

**CRIMINAL LAW—RETREAT FROM REASON:
HOW MINNESOTA’S NEW NO-RETREAT RULE
CONFUSES THE LAW AND CRIES FOR ALTERATION—
*STATE V. GLOWACKI***

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I. INTRODUCTION

In *State v. Glowacki*,¹ the Minnesota Supreme Court grappled with whether Minnesota’s general self-defense rule requiring retreat applies when co-residents fight at home, or whether an exception grounded in the castle doctrine should apply.² The court chose the latter path, ruling that co-residents may stand their

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1. 630 N.W.2d 392 (Minn. 2001) [hereinafter *Glowacki*].

2. *Id.* at 399 (noting that generally retreat is required by law “if reasonably possible” before acting in self-defense). See also BLACK’S LAW DICTIONARY 209 (7th ed. 1999) (defining *castle doctrine* as the criminal law “exception to the retreat rule allowing the use of deadly force by a person who is protecting his or her home and its inhabitants from attack, esp. from a trespasser who intends to commit a felony or inflict serious bodily harm”).

ground in the home as long as their force is reasonable.³ Ruling otherwise, the court said, would push residents from their safest place, would confuse juries hearing cases involving battered woman's syndrome, would require parents to consider abandoning their children, and would force residents to differentiate between co-residents and intruders.⁴

This note traces how retreat rules developed in the United States and in Minnesota, and how the rules affect battered women in particular.⁵ Next, the note summarizes how the *Glowacki* trial court gave an erroneous duty-to-retreat jury instruction amid conflicting accusations involving the defendant's physical confrontation with his live-in girlfriend.⁶ The note then explains the rationales that the Minnesota Supreme Court employed to enact a co-resident no-retreat rule that deviates from the state's general rule requiring retreat.⁷ Next, the note criticizes both the court's reasoning and the new rule, concluding that *Glowacki* was not a good case for making law, and asserting that the no-retreat standard is an imprudent departure from Minnesota's general retreat rule.⁸ Finally, this note proposes a self-defense standard for co-residents that resists the American tendency to hastily dismiss retreat, yet also provides exceptions for when safe escape is impossible, great peril must be averted, or battered woman's syndrome is at issue.⁹

3. *Glowacki*, 630 N.W.2d at 402:

[W]e adopt the following rule: There is no duty to retreat from one's home when acting in self-defense in the home, regardless of whether the aggressor is a co-resident. But the lack of a duty to retreat does not abrogate the obligation to act reasonably when using force in self-defense.

Id.

4. *Id.* at 400-02.

5. *See infra* Part II.

6. *See infra* Part III.A.

7. *See infra* Part III.B.

8. *See infra* Parts IV.A, IV.B.

9. *See infra* Part IV.C.

II. HISTORY OF THE DUTY TO RETREAT

A. *In the United States*

1. *Standing One's Ground Is the American Way*

From the battlefield to the baseball field, Americans are loath to retreat.¹⁰ In criminal law, sometimes allowing defenders to stand their ground even when retreat is possible is seen as a necessary, albeit unfortunate, part of self-defense amid perceptions that there are more guns on the street and less security in the one place where Americans should feel the safest: at home, surrounded by family.¹¹

The United States repudiated the English preference for retreating instead of fighting during the 1800s as the rebellious nation sought to distinguish American bravery from British cowardice.¹² No-retreat rules took root in the Colonies¹³ and

10. In 1778, George Washington scolded Maj. Gen. Charles Lee for "an unnecessary, disorderly, and shameful retreat" during the Revolutionary War's Battle of Monmouth. The Papers of George Washington, <http://gwpapers.virginia.edu/revolution/lee/lee3.html> (last visited Sept. 29, 2002). Hours after loaded jetliners slammed into the World Trade Center and Pentagon on Sept. 11, 2001, President George W. Bush commenced a War on Terrorism by telling the nation that terrorists had failed "to frighten our nation into chaos and retreat." *A Day of Terror; Bush's Remarks to the Nation on the Terrorist Attacks*, N.Y. TIMES, Sept. 12, 2001, at A4. After baseball commissioner Bud Selig halted the 2002 All-Star Game at a 7-7 tie, fans chanted "Let them play!" and "Refund!" Associated Press, *No pitchers are left, so game ends in tie*, ST. PAUL PIONEER PRESS, July 10, 2002, at 1D.

11. "The family is supposed to protect us from the violent world. All too often, however, this is not the case." OLA W. BARNETT ET AL., FAMILY VIOLENCE ACROSS THE LIFESPAN: AN INTRODUCTION 4 (1997). "As statistics show, even in our suburbs violent crime is rapidly increasing We are deceived if we take the casual view that firearms in the home can be controlled to merely deterring, or, at most, superficially wounding, an assailant in hopes of stopping him." BRENDAN F.J. FURNISH & DWIGHT H. SMALL, THE MOUNTING THREAT OF HOME INTRUDERS: WEIGHING THE MORAL OPTION OF ARMED SELF-DEFENSE 6 (1993). See also BLACK'S, *supra* note 2, at 1364 (defining *self-defense* as "[t]he use of force to protect oneself, one's family, or one's property from a real or threatened attack").

12. RICHARD MAXWELL BROWN, NO DUTY TO RETREAT: VIOLENCE AND VALUES IN AMERICAN HISTORY AND SOCIETY 5 (1991). The English rule requiring a defender to retreat "to the wall" before killing in self-defense developed not to reinforce the sanctity of life, but to allow the Crown to keep its monopoly on conflict resolution. *Id.* at 4.

13. *Id.* at 6 ("The roots of the transformation from the duty to retreat to standing one's ground went back to about the time of the American Revolution.").

blossomed in the Midwest, where courts saw retreat as a blemish on a man's character. In Ohio it was said that a "true man" fought off a violent, unprovoked attack.¹⁴ In Indiana it was noted that the "tendency of the American mind" was to favor standing one's ground instead of saving an assailant's life.¹⁵

Views favoring fight over flight snowballed in the 20th century,¹⁶ again in the Midwest, when the "sound reason" of the no-retreat rule was celebrated in Missouri¹⁷ and a rule requiring retreat was rejected as "ancient doctrine" in Wisconsin.¹⁸ The U.S. Supreme Court joined in when Justice Oliver Wendell Holmes, a celebrated civil libertarian, wrote that it was unreasonable to require a would-be defender to ponder retreat: "Detached reflection," he said, "cannot be demanded in the presence of an uplifted knife."¹⁹

Some states in the Northeast and South held to rules requiring retreat,²⁰ and they had Harvard University professor Joseph H. Beale, Jr. on their side:

A really honorable man, a man of truly refined and elevated feeling, would perhaps always regret the apparent cowardice of a retreat, but he would regret ten times more, after the excitement of the contest was past, the thought that he had the blood of a fellow-being on his hands. It is undoubtedly distasteful to retreat; but it is ten

14. "[A] true man, who is without fault, is not obliged to fly from an assailant, who, by violence or surprise, maliciously seeks to take his life or do him enormous bodily harm." *Erwin v. State*, 29 Ohio St. 186, 199-200 (1876). Cf. Susan Estrich, *Defending Women*, 88 MICH. L. REV. 1430, 1432 (1990) (reviewing CYNTHIA GILLESPIE, *JUSTIFIABLE HOMICIDE: BATTERED WOMEN, SELF-DEFENSE AND THE LAW* (1989), which asserts that "the retreat requirement is opposed by many precisely because it limits the manly instinct to stand one's ground and fight").

15. "[T]he tendency of the American mind seems to be very strongly against the enforcement of any rule which requires a person to flee when assailed, to avoid chastisement or even to save human life . . ." *Runyan v. State*, 57 Ind. 80, 84 (1877).

16. *BROWN*, *supra* note 12, at 20 (explaining how "energetic state supreme court justices the length and breadth of the land eloquently and feelingly put under siege the beleaguered notion of the duty to retreat").

17. *State v. Bartlett*, 71 S.W. 148, 151 (Mo. 1902).

18. *Miller v. State*, 119 N.W. 850, 857 (Wis. 1909).

19. *Brown v. United States*, 256 U.S. 335, 343 (1921) (reversing a conviction because the jury was instructed, contrary to Texas law, that the assaulted always must retreat if safe escape is available). To Holmes, "the right to stand one's ground and kill in self-defense was as great a civil liberty as, for example, freedom of speech." *BROWN*, *supra* note 12, at 36-37.

20. *BROWN*, *supra* note 12, at 24.

times more distasteful to kill.²¹

As crime rates rose in the latter half of the 20th century, Americans increasingly voiced a right to self-defense as debate intensified over levels of force available to protect self, family, and home.²²

2. *Retreat Rules Today*

Today, nineteen states reflect the nation's reluctance to retreat and generally do not require a faultless defender to retreat from a deadly confrontation.²³ The no-retreat rules are grounded in notions that victims need not yield their rights, surrender their dignity, or reveal their weak side to aggressive wrongdoers.²⁴ Requiring retreat, it is said, might put innocent people at risk as they escape an aggressor bolstered by apparently successful

21. Joseph H. Beale, Jr., *Retreat from a Murderous Assault*, 16 HARV. L. REV. 567, 581 (1903).

22. "The morgue is full of people who hoped for the best from their attackers and were dead wrong The security that comes from knowing how to protect yourself cannot be equaled." JAMES D. BREWER, *THE DANGER FROM STRANGERS: CONFRONTING THE THREAT OF ASSAULT* 119 (1994). See also Rollin M. Perkins, *Self-Defense Re-Examined*, 1 UCLA L. REV. 133, 135 (1954) (concluding that nondeadly force is allowed when (1) the defender reasonably believes a battery or unlawful imprisonment is imminent, (2) force is proportional to the force it is intended to prevent, and (3) the defender reasonably believes the harm cannot be avoided without using defensive force).

23. ARIZ. REV. STAT. § 13-411 (2001); TENN. CODE ANN. § 39-11-611(a) (2001); TEX. PENAL CODE ANN. § 9.32(a)(2) (2002); UTAH CODE ANN. § 76-2-402(3) (2002); *People v. Humphrey*, 921 P.2d 1, 20 n.1 (Cal. 1996); *People v. Garcia*, 28 P.3d 340, 348 (Colo. 2001); *Johnson v. State*, 315 S.E.2d 871, 873 (Ga. 1984); *State v. McGreevey*, 105 P. 1047, 1051-52 (Idaho 1909); *People v. Rodriguez*, 543 N.E.2d 324, 328 (Ill. App. Ct. 1989); *Page v. State*, 40 N.E. 745, 745-46 (Ind. 1895); *State v. Scobee*, 748 P.2d 862, 867 (Kan. 1988); *Sikes v. Commonwealth*, 200 S.W.2d 956, 960 (Ky. 1947); *Cook v. State*, 467 So. 2d 203, 211 n.7 (Miss. 1985); *State v. Merk*, 164 P. 655, 658 (Mont. 1917); *Runion v. State*, 13 P.3d 52, 59 (Nev. 2000); *State v. Horton*, 258 P.2d 371, 373 (N.M. 1953); *Kirk v. Territory*, 60 P. 797, 805 (Okla. 1900); *State v. Hatcher*, 706 A.2d 429, 435 (Vt. 1997); *State v. Allery*, 682 P.2d 312, 316 (Wash. 1984). See also JOSHUA DRESSLER, *UNDERSTANDING CRIMINAL LAW* 226 (3d ed. 2001) ("At least until recently, and perhaps still, a slim majority of jurisdictions applied the rule that a non-aggressor is permitted to use deadly force to repel an unlawful deadly attack, even if he is aware of a place to which he can retreat in complete safety.").

24. "If a defender is obligated to retreat, he is obligated to give way to the forces of Unrecht or the Wrong." GEORGE P. FLETCHER, *RETHINKING CRIMINAL LAW* 865 (1978). See also RESTATEMENT (SECOND) OF TORTS § 65 (1965) reporters notes ("The interest of the actor in his personal dignity has been regarded as of greater importance than the social interest in the prevention of deadly affrays, and in the preservation of life and limb of those engaged in them.").

dominance.²⁵

Twenty-nine states have resisted the stand-your-ground ethos and require a would-be defender to try to avoid using deadly force, including a retreat “to the wall” if it can be done safely.²⁶ The rules are characterized as a triumph of civility over the American tendency to stand one’s ground: “[A]ll human life, even that of an aggressor, should be preserved if at all possible.”²⁷ The Model Penal Code advises that any “bullies” who dare to exploit the retreat rule should be met not with force, but with a report to the police.²⁸ However, in these jurisdictions flight from a nondeadly altercation generally is not required, and even flight from a deadly threat is rarely mandatory because many rules specify that the person retreating actually knows that a completely safe place exists and that she can get there unharmed.²⁹

Three U.S. jurisdictions claim a “middle ground” that shuns a categorical duty to retreat but still scrutinizes the defender’s

25. DRESSLER, *supra* note 23, at 227 (explaining that requiring retreat “might embolden aggressors; and innocent people, if required to retreat, might be killed while fleeing”).

