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BETWEEN THE HAMMER AND THE ANVIL: BATTERED WOMEN CLAIMING SELF-DEFENSE AND A LEGISLATIVE PROPOSAL TO AMEND SECTION 3.04(2)(b) OF THE U.S. MODEL PENAL CODE

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Despite the critical legal discourse that has taken place over the past thirty years in the United States regarding battered women who kill their assailing partner and the partial legislative reforms passed in individual states, no comprehensive and uniform legislative amendment has been proposed yet. Consequently, the American doctrine relating to battered women who act in self-defense is inconsistent and incomplete. Such a legal structure precludes the provision of adequate and uniform legal justice for victims of domestic violence and leads to tragic legal consequences for battered women who defend themselves against their aggressors.

This article seeks to translate the insights of the recent critical legal discourse on the issue of self-defense of battered women into a statutory amendment regarding the doctrine of self-defense in circumstances of domestic violence. The amendment proposed in this article is influenced by previous scholarly proposals that have not yet been the subject of detailed legislative drafting. The amendment is introduced into the legal framework of the American Law Institute's Model Penal Code ("MPC") because of the Code's enormous influence in shaping state criminal codes in the United States. The legislative proposal offered contains unique criminological features pertaining to the nature of the phenomenon of battered women, tailored to the doctrine of self-defense and its legal requirements.

The proposed amendment is also consistent with the current doctrine, which precisely and distinctly regulates the conditions for using deadly protective force, but also contemplates the expansion of the category of deadly protective force as it is currently formulated in Section 3.04(2)(b) of the MPC. The proposal creates a legal presumption that circumstances of severe and prolonged violence in the family poses a real danger to the victim's body and life. In addition, it offers unique adjustments to the specific legal requirements (the duty to retreat and the duty to comply with the perpetrator's demands) that, according to the MPC, victims of domestic violence must meet prior to using deadly protective force.

If only to ensure legislative harmony, the amendment also suggests criminalizing acts of sexual violence committed against intimate female partners, acts which unfortunately are explicitly permitted under the current MPC. Although the amendment to the definition of sexual crimes might appear irrelevant to the issue of domestic violence, the amendment is in fact crucial to creat-

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The authors are deeply grateful to the editors and staff at the Harvard Journal on Legislation for their valuable and insightful comments.

ing a properly rounded and just legal doctrine of self-defense in cases of battered women.

In order to promote legal clarity and prevent arbitrary interpretations of the law by fact finders, a clear and explicit statutory legal arrangement should be promoted. Accordingly, this article will articulate a focused and detailed legislative proposal to amend the MPC. The hope is that this amendment can serve as a prototype for future legislative state reforms and eventually help to establish a suitable criminal doctrine for victims of domestic violence who kill their assailants in self-defense.

I. A Criminological Perspective on Violence Against Women in the United States

Apart from the military and police arenas that are inherently dangerous, the most dangerous and violent arena in the United States is the home.[1] This assertion, though correct, can actually be stated more precisely: In the United States, home is the most dangerous place for women.[2] Indeed, in 1995 the U.S. Department of Justice estimated that about 90% to 95% of victims of domestic violence were women[3]: "Battering of women by their husbands, ex-husbands or boyfriends is the largest single cause of injury to women in the United States."[4] The criminological significance of these findings is that in the vast majority of cases, domestic violence is in fact equivalent to violence against women.[5] This is not a marginal phenomenon. According to reports by the Department of Justice, in America alone, about 3 million women suffer each year from serious or life-threatening violence.[6] The empirical findings about the extent and characteristics of violence against women are not particularized to any specific class, ethnicity, or relig-

[1] *See* Richard J. Gelles & Murray A. Straus, *Violence in the American Family*, *in* Crime and the Family 88, 88 (Alan Jay Lincoln & Murray Straus eds., 1985).

[2] *See* R. Emerson Dobash & Russell P. Dobash, *Wives: The 'Appropriate' Victims of Marital Violence*, 2 Victimology 426, 426–27 (1978).

[3] *See* Reva B. Siegel, *The Rule of Love: Wife Beating as Prerogative and Privacy*, 105 Yale L.J. 2117, 2172 (1996).

[4] Catherine A. MacKinnon, Sex Equality 715 (2001).

[5] Violence against women has broader criminological aspects than mere domestic violence, as female victimology is also a characteristic of crimes committed outside the home environment, such as sexual crimes. In the context of domestic violence, victims of assault and murder are almost entirely women. Likewise, patterns relating to the murder of women display empirical proximity to the family arena: women who are murdered are primarily murdered within the framework of "their family." For further discussion regarding the murder of women, see Hava Andrea Dayan & Emanuel Gross, *Uxoricide Under the Auspices of the Model Penal Code: a Legislative Proposal to Amend Section 210.3 (b) of the Model Penal Cod*e, 15 Geo. J. Gender & L. (Aug. 2014).

[6] Mary P. Koss et al., No Safe Haven: Male Violence Against Women at Home, at Work and in the Community 44 (1994); Jennifer Truman et al., *Criminal Victimization, 2012*, Bureau of Justice Statistics, Table 1 (Oct. 2013), *available at* http://www.bjs.gov/content/pub/pdf/cv12.pdf, *archived at* http://perma.cc/5Q6T-2RZ9.

ion; the data show that the high frequency of violence against women cuts across all strata and groups of the American population.[7]

This violence is characterized by five unique patterns. First, the vast majority of incidents of violence against women are committed by their past or present partners. In fact, in the United States, three-quarters of all attacks against women are committed by persons who are in or have been in an intimate relationship with these women.[8] Second, most of these attacks are likely to include rape and repeated sexual assaults.[9] Third, they are characterized by severe physical injury, more severe than that typically caused in the course of attacks committed by strangers in other circumstances. The Department of Justice has shown that the injuries suffered by women assaulted by their partners are more serious than those suffered by women assaulted by strangers. It estimates the severity of about one-third of the attacks against women within the home to be equivalent to the severity of violence accompanying the highest level of crime: crimes of robbery, felony rape, and serious assaults.[10] Fourth, these attacks typically constitute a pattern of continuous and escalating assaults, which over time become increasingly severe[11] and result in a greater likelihood of the women being killed.[12] Fifth, domestic violence is not gender-symmetrical: in most cases of domestic violence and domestic murders, the perpetrators are men and the victims are women.[13] It is rare for women to kill their partners.[14] Women who do kill

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[7] MacKinnon, *supra* note 4, at 717. The high rate of domestic violence directed against women is similar across different strata and different ethnic groups (albeit the specific expressions and typical responses vary slightly across origin and status).

[8] Siegel, *supra* note 3, at 2172; Angela Browne, When Battered Women Kill 9–10 (1987).

[9] *See* MacKinnon, *supra* note 4, at 744, 869; Siegel, *supra* note 3, at 2173.

[10] Siegel, *supra* note 3, at 2173. Additionally, the Department of Justice estimates that the vast majority of attacks on women defined as "common assaults" (i.e., attacks which *prima facie* are not serious), in fact include serious physical injuries similar to those associated with severe attacks and robberies. *See id.* Similarly, the American Medical Association's Council on Scientific Affairs has reported that attacks on women in cases of domestic violence are more severe and violent than attacks committed in other circumstances—while approximately half of the attacks committed by strangers end in severe injury, over eighty percent of the attacks against intimate partners result in severe injury, and are characterized by a high rate of serious injury including damage to internal organs and loss of consciousness. *Id.*

[11] Cynthia K. Gillespie, Justifiable Homicide: Battered Women, Self-Defense and the Law 59–60, 148–49 (1989); John Q. La Fond, *The Case of Liberalizing the Use of Deadly Force in Self Defense*, 6 U. Puget Sound L. Rev. 237, 276–77 (1964).

[12] Statistically, it appears that about half of the women murdered by their partners were, prior to their murder, victims of sustained and routine domestic violence. *See* Donald Alexander Downs, More Than Victims: Battered Women, the Syndrome Society, and the Law 53 (1984); Siegel, *supra* note 3, at 2173. *But see* Fiona Leverick, Killing In Self Defence 91 (2006) (suggesting "the fact that a battered woman has been assaulted on many occasions in the past but has not been killed might suggest that she is unlikely to be killed by her partner in the future").

[13] MacKinnon, *supra* note 4, at 716, 722.

[14] Notwithstanding the absence of a systematic collection of precise data in the context of female perpetrators (the number of women in America who committed murder, those among them who killed their partners, those among them who alleged domestic violence, and those among them who alleged homicide in self-defense), the accepted estimate is that each year

are often themselves prior victims of ongoing and severe domestic violence by the partner whom they killed.[15]

The significance of the empirical data and the unique characteristics of domestic violence is that, in practice, battered women are at concrete risk of severe physical injury or death, and this risk hovers over them not as a result of a one-time attack but as a result of an ongoing pattern of prolonged and sharply escalating attacks. Unfortunately, the empirical findings regarding the prevalence of violence against women and murder committed by women have not yet been appropriately translated into adequate legal presumptions regarding the use of deadly protective force in circumstances of domestic violence. Consequently, it is almost impossible for a female defendant to obtain justice under the current criminal law doctrine of self-defense. Such battered women are therefore trapped in a grim and fatalistic existential dilemma; they are caught between "the hammer and the anvil"—between the choice of continuing to suffer severe injury and even mortal danger, and the choice of using effective protective force and in an instant becoming defendants facing a murder charge.[16] A proper socio-legal handling of the phenomenon of defendants trapped in situations of domestic violence requires, among other things, a legal arrangement that is well adapted to the unique characteristics of domestic violence in general and those of battered women who use deadly protective force. In order to promote legal clarity and prevent arbitrary interpretations of the law by fact finders,[17] it is imperative that a clear and explicit legal statutory arrangement be stated and implemented.

