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The "True Man" and His Gun: On the Masculine Mystique of Second Amendment Jurisprudence

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THE "TRUE MAN" AND HIS GUN: ON THE MASCULINE MYSTIQUE OF SECOND AMENDMENT JURISPRUDENCE

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The Supreme Court's recent Second Amendment jurisprudence raises serious normative questions for the use of self-defense with a firearm. This jurisprudence also implicates our prevailing social norms with respect to socially constructed and structurally pervasive gender roles. I argue that a peculiarly American conception of masculinity underpins the judicial construction of the Second Amendment's core purpose as guaranteeing the right to armed defense of one's self and one's home. The Court's recent Second Amendment rulings create an individual protection for gun ownership and incorporate the same against the States. But the Court's reasoning entangles this protection with an implicit valuation of manhood that reifies the notion that "true men" do not retreat in the face of danger. In so entangling, the Court establishes a right to gun ownership that is politically free but legally male. This Article explores the socio-legal structures that underpin the Court's reasoning to explain (a) how the right to keep and bear arms arises from a dubious ideal of the American "man," and thus how (b) the purposes for which one may keep and bear arms galvanizes a particular masculine type within our Second Amendment jurisprudence. That type establishes a problematic cultural narrative of and ethos for manhood in America; consequently, this jurisprudence establishes a dominant masculinity predicated upon firearm ownership. That masculinity complicates, and may even impede, the social evolution of subordinated masculinities and shifts the social hierarchy of masculinities to empower and privilege gun-owning males.

INTRODUCTION
I. *HELLER* AND THE CASTLE DOCTRINE
   A. Our Homes Ourselves
   B. Necessity and Proportionality in Heller
   C. A Man's Gun Is His Castle?
   D. The Castle Doctrine and the "True Man"

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II. *HELLER*'S CONSTITUTIONAL NARRATIVE: A MASCULINE MYSTIQUE
A. Second Amendment as Hegemonic Masculinity
B. The Illusion of a Feminist Second Amendment
C. Heller*'s Art of Manliness*
1. Navigating Heller*'s Paradox*
2. Ethos and Legal Performance
III. AN IMPERATIVE TO KILL: SOCIAL TRANSFORMATION BEYOND *HELLER*
CONCLUSION

INTRODUCTION

In the year since Justice Scalia's death, the political stakes of the Second Amendment have shifted dramatically. On the one hand, lower courts continue to disagree over whether the Amendment protects a right to carry firearms in public.[1] This is nothing new. Even with Scalia's presence the Court had refused to consider the question.[2] On the other hand, the Second Amendment is in imminent peril, with some going so far as to postulate that the Amendment is in danger of "being written out of the constitution [sic] altogether."[3] Tellingly, both hands are raised by advocates for expansive gun rights.[4] Yet, the dichotomy is stark: marginal expansion or wholesale liquidation.

Neither outcome is very likely, and each tender more political currency than legal import; for better or for worse, the Second

1. *See* Peruta v. City of San Diego, No. 10-56971, at *11 (9th Cir. June 9, 2016) (holding that the Second Amendment "does not preserve or protect a right of a member of the general public to carry concealed firearms in public."); Moore v. Madigan, 702 F.3d 933, 936 (7th Cir. 2012) (holding the Second Amendment "implies a right to carry a loaded gun outside the home.").

2. *See* Friedman v. City of Highland Park, 136 S. Ct. 447, *cert. denied* (No. 15-133) (Thomas, J., dissenting); Adam Liptak, *Supreme Court Won't Hear Challenge to Assault Weapons Ban in Chicago Suburb*, N.Y. TIMES (Dec. 7, 2015), http://www.nytimes.com/2015/12/08/us/supreme-court-will-not-hear-challenge-to-assault-weapons-ban-of-highland-park-ill.html [https://perma.cc/9Y54VQ3K].