26. ALA. CODE § 13-A-3-23(b)(1) (2002); ALASKA STAT. § 11.81.335 (2001); ARK. CODE ANN. § 5-2-607(b) (2001); CONN. GEN. STAT. § 53a-19(b) (2001); DEL. CODE. ANN. tit. 11, § 464(e)(2) (2001); HAW. REV. STAT. § 703-304(5)(b) (2001); NEB. REV. STAT. § 28-1409(4)(b) (2002); N.H. REV. STAT. ANN. § 627:4(III)(a) (2002); N.J. STAT. ANN. § 2C:3-4(b)(2)(b) (2002); N.Y. PENAL LAW § 35.15(2)(a) (2002); N.D. CENT. CODE § 12.1-05-07(2)(b) (2002); 18 PA. CONS. STAT. § 505(B)(2)(ii) (2002); *Thompson v. State*, 552 So. 2d 264, 266 (Fla. Dist. Ct. App. 1989); *State v. Badgett*, 167 N.W.2d 680, 683 (Iowa 1969); *State v. Lavery*, 495 A.2d 831, 832 (Me. 1985); *Burch v. State*, 696 A.2d 443, 458 (Md. 1997); *Commonwealth v. DeCaro*, 269 N.E.2d 673, 674 (Mass. 1971); *Pond v. People*, 8 Mich. 150, 176 (1860); *State v. Johnson*, 277 Minn. 368, 373, 152 N.W.2d 529, 532 (1967); *State v. Jordan*, 646 S.W.2d 747, 751 (Mo. 1983); *State v. Stevenson*, 344 S.E.2d 334, 335 (N.C. Ct. App. 1986); *State v. Jackson*, 490 N.E.2d 893, 896 (Ohio 1986); *State v. Charles*, 647 P.2d 897, 903 (Or. 1982); *State v. Martinez*, 652 A.2d 958, 961 (R.I. 1995); *State v. Long*, 480 S.E.2d 62, 63 (S.C. 1997); *State v. Stumbaugh*, 132 N.W. 666, 674 (S.D. 1911); *Vaiden v. Commonwealth*, 53 Va. 717, 729 (1855); *State v. Boggess*, 512 S.E.2d 189, 195 (W. Va. 1998); *Baier v. State*, 891 P.2d 754, 760 (Wyo. 1995). In all jurisdictions, no retreat is required from an intruder’s attack in the home. See *infra* note 37 and accompanying text. See also WAYNE R. LAFAVE, CRIMINAL LAW 498 (3d ed. 2000).

27. DRESSLER, *supra* note 23, at 227.

28. MODEL PENAL CODE § 3.04 cmt. 4(c) at 54 (Official Draft 1985).

29. *Id.* at 54-55 (“retreat is only a requisite if the actor knows that he can avoid the need to use such force *with complete safety* by retreating”). See also DRESSLER, *supra* note 23, at 228 (“The practical effect of these conditions is that people under attack rarely are compelled to retreat, especially when the aggressor is armed with a gun”); ARNOLD H. LOEWY, CRIMINAL LAW IN A NUTSHELL 74 (3d ed. 2000) (noting that retreat from nondeadly attack generally is not required).

behavior. In the District of Columbia, a defender who fails to retreat might convey that a case of “true self-defense” did not exist.³⁰ Louisiana and Wisconsin dismiss a duty to retreat but nonetheless assess the “possibility of escape” and “opportunity to retreat” in determining whether force was appropriate.³¹

Even though deep differences in the nation’s retreat rules may embody “deeper ideological clashes” about criminal law,³² the competing policies draw on two basic tenets of self-defense law: necessity³³ and proportionality.³⁴ Where retreat is required, deadly force is deemed necessary only when the defender feels he had “no choice” but to kill or when he confidently chose the “lesser evil”; where defenders may stand their ground, killing is necessary because personal liberty has been threatened.³⁵ Under rules of

30. *Gillis v. United States*, 400 A.2d 311, 313 (D.C. 1979) (explaining the “middle ground” approach that “does not impose a duty to retreat but does allow a failure to retreat, together with all the other circumstances, to be considered by the jury in determining if there was a case of true self-defense”).

31. *State v. Brown*, 414 So. 2d 726, 729 (La. 1982) (“Although there is not an unqualified duty to retreat the possibility of escape is a recognized factor in determining whether or not a defendant had the reasonable belief that deadly force was necessary to avoid the danger.”); *State v. Wenger*, 593 N.W.2d 467, 471 (Wis. Ct. App. 1999) (“While Wisconsin has no statutory duty to retreat, whether the opportunity to retreat was available may be a consideration regarding whether the defendant reasonably believed the force used was necessary to prevent or terminate the interference.”), *review denied*, 599 N.W.2d 409 (Wis. 1999).

32. FLETCHER, *supra* note 24, at 874.

33. Necessity in the criminal context is “[a] justification defense for a person who acts in an emergency that he or she did not create and who commits a harm that is less severe than the harm that would have occurred but for the person’s actions.” BLACK’S, *supra* note 2, at 1053. *See also* Stephen J. Schulhofer, *The Gender Question in Criminal Law*, 7 SOC. PHIL. & POL’Y 105, 117 (1990) (asserting that in self-defense killings, “the touchstone for the courts is always necessity”). *But see* Perkins, *supra* note 22, at 133 (concluding that necessity in the self-defense context is based on “false conclusions drawn from incomplete generalizations”).

34. A basic tenet of self-defense law is that returned force must “not be unreasonable or disproportionate relative to the interest defended.” FLETCHER, *supra* note 24, at 870.

35. Columbia Law School professor George P. Fletcher outlines three competing notions of necessity as it relates to self-defense law: (1) Necessity as an excuse. The defender is at the wall and involuntarily sees “no choice” but to kill. Because most people would do the same thing, his act is morally and legally permissible. (2) Necessity as a choice involving “lesser evils.” Although the “lesser evils” theory normally favors preserving life over property or dignity, an aggressor is said to forfeit his right to life by starting a fight and, subsequently, the evil of killing is lessened. Fletcher says this is the dominant self-defense theory in the United States. (3) Necessity as vindication of autonomy. Defenders are entitled to kill aggressors who try to take away liberty, just as sovereign nations are entitled to expel invaders. This notion of necessity manifests most visibly in the castle

proportionality, “one must submit to a box on the ear and seek redress in the courts if he is unable to prevent it by means other than resort to deadly force.”³⁶

3. *The “Castle” Exception*

Even retreat-to-the-wall jurisdictions recognize an exception: a person attacked in or around the home may stand her ground and fight, regardless of whether safe escape is known or possible.³⁷ As “handed down to us through many generations,”³⁸ the “castle doctrine”³⁹ frequently contains caveats that only nondeadly force is proper for “mere civil trespass”⁴⁰ and that the defender had no fault in instigating the conflict.⁴¹

The Supreme Court endorsed the doctrine in 1895, ruling in *Beard v. United States* that a faultless defendant who was “where he had the right to be” need not consider retreat when his assailant “advanced upon him in a threatening manner, and with a deadly weapon[.]”⁴²

doctrine. Fletcher says “the first two models of necessary defense readily support a duty to retreat prior to killing the assailant” FLETCHER, *supra* note 24, at 856-65.

36. Perkins, *supra* note 22, at 136. Proportionality has bred differentiation between deadly force and nondeadly force and has helped define categories of defense of person, defense of habitation and defense of property. FLETCHER, *supra* note 24, at 871.

37. DRESSLER, *supra* note 23, at 228. Of course, a person withstanding attack still may choose retreat. See FURNISH & SMALL, *supra* note 11, at 71 (“For many individuals, confrontation would be too fearful. Even an armed and fairly confident householder might at some moment panic and flee, his retreat having nothing to do with the retreat rule.”).

38. *State v. Phillips*, 187 A. 721, 721 (Del. 1936).

39. Defense of habitation “stems from the law’s early view that a man’s home is his ‘fortress’ or ‘castle.’” FRED E. INBAU ET AL., CASES AND COMMENTS ON CRIMINAL LAW 198 (3d ed. 1983). See also definition of “castle doctrine,” *supra* note 2. See, e.g., ALASKA STAT. § 11.81.335(b)(1) (2001) (requiring retreat before using deadly force unless the defender is on premises that he owns or leases); MINN. STAT. § 609.065 (2001) (permitting deadly force to prevent “great bodily harm or death” or commission of a felony in the actor’s place of abode); NEV. REV. STAT. § 200.160 (2001) (justifying homicide when used to resist “a felony upon the slayer, in his presence, or upon or in a dwelling, or other place of abode in which he is”).

40. INBAU, *supra* note 39, at 199.

41. “[T]he law is well settled that the ‘castle’ doctrine can be invoked only by one who is without fault in bringing the conflict on.” *United States v. Peterson*, 483 F.2d 1222, 1237 (D.C. Cir. 1973). See also MODEL PENAL CODE § 3.04(2)(b)(ii)(A) at 56 (Official Draft 1985) (stating that an individual is not required to retreat from the home unless the actor was the initial aggressor).

42. 158 U.S. 550, 560, 564 (1895). Cf. *Allen v. United States*, 164 U.S. 492,

The castle doctrine's rationale is that there is not (or at least should not be) a place safer than home.⁴³

[T]he dwelling-place exception to the retreat rule recognizes the importance of the sovereign person's ability to retain control of the single place in the world that is most clearly his or her own, not necessarily in the sense that the individual holds title to it, but rather in the sense that it is the place in which that person's decisions and actions are least susceptible to intrusion from the requirements of others.⁴⁴

Castle and sovereign person are defined broadly. Front porches and similar "curtilage" around a home usually receive the law's protection—sometimes even broader protection than in search-and-seizure cases.⁴⁵ Trailers in mobile home parks, cribs in farmyards, automobiles on public highways, and even tents in public campgrounds have been considered castles.⁴⁶ Guests, babysitters and household employees have been among those shielded.⁴⁷

530 (1896) (limiting *Beard* to defense of habitation and allowing a general duty to retreat in other instances).

43. "The rationale is that a person in her own home has already retreated 'to the wall,' as there is no place to which she can further flee in safety." *State v. Thomas*, 673 N.E.2d 1339, 1343 (Ohio 1997).

44. ROBERT F. SCHOPP, JUSTIFICATION DEFENSES AND JUST CONVICTIONS 86 (1998).

45. *Compare* *State v. Bonano*, 284 A.2d 345, 347 (N.J. 1971) (refusing to require retreat from a front porch) *with* *Commonwealth v. Perdue*, 564 A.2d 489, 492 (Pa. Super. Ct. 1989) (holding that police needed no warrant to search a garbage can underneath the defendant's porch), *appeal denied*, 574 A.2d 604 (Pa. 1990). *See also* *People v. Canales*, 624 N.W.2d 918, 921 (Mich. 2001) (Corrigan, C.J., dissenting) (noting that extending the retreat exception to the "curtilage" surrounding the home "has serious implications for the use of deadly force in densely populated urban areas").

46. *State v. Borwick*, 187 N.W. 460, 463 (Iowa 1922) ("When [a person] takes his family or friends or guests into his car and drives out upon the public street, we think it no undue stretch of the principle to hold that the car is (in a restricted sense, perhaps), for the time being, his castle . . ."); *State v. Baird*, 640 N.W.2d 363, 369 (Minn. Ct. App. 2002) (ordering new trial when jurors were instructed that co-residents had a duty to retreat from a motor home), *review granted*, No. C1-01-894, 2002 Minn. LEXIS 324 (May 14, 2002); *State v. Frizzelle*, 89 S.E.2d 725, 726 (N.C. 1955) ("[T]he curtilage of the home will ordinarily be construed to include at least the yard around the dwelling house as well as the area occupied by barns, cribs, and other outbuildings . . ."); *State v. Marsh*, 593 N.E.2d 35, 38 (Ohio Ct. App. 1990) ("[F]or purposes of a duty to retreat, a tent and a home are the logical equivalent of each other.").

47. *People v. White*, 484 N.Y.S.2d 994 (Sup. Ct. 1984) (extending protection to "nonresident family members, household employees, baby-sitters, social guests

But there are limits. A prison may not be a home worthy of defense, and merely owning a dwelling may not make one a resident in it.⁴⁸ The domicile is not a venue for violence: “The home provides a haven, not an arena.”⁴⁹

4. *Retreat Requirements When Co-Residents Are Involved*

Nineteen states do not require retreat inside or outside the home, leaving thirty-two jurisdictions to grapple with whether the castle doctrine applies to co-residents.⁵⁰ Among those thirty-two jurisdictions, seven join the Restatement (Second) of Torts in requiring a home-dweller to consider retreat before defending against a co-resident with deadly force. In North Dakota, the law is set by statute.⁵¹ Elsewhere, the rules have been established by courts⁵² that stress notions of necessity,⁵³ the precious quality of

and others”); *State v. Stevenson*, 344 S.E.2d 334, 336-37 (N.C. Ct. App. 1986) (holding that “neither permanency of residence nor a leasehold interest in the premises is required before a person is legally justified in standing her ground”).