II. The American Doctrine of Self-Defense

American criminal law as a whole is based on its forbear, British doctrine. The same is true of the legal criminal doctrine of self-defense, which

about 500 women kill their intimate partners. *See* Holly Maguigan, *Battered Women and Self-Defense: Myths and Misconceptions in Current Reform Proposals*, 140 U. Pa. L. Rev. 379, 397–400 (1991).

[15] About seventy percent of women who use deadly force against their partners in self-defense have previously been consistently and severely battered by them. *See* Gillespie, *supra* note 11, at xii; Browne, *supra* note 8, at 143.

[16] *See* MacKinnon, *supra* note 4, at 745; La Fond, supra note 11, at 250, 271. *See also* Cynthia Lee, Murder and the Reasonable Man – Passion and Fear in the Criminal Courtroom 135 (2003). It should be noted that the MPC enables a conviction for an intermediate level of awareness (the mens rea of negligence) and creates graduated categories of guilt which enable convictions for offenses less serious than murder (in cases lacking the mens rea required for a conviction for murder, where it is not possible to assert the claim of self-defense because of a failure to satisfy the doctrinal requirements). This "intermediate arrangement" is expressed in the text of Section 3.09 of the MPC but it is doubtful whether this legal arrangement is appropriate in cases of battered women who use protective force. For the opinion that an intermediate arrangement (enabling a conviction on the basis of the doctrine of "the defense of mistake") is appropriate in cases relating to battered women, *see* Boaz Sangero, Self Defense in Criminal Law 349 (2006).

[17] *See* Maguigan, *supra* note 14, at 386–87. *See also* Gillespie, *supra* note 11, at 185.

originally developed in medieval Britain.[18] The doctrine comprises an exception to the rule prohibiting the use of force[19] and is particularly dramatic in the homicide context, for it allows such acts to be considered legally justified.[20] The traditional rules of the British doctrine of self-defense have hardly changed over the past 900 years,[21] and they are comprised of five main requirements.[22] First, the use of force must be *in response to* an attack unlawfully perpetrated upon the defendant.[23] Second, the response to the unlawful attack must be immediate (the defendant must have an immediate need to use force and cannot wait for police assistance).[24] Third, the defendant's response must be proportional (the damage caused by the defendant's defensive reaction cannot be greater than the damage that he is attempting to prevent).[25] Fourth, the defendant's response must be necessary (the defendant must do everything he can to prevent the occurrence of the attack, including withdrawing from the scene if possible).[26] Finally, the defendant's behavior prior to the attack cannot have been unlawful itself (the defendant cannot have brought about the circumstances under which he is compelled to use protective force by virtue of his own unlawful behavior).[27]

The principles of the American doctrine were codified by the states in the twentieth century, and before then functioned as common law rulings.[28]

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[18] In circumstances where the government was unable to enforce security, the crime rate and numbers of homicides were among the highest in European history. *See* GILLESPIE, *supra* note 11, at 35. The English legal principles concerning the application of the claim of self-defense are ancient and are attributed to the Norman invasion in the eleventh century. For a review of the impact of the Norman invasion of England in the eleventh century, the subsequent changes in the English legal system in general, and changes to the doctrine of self-defense in particular, see LEVERICK, *supra* note 12, at 1; GILLESPIE, *supra* note 11, at 32–35. For an historical review of medieval England and a cross comparison with America in the nineteenth and twentieth centuries, see BEEGHLEY LEONARD, HOMICIDE—A SOCIOLOGICAL EXPLANATION, 41–77, (2003).

[19] Peter D.W. Heberling, *Justification: The Impact of the Model Penal Code on Statutory Reform*, COLUM. L. REV. 914, 930–31 (1975).

[20] The judicial decision to apply the exemption from criminal liability to homicides committed by defendants in self-defense leads in effect to the full acquittal of the defendant. Such acquittals, as a rule, were deemed to be very unusual in light of the accepted Anglo-Saxon view that a defendant who killed a man was guilty of his death irrespective of the circumstances surrounding the killing. Prior to the refinement of the concept of killing in self-defense and its transformation into a principle of Anglo-Saxon law, English law applied a form of "strict liability" to any person who by his act—or even through his property—caused the death of another. The mens rea for causing death was completely irrelevant and therefore the particular mens rea of the act of homicide (for example, malice, negligence or mistake) had no legal significance in terms of the conviction. *See* GILLESPIE, *supra* note 11, at 31–32.

[21] *Id.* at 31.

[22] GEORGE P. FLETCHER, RETHINKING CRIMINAL LAW 865–75 (1978); GEORGE P. FLETCHER, A CRIME OF SELF DEFENSE: BERNHARD GOETZ AND THE LAW ON TRIAL 19, 26 (1985) [hereinafter FLETCHER, A CRIME OF SELF DEFENSE].

[23] FLETCHER, A CRIME OF SELF DEFENSE, *supra* note 22, at 19.

[24] *Id.* at 19–22.

[25] *Id.* at 19, 24.

[26] *Id.* at 19, 23, 30.

[27] *Id.* at 25.

[28] GILLESPIE, *supra* note 11, at 48.

As America emerged as an independent socio-cultural and political entity, its criminal doctrine became increasingly distinct from its British forbear;[29] it abolished the duty to retreat[30] and softened the traditional British requirement to avoid, as much as possible, any use of force. Three additional unique features were later added to the American doctrine: the concept of a separate and distinct category for the use of deadly protective force,[31] the application of the reasonable person standard (with the promotion of the subjective elements of reasonableness),[32] and the introduction of the policy permitting the use of force to prevent crime.[33]

These American doctrinal developments were explicitly and statutorily articulated in the Model Penal Code in the 1950s.[34] Since its formulation, the MPC has had a notable impact on legislative reforms to state criminal codes,[35] and in fact, its wording provides the current prototype for the doctrine of self-defense in all states.[36] Moreover, the MPC has immensely impacted the development of principles of criminal law as a whole, with extensive case law emerging based on the Code as a normative source for

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[29] The endemic changes to the doctrine are related to unique socio-cultural and geographical characteristics of the British colonists in America during the eighteenth and nineteenth centuries. For example, the prerequisite of retreat was regarded as overly "soft" for the settlers: in the western states of America, the settlements were sporadic and geographically remote from any center of government which could have enforced law and order; retreat in such circumstances was regarded as improper submission. GILLESPIE, *supra* note 11, at 42. Abolition of the duty to retreat and the rise of the ethos of "standing one's ground" were reflected in the mythological figure of the sinless cowboy in American culture who expressed the "real American man." According to Gillespie, "the figure of the lone hero—be he cowboy, sheriff or outlaw—had reached truly mythic proportions in the popular mind in the last decades of the nineteenth century. He was a 'man's man,' a two-fisted fighter, never a coward or a bully, never entangled by the Victorian society that his idolizers were tied to, beholden to no one but himself." GILLESPIE, *supra* note 11, at 46.

[30] Alongside the general requirement to avoid, insofar as possible, any involvement in the use of force, exceptions developed to the application of the claim of self-defense. For example, shooting a person in the back or shooting an unarmed man were not covered, nor were acts not in immediate response to the attack. *See* GILLESPIE, *supra* note 11, at 42–43, 67. With the end of the frontier era, the expansive doctrine relating to abolition of the duty to retreat prerequisite was gradually narrowed in the western states. However, the perception that it was appropriate for a man to stand his ground and respond to an attack remained broadly accepted in American society, including in the self-defense context. *See* Catherine L. Carpenter, *Of the Enemy Within, The Castle Doctrine, and Self Defense*, 86 MARQ. L. REV. 654, 655, 663 (2003).

[31] Heberling, *supra* note 19, at 933.

[32] SANGERO, *supra* note 16, at 114–15.

[33] *Id.* at 115.

[34] *Id.* at 114–15.

[35] *See* Heberling, *supra* note 19, at 914–15.