3. Matt Flegenheimer, *The Death of Justice Scalia: Reactions and Analysis*, N.Y. TIMES (Feb. 14, 2016, 11:19 AM) (quoting Ted Cruz), https://www.nytimes.com/live/supreme-court-justice-antonin-scalia-dies-at-79 [https://perma.cc/2S87QTUZ].

4. Curiously, both sides of the American gun control debate might sign on to the first side of this ledger. The disagreement over the Second Amendment's applicability in the public domain is one raised by each, with gun control proponents attempting to restrict access to specific types of firearms and the places where they may be carried, and gun rights advocates wishing to expand the same. Yet, gun control advocates are not those crying out that American gun rights are in danger. Put differently, the same camp that wishes to expand Second Amendment protections fears their disappearance, while the camp that wishes to restrict Second Amendment protections has resolved itself that the Second Amendment, for better or for worse, is here to stay.

Amendment isn't going anywhere.[5] But perhaps the same set of social forces motivates both sides of this dichotomy. Here, I want to suggest that both the battle for a more expansive Second Amendment and the fear of its disappearance share a cultural valuation of manhood that ignites an intense anxiety within the gun-owning class of American men over their masculine identities. To understand better what is at stake when we talk about the future of the Second Amendment in a world without Scalia, we would therefore do well to pay careful attention to the cultural values and social forces underpinning the language of his crowning jurisprudential achievement, *District of Columbia v. Heller*.[6] Indeed, if the Second Amendment's constitutional moorings, as best we can tell, remain secure, then the vulnerability that this dichotomy expresses must be animated by something else. To unearth these, I would like to begin by way of illustration with a case that, on its face, has nothing to do with *Heller*, and return for my starting point to a small courthouse in Shenandoah County, Virginia. Consider the trial of *Commonwealth v. Jody Bradley*.[7]

Its fact pattern is as striking as it is perverse. On the evening of January 6, 2009, Jody Lynn Bradley, a forty-eight-year-old white male, shot and killed Brendon Manning Barker, an unarmed sixteen-year-old white youth, in the attic of Bradley's Virginia farm house.[8]

Although the circumstances leading to Mr. Bradley's decision to shoot and kill Barker remain disputed, Mr. Bradley's attorney contended that he did not approve of Barker's relationship with his daughter, Sarah, and on several occasions forbade Barker to see her.[9] He went as far as to warn Barker explicitly that he would shoot him if he were ever found with his daughter or on his property.[10]

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5. *See* Joseph Blocher, *Scalia's Gun Rights Legacy is Likely to Stand, No Matter Who Replaces Him*, THE TRACE (Feb. 15, 2016), https://www.thetrace.org/2016/02/antonin-scalia-legacy-gun-rights/ [https://perma.cc/5ULZ4TV5] (noting that "the primary obstacles to stronger gun laws remain political, not constitutional"). The same strategy of investing substantial rhetorical and political capital into what promises to amount to otherwise insubstantial legal and practical change is evident amongst those favoring stricter gun control as well, *see* Franklin E. Zimring, *Continuity and Change in the American Gun Debate*, *in* GUNS, CRIME, AND PUNISHMENT IN AMERICA 29, 33 (Bernard E. Harcourt, ed., 2003) (arguing that gun control proponents "couple small operational changes with the full weight of firearms control symbolism").

6. District of Columbia v. Heller, 554 U.S. 570 (2008).

7. Virginia v. Bradley (Shenandoah Cty. Ct. 2009) (CR09000122-00).

8. *Charges Against Bradley Heading to Grand Jury*, WHSV NEWS (Mar. 20, 2009), http://www.whsv.com/home/headlines/41517862.html [https://perma.cc/2PT4ACMP]; *Man Arrested for Killing Daughter's Boyfriend*, WHSV NEWS (Jan. 9, 2009), http://www.whsv.com/home/headlines/37212929.html [https://perma.cc/2YB9TEWZ]; *The Bradley Verdict*, N. VA. DAILY (Aug. 24, 2009), http://www.nvdaily.com/opinion/2009/08/the-bradley-verdict [https://perma.cc/BSE2TX7S].