48. *People v. Fisher*, 420 N.W.2d 858, 864 (Mich. Ct. App. 1988) (refusing to protect a property owner who had not lived at the premises for eight months), *rev'd on other grounds*, 503 N.W.2d 50 (Mich. 1993); *State v. McCray*, 324 S.E.2d 606, 615 (N.C. 1985) (refusing to consider a prison a self-defense claimant’s “home”).

49. *State v. Herriges*, 455 N.W.2d 635, 638 (Wis. Ct. App. 1990) (holding that an actor who provoked a fight in his home may not invoke the no-duty-to-retreat rule).

50. *See supra* Part II.A.2.

51. N.D. CENT. CODE § 12.1-05-07(2)(b) (2002). In 1983, the North Dakota Supreme Court rejected a claim that the statute violates the U.S. Constitution because it requires defenders to differentiate between co-residents and nonresidents. *State v. Leidholm*, 334 N.W.2d 811, 821 (N.D. 1983).

52. *State v. Shaw*, 441 A.2d 561, 566 (Conn. 1981) (stating tenant who rented a bedroom not allowed to defend against co-occupant); *Cooper v. United States*, 512 A.2d 1002, 1006 (D.C. 1986) (holding that “evidence that the defendant was attacked in his home by a co-occupant did not entitle him to an instruction that he had no duty whatsoever to retreat”); *State v. Necaize*, 466 So. 2d 660, 663, 667 (La. 1985) (holding that the “trial judge was duty bound to include a statement on the possibility of retreat” for a woman charged with killing her abusive husband in their bedroom”); *State v. Grierson*, 69 A.2d 851, 854 (N.H. 1949) (holding that the “privilege of the [no-retreat] rule does not exist [for co-residents] and the person must retreat if this is a reasonable means of avoiding the danger”); *State v. Ordway*, 619 A.2d 819, 824 (R.I. 1992) (noting that “the obligation to attempt retreat exists even when one is assaulted in his or her own living quarters by his or her co-occupant”); *State v. Crawford*, 66 S.E. 110, 110 (W. Va. 1909) (holding that the castle doctrine did not apply when “defendant and deceased were at the time of the homicide jointly occupying the house where the killing occurred”). *See also* RESTATEMENT (SECOND) OF TORTS § 65 reporters notes (1965) (“[T]he exceptional privilege to stand one’s ground in a dwelling which is the final place of refuge should not apply as against an assailant who is also within his own dwelling place

human life,⁵⁴ the duties that even unrelated co-residents owe each other,⁵⁵ and a distaste for sanctioning “the reenactment of the climactic scene from ‘High Noon’ in the familial kitchens[.]”⁵⁶

Eighteen states where retreat generally is required outside the home maintain exceptions for residents who face attack from fellow co-residents. Statutes in Hawaii, Nebraska, and Pennsylvania follow the Model Penal Code, which requires retreat from a co-worker but not a co-resident.⁵⁷ A recently altered statute now permits co-residents to stand their ground in New Jersey, where the state’s supreme court had expressed “grave concerns” over a statutory “loophole in the castle doctrine” that required a co-resident’s retreat.⁵⁸ Fourteen of the eighteen states have set rules through common law.⁵⁹ Some courts say co-residents have no place

and castle.”).

53. “[T]he right of self-defense is born of necessity and should terminate when the necessity is no more.” *State v. Quarles*, 504 A.2d 473, 476 (R.I. 1986) (holding that a co-resident facing an attack from another co-resident must attempt retreat).

54. *See State v. Shaw*, 441 A.2d 561, 566 (Conn. 1981) (explaining that the co-resident retreat rule “is in line with a policy favoring human life over the burden of retreating from the home”).

55. *Cooper v. United States*, 512 A.2d 1002, 1006 (D.C. 1986) (“[A]ll co-occupants, even those unrelated by blood or marriage, have a heightened obligation to treat each other with a degree of tolerance and respect.”).

56. *State v. Shaw*, 441 A.2d 561, 566 (Conn. 1981).

57. MODEL PENAL CODE § 3.04(2)(b)(ii)(A) (Official Draft 1985) (“[T]he actor [contemplating deadly force] is not obliged to retreat from his dwelling or place of work, unless he was the initial aggressor or is assailed in his place of work by another person whose place of work the actor knows it to be.”); *see also* HAW. REV. STAT. § 703-304(5)(b)(i) (2001); NEB. REV. STAT. § 28-1409(4)(b)(i) (2001); 18 PA. CONS. STAT. § 505(B)(2)(ii)(A) (2002). Originally, Model Penal Code drafters required a co-resident’s retreat, but a vote taken during American Law Institute proceedings in 1958 resulted in the current guideline. *See* MODEL PENAL CODE § 3.04 cmt. 4(c) at 56 (Official Draft 1985).

58. *Compare* N.J. STAT. ANN. § 2C:3-4b(2)(b)(i) (2002) (holding that “[t]he actor is not obliged to retreat from his dwelling, unless he was the initial aggressor”) *with* N.J. STAT. ANN. § 2C:3-4b(2)(b)(i) (1998) (including the additional language “or is assailed in his dwelling by another person whose dwelling the actor knows it to be”). In 1997, the New Jersey Supreme Court urged the co-resident retreat law to be reconsidered “in the case of a spouse battered in her own home.” *State v. Gartland*, 694 A.2d 564, 571 (N.J. 1997). *See also* Melissa Wheatcroft, Note, *Duty to Retreat for Cohabitants — In New Jersey a Battered Spouse’s Home Is Not Her Castle*, 30 RUTGERS L.J. 539, 542 (1999) (concluding that New Jersey had “inexcusably burden[ed] battered persons living with their batterers, forcing them to attempt a nearly impossible escape, risk serious bodily harm, or face prison terms for actions that would be excused if the assailant was a stranger rather than a cohabitant”).

59. *See Wilkinson v. State*, 374 So. 2d 396, 399-400 (Ala. Crim. App. 1979)

besides the home for a safe retreat,⁶⁰ that it is illogical to require a victim to distinguish between intruders and co-residents,⁶¹ and that it is unfair to force a faultless victim to try to avoid peril when attacked in what should be one's safest place.⁶²

(approving jury instruction in a spousal homicide case that retreat law was inapplicable because the defendant was in the home), *writ denied*, 374 So. 2d 400 (Ala. 1979); *Thomas v. State*, 583 S.W.2d 32, 37 (Ark. 1979) (noting that "an occupant of the house" need not retreat from an encounter with a fellow occupant); *State v. Phillips*, 187 A. 721, 721 (Del. 1936) (ruling that a "lawful occupant" need not retreat when "violently attacked by another occupant, in circumstances showing an imminence of death or of great bodily harm"); *Weiand v. State*, 732 So. 2d 1044, 1051 (Fla. 1999) (joining "the majority of jurisdictions that do not impose a duty to retreat from the residence when a defendant uses deadly force in self-defense, if that force is necessary to prevent death or great bodily harm from a co-occupant"); *State v. Jacoby*, 260 N.W.2d 828, 835 (Iowa 1977) (endorsing *State v. Leeper*, 200 N.W. 732, 736 (Iowa 1925), in which the court stated, "[t]he fact that the assailant is also an occupant of the home, with an equal right there, does not put upon the one assaulted any duty to retreat"); *State v. Laverty*, 495 A.2d 831, 833 (Me. 1985) (ruling that the "dwelling place exception" to the general rule that requires retreat applies to co-residents); *People v. Lenkevich*, 229 N.W.2d 298, 300 (Mich. 1975) (holding that the victim of an attack by a non-intruder "is without fault [and] need not 'retreat to the wall' before defending herself"); *State v. Glowacki*, 630 N.W.2d 392, 402 (Minn. 2001) ("There is no duty to retreat from one's own home when acting in self-defense in the home, regardless of whether the aggressor is a co-resident."); *State v. Hafeli*, 715 S.W.2d 524, 528-29 (Mo. Ct. App. 1986) (noting that it was error not to instruct the jury that a co-resident is covered by the retreat exception); *People v. Tomlins*, 107 N.E. 496, 497 (N.Y. 1914) (noting that it "never has been the law" that one must retreat from attack in one's own home); *State v. Browning*, 221 S.E.2d 375, 377 (N.C. Ct. App. 1976) (noting that the state supreme court had not addressed a co-resident's duty to retreat, and holding that retreat is not required from home or curtilage regardless of "whether the assailant be an intruder or another lawful occupant of the premises"); *State v. Thomas*, 673 N.E.2d 1339, 1343 (Ohio 1997) (reasoning that "one is not required to retreat from one's own home when attacked by an intruder; similarly one should not be required to retreat when attacked by a cohabitant in order to claim self-defense"); *State v. Sales*, 328 S.E.2d 619, 620 (S.C. 1985) (ruling that defendant could "claim immunity from the law of retreat" when he intervened to protect his sister in her house when she was attacked by a live-in boyfriend); *State v. Burtzlaff*, 493 N.W.2d 1, 8 (S.D. 1992) (upholding a jury instruction that a wife facing her husband's abuse in the home "had the right to stand her ground").

60. *People v. Tomlins*, 107 N.E. 496, 497-98 (N.Y. 1914) ("[A] man assailed in his own dwelling . . . is under no duty to take to the fields and the highways, a fugitive from his own home The rule is the same whether the attack proceeds from some other occupant or from an intruder.").

61. *State v. Thomas*, 673 N.E.2d 1339, 1343 (Ohio 1997). "There is no rational reason for a distinction between an intruder and a cohabitant when considering the policy for preserving human life where the setting is the domicile . . ." *Id.*

62. *People v. Lenkevich*, 229 N.W.2d 298, 300 (Mich. 1975) (holding that the victim of an attack by a non-intruder "is without fault [and] need not 'retreat to

Six states with general duties to retreat appear not to have addressed the co-resident question directly.⁶³ Additionally, the law is in disarray in Massachusetts, where in 1975 the supreme judicial court withstood “widespread criticism” after ruling that a woman abused by her mate had a duty to retreat from her home before killing him.⁶⁴ In response, the legislature passed a law allowing residents to stand their ground against people unlawfully in a dwelling.⁶⁵ Subsequently, the Massachusetts Supreme Judicial Court has stressed that retreat still may be required when an assailant is lawfully on the premises.⁶⁶

5. *The Special Circumstances of Domestic Violence*

Too often, homes are violent places. Reliable data are difficult to obtain⁶⁷ and countless crimes go unreported,⁶⁸ but a few recent

the wall’ before defending herself”).

63. They are Alaska, Maryland, Oregon, Virginia, Wisconsin, and Wyoming. Two of the states have not required a resident to retreat from invited guests. *See Gainer v. State*, 391 A.2d 856, 861 (Md. Ct. Spec. App. 1978); *Reid v. Commonwealth*, No. 1783-92-1, 1994 Va. App. LEXIS 370, at *9 (Va. Ct. App. June 14, 1994). Oddly, the Kentucky Supreme Court twice has required residents to retreat from invited guests even though retreat generally is not required outside the home. *See Baker v. Commonwealth*, 202 S.W.2d 1010, 1012 (Ky. 1947); *Oney v. Commonwealth*, 9 S.W.2d 723, 725 (Ky. 1928). In Wyoming, a jury instruction that a guest need not retreat before acting in defense was rejected because the claim involved self-defense, not defense of habitation. *State v. Eldredge*, 21 P.2d 545, 547 (Wyo. 1933).

64. *Commonwealth v. Shaffer*, 326 N.E.2d 880, 883 (Mass. 1975) (ruling that the retreat-to-the-wall rule “has equal application to one assaulted in his own home”). LLOYD L. WEINREB, *CRIMINAL LAW: CASES, COMMENT, QUESTIONS* 206 (6th ed. 1998) (“The decision in *Shaffer* prompted much discussion and widespread criticism from persons who asserted that the defendant was an example of the battered woman.”).

65. 1981 MASS. ACTS c. 696 (codified as MASS. GEN. LAWS ch. 278, § 8A (2002)). *See also Commonwealth v. Peloquin*, 754 N.E.2d 703, 705 n.3 (Mass. App. Ct. 2001) (noting that the statute was a response to *Shaffer*, 326 N.E.2d at 883), *overruled on other grounds*, 770 N.E.2d 440 (Mass. 2002).

66. *Commonwealth v. Lapointe*, 522 N.E.2d 937, 942 (Mass. 1988). *See also Commonwealth v. Peloquin*, 770 N.E.2d 440, 444 (Mass. 2002) (concluding that MASS. GEN. LAWS ch. 278 § 8A (2002) does not allow a resident to stand his ground against an invited guest); *Commonwealth v. Noble*, 707 N.E.2d 819, 823 (Mass. 1999) (noting that trespass law should be used to determine intruders in duty-to-retreat cases).