[36] *See id.*; Markus Dirk Dubber & Paul H. Robinson, *An Introduction to the Model Penal Code*, UNIV. OF PA. L. SCH., (Mar. 12, 1999), *available at* https://www.law.upenn.edu/fac/phrobins/intromodpencode.pdf, *archived at* http://perma.cc/T4S3-K5XF. In light of the legislative amendments in the various states, the MPC had a critical impact on creating certain similarities between the criminal codes of the various states, albeit not all the legal arrangements proposed by the drafters of the MPC were adopted. For example, many states have still preserved the common law felony murder rule, even though the drafters of the MPC originally abolished it. Similarly, many states still apply different rules to attempted offenses and completed offenses, whereas the MPC advocates equivalent punishment for completed and uncompleted offenses. See GILLESPIE, *supra* note 11, at 183–84.

interpreting state criminal law.[37] In these two respects, the MPC is therefore the closest thing to what can be called the "American Criminal Code."[38]

Since its inception, the MPC has shifted even further away from the British model and strengthened the expansive American approach regarding the use of protective force. The Code has further de-emphasized the duty to retreat[39] and loosened the reasonable person standard.[40] It has also relaxed the traditional British requirement of immediacy[41] and implicitly ameliorated

[37] Even the Official Commentaries accompanying the proposed draft MPC (the draft Code was published in 1962 and the Official Commentaries relating to the various sections were published shortly thereafter between 1980 and 1985) provide an interpretive source for the development of the legal discipline and judicial legislation in the various jurisdictions of the United States. *See* Dubber and Robinson, *supra* note 36, at 6.

[38] Dubber and Robinson, *supra* note 36, at 1–2. In view of this deficient legislative infrastructure, the American Law Institute turned to the work of criminal codification, which in turn led to the drafting of the Model Penal Code. *Id.* at 3.

[39] The MPC has extended the abolition of the duty to retreat by adding to the circumstances in which a person can retreat without danger circumstances in which the attack takes place in the victim's home or workplace. As noted, this expansion of the doctrine developed in the Western United States and found its way into the MPC. *See supra* note 29. Like the approach of the western states, the MPC does not require the defendant to retreat in circumstances in which he believes it would be ineffective or would endanger him; in particular, the MPC does not require the defendant to retreat in his home or place of work. *See* MODEL PENAL CODE § 3.04(2)(b)(ii)(A) (1981). The Official Commentaries state: "The provision also exempts from the duty to retreat a person in his place of work. Because the sentimental factors relevant to dwellings may not apply to one's place of work, it can be argued that this extension is inappropriate; but it was concluded that the practical considerations concerning the two locations were far too similar to sustain distinction." *See* MODEL PENAL CODE AND COMMENTARIES, Part I § 3.04 at 56 (Official Draft and Revised Comments 1985).

[40] The MPC loosened the requirement to repel an unlawful assault by substituting the objective standard for a subjective one. Regarding the prerequisite of repelling an unlawful act, the MPC expands the subjective element and states that it is not required that the initial attack be unlawful. Instead, it is sufficient if the defendant believes that the attack against which he defends himself is unlawful: "There is no requirement that the force against which the actor defends himself be unlawful. It is enough that he believes it to be so." *Id.* at 40; *see also* MODEL PENAL CODE § 3.04(1) ("[T]he use of force upon or toward another person is justifiable when the actor believes that such force is immediately necessary for the purpose of protecting himself against the use of unlawful force by such other person on the present occasion."). The approach of the MPC greatly strengthens the subjective element found in the requirement of reasonableness, and requires the defendant to act on the basis of his subjective assessment of the danger, and exert the protective force needed in his assessment to repel the attack. *See* MODEL PENAL CODE AND COMMENTARIES, Part I § 3.04 at 56.

[41] The MPC loosened the traditional British requirement for immediacy by determining that no specific proximity is required. Nonetheless, most states have chosen not to follow the MPC's "immediately necessary" wording and instead use the 'imminence' term, which further loosens the immediacy requirement. *See* Heberling, *supra* note 19, at 931. The MPC terminology in section 3.04(1) is: "such force . . . immediately necessary for the purpose of protecting himself against the use of unlawful force by such other person on the present occasion." Regarding this particular choice of wording, the MPC Official Commentaries state: "The actor must believe that his defensive action is immediately necessary and the unlawful force against which he defends must be force that he apprehends will be used on the present occasion, but he need not apprehend that it will be used immediately. There would, for example, be a privilege to use defensive force to prevent an assailant from going to summon reinforcements, given a belief that it is necessary to disable to prevent an attack by overwhelming numbers—so long as the attack is apprehended on the 'present occasion.'" MODEL PENAL CODE AND COMMENTARIES, Part I § 3.04 at 39–40.

the traditional British requirement of proportionality.[42] Accordingly, it is safe to argue that the MPC has made four out of the five main traditional British requirements for asserting the claim of self-defense more flexible.

One would think, then, that the MPC should have been able to sufficiently accommodate circumstances of domestic violence within its current doctrine of self-defense. However, as will be demonstrated below, the Code has not changed much since it was originally drafted in the 1950s, particularly with regard to gender-related aspects of criminal law.[43] As a result, despite its considerable flexibility, the MPC contains a distorted legal arrangement regarding the application of the self-defense doctrine to situations where battered women kill their aggressors.

III. The American Doctrine of Self-Defense in Circumstances of Domestic Violence

Though the requirements of the American doctrine of self-defense were greatly eased compared to the traditional British demands, they are still problematic in the context of their application to women in general and, in

[42] The MPC does not explicitly deal with the prerequisite of proportionality, but rather relates to it implicitly primarily in the context of the use of protective deadly force. *See* Sangero, *supra* note 16, at 113. Section 3.04(2)(b) states as follows: "The use of deadly force is not justifiable under this section unless the actor believes that such force is necessary to protect himself against death, serious bodily injury, kidnapping or sexual intercourse compelled by force or threat . . . ." The prerequisite of proportionality is dealt with through the exception to criminal liability arising from the use of deadly protective force in circumstances that the legislature deem to be extreme and consequently justify the use of deadly protective force. *See* Model Penal Code and Commentaries, Part I § 3.04 at 47 ("Clearly deadly force, as so conceived, should be privileged only in extreme situations."). The creation of this legal presumption in the context of the situations referred to in the text of the law, also gives rise, in effect, to the prerequisite of proportionality, even though it is not explicitly referred to in this context. *See id.* at 47–48 ("The formulation rests on the common law principle that the amount of force used by the actor must bear a reasonable relation to the magnitude of the harm that he seeks to avert."). For the argument to the effect that the concealed prerequisite of proportionality applies generally in all the criminal codes of the US states which enable the use of deadly protective force in situations of real life threatening danger, see La Fond, *supra* note 11, at 274–75, 239–41. By articulating a distinctive category of protective deadly force that permits the use of such force in circumstances where there is no actual danger to life (e.g., in kidnapping and rape cases), the MPC ameliorated the traditional British requirement for proportionality. Particularly relevant to this legal conclusion is the situation of rape, which appears in § 3.04(2)(b) and enables the application of deadly protective force even if there is no genuine threat to life. In this context, the drafters of the MPC considered rape a situation justifying the use of deadly protective force even in the absence of real danger to life, if only because of the existence of a social convention (and ancillary legal presumption) that an act of rape harms a supreme social value: "[t]he premise is, of course, that the discouragement of the infliction of death or serious bodily injury is so high on the scale of preferred societal values that such infliction cannot be justified by reference to the protection of an interest of any lesser pretentions . . . ." *See* Model Penal Code and Commentaries, Part I § 3.04 at 48.

[43] As noted, this is an area that has enjoyed considerable development over the past thirty years, and in practice it forms one of the most prominent features of American criminal law today, *see* Sangero, *supra* note 16, at 116; Dubber and Robinson, *supra* note 36, at 7, although it was not explicitly incorporated into the MPC.

particular, to battered women who kill their aggressors.[44] Of the five requirements of the doctrine, female defendants facing prosecution for killing their aggressive intimate partners will at most satisfy two: the requirement to behave lawfully prior to their use of force and the requirement that the use of force be in response to an unlawful attack. The critical legal discourse taking place over the past thirty years has indeed denounced the current self-defense doctrine as incompatible with women, particularly battered women.[45] Scholars have highlighted the miscarriage of justice resulting from the failure to adjust at least three of the existing traditional doctrinal requirements: immediacy, proportionality, and necessity (specifically, the duty to retreat).[46]

Much criticism has been directed at the rigid application of the requirement of immediacy,[47] which leads to the rejection of a defendant's claim of self-defense if and when the protective response takes place during a period

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[44] *See* Downs, *supra* note 12, at 229–30.

[45] For the masculine foundations of the self-defense doctrine, see Phillis L. Crocker, *The Meaning of Equality for Battered Women Who Kill Men in Self-Defense*, 8 Harv. Women's L.J. 121, 123, 126 (1985); Nancy Fiora-Gormally, Case/Comment, *Battered Wives Who Kill: Double Standard Out of Court, Single Standard In?*, 2 Law & Hum. Behav. 133, 158 (1978); Victoria M. Mather, *The Skeleton in the Closet: The Battered Women Syndrome, Self Defense, and Expert Testimony*, 39 Mercer L. Rev. 545, 569 (1988); Laura E. Reece, *Women's Defenses to Criminal Homicide and the Right to Effective Assistance of Counsel: The Need for Relocation of Difference*, 1 U.C.L.A. Women's L.J. 53, 55 (1991); Gillespie, *supra* note 11, at 31–49, 99–100; Downs, *supra* note 12, at 228.