9. *See The Bradley Verdict, supra* note 8, at 1.

10. Sally Voth, *Mother of slain teen won't rest on her conviction that the killer's punishment didn't fit the crime*, N. VA. DAILY (Nov. 20, 2009), http://www.nvdaily.com

Returning home on January 6th unable to find Sarah, and suspecting that someone might be in the attic, Mr. Bradley placed an object in front of the attic door, and then walked downstairs to retrieve a .38 caliber revolver and a flashlight.[11] Mr. Bradley then proceeded to the attic, pushing past his daughter, and fired one shot.[12]

Brendon Manning Barker lay defenseless on his back when he was shot once in the head from two feet away by his girlfriend's father.[13]

Facing a first-degree murder charge, Mr. Bradley's defense invoked the protection of the Castle Doctrine, a common law doctrine of self-defense that authorizes the use of force to defend (a) one's self and (b) one's home.[14] The common law recognizes each of these principles as an affirmative defense against prosecution for the use of force; together they allow a home dweller to use deadly force upon a home intruder and they abrogate the home dweller's duty to retreat.[15]

In the context of this Castle Doctrine defense, Mr. Bradley's defense submitted to the jury in closing arguments:

> You all got to see and hear from Jody Bradley. I think you can tell, he is not a complicated guy. A pretty simple guy. He is out there running a farm, on his own. [But] he is trying to deal with something that is overwhelming, and he is just not capable of dealing with it.[16]

Citing previous occasions Barker had been secretly visiting Sarah, the defense argued further:

> Six to eight times he [Mr. Bradley] calls law enforcement. . . Jody Bradley does what. . . follows the path that he, in his frustration, has been told to follow. 'I can't cope with it. It's frustrating. It's making me angry. I don't know how to stop it. My

/news/2009/11/mother-of-slain-teen-wont-rest-on-her-conviction-that-the-killers-punishment-didnt-fit-the-crime/ [https://perma.cc/UZ6HGBWX].

11. *See The Bradley Verdict, supra* note 8, at 1.

12. *Id.*

13. *See Man Arrested for Killing Daughter's Boyfriend, supra* note 8, at 1.

14. Denise Paquette Boots, Jayshree Bihari, & Euel Elliot, *The State of the Castle: An Overview of Recent Trends in State Castle Doctrine Legislation and Public Policy*, 34 CRIM. JUST. REV. 515, 516 (2009) (citing Daniel Michael, Florida's Protection of Persons Bill, 43 HARV. J. ON LEGIS. 199 (2006)).

15. *Id.*

16. Transcript of Closing Arguments at 521–31, Virginia v. Bradley (Shenandoah Cty. Ct. 2009) (CR09000122-00).

> daughter is heading down a path of destruction. I don't know how to stop it.' . . .
>
> [T]his time he has found him on the property. On his property. . . [A]nd now we hear, at night, Jody Bradley back in the house from work. It's dark out. He doesn't know where his daughter is. She is not answering his calls. He sees that there is somebody in the attic. He puts a hamper there, so he will know if somebody comes out. He thinks there is an intruder. It might be Sarah. It might be somebody else. He clearly has some idea that maybe it's Sarah, with somebody who is not supposed to be there. He decides what to do. . . .[17]

The defense's narrative continues, framing Mr. Bradley's thought process:

> I am in my house. I've got somebody unknown in my house. Maybe with my daughter. It may not be with my daughter. I don't know.' He arms himself to go up to his own attic. He gets his own gun, from his own house, to go into another part of his own house. Is that evil? Is that logical? Is that just human? It's pretty human.
>
> He goes upstairs. And he finds Sarah. He is looking around. 'I'm looking around. I'm thinking maybe it's Brendon up here. Maybe it's somebody up here.'
>
> What happens there is Jody Bradley being in a place he is allowed to be, his own home, at night, with a hooded figure crouched down in his attic, at night, hiding himself in a location he has been barred by law from being. . . Without thinking, Jody fires the one shot.[18]