67. *See The Structure of Family Violence: An Analysis of Selected Incidents*, FBI UNIFORM CRIME REPORTS 1, available at <http://www.fbi.gov/ucr/nibrs/famvio21.pdf> (last visited Sept. 29, 2002) (noting that “the involvement of family members, friends, and acquaintances is not delineated” for most violent crimes); EVE S. BUZAWA & CARL G. BUZAWA, *DOMESTIC VIOLENCE: THE CRIMINAL JUSTICE*

statistics of reported crimes offer a glimpse. In 2000, 53% of violent-crime victims in the United States knew the offender, 61% of simple assaults were committed by people known to the victim, and one in five violent crimes on a woman was done by an “intimate.”⁶⁹ When a death resulted and police could determine a relationship between the victim and alleged killer, a family member, boyfriend, or girlfriend was responsible 31% of the time.⁷⁰

Retreat rules and other self-defense laws, ostensibly crafted from a male perspective, are of particular importance to women because they most often are victims of at-home violence.⁷¹ Commentators and researchers often assert that rules requiring retreat ignore evidence that a woman is more likely to be killed by her partner when she leaves an abusive relationship,⁷² and that women and their children who flee abuse often have no safe place to go.⁷³ Requiring retreat is seen as ignoring battered woman

RESPONSE 8, 10 (2d ed. 1996) (concluding that because no single entity collects domestic violence data, statistics “are of necessity inexact, with official statistics that are not accepted as definitive”).

68. In 1999, an estimated 54% of violent crimes were not reported to police; nearly 60% of simple assaults went unreported. SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 2000, p. 208 (28th ed.) (U.S. Department of Justice data), *available at* <http://www.albany.edu/sourcebook/1995/pdf/t338.pdf> (last visited Sept. 29, 2002).

69. *Id.* at 196, *available at* <http://www.albany.edu/sourcebook/1995/pdf/t317.pdf> (last visited Sept. 29, 2002).

70. Data are for murders and non-negligent manslaughters in 2000. Relationships were known in 7,428 of the nation’s homicides; 3,308 of the victims (44.5%) were acquaintances or friends; 2,306 (31.0%) were family members, boyfriends or girlfriends; 1,688 (22.7%) were strangers; and 126 (1.6%) were neighbors, employees, or employers. Relationships were not delineated in 5,515 of the 12,943 cases. *Id.*, Table 3.141, *available at* <http://www.albany.edu/sourcebook/1995/pdf/t3141.pdf> (last visited Sept. 29, 2002).

71. *See* State v. Gartland, 694 A.2d 564, 570 (N.J. 1997) (concluding that male pronouns in self-defense statutes “reflect a history of self-defense that is derived from a male model”); DENISE KINDSCHI GOSSELIN, HEAVY HANDS: AN INTRODUCTION TO THE CRIMES OF DOMESTIC VIOLENCE 16 (2000) (summarizing expert research that men are victims in approximately 5% of domestic-violence cases, although “[s]ome researchers suggest that the incidence of male battered may be as high as female battering”).

72. “Women who leave their abusive partners are most vulnerable to being beaten and killed, up to 75 percent greater than for those who stay.” GOSSELIN, *supra* note 71, at 15. *See also* B. Sharon Byrd, *Putative Self-Defense and Rules of Imputation in Defense of the Battered Woman*, in FOUNDATIONS OF CRIMINAL LAW 265 (Katz et al. eds., 1999) (“She may have tried to escape in the past with the result that her husband has found her and beaten her even more brutally.”).

73. “Because judges and juries often are not aware of the limited escape opportunities feasible, they may assume she could have just walked out the door, called the police, or sought refuge in a battered woman’s shelter.” Erica Beecher-

syndrome⁷⁴ and is said to further stereotypes that an abused woman may leave at any time.⁷⁵

As noted researcher Lenore E. Walker wrote in her landmark 1979 treatise *The Battered Woman*: “In a society where women are culturally indoctrinated to believe that love and marriage are their true fulfillment, nothing is lost by pretending that they are free to leave home whenever the violence becomes too great.”⁷⁶ Still, University of Chicago law professor Stephen J. Schulhofer asserts that many women do escape abuse, and those who do not “should have to prove the concrete circumstances that prevented them from doing likewise.”⁷⁷

The effect of retreat rules on battered women has been contentious in Florida, where the issue was certified as a question of “great public importance” in 1999 and a controversial supreme court case requiring retreat was overruled after the state’s governor granted clemency to six battered women convicted of murder.⁷⁸ In

Monas, *Domestic Violence: Competing Conceptions of Equality in the Law of Evidence*, 47 LOY. L. REV. 81, 111-12 (2001).

74. See BLACK’S, *supra* note 2, at 146 (defining *battered-woman syndrome* as “[t]he medical and psychological condition of a woman who has suffered physical, sexual, or emotional abuse at the hands of a spouse or lover. This syndrome is sometimes proposed as a defense to justify a woman’s killing of a man”). In Minnesota, battered woman syndrome is a “scientifically recognized and accepted psychological syndrome” for women, but not for men. *State v. Nystrom*, 596 N.W.2d 256, 260 (Minn. 1999). See also *State v. Borchardt*, 478 N.W.2d 757, 761 (Minn. 1991) (agreeing that “male sexual victimization” theory has not “reached the required level of scientific acceptance” for admission in a homicide trial).

75. “The feminist position has generally been hostile to retreat rules on the theory that they too easily dissolve into questions about why the woman did not leave the relationship rather than whether the knife was poised above her head.” V.F. Nourse, *Self-Defense and Subjectivity*, 68 U. CHI. L. REV. 1235, 1280 (2001). See also *Weiand v. State*, 732 So. 2d 1044, 1054 (Fla. 1999) (explaining the “common myth” that women can leave an abusive relationship at any time).

76. LENORE E. WALKER, *THE BATTERED WOMAN* 29 (1979). Walker is a professor at Nova Southeastern University. For a biography, see <http://www.cps.nova.edu/faculty/Ffulltime/walker/walker.html> (last visited Sept. 29, 2002).

77. Schulhofer, *supra* note 33, at 129. Women who kill abusive mates because they cannot leave or have been “pursued, beaten, and dragged back” after a previous escape deserve to be acquitted, Schulhofer says. “[C]ourts and juries can be led to understand that a person in that situation would have reasonably concluded that escape was impossible.” *Id.*

78. See *Weiand*, 732 So. 2d at 1047 (agreeing to reconsider the co-resident duty-to-retreat rule under Fla. Const. art. V, § 3(b)(4), which affords the Florida Supreme Court discretionary jurisdiction to review questions “of great public importance”), *overruling State v. Bobbitt*, 415 So. 2d 724, 726 (Fla. 1982) (holding that the no-retreat rule does not apply when co-residents “had equal rights to be in

reversing a seventeen-year-old rule, the Florida Supreme Court acknowledged an “increased understanding of the plight of victims of domestic violence.”⁷⁹ The court singled out studies showing that retreat may increase a battered woman’s chance of being killed⁸⁰ and recognized fears that jurors may be confused by duty-to-retreat instructions.⁸¹

The change in Florida, recognized as a “step forward in affording more protection to victims of domestic violence,”⁸² is typical of efforts to make laws fairer for women by erasing duty-to-retreat rules.⁸³ However, a researcher who studied 223 cases in

the ‘castle’ and neither had the legal right to eject the other”). In *Weiland*, the court said: “We now conclude that it is appropriate to recede from *Bobbitt* . . . We join the majority of jurisdictions that do not impose a duty to retreat from the residence when a defendant uses deadly force in self-defense, if that force is necessary to prevent death or great bodily harm from a co-occupant.” 732 So. 2d at 1051. See also Julie Hauserman, *Six Battered Women Who Killed Are Freed*, ST. PETERSBURG TIMES, Dec. 30, 1998, at A1 (explaining that the women, who were freed on Christmas Eve 1998 as news helicopters circled the prison, had told stories of their abuse to Florida’s Cabinet and Gov. Lawton Chiles during a clemency hearing. Chiles died two days afterward. Clemency was granted by Gov. Buddy MacKay. Some relatives of people who were killed were outraged) “Three trials and three juries found her guilty. Then, a bunch of politicians up there just turn her loose,” one relative said. “Where’s the justice in that?” *Id.*

79. *Weiland*, 732 So. 2d at 1051. The court also abandoned the argument that retreat is required because one co-resident has no right to eject the other: “[O]ur decision in *Bobbitt* appears to have been grounded upon the sanctity of property and possessory rights, rather than the sanctity of human life.” *Id.* at 1052.

80. *Id.* at 1053 (quoting LENORE E. WALKER, TERRIFYING LOVE: WHY BATTERED WOMEN KILL AND HOW SOCIETY RESPONDS 65 (1989): “[T]he batterer would often rather kill, or die himself, than separate from the battered woman”; and DONALD G. DUTTON, THE BATTERER: A PSYCHOLOGICAL PROFILE 15 (1995), who cited a case study showing that 45% of women’s murders “were generated by the man’s ‘rage over the actual or impending estrangement from his partner’”).

81. *Weiland*, 732 So. 2d at 1054 (noting that a jury instruction on requiring a victim’s retreat furthers an incorrect stereotype about women’s ability to leave an abusive relationship).

82. Christy S. Etheredge, Comment, *The Castle Doctrine: Extension of the Rule to Co-inhabitants*, 3 FLA. L. REV. 695, 702 (2000).

83. See, e.g., CYNTHIA K. GILLESPIE, JUSTIFIABLE HOMICIDE: BATTERED WOMEN, SELF-DEFENSE, AND THE LAW 187-88 (1989) (asserting that requiring retreat is unfair to women defendants); Phyllis L. Crocker, *The Meaning of Equality for Battered Women Who Kill Men in Self-Defense*, 8 HARV. WOMEN’S L.J. 121, 144 (1985) (advocating expert testimony in cases of battered woman’s syndrome); Kit Kinports, *Defending Battered Women’s Self-Defense Claims*, 67 OR. L. REV. 393, 416 (1988) (suggesting a “reasonable battered woman” standard); Cathryn Jo Rosen, *The Excuse of Self Defense: Correcting a Historical Accident on Behalf of Battered Women Who Kill*, 36 AM. U. L. REV. 11, 46 (1986) (“Treatment of all self-defense as an excuse would further the criminal justice system’s interest in discouraging self-help, promote society’s interest in preserving the sanctity of human life, and fulfill

which women appealed convictions for killing their mates challenged the view that discriminatory self-defense laws are solely to blame: “[T]he most common impediments to fair trials for battered women are the result not of the structure or content of existing law but of its application by trial judges.”⁸⁴

B. In Minnesota

1. Defending Self and Home: The Basics

From Minnesota’s infancy, the state’s courts and legislature have stressed that force used in self-defense must be necessary and proportional to the threatened harm. The state’s first reported case on self-defense came in 1859, one year after statehood, as the Minnesota Supreme Court ruled that a defendant anticipating a blow from a cane was not justified in hitting his would-be assailant with disproportionate force.⁸⁵ “Every assault will not justify a battery; and whether the degree of force used by the defendant was justified by the occasion, is a question to be determined on the evidence.”⁸⁶ A few years later, the court stressed that a defender may harm another person only to prevent even greater harm. “Self-defense . . . must not exceed the bounds of mere defense and prevention. To justify such act there must be at least an apparent *necessity* to ward off by force some bodily harm.”⁸⁷

In the years that followed, Minnesota’s courts and legislature consistently scrutinized levels of force to determine reasonable responses to threatened harm.⁸⁸ Today, deadly force generally is

the feminist goal of absolving battered women who kill of guilt without proclaiming that such women are inferior to men.”). *But see* DRESSLER, *supra* note 23, at 236 (“Is it fair to hold a diminutive and weak man who lacks self-defense skills to the standard of a ‘reasonable man,’ if the latter standard assumes that males are tall, strong, and experienced in combat?”).

84. Holly Maguigan, *Battered Women and Self-Defense: Myths and Misconceptions in Current Reform Proposals*, 140 U. PA. L. REV. 379, 383 (1991).

85. *Gallagher v. State*, 3 Minn. 185, 187 (1859). A review of Minnesota’s earliest supreme court decisions revealed that *Gallagher* provided the state’s first reported common-law rule of self-defense.

86. *Id.* The court urged that force used to prevent an assault must be proportional: “[T]he party thus assaulted may strike or use a sufficient degree of force to prevent the intended blow, without retreating at all.” *Id.*

87. *State v. Shippey*, 10 Minn. 223, 231 (1865).

88. *See, e.g., State v. McKissic*, 415 N.W.2d 341, 344 (Minn. 1987) (noting that even if a defendant’s actions satisfy the elements of self-defense, jurors still may convict when they find that “the amount of force used was unreasonable under the

available to a defender who fears “great bodily harm or death,”⁸⁹ while “reasonable” force is allowed to protect property.⁹⁰

Amid threats at home, however, a “peculiar immunity” from general self-defense rules has evolved,⁹¹ and under Minnesota’s defense-of-dwelling statute a defender may use deadly force merely to stop an intruder from committing a felony, regardless of whether she fears harm.⁹² The burden is on the state to prove that the defender was not justified in her actions.⁹³

By allowing a home-dweller to use deadly force when faced with a felony, the state’s defense-of-dwelling law appears broader than the modern norm.⁹⁴ The Minnesota Court of Appeals has said the statute “may exceed what most people would think permissible under the law.”⁹⁵

circumstances”); *State v. Bland*, 337 N.W.2d 378, 381 (Minn. 1983) (clarifying that force used in self-defense is “limited to that which a reasonable person in the same circumstances would believe to be necessary”); *State v. McCuiston*, 514 N.W.2d 802, 806 (Minn. Ct. App. 1994) (noting that no force would be allowed to resist insurance fraud in one’s dwelling).