[46] Gillespie, *supra* note 11, at 68–69, 76–81, 93–94; Catherine J. Rosen, *The Excuse of Self Defense: Correcting a Historical Accident on Behalf of Battered Women Who Kill*, 36 Am. U. L. Rev. 11, 34 (1986) [hereinafter C. Rosen]; Mather, *supra* note 45, at 587.

[47] Battered women who killed their assailing partners are most often convicted by reason of a judicial conclusion that the defendants did not comply with the prerequisite of immediacy. *See* Gillespie, *supra* note 11, at 76. For the opinion that the prerequisite of immediacy should be left intact, even in the context of battered women, see Leverick, *supra* note 12, at 96, 101. See also the arguments put forward by Maguigan generally and in particular Maguigan's assertion that there is no significant discrepancy between the legal doctrine of self-defense and the unique characteristics of battered women who respond in self-defense, *supra* note 14, at 381–82, and that the doctrine of self-defense as formulated is capable of accommodating an examination of the specific social context of the attack, *id.* at 383, 401–05. More specifically, she argues that the existing legislative arrangement allows the application of the doctrine in circumstances of domestic violence in the context of the immediacy prerequisite. For criticism of the research methodology and conclusions reached by Maguigan in this context, see Downs, *supra* note 12, at 139; in the context of the prerequisite of proportionality (because there is no explicit prohibition on the use of weapons when defending oneself from an attack, and because states tend to examine compliance with the requirement using contextualization) see Maguigan, *supra* note 14, at 386, 416–19. In the context of the prerequisite of reasonableness (as only a minority of states still employ a strict objective test), see *id.* at 409–13; in the context of the duty to retreat, as most states do not require a retreat, and the few which do demand it, qualify the requirement where the attack takes place at the defendant's home, see *id.* at 386, 419–420. Similarly, Maguigan asserts that there is no need for legislative reform of the existing procedural law, as in many states the procedural law allows relevant evidence to be brought regarding the circumstances of the violence, whether through the regulation of expert testimony in general, or by utilizing existing possibilities for adducing evidence in the context of homicide, in particular, see *id.* at 386, 421–23. Maguigan argues that to the extent that a problem exists in the context of battered women facing criminal charges, that problem does not stem from the wording of the existing legislative arrangements in the substantive and procedural law but rather the manner of their implementation by the judges and members of the jury. *Id.* at 386–87, 432–38.

of respite or when the immediate danger has seemingly passed.[48] The main contention is that such a requirement is inconsistent with empirical findings regarding the characteristics of domestic violence,[49] as well as with findings demonstrating that the requirement to respond while being attacked may actually exacerbate the intensity and severity of the violence directed against such victims.[50] In this context, scholars criticized the judicial tendency to examine the prerequisite of immediacy from a narrow and concrete perspective that embraces only those events directly linked to the time of the homicide (independently of the continuous, cumulative, cyclical, and escalating dynamic of domestic violence).[51] Such judicial examination of the direct events linked to the homicide lead to the incorrect judicial classification of battered women's responses as mere attacks, and hence, criminal offenses.[52]

Gender discourse has also criticized judicial decisions concluding that battered women who kill their aggressors grossly overstep the requirement of proportionality,[53] on the ground that the requirement of proportionality is *per se* inappropriate in circumstances of predetermined physical asymmetry and inequality.[54] Much of the criticism posits that it is highly problematic to compel a defendant to persuade the court that the use of deadly protective force was proportionate because she faced a real danger to her life.[55] In such circumstances, the real, life-threatening danger to the defendant is not the outcome of a one-time or concrete event but persists as a constant danger, shaped by the unique characteristics of this particular kind of violence[56]: the

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[48] M. J. Willoughby, *Rendering Each Woman Her Due: Can a Battered Woman Claim Defense When she Kills her Sleeping Batterer?*, 38 U. KAN. L. REV. 169, 185 (1989); Elizabeth M. Schneider, *Equal Rights to Trial for Women: Sex Bias in the Law of Self Defense*, 15 HARV. C.R.-C.L. L. REV. 623, 634 (1980); Mather, *supra* note 45, at 567; C. Rosen, *supra* note 46, at 43; Jill S. Talbot, Note*, Is "Psychological Self-Defense" a Solution to the Problem of Defending Battered Women Who Kill?*, 45 WASH. & LEE L. REV. 1527, 1528–1529 (1988). For the opinion that, empirically, most killings by battered woman can be described as 'confrontational' and therefore meet the prerequisite of imminence, see Maguigan, *supra* note 14, at 384–385, 391–401. For reservations regarding Maguigan's observations, see DOWNS, *supra* note 12, at 139.

[49] Fiora-Gormally, *supra* note 45, at 154–55; GILLESPIE, *supra* note 11, at 68–69, 71; *see also* C. Rosen, *supra* note 46, at 34.

[50] *See* Schneider, *supra* note 48, at 634; GILLESPIE, *supra* note 11, at 71 ("The imminence requirement can sometimes turn a life and death situation into a macabre game of timing.").

[51] For the importance of considering the entire web of abuse and violence as relevant when examining the immediate background to the attack, see generally Donald Nicolson & Rohit Sanghvi, *More Justice for the Battered Woman*, 145 NEW. L.J. 1122 (1995). *See also* DOWNS, *supra* note 12, at 96.

[52] GILLESPIE, *supra* note 11, at 72, 81–87.

[53] *See* Mather, *supra* note 45, at 587; GILLESPIE, *supra* note 11, at 93–94, 99.

[54] This includes, for example, circumstances where the woman unlawfully attacked is weaker and has less experience in physical combat. *See* Aileen McColgan, *In Defense of Battered Women Who Kill*, 13 OXFORD J. LEGAL STUD. 508, 520–21 (1993); GILLESPIE, *supra* note 11, at 69, 88, 92, 100–22; La Fond, *supra* note 11, at 250.

[55] McColgan, *supra* note 54, at 520–21.

[56] For a psychological account of the battered women syndrome in this respect, see LENORE E. WALKER, THE BATTERED WOMAN 55–70 (1979); DOWNS, *supra* note 12, at 53–75. For an overall account of the reasonableness of battered women, see GILLESPIE, *supra* note 11, at 123–56.

gradual, inevitable escalation of real, life-threatening danger in the characteristically cyclical pattern of domestic violence.[57]

Likewise, the demand that battered women retreat from their own homes to avoid being attacked in order to satisfy the traditional doctrinal requirement of necessity has been criticized as incompatible with the unique circumstances of battered women.[58] The critical legal discourse has pointed to the futility of a legal requirement to retreat in this context, as it is a well-known fact that retreat is unlikely to halt a domestic violence attack.[59] Instead, retreating will, at best, postpone the violence.[60] And at worst, retreating could possibly exacerbate it.[61] It has also been argued that victims of domestic violence have less of a choice to retreat.[62] In these circumstances, staying at home despite being attacked may not represent an affirmative choice to remain with the violent partner. Instead, it may reflect the many practical difficulties involved in abandoning the home, including, among other things, concern for children, economic dependence on the partner, and lack of alternative housing arrangements.[63] In practice, the requirement to retreat in circumstances where the aggressor and the victim live together may in itself negate the possibility of asserting the doctrine of self-defense in cases of domestic violence.[64] Thus, this legal requirement disregards the fact that the "arena" from which the battered woman is required to retreat is her own home, and the demand therefore violates her fundamental human right to live freely without threat of violence.[65]

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[57] Even though it is not always possible to point to a critical and acute event immediately before the response of the battered women, it is also not possible to talk seriously of a transient danger that may not take place. *See* GILLESPIE, *supra* note 11, at 60. *See also* McColgan, *supra* note 54, at 508–29.

[58] In the case of battered women, this demand is often translated into a question which troubles many: "why don't they leave?" *See* GILLESPIE, *supra* note 11, at 77–81. For the opinion that in cases of battered women, retreat from the home should not be exempted from the retreat rule because of the aggressor's rights to life, see LEVERICK, *supra* note 12, at 102.

[59] Richard A. Rosen, *On Self-Defense, Imminence, and Women Who Kill Their Batterers*, 71 N.C. L. REV. 371, 405 (1993) [hereinafter R. Rosen].

[60] For recent case law decisions, see Carpenter, *supra* note 30, at 654 n.3.

[61] *See* Martha R. Mahoney, *Legal Images of Battered Women: Redefining the Issue of Separation*, 90 MICH. L. REV. 1, 58 (1991); GILLESPIE, *supra* note 11, at 151; Carpenter, *supra* note 30, at 684, 693.

[62] *See* Mahoney, *supra* note 61, at 10–24; GILLESPIE, *supra* note 11, at 144–56.

[63] ELIZABETH M. SCHNEIDER, BATTERED WOMEN AND FEMINIST LAWMAKING 77–79 (2000); Carpenter, *supra* note 30, at 680–81; LEVERICK *supra* note 12, at 8.

[64] GILLESPIE, *supra* note 11, at 187–88.