In light of this narrative, Mr. Bradley's attorney offered as a final defense:

> This is clearly not a murder case. . . . Because I submit to you, there is this level of frustration, this anger that he has tried to get fixed, this problem between these. . . his daughter and this boy, that he has tried over and over and over, without success, to get help with and to stop.
>
> [I]f this was malice, it wouldn't have been one shot. It was one shot. He sees the boy go down. He sees, and it is obvious to

17. *Id.*
18. *Id.*

> him, that the boy is deceased. . . That shot is not fired with malice. What it is, it is not fired with malice, if it is fired with anything, it is fired with love for his daughter.
>
> . . . There is no question that that frustration and that anger, that inability to solve this difficulty, to save his daughter, is what motivates this. This is not willful and premeditated. It is a tragedy all the way around.[19]

The rhetorical devices that Mr. Bradley's defense employed to frame the killing of an unarmed youth are not unique. Indeed, the discourse through which the jury was prompted to interpret Mr. Bradley's actions implicates the all too common narrative of self-defense and justifiable deadly force that has inundated national news media and haunted the American psyche as killings not unlike Barker's gather widespread attention. From the killings of unarmed black youths, from Trayvon Martin and Jordan Davis at the hands of private citizens, to that of Michael Brown at the hands of public officers of law, this narrative raises a host of social, political and legal issues.[20] Together they demonstrate the contemporary departure from historical common law doctrines of self-defense, systemic racial stereotyping, and the peculiar association between firearm ownership, self-defense, and masculinity with which this Article grapples.[21]

Though each of these killings is circumstantially distinct, beneath their discontinuities each is rooted firmly in a narrative that reflects an ethos of manhood. Put a different way, they are united by a conception of masculinity that links male agency and self-defense with a *firearm*.[22] That the firearm is both a tool and a phallus is old

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19. *Id.*

20. For a discussion of these implications from a criminological perspective, *see* Boots et al., *supra note* 14, at 524–30; Anna Marie Smith, *Deadly Force and Public Reason,* Theory & Event 15, no. 3 (2012), https://muse.jhu.edu/ (accessed Feb. 15, 2017) (arguing that narratives like this, and the legal armature that conducts them, manifest "what we are supposed to collectively value, to whom we are required to show respect, what ends we are encouraged to regard as our most weighty social priorities, which crimes deserve the full glare of our public attention, and which crimes ought to be left in the shade.").

21. *See*, *e.g.*, Frank Rudy Cooper, *"Who's the Man?": Masculinities Studies, Terry Stops, and Police Training*, 18 COLUM. J. GENDER & L. 617, 674 (2009) ("Male police officers may sometimes be tempted to turn encounters with male civilians into masculinity contests."); Myisha Cherry, *The Police and Their Masculinity Problem*, THE HUFFINGTON POST (Nov. 26, 2014), http://www.huffingtonpost.com/myisha-cherry/the-police-and-their-masc_b_6225834.html [https://perma.cc/BJS532WS] ("Officer Darren Wilson's account of the shooting of Michael Brown sounds not only like a Western film . . . but a Western film entrenched in masculinity discourse.").

22. To be sure, each of these cases retains important factual distinctions that complicate the promise for a harmonious legal analysis. For instance, that Barker was a white male in the rural south does not implicate the racial factors deeply embedded within the Martin, Davis, and Brown killings.

hat, but at levels both symbolic and practical the defense of gun ownership, and more importantly, the defense of one's "lawful" actions with a gun, is a defense of a particularly *masculine* ideology.[23] In this regard, the association between gun ownership and masculinity enjoys a rich sociological literature.[24] But scarce work examines the extent to which the legal apparatus that forms the core of this association, namely, the Second Amendment, perpetuates this linkage and the social meanings attached to it.[25]