89. MINN. STAT. § 609.065 (2001) (allowing a killing “when necessary in resisting or preventing an offense which the actor reasonably believes exposes the actor or another to great bodily harm or death, or preventing the commission of a felony in the actor’s place of abode”).

90. MINN. STAT. § 609.06, subd. 1(4) (2001) (noting that “reasonable force may be used upon or toward the person of another without the other’s consent when . . . used by any person in lawful possession of real or personal property, or by another assisting the person in lawful possession, in resisting a trespass upon or other unlawful interference with such property”).

91. *State v. Touri*, 101 Minn. 370, 374, 112 N.W. 422, 424 (1907) (noting that the home has “peculiar immunity” because “it is sacred for the protection of . . . person and . . . family”).

92. MINN. STAT. § 609.065; *State v. Carothers*, 594 N.W.2d 897, 903 (Minn. 1999) (holding that under a defense-of-dwelling claim, a defender need not fear harm before using deadly force to thwart an intruder’s felonious act).

93. *State v. Harvey*, 277 N.W.2d 344, 346 (Minn. 1979) (reversing a murder conviction because the state “merely established that defendant did the shooting” and did not prove beyond a reasonable doubt that he was not justified in killing during an apparent home robbery).

94. See J. David Jacobs, *Privileges for the Use of Deadly Force Against a Residence-Intruder: A Comparison of the Jewish Law and the United States Common Law*, 63 TEMP. L. REV. 31, 49-50 (1990) (noting that “there is no longer a right to kill in order to prevent any felony”). Early common law allowed deadly force to fend off a felony because all felonies were punishable by death anyway. Today, deadly force normally is reserved for “dangerous” or “atrocious” felonies. *Id.* at 48-49. See also FLETCHER, *supra* note 24, at 861 (noting that the “absolute right to prevent the commission of a felony” is “often made, but typically unfounded in the law”).

95. *State v. McCuiston*, 514 N.W.2d 802, 805-07 (Minn. Ct. App. 1994) (ordering a new trial when a defense-of-dwelling instruction was omitted. “The legislature made a policy judgment that persons should be able to claim self-

2. *The Retreat Rule in General*

Minnesota is among the twenty-nine states where retreat must be considered: a defender generally must consider retreat before using deadly force.⁹⁶ Unlike states that require flight only when the defender actually knows that a safer place exists and that she can get there safely, Minnesota imposes the duty when retreat is “reasonably possible.”⁹⁷

Minnesota is not among the states with a duty-to-retreat statute.⁹⁸ The issue was “left to judicial development” four decades ago when the current criminal code was drafted and the standard of “reasonable” defensive force was codified.⁹⁹

The current retreat rule can be traced to *State v. Shippey*, a case of “outrageous and barbarous revenge” from 1865 in which the Minnesota Supreme Court provided dictum on when an innocent person may defend himself: “Self-defense can only be resorted to in case of necessity. The right to defend himself would not arise until defendant had at least attempted to avoid the necessity of such defense.”¹⁰⁰

Shippey’s duty-to-retreat language was imported into Minnesota’s common law a century later in *State v. Johnson*, which, unlike *Shippey*, featured a defendant who was more of a defender than an aggressor.¹⁰¹ The dictum became law when the Minnesota Supreme Court looked to the 1963 Criminal Code’s advisory committee for help determining what the legislature meant by “reasonable force” in the then-new statutes.¹⁰² The committee said the reasonableness standard was to be guided by two cases from the

defense in their own home even if their actions would not meet all the conditions of self-defense occurring elsewhere [I]t is not our role to debate the wisdom or parameters of the statutory language[.]”, *review denied*, No. C8-93-1378, 1994 Minn. LEXIS 448 (June 15, 1994).

96. *State v. Johnson*, 277 Minn. 368, 373, 152 N.W.2d 529, 532 (1967).

97. *State v. Austin*, 332 N.W.2d 21, 24 (Minn. 1983). *Cf. State v. Quarles*, 504 A.2d 473, 476 (R.I. 1986) (“The person attacked is obligated to attempt retreat if he or she is aware of a safe and available avenue of retreat.”).

98. *Cf. supra* note 26 and accompanying text.

99. PROPOSED MINNESOTA CRIMINAL CODE 29-30 (Minnesota Legislative Interim Commission, 1962).

100. *State v. Shippey*, 10 Minn. 223, 230-32 (1865).

101. *Johnson*, 277 Minn. at 373, 152 N.W.2d at 532. The *Johnson* court characterized the defendant as “a young man whose girlfriend had been rudely treated and who, out of a mistaken sense of chivalry, thought something should be done about it.” *Id.* at 374, 152 N.W.2d at 533.

102. *Id.* at 373, 152 N.W.2d at 532.

1800s, including *Shippey*.¹⁰³ The *Johnson* court also used *Shippey* to justify the law of retreat, even though the defendant in the century-old case “was the pursuer not the pursued[.]”¹⁰⁴

Shippey’s dictum on the duty to retreat, as stated in *Johnson*, remains part of Minnesota law.¹⁰⁵ It is “well settled that there is a duty to retreat and avoid danger if reasonably possible” before using deadly defensive force in Minnesota.¹⁰⁶

3. *The Retreat Rule in and Around the Home*

Consistent with the castle doctrine, Minnesota does not require retreat from a home intrusion.¹⁰⁷ The rationale was articulated a century ago when the Minnesota Supreme Court permitted a landowner in the “vast wilderness” to stand his ground when his foe had a gun nearby.¹⁰⁸ “Self-defense has not, by statute nor by judicial opinion, been distorted, by an unreasonable requirement of the duty to retreat, into self-destruction.”¹⁰⁹

While defense of home and curtilage are staunchly defended in Minnesota, it has been unclear what levels of force defenders may use and, consequently, when there might be a duty to

103. *Id.* at 372, 152 N.W.2d at 532; PROPOSED MINNESOTA CRIMINAL CODE, *supra* note 99, at 30. The other case that the 1963 Criminal Code advisory committee singled out as stating the “reasonable force” standard was *State v. Tripp*, 34 Minn. 25, 24 N.W. 290 (1885), which involved an assault conviction with little mention of self-defense and no mention of retreat. See PROPOSED MINNESOTA CRIMINAL CODE, *supra* note 99, at 30.

104. *Johnson*, 227 Minn. at 373, 152 N.W.2d at 532; *Shippey*, 10 Minn. at 231.

105. Self-defense according to *Johnson*:

requires (1) the absence of aggression or provocation on the part of the slayer; (2) the actual and honest belief of the slayer that he was in imminent danger of death, great bodily harm, or some felony and it was necessary to take the action he did; (3) the existence of reasonable grounds for such belief; and (4) the duty of the slayer to retreat or avoid the danger if reasonably possible.

Id. at 373, 152 N.W.2d at 532. However, an anticipated felony does not justify self-defense anymore. See *State v. Basting*, 572 N.W.2d 281, 285 (Minn. 1997) (omitting the “or some felony” language from *Johnson*). See also *supra* note 94.

106. *State v. Austin*, 332 N.W.2d 21, 24 (Minn. 1983). See also *State v. Nystrom*, 596 N.W.2d 256, 261 (Minn. 1999) (“Self-defense is not available to one who abandons a successful retreat and elects instead to make an aggressive choice to confront the victim.”).

107. See *supra* Part II.A.3; *State v. Carothers*, 594 N.W.2d 897, 903 (Minn. 1999).

108. *State v. Gardner*, 96 Minn. 318, 320, 328, 104 N.W. 971, 972, 975 (1905).

109. *Id.* at 327, 104 N.W. at 975.

retreat.¹¹⁰ As recently as 1997, deadly force was available under a self-defense claim as long as the actor feared death or great bodily harm, while deadly force was allowed under a defense-of-dwelling claim regardless of the actor's fears.¹¹¹

Oddly, Minnesota law had favored property over human life, and in 1999 the supreme court addressed that "anomaly" in *State v. Carothers*.¹¹² In that case, which involved a felony-murder conviction, the court ordered a new trial because the jury was instructed that a duty to retreat attaches to a defense-of-dwelling claim.¹¹³ The supreme court ruled that the instruction was erroneous and clarified that a home-dweller facing an intruder's felonious act need not retreat before using deadly force, regardless of the home-dweller's fears or which common-law doctrine he pled:

To require a person claiming self-defense to retreat but not require a person claiming defense of dwelling to retreat would provide greater protection to a person safeguarding property than to a person safeguarding life. As the law clearly values life above property, a person claiming self-defense within the home should not have a duty to retreat before using deadly force.¹¹⁴

4. *The Retreat Rule When Co-Residents Fight*

The *Carothers* court specifically refused to consider whether the no-retreat rule applies to co-residents acting in self-defense.¹¹⁵

110. See Steve Fenlon, *Recent Developments: Criminal Law*, 26 WM. MITCHELL L. REV. 1263, 1263 (2000) (noting that self-defense and defense of dwelling were not distinguished until recently in Minnesota). See also FLETCHER, *supra* note 24, at 855, 857 ("The theory of self-defense, defense of others and defense of property is torn by its conflicting and uncertain premises It is unlikely that protecting property would be seen as the kind of case where the defender has 'no choice' but to kill.").

111. *State v. Pendleton*, 567 N.W.2d 265, 268 (Minn. 1997) (distinguishing between provisions in section 609.065 of the Minnesota Statutes by concluding that "'reasonable force' includes deadly force only when the offense against a person involves great bodily harm or death or is used to prevent the commission of a felony in one's home").

112. *Carothers*, 594 N.W.2d at 903.

113. *Id.* at 897, 904.

114. *Id.* at 903-04. Some jurisdictions specify felonies that a home-dweller must anticipate before using deadly force, such as arson, burglary, or robbery. LAFAVE, *supra* note 26, at 505. The Model Penal Code allows deadly force to protect property only amid a threat of dispossession or when the wrongdoer is attempting arson, burglary, robbery, "or other felonious theft or property destruction[.]" MODEL PENAL CODE § 3.06(3)(d) (Official Draft 1985).

115. *Carothers*, 594 N.W.2d at 904 n.6.

Therefore, the issue was left unsettled.

Guidance on the co-resident retreat issue has been inconsistent over the years. In 1911, the supreme court did not require a sailor attacked in his bunk room to retreat from “where he slept and kept his clothing, and when he was about as close to the ‘wall’ as it was possible to get.”¹¹⁶ However, in 1985 the supreme court permitted a duty-to-retreat instruction in an apparent home-invasion case when the eventual homicide victim allegedly “came barging in” to a dwelling, grabbed a knife, and threatened to kill the resident, who was subsequently convicted of murder.¹¹⁷ A few years later, the court articulated no opposition when juries twice were instructed that Minnesotans must consider ways to avoid “peril” in their homes before using deadly force against co-residents and guests.¹¹⁸

In 2001, with an apparent appetite to settle decades of discrepancies, the Minnesota Supreme Court attempted to address the co-resident retreat issue head-on in *Glowacki*.¹¹⁹

III. THE *GLOWACKI* CASE AND DECISION

A. *Facts*

A jury convicted William Glowacki¹²⁰ of misdemeanor fifth-

116. *State v. McPherson*, 114 Minn. 498, 499-500, 131 N.W. 645, 645-46 (1911) (holding that a fireman on a vessel in the Duluth harbor did not have to retreat from the bunk room when a fellow fireman attacked him there).

117. *State v. Sanders*, 376 N.W.2d 196, 198, 201 (Minn. 1985). The defendant conceded, perhaps contrary to Minnesota law, that a duty-to-retreat instruction was proper in a home-intrusion case. *Id.* at 201.

118. *State v. Hennem*, 441 N.W.2d 793 (Minn. 1989), *affg in part*, *State v. Hennem*, 428 N.W.2d 859, 866 (Minn. Ct. App. 1988) (endorsing a jury instruction that a co-resident must have “consider[ed] the existence of an alternative way of avoiding the peril” before using deadly force); *State v. Morrison*, 351 N.W.2d 359, 360, 362 (Minn. 1984) (affirming a jury instruction that the defendant had a duty to retreat from her home before stabbing someone who apparently was not an intruder). *See also State v. Baird*, 640 N.W.2d 363, 367 (Minn. Ct. App. 2002) (noting that the supreme court had “appeared to approve [of] jury instructions imposing a duty to retreat on defendants claiming self-defense when the incident occurred inside the defendant’s home and the defendant and the victim were co-residents”), *review granted*, No. C1-01-894, 2002 Minn. LEXIS 324 (May 14, 2002).

119. *State v. Glowacki*, 630 N.W.2d 392, 399 (Minn. 2001) (noting that *Carothers* reserved the issue of a co-resident’s duty to retreat).