[65] MACKINNON, *supra* note 4, at 762. Likewise, scholars have argued that it is not proper for this right to be negated even if the scene is none other than the home of the person being attacked by her partner, since he too has property rights in the joint home. Moreover, such judicial rulings reflect an inappropriate preference for property rights over the interest in life and bodily integrity. *See* GILLESPIE, *supra* note 11, at 84–87; *see also* Carpenter, *supra* note 30, at 660, 685–87. Even states that do not make retreat a requirement for asserting self-defense offer no remedy for battered women, as some of these states explicitly require the defendants to retreat in the case of co-dwellers. *See, e.g.,* ALA. CODE 13A-3 § 23 (2014); FLA. STAT. § 776.013 (2014); 18 PA. CONS. STAT. § 505 (2011); S.C. CODE ANN. § 16-11-440 (2014); TENN. CODE ANN. § 39-11-611 (2014).

Despite the legal criticisms described above, within the MPC there is potential for compatibility between the requirements of the self-defense doctrine and the typical circumstances of the battered woman. To begin with, the use of force in these circumstances could be deemed legally justified rather than merely excused.[66] Conceiving of self-defense as legally excused implicitly attributes to the battered woman moral failure and unreasonableness.[67] If, by contrast, the MPC were to consider the battered woman's use of force legally justified, it would recognize that she was neither morally nor legally culpable.

Unfortunately, however, the MPC contains legal rules that create fundamental obstacles when applying the doctrine in cases of domestic violence. At the outset, despite the abolition of the retreat requirement in a person's home and place of work, the MPC has not abolished it in circumstances where the aggressor is a co-dweller.[68] Particularly puzzling is the MPC drafters' explicit decision to retain the retreat requirement when the aggressor is a co-dweller[69] while abolishing it in the workplace when a co-worker carries

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[66] For a discussion on the distinction between justification and excuse and the MPC's approach in this context, see Heberling, *supra* note 19, at 916–25. Some legal scholars argue that this distinction is unnecessary because the defendant is acquitted under either regime. *See, e.g.*, R. Rosen, *supra* note 59, at 408; Kit Kinports, *Defending Battered Women's Self Defense Claims*, 67 Or. L. Rev. 393, 460 (1988). For a discussion about the current preference for excuse in the domestic violence context, see C. Rosen, *supra* note 46, at 31; Sangero, *supra* note 16, at 350. *See generally* B. Sharon Byrd, *Till Death Do Us Part: A Comparative Law Approach to Justifying Lethal Self-Defense by Battered Women*, 1 Duke J. Comp. & Int'l L. 169 (1991).

[67] Excuse defines the battered woman's act of self-defense as unlawful, and consequently as a crime in itself. It merely establishes that the woman cannot be held liable for that unlawful act. *See* C. Rosen, *supra* note 46, at 17, 42–44. In practice, while excusing a woman's use of force in cases of domestic violence ensures she avoids imprisonment, it also stigmatizes her as a morally defective person and perpetuates gender-based stereotypes. *See* Anne M. Coughlin, *Excusing Women*, 82 Calif. L. Rev. 1, 37–47, 55–57 (1994); Robert F. Schopp, Barbara J. Sturgis & Megan Sullivan, *Battered Woman Syndrome, Expert Testimony, and the Distinction between Justification and Excuse,* 1994 U. Ill. L. Rev. 45, 92–93, 95–97 (1994); Alafair S. Burke, *Rational Actors, Self-Defense, and Duress: Making Sense, Not Syndromes, Out of the Battered Woman*, 81 N.C. L. Rev. 211, 214–16 (2002).

[68] In other words, the duty to retreat has been abolished in respect to the home arena only when the attack is carried out by a stranger. The MPC Official Commentaries reveal that the drafters deliberately chose not to abolish the retreat prerequisite in domestic violence cases. *See* Model Penal Code and Commentaries, Part I § 3.04 at 56.

[69] A hint of the gender bias leading to the abolition of the requirement to retreat at the workplace but not at the home may perhaps be seen in the fact that in the explanatory comments provided by the drafters of the Model Penal Code there is a reference to the fact that the legislative proposal of 1958—which suggested abolishing the requirement of retreat both at the workplace and at home—was not accepted. The explanatory remarks also contain strict gender terminology regarding characteristic domestic violence, which may indicate masculine bias resulting in the rejection of the 1958 proposal in the context of the home. In the explanatory comments, the typical victim of an attack at the home is the "wife," whereas the terminology used to describe the typical aggressor at the home is the "husband":

> The provision also excepts from the duty to retreat a person in his place of work . . . . A second, and also difficult issue, is whether the right to stand one's ground should be preserved when the attack is by a co-dweller or co-worker. The proposal originally submitted to the Institute did not extend the exception in either instance; a wife

out the attack.[70] In effect, since most attacks on women are carried out by intimate partners while they are at home,[71] the requirement to retreat when the aggressor is a co-dweller nullifies the doctrine of self-defense in these circumstances.[72]

Apart from the requirement to retreat in cases where the aggressor is a co-dweller, the MPC also explicitly requires the woman to surrender to the aggressor's demands prior to resorting to the use of deadly protective force. Section 3.04(2)(b)(ii) states that the use of force is not justified if "the actor knows that he can avoid the necessity of using such force with complete safety by retreating or by surrendering possession of a thing to a person asserting a claim of right thereto or by complying with a demand that he abstain from any action that he has no duty to take." As follows from the text, the MPC distinguishes between lawful and unlawful demands. A person is not obliged to comply with unlawful positive demands, such as during a robbery, but he must comply with positive demands so long as they are not unlawful.[73] Likewise, in relation to the requirement of compliance, the MPC distinguishes between demands to perform an act and demands to avoid an act, and, as clearly emerges from the comments of the drafters, this arbitrary legal arrangement was chosen merely for technical reasons relating to drafting difficulties.[74] In this regard, the MPC draws a strange technical distinction between the aggressor's positive demands and his negative demands. The Code states that a person must comply with the aggressor's demands to abstain from taking certain action, before using deadly protective force,[75] as

> was thus compelled to retreat from an attack by her husband in their common home . . . as was one partner from an attack by another partner at their place of work. The Institute voted to require retreat from attacks at one's place of work in such a context, but not from attacks at one's dwelling. The language of Subsection (2)(b)(ii)(A) states that position.

MODEL PENAL CODE AND COMMENTARIES, Part I § 3.04 at 56. This arbitrary decision is actually dangerous when explicitly adopted in the explanatory comments of the MPC, since, as noted, the Code and its explanatory comments comprise a legislative model and source of judicial interpretation in many states in the United States. Thus, even states that have explicitly abolished the retreat requirement (Alabama, Florida, Tennessee, Pennsylvania and South Carolina), may apply an exception relating to the home front, when referring to women assaulted by their partners.

[70] For criticism of the abolition of this particular requirement, see Heberling, *supra* note 19, at 939.

[71] The home is also usually the place of residence of the aggressive partner in domestic violence cases. *See supra* notes 2, 3, 6; *see also* Carpenter, *supra* note 30, at 669. Carpenter argues that the characteristics, identity, and property rights of the aggressor are not relevant to determining the degree to which the use of deadly force in self-defense is necessary. *Supra* note 30, at 661–62, 700. Furthermore, Carpenter argues that an assault at the home is equivalent to a legal determination that the defendant satisfied the requirement of retreat, because the home—as a "place of last resort"—is similar to the "wall of retreat," exactly as was required in the Middle Ages when applying the doctrine of self-defense. *See id.* at 667.

[72] Carpenter, *supra* note 30, at 660.

[73] *See* MODEL PENAL CODE AND COMMENTARIES, Part I § 3.04 at 58–60.

[74] *See id.*

[75] As implied in § 3.04(2)(b)(ii), the requirement of compliance with the demands of the aggressor does not apply to the aggressor's positive demands to perform any act—for example,

long as he can comply with the aggressor's demands for abstention with complete safety.[76]

The legal requirement that an intimate partner must comply with all the aggressor's demands so long as they are negatively stated (*i.e.*, that she must avoid certain actions) might legalize a full repertoire of demands that together might create a horrible and permanent pattern of severe domestic violence, including offensive, strange, arbitrary, humiliating and depressing demands, provided however that they direct the victim to abstain from performing certain actions.[77] Even if we assume that such an odd legal arrangement is appropriate in principle in the context of the self-defense doctrine as a whole, it certainly and patently cannot be applied in circumstances of domestic violence, which by their nature are continuous, repetitive and escalating. Furthermore, even if such a legal arrangement might be appropriate in certain circumstances of domestic violence, its practical application might shift the judicial focus towards marginal and insignificant issues relating to the particular classification of the type of violence committed against the women standing trial. Such an arrangement perhaps would be tolerable if it were merely cumbersome and technocratic, but in fact it is fundamentally harmful and dangerous in the context of domestic violence, since it legitimizes an entire range of domestic abuse under the auspices of the MPC.

