recognize the true flaws of the castle doctrine, and to inquire whether ideological critiques really reflect the doctrine's effects.

VI. CONCLUSION

The cultural framing and the philosophical justifications for the castle doctrine need not be monolithic and can just as easily be seen from the left as the right. Because of this, an ideological drive to oppose castle laws because they represent a "true man," cowboy ethos should be tempered or at least be supported by proof that there are in fact disproportionately negative effects of castle doctrine laws. Dean Kadish has written that "the criminal law is a highly specialized tool of social control, useful for certain purposes but not for others; that when improperly used . . . is capable of producing more evil than good."¹⁵³ In the case of the castle doctrine, this delicate balancing requires a greater understanding of the true effects of the law.¹⁵⁴ Even if empirical studies about the impact of castle doctrine upon various demographic groups would not be dispositive, such an engagement with the castle doctrine's effects would at least force a reorientation of the current policy debates. The castle doctrine laws raise many difficult questions, but these

¹⁵² While one's personal views on criminalization would necessarily have a strong impact on these questions, Kennedy argues that they are essential to understanding and analyzing the racial politics of disparate impact. He questions:

Whether, or for whom, such a disparity is harmful. . . . [I]s the black population *hurt* when traffickers in crack cocaine suffer longer prison sentences than those who deal in powdered cocaine or *helped* by incarcerating for longer periods those who use and sell a drug that has an especially devastating effect on African-American communities?

Id. at 10.

¹⁵³ Sanford H. Kadish, *The Crisis of Overcriminalization*, 374 ANNALS AM. ACAD. POL. & SOC. SCI. 157, 169 (1967).

¹⁵⁴ As the study for the Connecticut General Assembly points out, "We could not find any studies on the impact of these laws." REINHART, *supra* note 62, at 2.

issues should be addressed through a realist lens, recognizing that a drive to eliminate castle doctrine laws may not be in the best interest of home dwellers, even those who do not fit the “true man” stereotype.