120. Glowacki was a member of the City Council in Corcoran, Minnesota. After his conviction, he was met by a dozen protesters who demanded his

degree assault, domestic assault, and disorderly conduct¹²¹ after hearing markedly different versions of an altercation at his home with his girlfriend, Priscilla Andrews.¹²²

Glowacki claimed Andrews hit him first.¹²³ He said the left-handed blow to his shoulder came as Andrews leaned over him, screamed “horrible things,” and kept her right hand behind her back – perhaps, according to Glowacki, to conceal something.¹²⁴ Glowacki said he responded by kicking Andrews to the floor, telling her to “knock it off,” and walking away.¹²⁵ Upon turning to face Andrews, Glowacki testified that he pushed Andrews to the floor after seeing something moving toward his head.¹²⁶ Moments later, as Andrews was seated on a couch to cool off, Glowacki testified that he withstood a kick to the left thigh.¹²⁷ Glowacki said he then vowed to take Andrews to a hotel; she responded by swearing and yelling she was going to destroy him.¹²⁸ Andrews went upstairs, and police arrived shortly thereafter and arrested Glowacki.¹²⁹

Andrews testified that Glowacki hit her and that she did not hit back.¹³⁰ A blow to the side of the head felled her, and while on the floor Andrews said she endured death threats and fifty to 100 kicks.¹³¹ Once able to stand, Andrews testified that Glowacki put his hands around her throat, ripped a button from her robe, and told

resignation and carried signs such as “Woman beaters are not leaders” and “Bill is a Black Eye in our Community.” Andrew Tellijohn, *Corcoran council member not planning to resign*, STAR TRIB. (Minneapolis), Aug. 27, 1999, at 3B. Glowacki was sentenced to forty-five days in the workhouse even though the prosecution had requested a fifteen-day sentence and he had no prior convictions. In characterizing Glowacki’s conduct as “that of a thug,” Hennepin County District Judge Thorwald Anderson denied Glowacki work release or home monitoring and assessed the maximum misdemeanor fine of \$700. At the time, it was considered rare to send a first-time domestic violence offender to the workhouse. Margaret Zack, *Corcoran council member sent to workhouse for assault*, STAR TRIB. (Minneapolis), Sept. 2, 1999, at 1B.

121. MINN. STAT. § 609.224, subd. 1 (2001); MINN. STAT. § 609.2242, subd. 1 (2001); MINN. STAT. § 609.72, subd. 1(3) (2001).

122. *Glowacki*, 630 N.W.2d at 395-97. The supreme court identified Andrews by name in its opinion; the Minnesota Court of Appeals, however, used only her initials. *Cf. State v. Glowacki*, 615 N.W.2d 843, 844 (Minn. Ct. App. 2000).

123. *Glowacki*, 630 N.W.2d at 396.

124. *Id.*

125. *Id.*

126. *Id.*

127. *Id.*

128. *Id.*

129. *Id.*

130. *Id.* at 395.

131. *Id.*

her to “[g]et the hell out of my goddamn house.”¹³² In all, she testified that she endured about 20 minutes of abuse before locking herself in a bathroom and calling for help.¹³³

To counter Glowacki’s claim of self-defense at trial, the prosecution requested that jurors be instructed that there is always a duty to retreat from one’s home when acting in self-defense.¹³⁴ The request was based on the Minnesota Court of Appeals’ decision in *Carothers*, which the prosecution assured was good law.¹³⁵ In fact, the Minnesota Supreme Court had overruled the court of appeals two months earlier, holding that there is no duty to retreat from the home when defending against an intruder.¹³⁶ Glowacki’s counsel did not disagree that the court of appeals decision was good law, even as the trial court expressed doubts, and jurors were instructed that an actor claiming self-defense must “avoid the danger if reasonably possible.”¹³⁷

On appeal, Glowacki argued *inter alia* that the assault verdicts should be overturned because jurors were erroneously instructed that he “had a duty to avoid danger in his own home while acting in self-defense[.]”¹³⁸ The court of appeals agreed and awarded a new trial on the assault convictions, ruling that the trial court committed “significant” error by instructing the jury erroneously.¹³⁹

132. *Id.*

133. *Id.*

134. *Id.* at 397.

135. *Id.*

136. *State v. Carothers*, 585 N.W.2d 64 (Minn. Ct. App. 1998), *rev’d* 594 N.W.2d 897 (Minn. 1999). *See also supra* note 114 and accompanying text.

137. *Glowacki*, 630 N.W.2d at 397. The parties agreed to the trial judge’s suggestion that the words “retreat or” be removed from 10 MINNESOTA PRACTICE: MINNESOTA JURY INSTRUCTION GUIDES – CRIMINAL (4th ed. 1999) CRIMJIG 7.08, which says: “The legal excuse of self-defense is available only to those who act honestly and in good faith. This includes the duty to retreat or avoid the danger if reasonably possible.” This was the instruction given to the jury. *Glowacki*, 630 N.W.2d at 397 n.1.

138. *Glowacki*, 630 N.W.2d at 397. The defendant did not object to the jury instruction at trial. At sentencing he moved for a new trial based on the district court judge’s reliance on the erroneous court of appeals decision. The motion was denied. The trial judge interpreted *Carothers* as applying to defense of dwelling, not self-defense. *Id.* Glowacki appealed three other matters to the supreme court, which were subsequently referred to the court of appeals. *Id.* at 403. On remand, the appeals court (1) concluded again that Glowacki and Andrews were co-residents, (2) upheld the trial court’s decision to disallow questions about a lawsuit Andrews was contemplating against Glowacki, and (3) dismissed a sentencing challenge because he already had served the time. *State v. Glowacki*, No. C8-99-1507, slip op. at 3-7 (Minn. Ct. App. Oct. 9, 2001).

139. *State v. Glowacki*, 615 N.W.2d 843, 845 (Minn. Ct. App. 2000)

B. *The Court's Analysis*¹⁴⁰

The Minnesota Supreme Court agreed that jurors in Glowacki's trial were instructed incorrectly, but the error was deemed harmless and the court reinstated the assault conviction by ruling as a matter of law that even if Glowacki's version of events were taken as true, his force was not reasonable.¹⁴¹ Besides denying Glowacki a new trial, the court adopted a new no-retreat rule and professed to join a majority of states that do not require flight from one's home when faced with attack from a co-resident.¹⁴² In its analysis, the court considered arguments from amicus curiae,¹⁴³ noted an *American Law Review* annotation on the duty to retreat in homicide cases,¹⁴⁴ and examined rules in five other jurisdictions.¹⁴⁵ The court also recognized how difficult it can be to distinguish co-residents from nonresidents,¹⁴⁶ surveyed the probable effect on women who face domestic violence,¹⁴⁷ and asserted that a parent facing attack should not have to abandon her children.¹⁴⁸

The supreme court's opinion also stressed that it is unfair to force a co-resident to retreat from her "safest place."¹⁴⁹ The court

(concluding that the jury instructions misstated the law), *aff'd in part*, 630 N.W.2d 392 (Minn. 2001).

140. The defendant's motion for a new trial preserved his right to appeal under MINN. R. CRIM. P. 26.03, subd. 18(3) because the trial court and counsel "were operating under a misconception of the status of the law." See *Glowacki*, 630 N.W.2d at 398.

141. *Glowacki*, 630 N.W.2d at 402-03. Although the jury instruction did not include the word "retreat," it was said to be implied. *Id.* at 402.

142. "[W]e adopt the following rule: There is no duty to retreat from one's own home when acting in self-defense in the home, regardless of whether the aggressor is a co-resident." *Id.* at 402. To conclude that "a majority of other states" do not require a co-resident to attempt retreat from the home, the court relied on Linda A. Sharp, Annotation, *Homicide: Duty to Retreat Where Assailant and Assailed Share the Same Living Quarters*, 67 A.L.R.5th 637 (1999). *Id.* at 400 n.3. [The supreme court's citation erroneously referred to A.L.R.5th vol. 65; the annotation is found in vol. 67].

143. The Minnesota County Attorneys Association backed a rule favoring a co-resident's duty to retreat; the Minnesota Association of Criminal Defense Lawyers did not. See *Glowacki*, 630 N.W.2d at 398.

144. Sharp, *supra* note 142.

145. See *Glowacki*, 630 N.W.2d at 400-03 (examining rules in Connecticut, the District of Columbia, Florida, New Jersey, and New York).

146. *Id.* at 400.

147. *Id.* at 401 ("Instructing a jury on a duty to retreat may therefore contradict a battered spouse defense.").

148. *Id.* at 401 ("[T]he duty to retreat also may force an abused spouse to choose between acting against the law or abandoning her children.").

149. *Id.* ("Requiring retreat from the home before acting in self-defense would

acknowledged that co-resident quarrels are self-defense issues more than defense-of-dwelling issues,¹⁵⁰ but it justified an exception from the general self-defense rule requiring retreat because the rule presumes that a fleeing resident has a safer place to go — namely, the home.¹⁵¹

The supreme court was careful not to endorse the *carte blanche* use of violence, stressing that in a dispute between co-residents the “key inquiry will still be into the reasonableness of the use of force and the level of force under the specific circumstances of each case.”¹⁵² And further refinement of the *Glowacki* rule may be forthcoming: In May 2002 the court granted review to a case involving a fight between co-residents in a trailer.¹⁵³

require one to leave one’s safest place.”).

150. “Defense of dwelling is a defense based on property rights and thus is only available against one who does not have rights to the dwelling. The defense of dwelling defense is not appropriate when the party against whom the force is used has rights to the dwelling as well.” *Id.* (citing *State v. Hare*, 575 N.W.2d 828, 832 (Minn. 1998)).

151. *Glowacki*, 630 N.W.2d at 401.

152. *Id.* at 402.

153. *State v. Baird*, 640 N.W.2d 363 (Minn. Ct. App. 2002), *review granted*, No. CI-01-894, 2002 Minn. LEXIS 324 (May 14, 2002). In *Baird*, the appeals court ordered a new trial because jurors were erroneously instructed that the co-resident defendant had a duty to retreat from his motor home. *Id.* at 370. Reconsideration of *Baird*, without oral argument, was set for Sept. 11, 2002. The supreme court seemed poised to determine whether *Glowacki* applies retroactively. The fight in *Baird* occurred June 16, 2001; the supreme court decided *Glowacki* on July 12, 2001. *Id.* at 365. In effect, the appeals court applied *Glowacki* retroactively because it said the case neither overruled clear past precedent nor decided an issue of first impression that could not have been clearly foreshadowed. *Id.* at 368. Appellant state of Minnesota argues in *Baird* that because *Glowacki* was “a fundamental change” in self-defense law, the trial judge’s instruction was not erroneous and the rule should not be applied retroactively. Brief for Appellant at 16, *State v. Glowacki*, 630 N.W.2d 392 (Minn. 2001) (No. C8-99-1507). Respondent Baird asserts that because duty-to-retreat law has been unsettled in Minnesota recently, *Glowacki* “did not overrule anything” and the court of appeals was correct to order a new trial. Brief for Respondent at 14, 18, *State v. Glowacki*, 630 N.W.2d 392 (Minn. 2001) (No. C8-99-1507).

IV. ANALYSIS OF THE *GLOWACKI* DECISIONA. *Some Unanswered Questions*1. *Who Was the Aggressor?*

Generally, aggressors may not claim self-defense.¹⁵⁴ If the jurors believed Glowacki was an aggressor—which seems likely, given his conviction¹⁵⁵—then analysis under self-defense and duty-to-retreat rules is irrelevant and inappropriate.¹⁵⁶ The issue appears to be not the contents of the duty-to-retreat jury instruction, but whether one should have been given at all.¹⁵⁷

Glowacki claimed he did not start the fight, and the supreme court adopted his story as true to rule as a matter of law that his use of force, even in self-defense, was unreasonable.¹⁵⁸ The court could have stopped there, reinstated the conviction, acknowledged that justice was done, and reserved the co-resident retreat question for the legislature or for a case in which facts were less disputed and

154. See *Bellcourt v. State*, 390 N.W.2d 269, 272 (Minn. 1986) (noting that an aggressor “has no right to a claim of self-defense”). See also *LAFAYETTE*, *supra* note 26, at 497 (“It is generally said that one who is the aggressor in an encounter with another . . . may not avail himself of the defense of self-defense.”).

155. See *supra* Part III.A. See also *State v. Sanders*, 376 N.W.2d 196, 199 (Minn. 1985) (noting that a jury is “free to consider and weigh all the evidence” in a self-defense claim); *DRESSLER*, *supra* note 23, at 224 (“[T]he issue of whether a defendant lost the right of self-defense in a conflict is ordinarily a matter for the jury to decide, based on a proper instruction on the meaning of the term ‘aggressor.’”).

156. However, it is possible that Glowacki regained his right to self-defense if he demonstrated withdrawal from the conflict and Andrews then responded to his nondeadly force with deadly force. See *Bellcourt*, 390 N.W.2d at 272 (noting that jurors may be instructed on self-defense “only if [an aggressor] actually and in good faith withdraws from the conflict and communicates that withdrawal, expressly or impliedly, to his intended victim”). See also *DRESSLER*, *supra* note 23, at 225 (noting that “[m]any courts provide that when the victim of a nondeadly assault responds with deadly force, the original aggressor immediately regains his right of self-defense”).