In addition to the problems involved in the categorical requirement to comply with the aggressor's negative demands, the language of the MPC creates a substantive problem in relation to the exercise of deadly protective force in circumstances where there seem to be no concrete and provable threats to life. Although some might argue that the provisions of the MPC do in fact apply to circumstances of rape, even in the absence of tangible threat to life or body,[78] the provisions still do little to protect many victims of

the daily positive demand made of the defendant in *State v. Norman* to engage in prostitution, bark like a dog, eat from the dog's plate and more, see *State v. Norman*, 378 S.E.2d 8, 10 (N.C. 1989)—as according to the text of the section, a battered woman is entitled to refuse to perform such acts, however, according to the language of the section, the requirement of compliance applies, with strange and broad generalization, to an entire range of possible demands on the part of the aggressor to abstain from performing certain acts, whether large or small, marginal or significant, provided only that the defendant is not under a lawful duty to perform them—or in the language of the provision, the defendant must abstain from any action that he has no duty to take.

[76] *See* Model Penal Code § 3.04(2)(b)(ii).

[77] A terrible and permanent pattern of violence may be based on demands to abstain from certain acts, including but not only—to abstain from eating at the table in company, to abstain from watching television, to abstain from talking to people, to abstain from meeting friends and family, to abstain from reading books, and similar outrageous and abusive demands. Such macabre possibilities can be avoided if the MPC would adopt language qualifying the demand to comply with the demands of the aggressor so long as the interference with the victim's freedom was minimal as, for example, North Dakota has done. N.D. Cent. Code § 12.1-05-07(2)(b) (2012) ("The use of deadly force is not justified if it can be avoided, with safety to the actor and others, by retreat or other conduct involving minimal interference with the freedom of the individual menaced.").

[78] As currently formulated, the Code permits the use of deadly protective force in circumstances of rape involving force or threats. *See* Model Penal Code § 3.04(2)(b). Rape is there-

domestic abuse because the MPC explicitly permits marital rape.[79] Though most states have diverged from the MPC on the issue of marital rape, the MPC still categorically exempts males from criminal liability for a variety of sexual offenses, as long as they are committed against their female partners.[80] Such immunity from legal culpability for sexual violence accordingly negates any battered woman's assertion of a defense based on the legitimate use of deadly protective force in domestic circumstances, where the woman cannot point to a concrete and tangible danger to her life.

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fore considered to be a circumstance justifying the use of deadly protective force even if there is no tangible threat to life or threat of serious bodily injury. Although some researchers believe that rape inherently involves serious bodily injury, *see* LEVERICK, *supra* note 12, at 150–54 (describing such claims), if the Code's drafters had believed that rape in fact involved a real danger to life or serious bodily injury, there would have been no reason to include it explicitly in § 3.04(2)(b)—it would be surplusage. However, it should be noted that some state criminal codes diverge from the MPC on this issue and do not state explicitly that circumstances of rape permit the use of deadly protective force. *See* GILLESPIE, *supra* note 11, at 62–67. Historically, rape was considered a circumstance justifying deadly protective force, even if it was not accompanied by threat of violence or great physical injury, see *id.* at 33, 38; LEVERICK, *supra* note 12, at 150, probably not because of the serious physical injury aspect, but because it was detrimental to a woman's respectability and the moral conventions of society, *see* LEVERICK, *supra* note 12, at 150. For the arguments that rape strikes a mortal blow to the humanity and human dignity of the victim, see *id.* at 156–57. For a comprehensive analysis of the connection between the social subjugation of women and the offense of rape, see generally MACKINNON, *supra* note 4, at 772–897.

[79] The definitions of sexual offenses in the MPC provide for the inherent immunity of a spouse from criminal liability with respect to such offenses. *See* MODEL PENAL CODE § 213.1(1) (Rape: "A male who has sexual intercourse with a female not his wife is guilty of rape . . . ."); § 213.1(2) (Gross Sexual Imposition: "A male who has sexual intercourse with a female not his wife commits a felony of the third degree . . . ."; § 213.3(1) (Corruption of Minors and Seduction: "A male who has sexual intercourse with a female not his wife, or any person who engages in deviate sexual intercourse . . . ."; § 213.4 (Sexual Assault: "A person who has sexual contact with another not his spouse . . . ."; § 213.5 (Indecent Exposure: "A person commits a misdemeanor if, for the purpose of arousing or gratifying sexual desire of himself or of any person other than his spouse . . . ."); *see also* MODEL PENAL CODE AND COMMENTARIES, Part II § 213.1 at 275 ("[T]he central notion [of rape] has always been unlawful sexual intercourse committed upon a female by imposition. The term "unlawful" served the function of excluding cases where the actor and the victim were married to each other."). According to the commentaries of the drafters, it is still possible to prosecute a man who forcibly rapes his partner, albeit for assault (by virtue of the use of force) and not for rape. *See* MODEL PENAL CODE AND COMMENTARIES, Part II § 213.1 at 344. In the commentaries, the drafters refer to the criminal exemption applying to spouses and justify it with a number of well-known arguments in this field. *See id. See generally* Philip N. S. Rumney, *When Rape Isn't Rape: Court of Appeal Sentencing Practice in Case of Marital and Relationship Rape*, 19 OXFORD J. LEGAL STUD. 243 (1999) (discussing such well-known arguments in the context of sentencing). The reasons cited include: marriage is a default consent to sexual intercourse; the home is a private arena which should not be interfered with; and the idea that forcible sexual relations within the marital context are fundamentally different. *See* MODEL PENAL CODE AND COMMENTARIES, Part II § 213.1 at 344–46. For further details regarding marital rape at common law, see generally MACKINNON, *supra* note 4, at 856–71.

[80] The Code uses the term "wife;" however, the definitions section clarifies that this exception also applies to unmarried couples who live together. *See* MODEL PENAL CODE § 213.6(2) (The spousal "exclusion shall be deemed to extend to persons living as man and wife, regardless of the legal status of their relationship."). Moreover, according to the commentaries, this criminal exception applies even if the couple has separated, as long as no judicial separation order has been given. *See* MODEL PENAL CODE AND COMMENTARIES, Part II § 213.1 at 342.

Thus, despite the seemingly greater flexibility of the doctrine of self-defense in the MPC, self-defense remains both explicitly and implicitly limited within the context of domestic violence. It is doubtful that the legal arrangement currently in place, without amendment, can properly be applied to cases in which battered women defend themselves by killing their aggressor partners.

IV. Legal Principles Underlying the Proposed Amendments to the Doctrine of Self-Defense in the Model Penal Code

The current legal structure of the self-defense clause in the MPC can be swiftly adapted to the circumstances of domestic violence through the introduction of the proposed amendments. The principles of the proposed amendments are consistent with previous scholars' proposals for the modification of the doctrine of self-defense in circumstances where battered women have killed their assailant partners.[81] The proposal focuses on the concrete legal

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[81] Previous proposals made by researchers in the field of battered women have not yet evolved into detailed relevant legislative drafts to address the issue in the MPC. Such proposals include a proposal to abolish the duty to retreat in the context of battered women, see MacKinnon, *supra* note 4, at 762, in states that have not abolished the duty to retreat in relation to co-dwellers, see Gillespie, *supra* note 11, at 187–88 (discussing duty to retreat from co-dweller and advocating for its elimination); Downs, *supra* note 12, at 233 (advocating for elimination of duty to retreat from co-dweller in the minority of states that require it); Maguigan, *supra* note 14, at 450–51 (advocating for no duty to retreat in the home and from co-dwellers and stating that no relevant legislation is pending); Mather, *supra* note 45, at 568–69 (discussing duty to retreat in context of domestic abuse). Proposals to deal with the requirement of proportionality by expanding the circumstances in which the use of deadly protective force is permitted are of relevance. *See* Gillespie, *supra* note 11, at 185; La Fond, *supra* note 11, at 279–84; Schneider, *supra* note 48, at 631–33; Mather, *supra* note 45, at 564–65; Charles Patrick Ewing, *Psychological Self-Defense: A Proposed Justification for Battered Women Who Kill*, 14 Law & Hum. Behav. 579, 585–90 (1990). So is the proposal to create a legal presumption of real danger to life or of serious injury in circumstances of domestic violence. *See* Downs, *supra* note 12, at 236 (arguing that any "violent action with a fist or other tool by a more powerful attacker creates a reasonable apprehension of real danger," which permits the use of lethal protective force). As the language of the MPC allows a relatively broad interpretation of the requirement of imminence, it is not necessary to adopt the proposed amendments to the doctrine in this context. However, these proposals are needed in states that adopt stringent and objective requirements in this context. With regard to these states it is desirable, in general, to adopt proposals abolishing the requirement of imminence in the context of battered women, or at least increasing the flexibility of the requirement. *See* Mahoney, *supra* note 61, at 83–93; Schneider, *supra* note 48, at 634; Maguigan, *supra* note 14, at 449–50; Gillespie, *supra* note 1111, at 185–87; Mather, *supra* note 45, at 567; Fiora-Gormally, *supra* note 47, at 16; C. Rosen, *supra* note 46, at 34; Talbot, *supra* note 48, at 1545. It would also be particularly desirable to adopt proposals that modify the imminence requirement so as to be satisfied by: the possibility of an impending assault that may occur at any moment, Downs, *supra* note 12, at 232, 247–48 (endorsing interpreting imminence to mean "coming on shortly"); inevitable assault, see Leverick, *supra* note 12, at 102–08 (discussing, but not endorsing, the proposal); an act of defense which is "necessary," even if not responding to an imminent threat, see R. Rosen, *supra* note 59, at 380–81; or an act needed to effectively resolve an ongoing situation of assault, see La Fond, *supra* note 11, at 280. In circumstances of domestic violence, in states where there is an "objective" reasonableness approach, it is necessary to soften it into a subjective standard relating to the reasonableness of the actions taken by the defendant. *See* Gillespie, *supra* note 11, at 189 (advocating for a

structure of the doctrine of self-defense in the MPC and its unique deficiencies with respect to domestic violence. The proposed amendments leave intact three of the traditional requirements for use of self-defense found in the MPC: immediacy; repelling an unlawful act; and prior conduct which is not unlawful. Four major amendments are proposed regarding the two other traditional requirements: the duty to retreat and the requirement of proportionality.

First, it is proposed to adjust the requirement of proportionality in circumstances of domestic violence by inserting these circumstances into the section of the MPC that currently permits the use of deadly protective force.[82] The inclusion of such circumstances in this section would create a legal presumption that a real and concrete danger exists in cases of severe and continuous domestic violence,[83] with the result that the use of deadly protective force in such cases would meet the doctrine's requirement of proportionality.

Second, one proposed amendment explicitly abolishes the requirement to comply with the demands of the aggressor, whether positive demands to act in certain ways or negative demands to avoid doing something. In addition, in circumstances of severe and prolonged domestic violence, it abolishes the particular duty to retreat if and when the aggressor is a co-dweller. As stated in the proposed amendment, the abolition is explicitly confined to the aggressor's demands "that endanger the personal security, bodily integrity, autonomy or dignity of the victim." This categorical provision should be inserted, in our view, in a separate subsection following § 3.04(2)(b)(ii)(B), which refers expressly to the need to comply with these requirements before the use of deadly protective force is permitted.

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subjective reasonable or subjective honest belief standard); DOWNS, *supra* note 12, at 238, 241 (arguing for a standard that incorporates gender and context); Maguigan, *supra* note 14, at 445–48 (advocating for a standard that incorporates objective and subjective elements). For a proposal to create a standard of reasonableness specifically for battered women, see Kinports, *supra* note 66, at 415–16. Furthermore, it is worth considering the modification of rules of expert testimony and the presentation of evidence. *See* GILLESPIE, *supra* note 11, at 190 (arguing that courts should permit expert testimony under the usual standard); DOWNS, *supra* note 12, at 239; Maguigan, *supra* note 14, at 449, 456–58; Kinports, *supra* note 66, at 451–54. It is also worth considering giving specific instructions to the jury concerning the proper legal interpretation of the requirements of the doctrine. *See* Maguigan, *supra* note 14, at 457–60; DOWNS, *supra* note 12, at 233–35, 237.

[82] MODEL PENAL CODE § 3.04(2)(b). This proposal is consistent with La Fond's proposal. *See* La Fond, *supra* note 11, at 280. It is also in line with the legal scheme in Arkansas, which specifically includes circumstances of domestic abuse in the category that permits the use of deadly protective force. *See* ARK. CODE ANN. § 5-2-607(3) (Suppl. 2013).

[83] In justifying such an expansive approach in the context of the use of deadly protective force, La Fond argues that, "the law of self-defense ought to be grounded primarily in the theory of personal autonomy and, accordingly, that the law should be changed explicitly to permit recourse to deadly force by innocent victims against aggressors whenever necessary to defend effectively against unlawful violence." La Fond, *supra* note 11, at 238; *see also id.* at 243–44, 278–82. In this regard, see also the scholars supporting the use of deadly protective force in circumstances of rape despite the absence of real danger to life or threat of severe bodily injury, if only because of the brutal interference with the victim's autonomy and humanity. *See* LEVERICK, *supra* note 12, at 156–57 (describing, but not endorsing, such arguments).

Third, in order to ensure clarity and uniformity in the application of the proposed amendments, it is recommended to insert particular legal definitions of the terms relevant to the circumstances of domestic violence within the section dealing with the general legal definitions relevant to the doctrine of self-defense, § 3.11. Adding specific legal definitions of "domestic violence" and of a "family member" to the legal definitions currently set out in § 3.11 will clarify who will be regarded as a family member for the purpose of domestic violence, and, accordingly, what constitutes domestic violence. The proposed definition of domestic violence is in line with current scholarship in this field and recognizes the various patterns of violence that may be inflicted on a family member.

Fourth, in order to ensure legislative harmony—as well as gender-related justice—it is proposed to abolish the criminal exemptions applicable today to men committing sex crimes against their female partners. Any selective implementation of the three main amendments proposed above, without the implementation of this accompanying indirect amendment to the existing definitions of sexual offenses, might create an absurd legal order prohibiting, on the one hand, the commission of physical or mental violence against women in general, including partners, but expressly allowing myriad forms of sexual violence when directed towards intimate female partners. Such an implicit criminal permission and legal disharmony must be categorically avoided.

V. Draft Statutory Amendments of the Self-Defense Doctrine in the Model Penal Code

Below is the wording of the proposed amendments of the MPC in the context of a claim of self-defense made in circumstances of severe and sustained violence in the family:

Proposed direct amendments to §§ 3.04, 3.11 of the Model Penal Code

§ 3.04. Use of Force in Self-Protection

(2) Limitations on Justifying Necessity for Use of Force.

(a) . . . .

(b) The use of deadly force is not justifiable under this Section unless the actor believes that such force is necessary to protect himself or herself against death, serious bodily injury, kidnapping, sexual intercourse compelled by force or threat, or circumstances of a severe and prolonged pattern of domestic violence; nor is it justifiable if:

(i) the actor . . . provoked the use of force against himself or herself in the same encounter; or

(ii) the actor knows that he can avoid the necessity of using such force with complete safety by retreating or by surrendering possession of a thing . . . except that:

(A) the actor is not obliged to retreat from his or her dwelling or place of work, unless the actor was the initial aggressor or is assailed in his or her place of work by another person whose place of work the actor knows it to be; ~~and~~

(B) a public officer justified in using force . . .; and

(C) in circumstances of a severe and prolonged pattern of domestic violence, the actor is not obliged to retreat from his or her dwelling even if the perpetrator is a co-dweller, nor is the actor obliged to comply with a demand to do or abstain from doing any action that endangers either his or her personal security, bodily integrity, autonomy, or dignity.

§ 3.11. Definitions

In this Article, unless a different meaning plainly is required:
(1) "unlawful force" . . . .
(2) "deadly force" . . . .
(3) "dwelling" . . . .
(4) "Domestic violence" means the occurrence of any of the following acts by a person, which is not an act of self-defense:

(i) Causing or attempting to cause physical or mental harm to a family or household member.
(ii) Placing a family or household member in fear of physical or mental harm.
(iii) Causing or attempting to cause a family or household member to engage in involuntary sexual activity by force, threat of force, or duress.
(iv) Engaging in activity toward a family or household member that would cause a reasonable person to feel terrorized, frightened, intimidated, threatened, harassed, or molested.
(v) Causing or allowing a child to see or hear violence directed against a person by a family or household member; or putting the child, or allowing the child to be put, at real risk of seeing or hearing that violence occurring.
(5) "Family or household member" includes any of the following:

(i) A spouse or former spouse.
(ii) An individual with whom the person resides or has resided, has or has had a dating relationship, is or has engaged in a sexual relationship, is related or was formerly related by marriage, has a child in common.
(iii) The minor child of an individual described in subparagraphs (i) and (ii).

Proposed indirect amendments to §§ 213.1–213.5 of the Model Penal Code

§ 213.1 Rape and Related Offenses.

(1) Rape. A <u>person</u> ~~male~~ who has sexual intercourse with <u>another</u> ~~a female not his wife~~ is guilty of rape . . . .
(2) Gross Sexual Imposition. A <u>person</u> ~~male~~ who has sexual intercourse with <u>another</u> ~~a female not his wife~~ commits a felony . . . .

§ 213.3 Corruption of Minors and Seduction.

(1) Offense Defined. A <u>person</u> ~~male~~ who has sexual intercourse with <u>another</u> ~~a female not his wife~~ . . . .

§ 213.4 Sexual Assault.

A person who has contact with another ~~not his spouse~~ . . . .

§ 213.5 Indecent Exposure.

A person commits a misdemeanor if, for the purpose of arousing or gratifying sexual desire of himself or herself, or of any <u>person</u> ~~other than his spouse~~ . . . .

VI. Explanations Accompanying the Draft Statutory Amendments

The wording of the proposed amendments adds the circumstance of a "severe and prolonged pattern of domestic violence" to the present category regulating the use of deadly protective force in § 3.04(2)(b) of the MPC. The expansion of this category is consistent with the legal arrangement in the state of Arkansas, which explicitly permits the use of deadly force against aggressors in circumstances of domestic abuse,[84] and with many other state systems that allow the use of deadly protective force not only in life-threatening situations but also in other circumstances where a crime is being committed.[85]

In addition, the proposals explicitly abolish the MPC's previous requirements of retreat when the aggressor is a co-dweller and of compliance with the negative demands of the aggressor. The explicit abolition of these two

[84] Ark. Code Ann. § 5-2-607(a) ("A person is justified in using deadly physical force upon another person if the person reasonably believes that the other person is: (1) Committing or about to commit a felony involving force or violence; (2) Using or about to use unlawful deadly physical force; or (3) Imminently endangering the person's life or imminently about to victimize the person as described in § 9-15-103 from the continuation of a pattern of domestic abuse.")