157. Jury instructions could have been tailored to whether the jury found Andrews or Glowacki to be the aggressor. Cf. *People v. Emmick*, 525 N.Y.S.2d 77, 79 (App. Div. 1988) (striking a conviction after the trial judge erroneously instructed the jury on a duty to retreat). “At the very least, the court should have charged the jury that if they found, as a matter of fact, that defendant was in his own dwelling, then he was under no duty to retreat.” *Id.*

158. “[E]ven if the jury accepted Glowacki’s version of events, no reasonable juror could conclude that his use of force to defend himself was reasonable.” *Glowacki*, 630 N.W.2d at 403.

levels of force used more apparent.¹⁵⁹

Instead, the court made a new rule and remanded the case so issues besides retreat could be addressed.¹⁶⁰ On remand, the court of appeals rejected Glowacki's assertion that the state failed to prove that he was the aggressor.¹⁶¹ Consequently, by reasoning "that the jury reasonably could have concluded that Glowacki was not engaged in self-defense[.]" the appeals court cast even more doubt on whether the matter should have been a duty-to-retreat case in the first place.¹⁶²

2. *What Levels of Force Does the Rule Cover?*

Usually no-retreat rules are at issue only in cases of deadly, or at least felonious, force.¹⁶³ In keeping with that trend, the Minnesota Supreme Court analyzed co-resident retreat rules from homicide and felony assault cases in other jurisdictions before articulating the co-resident no-retreat rule in *Glowacki*.¹⁶⁴

159. Andrews' status in the home was among significant facts in dispute. The defendant called her an intruder, the trial court labeled her an invited guest, the court of appeals called her a co-resident, and the supreme court did not address the issue even though Glowacki continued to argue that Andrews did not have equal rights to the dwelling and was considered hostile and unwelcome by the homeowner. *Id.* at 400; Brief for Respondent at 9, *State v. Glowacki*, 630 N.W.2d 392 (Minn. 2001) (No. C8-99-1507). It is unclear how the trial court's characterization of Andrews as an invited guest might have affected the jury's guilty verdict.

160. *See supra* note 138.

161. *State v. Glowacki*, No. C8-99-1507, slip op. at 5 (Minn. Ct. App. Oct. 9, 2001).

162. *Id.*

163. "[T]he question of the duty to retreat is a problem only when deadly force is used in self-defense[.]" LAFAYETTE, *supra* note 26, at 498. *See also* *State v. Baker*, 280 Minn. 518, 523, 160 N.W.2d 240, 243 (1968) (noting that "principles of self-defense in felonious assault and homicide cases are not materially different"); *State v. Pearson*, 215 S.E.2d 598, 602 (N.C. 1975) (noting it "particularly important" to distinguish between deadly force and nondeadly force in cases involving retreat rules); MODEL PENAL CODE § 3.04 cmt. 4(c) at 53 (Official Draft 1985) (noting that requiring retreat "never has been accepted when moderate force is used in self-defense").

164. *Glowacki*, 630 N.W.2d at 400. Four of the five cases cited involved deaths: *Cooper v. State*, 512 A.2d 1002 (D.C. 1986) (voluntary manslaughter); *State v. Gartland*, 694 A.2d 564 (N.J. 1997) (reckless manslaughter); *Weiand v. State*, 732 So. 2d 1044 (Fla. 1999) (second-degree murder); *State v. Bobbitt*, 415 So. 2d 724 (Fla. 1982) (manslaughter); *State v. Shaw*, 441 A.2d 561 (Conn. 1981) (involving a felony assault conviction in which the victim was shot three times). *Id.* Additionally, the Minnesota Supreme Court relied on an American Law Reports annotation, *supra* note 142, that analyzed only homicide cases.

However, the underlying dispute was charged under misdemeanors including fifth-degree assault, which is the least serious level of misdemeanor assault in Minnesota.¹⁶⁵ Therefore, the court unwisely used a misdemeanor appeal to make law intended for, or at least likely to be extended to, felonies. Consequently, trial courts undoubtedly will struggle with whether *Glowacki* applies to all criminal assault cases or only to those in which deadly or perhaps felonious force was apparent.

3. *What Is Reasonable Force?*

The court said the reasonableness test ultimately will govern self-defense cases involving co-residents.¹⁶⁶ However, leaving level-of-force decisions to “specific circumstances of each case”¹⁶⁷ does little to help co-residents who would rather not inflict injury, face arrest, or risk prosecution.

Minnesota is among states adhering to the “older principle” of unreasonableness in self-defense law.¹⁶⁸ A mistaken Minnesota defender, such as one who wrongly perceives nondeadly force to be deadly force, risks conviction for murder or another “crime of purpose” when he should be convicted of a lesser offense that incorporates reduced culpability such as negligence.¹⁶⁹ The Model Penal Code singles out statutes such as Minnesota’s as among those that should be altered so judges and prosecutors do not exert discretion in mistaken-defender cases.¹⁷⁰

As it stands, the *Glowacki* reasonableness test creates more questions than it provides answers.¹⁷¹ Specifically, it is unclear when

165. Statutes for other levels of assault address more serious degrees of harm: MINN. STAT. § 609.221 (2001) (first-degree assault, “great bodily harm”); MINN. STAT. § 609.222 (2001) (second-degree assault, assault with a dangerous weapon); MINN. STAT. § 609.223 (2001) (third-degree assault, “substantial bodily harm”); MINN. STAT. § 609.2231 (2001) (fourth-degree assault encompasses bias-motivated assaults and force used against public officials).

166. “[I]n all situations in which a party claims self-defense, even absent a duty to retreat, the key inquiry will still be into the reasonableness of the use of the force and the level of force under the specific circumstances of each case.” *Glowacki*, 630 N.W.2d at 402.

167. *Id.*

168. MODEL PENAL CODE § 3.09 cmt. 2 at 153 (Official Draft 1985). The Model Penal Code’s drafters say sections 609.065 and 609.06 of the Minnesota Statutes, *supra* notes 89 and 90, which are essentially unchanged from when the Model Penal Code was drafted, are among the older statutes. *Id.* at 153-54 n.12.

169. *Id.* at 153.

170. MODEL PENAL CODE § 3.04 cmt. 2 at 36 (Official Draft 1985).

171. Reasonableness has been called “[o]ne of the most common standards

a defender may abandon general rules of proportionality to counter nondeadly abuse with deadly force. Does size matter?¹⁷² Must the defender follow general rules of self-defense, minus the retreat requirement, and reserve deadly force for when “great bodily harm” is feared,¹⁷³ or may she rely on *Carothers* to oppose a nondeadly slap in the face with a stab to the heart?¹⁷⁴

B. *Some Shaky Reasoning*

The Minnesota Supreme Court based the new co-resident no-retreat rule on four presumptions: (1) home is the “safest place” and one should not be forced from it, (2) a retreat rule would confuse juries in cases of battered spouse’s syndrome, (3) parents should not have to choose between following the law and defending children, and (4) it can be difficult to distinguish intruders from co-residents.¹⁷⁵ The first assertion is wrong, the second is a problem more with trial procedure than criminal law, and the third already is anticipated by an existing statute.¹⁷⁶

used in the common law for judging almost every form of conduct[.]” Byrd, *supra* note 72, at 264. See also Seth D. DuCharme, Note, *The Search for Reasonableness in Use-of-Force Cases: Understanding the Effects of Stress on Perception and Performance*, 70 *FORDHAM L. REV.* 2515, 2520 (2002) (“[T]he defendant [in a self-defense case] will not prevail if the fact-finder determines that the amount of force used was unreasonable. But unreasonable to whom?”).

172. See Perkins, *supra* note 22, at 136 (“Where there is great disparity of strength between the two, death or great bodily harm is possible without any weapon, and circumstances may justify deadly force to repel such an attack.”).

173. *State v. Pendleton*, 567 N.W.2d 265, 268 (Minn. 1997) (ruling that deadly force will be “reasonable force” only amid threatened “great bodily harm or death” or to prevent a felony in one’s home).

174. “A resident has traditionally been empowered to use force, even deadly force, when necessary to protect the home.” *State v. Carothers*, 594 N.W.2d 897, 900 (Minn. 1999). In Minnesota, it is unclear when a foot or fist can constitute a dangerous weapon capable of causing felonious force, such as under section 609.222 of the Minnesota Statutes. Compare *State v. Born*, 280 Minn. 306, 308, 159 N.W.2d 283, 285 (Minn. 1968) (concluding that chasing a victim, punching him to the floor and stomping him could constitute use of dangerous weapons) and *State v. Mings*, 289 N.W.2d 497, 498 (Minn. 1980) (agreeing that cowboy boots could be considered dangerous weapons) with *State v. Basting*, 572 N.W.2d 281, 284-85 (Minn. 1997) (ruling that a professional boxer’s fist was not a dangerous weapon in part because the combatants were approximately of the same weight and height).

175. See *supra* notes 146-151 and accompanying text.

176. The fourth presumption, while valid, seems exacerbated by an even more difficult dilemma: What is a home, anyway? In Minnesota, a broad definition of home is evolving. See, e.g., *State v. Griller*, 583 N.W.2d 736, 741 (Minn. 1998) (holding that a defendant who raised a defense-of-dwelling claim had at least two

1. *Homes Are Not Safe*

As the castle doctrine evolved to offer “a natural sanctuary from external aggression,”¹⁷⁷ internal aggression silently and insidiously invaded American dwellings.¹⁷⁸ Homes remain unsafe today.¹⁷⁹ Basing a no-retreat rule on the sanctity and perceived placidity of the domicile denotes a desire for how things should be instead of how they are.

Domestic violence is no less severe in Minnesota, despite the state’s leadership role in trying to eradicate it.¹⁸⁰ An estimated 27,000 Minnesota women were battered in 1999, and while 41% of them were believed injured, only 11% sought medical care.¹⁸¹ Among the 123 Minnesota homicides in 2000 in which police could ascertain a relationship between the alleged killer and the victim, one-third were committed by family members, boyfriends, or girlfriends.¹⁸²

places of abode); *In re Welfare of R.O.H.*, 444 N.W.2d 294, 294-95 (Minn. Ct. App. 1989) (characterizing an unheated mini storage area as “a structure suitable for affording shelter for human beings”).

177. DRESSLER, *supra* note 23, at 228.

178. Christine Daniels, *Intimate Violence, Now and Then*, in *OVER THE THRESHOLD: INTIMATE VIOLENCE IN EARLY AMERICA* 5-16 (Christine Daniels & Michael V. Kennedy eds., 1999).

179. See *supra* notes 69-70 and accompanying text. “[I]f there is one point about which family violence experts seemingly agree, it is that family violence is far more common than we realize.” BARNETT ET AL., *supra* note 11, at 13. “Research consistently demonstrates that many women and children are more likely to be assaulted in their own homes than on the streets in the most violent American cities.” *Id.* at 4.

180. Minneapolis undertook an eighteen-month study in the 1980s, which was publicized nationwide, that showed that arrest was “by far the most effective deterrent” to domestic abuse. However, subsequent studies contradicted the findings. Vito Nicholas Ciraco, Note, *Fighting Domestic Violence with Mandatory Arrest: Are We Winning?*, 22 *WOMEN’S RTS. L. REP.* 169, 174, 190 (2001). Duluth was the first U.S. jurisdiction to require alleged abusers to be arrested, and now the jurisdiction vigorously prosecutes the crimes even when abuser and victim reconcile. BUZAWA & BUZAWA, *supra* note 67, at 182.

181. STEPHEN COLEMAN, AN EVALUATION OF MINNESOTA’S SHELTER PROGRAM FOR BATTERED WOMEN: A REPORT TO THE MINNESOTA LEGISLATURE 10 (2001), *available at* <http://www.mincava.umn.edu/papers/shelter.doc> (last visited Sept. 29, 2002).

182. There were 138 homicides in Minnesota in 2000. A relationship between the accused killer and victim was known in 123 of the cases; 49 victims (39.8%) were acquaintances or friends; 41 victims (33.3%) were family members, boyfriends, or girlfriends; 28 victims (22.8%) were strangers; and 5 victims (4.1%) were neighbors, an ex-wife, or someone else known to the accused killer. Minnesota Department of Public Safety data, *available at* <http://www.dps.state.mn.us/bca/cjis/documents/Crime2000/Page-14-005.html#CRIMINAL%20HOMICIDE%20-%20MURDER> (last visited Sept. 29, 2002).

It is a fantasy to say that Minnesota homes are safe; it is a fallacy to base a no-retreat rule on such a presumption. If anything, laws addressing crimes inside the home should be more like those for outside the home,¹⁸³ and deadly force should be discouraged at all costs.

2. *Fears for Battered Women Misdirected*

The supreme court enacted the co-resident no-retreat rule amid fears that juries hearing battered woman's syndrome cases might be confused by retreat rules.¹⁸⁴ The court's concerns are misdirected. The perceived problem is one of trial procedure, not criminal law. Now a law changed in favor of battered women also has been altered for siblings, parents, children, roommates, homosexuals, and others who cohabit for whatever reason.¹⁸⁵

3. *Parents Already Must Protect Their Children*

With *Glowacki*, the court aims to help parents who "will not have a legal defense under the law" if they stay in the home to protect children.¹⁸⁶ However, parents in such dreadful situations already have a tool in Minnesota's child-endangerment statute, which forbids people from knowingly or recklessly placing children in harm's way.¹⁸⁷ A "mere potential for substantial harm to

183. "Rather than seeing family violence and street violence as separate entities, it is probably helpful to view them as interconnected . . . [M]en who are violent in the home, for example, are especially likely to be violent outside the home." BARNETT ET AL., *supra* note 11, at 4. "It is notable to consider the contrast in criminal law that protects the sanctity of the home from strangers yet does little to protect the sanctity of the home from co-occupants." Amy E. Pope, *Children as Victims and Witnesses in the Criminal Trial Process: A Feminist Look at the Death Penalty*, 65 LAW & CONTEMP. PROBS. 257, 276 (2002).

184. *Glowacki*, 630 N.W.2d at 401.

185. See *State v. Shaw*, 441 A.2d 561, 562 (Conn. 1981) (requiring retreat for housemates); *People v. Emmick*, 525 N.Y.S.2d 77, 79 (App. Div. 1988) (holding that cohabitating brothers need not retreat from each other); BARNETT ET AL., *supra* note 11, at 213 ("There appears to be a strong reluctance within the lesbian community to acknowledge interpartner aggression."); GOSSELIN, *supra* note 71, at 18 ("Frequently, we view battering between men as normal aggressive behavior. Issues in gay relationships are forcing us to reconceptualize domestic violence.").

186. *Glowacki*, 630 N.W.2d at 401.

187. MINN. STAT. § 609.378, subd. 1(b)(1) (2001) (defining child endangerment as "intentionally or recklessly causing or permitting a child to be placed in a situation likely to substantially harm the child's physical, mental, or emotional health or cause the child's death").

children” is enough to satisfy the law.¹⁸⁸

When children watch parents fight, the youngsters risk substantial harm.¹⁸⁹ The state’s child-endangerment law requires – or should require – parents to shield their children from those hurts by taking whatever measures are necessary.¹⁹⁰ Sometimes those measures will include using force in the home; other times, retreat. *Glowacki*, however, seems to favor only the first option.

C. Making a Case for a Co-Resident’s Retreat

1. Minnesota’s General Retreat Rule Should Have Applied

The *Glowacki* court correctly asserted that when co-residents fight, neither has the legal right to eject the other.¹⁹¹ However, the court applied the assertion incorrectly. When combatants claim identical rights to a home, the castle doctrine vanishes and neither co-resident deserves royal treatment under the law. Therefore, all that is left is the general rule of self-defense, and in Minnesota that general rule requires retreat when reasonably possible and permits deadly force only amid fear of death or great bodily harm.¹⁹²

With *Glowacki*, the court seemed more interested in mending a gap left by *Carothers* than in exhaustively examining the effects that a broadened no-retreat rule might have. Instead of encouraging restraint, the court has succumbed to the American stand-your-ground ethos without exhibiting the precision and logical

188. *State v. Hatfield*, 627 N.W.2d 715, 720 (Minn. Ct. App. 2001) (affirming conviction of a father who stored anhydrous ammonia in an altered propane tank near his children), *aff’d*, 639 N.W.2d 372 (Minn. 2002).

189. Children who watch marital violence suffer from stress, immediate trauma, adverse development, and exposure to violent role models. BARNETT ET AL., *supra* note 11, at 140.

190. *See In re Lonell*, 673 N.Y.S.2d 116 (App. Div. 1998) (holding that a woman who refused to flee her abusive partner was criminally liable for child neglect). In Minnesota, people who fear that acting to stop child endangerment will result in “substantial bodily harm” are specifically afforded a defense. *See* MINN. STAT. § 609.378, subd. 2 (2001).

191. *See supra* note 150 and accompanying text.

192. *See supra* note 105. Because there is no intruder during a domestic fight, it seems the *Carothers* exception, *supra* note 114, does not apply. *See also* Jacobs, *supra* note 94, at 46 (“[T]o prevent a forcible intrusion, a lawful resident is permitted to use deadly force against an intruder who the resident reasonably believes intends to commit a felony or inflict serious bodily injury imminently upon anyone in the residence, provided necessity or apparent necessity is present.”).

foundation required for making a rule that anticipates life-and-death scenarios in the home.

2. *A Proposed Rule Based on Necessity and Proportionality*

The Minnesota Legislature could pass legislation extending the general retreat rule to co-residents, thereby requiring retreat when reasonably possible.¹⁹³ However, such a standard is no less vague than the *Glowacki* rule, and it would heap another layer on a “reasonableness” pile that already plagues Minnesota self-defense law.¹⁹⁴

Instead, the legislature should return to roots of necessity¹⁹⁵ and proportionality¹⁹⁶ to enact a co-resident retreat rule limited to instances of deadly force and respectful of the state’s general rule requiring retreat. A better law would be:

When threatened with deadly force from a co-resident in the home, a resident who knows that safe retreat is possible must try to leave the home or otherwise avoid the peril unless he finds defense necessary to prevent greater peril. Notwithstanding evidence of

193. The state urged such a path in *Glowacki*. “The law of Minnesota provides that the duty to retreat attaches ‘if reasonably possible.’ The State is not asking that the law be changed.” Reply Brief of Appellant at 3, *State v. Glowacki*, 630 N.W.2d 392 (Minn. 2001) (No. C8-99-1507). The Minnesota County Attorneys Association, which favored a rule requiring a co-resident’s retreat, suggested that retreat would be unreasonable when the victim was not dressed for cold weather, had experienced increased violence when retreating in the past, or was told “if I see you leaving this house I’ll take it out on the kids next.” Brief of Amicus Curiae at 8-9, *State v. Glowacki*, 630 N.W.2d 392 (Minn. 2001) (No. C8-99-1507).

194. Reliance on reasonableness encourages cumbersome legalese. For example: “The person may use force to defend himself against an assault if he believes it to be reasonably necessary and if it would appear to a reasonable person under similar circumstances to be reasonably necessary, with the amount of force used to defend himself being limited to that which a reasonable person in the same circumstances would believe to be necessary.” *State v. Bland*, 337 N.W.2d 378, 381 (Minn. 1983).

195. See discussion of necessity, *supra* notes 33, 35 and accompanying text. “The actor who knows he can retreat with safety also knows that the necessity can be avoided in that way.” MODEL PENAL CODE § 3.04 cmt. 4(c) at 53 (Official Draft 1985). Necessity is frequently mentioned in Minnesota Supreme Court cases involving defense in the home. See, e.g., *Carothers*, 594 N.W.2d at 900 (“A resident has traditionally been empowered to use force, even deadly force, when necessary to protect the home.”); *State v. Touri*, 101 Minn. 370, 374, 112 N.W. 422, 424 (1907) (noting that defense of the home may be done “by any means rendered necessary by the exigency”).

196. See discussion of proportionality, *supra* notes 34, 36 and accompanying text. Proportionality was an issue in the Minnesota Supreme Court’s first case involving self-defense. See *supra* notes 85-86 and accompanying text.

battered woman's syndrome, only defensive force proportional to the threatened harm shall be allowed.

This rule, unlike the much-heralded new judge-made law in Florida, values life over violence because retreat is the starting point.¹⁹⁷ It does not disturb the castle doctrine, but it does resist the American tendency to endorse a fight when flight is possible and prudent. Admittedly, the rule would not have changed *Glowacki's* ultimate outcome, but it would eradicate the vague reasonableness standard and correct the erroneous assumption that a violent home is a co-resident's safest place. Because children might be at risk during a domestic dispute and a deadly weapon is as handy as the silverware drawer, the proposed law acknowledges that fights at home differ remarkably from the average bar brawl. Therefore, the proposal specifically informs co-residents that retreat is not required to prevent great peril or when safe escape is not possible, and it singles out battered woman's syndrome as a phenomenon that courts must not ignore.¹⁹⁸ The proposed rule resembles a "limited duty to retreat" espoused by Florida courts in the 1980s, and it also seeks a "middle ground" similar to jurisdictions that reject a categorical duty to retreat but still scrutinize a defender's decision to stay.¹⁹⁹

3. *A Plan for the Legislature*

Remarkably, the Minnesota Legislature has not addressed the duty to retreat.²⁰⁰ The present common-law rule that requires retreat when "reasonably possible" can be traced in part to dictum in an 1865 supreme court case that involved a violent aggressor

197. *Cf. Weiland v. State*, 732 So. 2d 1044, 1051 (Fla. 1999) (not imposing a co-resident's duty to retreat "when a defendant uses deadly force in self-defense, if that force is necessary to prevent death or great bodily harm from a co-occupant"). The Minnesota rule proposed in this note would require retreat unless a co-resident finds it necessary to thwart great peril.

198. The proposed rule cannot refer to "battered spouses syndrome" because Minnesota has not recognized a syndrome in trials involving male defendants. *See supra* note 74.

199. *See supra* notes 30-31 and accompanying text; *State v. Bobbitt*, 415 So. 2d 724, 728 (Fla. 1982) (Overton, J., dissenting) (suggesting that a resident facing attack from a co-resident must retreat "to the extent reasonably possible" but need not flee the home); *Rippie v. State*, 404 So. 2d 160, 162 (Fla. Dist. Ct. App. 1981) (asserting that a "limited duty to retreat" would require a co-resident to at least retreat to another room before using deadly force).

200. *See supra* Part II.B.2.

instead of an innocent defender.²⁰¹ It is time for legislators to take a stand on the duty to retreat, and they should start with examining and overruling the new co-resident no-retreat rule.

Even if legislators shun the path suggested in this note, they should reconsider a rule that appears as hastily enacted as it is logically flawed. Police, prosecutors, domestic violence victims, and researchers should testify to the effects that a co-resident no-duty-to-retreat rule might have in Minnesota.

Typically Minnesota legislators, not judges, make laws involving the home.²⁰² As it stands, the supreme court has legislated by judicial action – something that, in the court’s own words, “we do not have the authority to do.”²⁰³

V. CONCLUSION

At best, *Glowacki* will serve to remind co-residents that defensive force in the home must be “reasonable.” At worst, the decision will be seen as suggesting, if not endorsing, that standing one’s ground during a domestic attack is preferred, even when retreat is possible and more prudent.

The new rule emanates from a case in which retreat should not have been an issue and deadly force probably was not used. However, the rule likely will provide justification for when deadly force *was* used. The case craves legislative intervention, particularly amid signs that legislators have shunned the general duty-to-retreat

201. *Id.*

202. *See, e.g.* State v. Gianakos, 644 N.W.2d 409, 419 (Minn. 2002) (noting “the important social policy objective of . . . deferring to the legislature to determine public policy with regard to family and marital issues”); State v. Pendleton, 567 N.W.2d 265, 269 (Minn. 1997) (explaining that the court examined legislative history, the plain meaning of section 609.065 of the Minnesota Statutes, *supra* note 89, and canons of statutory construction); State v. McCuiston, 514 N.W.2d 802, 806 (Minn. Ct. App. 1994) (“[I]t is not our role to debate the wisdom or parameters of the [defense-of-dwelling] statutory language . . .”).

203. State v. Thunberg, 492 N.W.2d 534, 537 (Minn. 1992) (holding that judicial alteration of the “reasonable person” standard in a manslaughter statute would violate the separation-of-powers doctrine). *See also* MINN. CONST., art. III, § 1 (“The powers of government shall be divided into three distinct departments: legislative, executive and judicial. No person or persons belonging to or constituting one of these departments shall exercise any of the powers properly belonging to either of the others . . .”); State v. Shaw, 441 A.2d 561, 569 (Conn. 1981) (Bogdanski, C.J., dissenting) (noting that the court’s majority opinion “usurps the legislature’s authority” on the co-resident retreat question); Perkins, *supra* note 22, at 161 (asserting that a legislature, not a court, is the proper forum for abandoning a no-retreat rule).

issue for 140 years.

It is disappointing, but perhaps not surprising, that the co-resident retreat question was decided with a case clouded by factual uncertainties and legal ambiguities. With clenched fists and jerking knees, this nation is quick to categorize everyone as either a villain or victim²⁰⁴ and to reserve retreat as a path only for cowards. How unsettling it is that as we blindly protect the sanctity of the domicile, we fail to realize that for many women, men, and children, the worst dangers are inside the home.

204. “The battered spouse cannot be an offender because, above all, she is clearly, undeniably, painfully, a victim. The abusive husband who is finally killed cannot be a real victim because he was so clearly, repulsively in the wrong. This way of thinking not only contributes to the appeal of the battered spouse defense, but it underlies other currents opposed to pacifist and demanding principles; for example, rejection of the duty to retreat.” Schulhofer, *supra* note 33, at 126.