[85] *See, e.g.*, Ark. Code Ann. § 5-2-607(a) (2014); Cal. Penal Code § 197 (West 2014); Fla. Stat. § 776.013(1) (2014); Ga. Code Ann. § 16-3-21(a) (2014).

requirements in the context of domestic violence is regulated in a separate section, § 3.04(2)(b)(ii)(C). The proposals also indirectly address sexual violence targeting intimate female partners. The proposed draft suggests the amendment of the current gender-related criminal exemptions explicitly set out in §§ 213.1–213.5 of the Code. By substituting the gendered wording of the definitions for neutral, non-gender terminology, the amendment abolishes the existing legal exception to the criminal liability of men for sexual offenses committed against their female partners. These indirect amendments are consistent with the legislative reforms made in many jurisdictions (in the United States and around the world) criminalizing sexual offenses without granting criminal immunity to one of the partners.[86] Likewise, and further to the gender neutral terminology adopted in this proposal, it proposes to adopt neutral language in relation to the gender identity of the victim and the assailant in sexual offenses. Currently, the language is not gender neutral in view of the use of the terms "male," "female," and "wife" instead of the gender neutral term "person."

In addition to these proposed amendments, the proposal contains new material in § 3.11, the section relating to the general legal definitions relevant to the doctrine of self-defense in the MPC. The proposal provides definitions of the particular terms required for the application of the proposed amendment. The proposed definitions adopt gender neutral and egalitarian terminology and relate to domestic violence in general—not just violence against women—so as to include potential male victims. The addition of § 3.11(4) is designed to provide a legal clarification of the term "domestic violence," and the addition of § 3.11(5) is designed to provide a legal definition of the term "family member." The legal definitions provided in these subsections are based on a number of current legislative state arrangements in the United States[87] and are consistent with the legal definitions associated with domestic violence in the federal criminal law of the United States.[88]

The legal definition proposed for the term "domestic violence" is broad in three main senses. First, it not only criminalizes acts that harm the physi-

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[86] *See generally* Lalenya Weintraub Siegel, *The Marital Rape Exemption: Evolution to Extinction*, 433 Clev. St. L. Rev. 351 (1995) (comprehensive review of the issue of marital rape and the related legislative provisions in various U.S. states); Michelle J. Anderson, *Marital Immunity, Intimate Relationships, and Improper Inferences: A New Law on Sexual Offenses by Intimates*, 54 Hastings L.J. 1465 (2003) (same); Jill Elaine Hasday, *Contest and Consent: A Legal History of Marital Rape*, 88 Calif. L. Rev. 1373 (2000) (same).

[87] For example, in Georgia, Wyoming, Arizona, Colorado, Florida, Kentucky, and Michigan. Our proposal is based primarily on the legal definition in Michigan and Wyoming. *See* Mich. Comp. Laws Ann. §§ 400.1501(1)(b), (d)–(e) (West 2008); Wyo. Stat. Ann. § 35-21-102(a)(iii) (2013).

[88] 18 U.S.C. § 2266(7) (2012) ("'[S]pouse or intimate partner' includes . . . (I) a spouse or former spouse of the abuser, a person who shares a child in common with the abuser, and a person who cohabits or has cohabited as a spouse with the abuser; or (II) a person who is or has been in a social relationship of a romantic or intimate nature with the abuser, as determined by the length of the relationship, the type of relationship, and the frequency of interaction between the persons involved in the relationship.").

cal integrity of a person but also acts that are harmful to the mental and emotional integrity of the person (via the language proposed in §§ 3.11(4)(i)–(iv)).[89] Second, and in line with the broad definition of domestic violence, the proposed definition criminalizes the mere exposure of a minor in the family to any violence directed against a family member (via the language proposed in § 3.11(4)(v)).[90] Third, and in line with current social trends of maintaining common households, the legal definition proposed affords protection not only to family members but also to household members who live together and might be exposed to violence, without the need for an intimate or blood relationship. This broad definition is set out in the language proposed in §§ 3.11(4)(i)–(iv).[91]

However, despite the broad scope accorded to the definition of "domestic violence," the proposed amendment is limited in scope by two legal principles. First, the criminal exemption in this defense is explicitly limited to the criminal liability of the defendant alone. This restricted arrangement is consistent with the text of the current provision in the MPC that confines the application of the criminal exception relating to the use of deadly protective force to the "actor" (in § 3.04(2)(b)),[92] and thereby prevents excessive expansion of the proposed criminal defense by applying it to other actors other than the abused individual. Second, the proposed text in § 3.04(2)(b) restricts the application of the criminal defense by introducing two cumulative preconditions in circumstances of domestic violence, namely, that the pattern of domestic violence is both severe and prolonged.[93] These two circum-

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[89] It also refers explicitly to non-physical injury as violence for all purposes. Likewise, the legal arrangement in both Michigan's and Wyoming's definition refers to both non-physical and physical harm and thereby avoids the tendency to define harm as severe only when it entails bodily injury. *See* MICH. COMP. LAWS ANN. § 400.1501(1)(d) (West 2008); WYO. STAT. ANN. § 35-21-102(a)(iii) (2013). For approaches emphasizing the gravity of mental injury and the need to adapt the criminal law so as to include it within the criminal doctrine, see Ewing, *supra* note 81, at 587; Jane Maslow Cohen, *Regimes of Private Tyranny: What Do They Mean to Morality and for the Criminal Law?*, 57 U. PITT. L. REV. 757, 790–91 (1996); Sanford H. Kadish, *Respect for Life and Regard for Rights in the Criminal Law*, 64 CALIF. L. REV. 871, 886–88 (1976).

[90] This is in accordance with the law adopted in 2005 in Victoria, Australia. *Crimes (Homicide) Act 1958* (Vic) s 6 (Austl.) (defining violence in relation to a child to be "(A) causing or allowing the child to see or hear the physical abuse, sexual or psychological abuse of a person by a family member; or (B) putting the child, or allowing the child to be put, at real risk of seeing or hearing that abuse occurring."). For a discussion on the exposure of children to domestic violence and the traumatic impact of this exposure, see generally Stephanie Holt et al., *The Impact of Exposure to Domestic Violence on Children and Young People: A Review of the Literature*, 32 CHILD ABUSE & NEGLECT 797 (2008).

[91] This proposal to include household members follows the broad definition set out in the current criminal statutes in Michigan and Wyoming. *See* MICH. COMP. LAWS ANN. § 400.1501(1)(d) (West 2008); WYO. STAT. ANN. § 35-21-102(a)(iii)(A).

[92] *See* MODEL PENAL CODE § 3.04(2)(b). In this way our proposal is also consistent with the provision in the MPC that provides a special defense to third parties. *See id.* at § 3.05.

[93] This proposal resembles the definition adopted in the Israeli Penal Law in the context of mitigating the punishment of women accused of killing their partners against a background of domestic violence, whereby notwithstanding the provisions of Section 300, a more lenient sentence than that stated therein may be imposed, if the offense was committed: "when the

scribed yet cumulative requirements would create a balanced arrangement that, on the one hand, is thorough in its consideration of the elements and characteristics of domestic violence and, on the other hand, does not unduly expand the scope of the exemption from criminal liability.

VII. Conclusion

Though advanced and enlightened, the American legal system has not yet offered a comprehensive solution to the problems faced by battered woman. Today, there is a much deeper awareness of the socio-legal problems faced by battered women as well as greater scientific knowledge of their behavior. Still, American legislators seem to be unwilling to adjust the legal approach to this disturbing issue. Only upon the emergence of such willingness will it be possible to find the appropriate legal remedy, either by creating a new defense or by extending the applicability of existing defenses so as to enable fair consideration of battered women's use of protective force against domestic violence.

This article has tried to translate the insights of the current legal discourse on the issue of battered women who kill their assailant partners into appropriate and focused amendments to the American doctrine of self-defense, as set out in the MPC. The key principles of the proposed provisions are consistent with previous proposals that have not yet been put into codified form, and they are compatible with the structure of the MPC's preconditions for the use of deadly protective force, which is a separate category within the MPC. As the majority of state criminal codes contain a separate legal category for the use of deadly protective force, the proposed amendments should comport with most state law. The hope is that the proposed amendments will provide a guide for future legislative reforms, so that state provisions governing the use of deadly protective force will apply to women accused of killing their partners in circumstances of severe and continuous domestic violence.

defendant was in a state of severe mental distress, because of severe or continued tormenting of himself or of a member of his family by the person whose death the defendant caused". *See* Penal Law, 5737–1977 § 300A(c), 6th ed. p. 91 (Isr.). *See also* La Fond, *supra* note 11, at 280–83 (proposing to expand the doctrine of self-defense and allow the use of deadly protective force in circumstances going beyond a real and concrete threat to life, along with a clear and circumscribed definition of the violence in respect of which deadly protective force may be applied).