At first glance, Mr. Bradley's case does not meaningfully implicate the Second Amendment. Indeed, the defense does not make any claims regarding his right to firearm ownership. Rather, this right is presupposed. The defense instead claims that Mr. Bradley had a right to use force—even deadly force—to defend himself, his daughter, and his home.[26] If anything, the firearm is merely the tool with which Mr. Bradley exercised this broader right. But Mr. Bradley's invocation of and narrative for his Castle defense implicates the underlying rationale and effect of the Court's justification for the Second Amendment's right to individual firearm ownership.[27] The rhetoric of Mr. Bradley's defense thus serves as an instructive starting point for two reasons. First, it animates the common law rationale of self-defense within the home upon which the Court has constructed a constitutional right to gun ownership. Second, it highlights the cultural

23. R.W. CONNELL, MASCULINITIES 212 (1995).

24. *See*, *e.g.*, JENNIFER CARLSON, CITIZEN-PROTECTORS: THE EVERYDAY POLITICS OF GUNS IN AN AGE OF DECLINE 135 (2015); SCOTT MELZER, GUN CRUSADERS: THE NRA'S CULTURE WAR 133 (2009); Kevin Lewis O'Neill, *Armed Citizens and the Stories They Tell: The National Rifle Association's Achievement of Terror and Masculinity*, 9 MEN & MASCULINITIES 457–58 (2007); Angela Stroud, *Good Guys With Guns: Hegemonic Masculinity and Concealed Handguns*, 26 GENDER & SOC'Y 216, 216 (2012).

25. The social meanings assigned to gun ownership, and the Second Amendment specifically, have been examined on both ideological and racial registers. *See* Dan Kahan, *The Secret Ambition of Deterrence,* 113 HARV. L. REV. 413, 453 (1999) (discussing the competing social meanings and cultural identities bound up in debates over gun rights); Maxine Burkett, *Much Ado About. . . Something Else:* D.C. v. Heller*, the Racialized Mythology of the Second Amendment*, 12 J. GENDER, RACE & JUST. 57, 58 (2008) ("The cultural mythology that undergirds the commitment to the right to bear arms has long gained force from and been perpetuated by a perennial struggle between white and black America."). My analysis of the Second Amendment's masculinity problem does not offer an alternative account of the amendment's cultural mythology; rather, it offers a concomitant one. To be sure, masculinity, and gender more generally, is tethered inextricably to a complex matrix of social relations—including and perhaps especially race—and their constructed meanings intersect and often compound one another. With this in mind, readers might well ponder the account of masculinity offered herewith as one perhaps peculiar to the white identity, though not necessarily limited to it.

26. *See supra* note 16.

27. *See infra* Part II (laying out how *Heller* decision mirrors the legal armature of the Castle Doctrine).

norms associated with and evoked by the role of men in the preservation of the familial hearth.[28]

The relatively recent decisions of *District of Columbia v. Heller* and *McDonald v. City of Chicago* together establish that the Second Amendment right to keep and bear arms exists for the individual purpose of self-defense, and consequently, has given rise to the reasonable expectation that gun control issues that have remained relatively dormant in recent political debate will become increasingly accommodating to the pro-gun agenda.[29] So, too, these decisions have supplied the fodder for statutory innovations accommodating the justified use of self-defense with a firearm, namely through the expansion of the Castle Doctrine and the rise of controversial Stand Your Ground laws.[30] Because the Court relies overwhelmingly upon the understanding of self-defense in the common law tradition in order to demonstrate historical evidence for a purported right to self-defense in their construction of the Second Amendment, it has left open a doorway through which statutes conventionally associated with the common law might now be understood as constitutional authority.[31]

The practical implications of the holdings in both *Heller* and *McDonald* are widely discussed within both academic and political spheres. If nothing else, *Heller* and *McDonald* reinvigorated the contemporary political conversation about the legitimacy, desirability, and importance of personal firearms for purposes of self-defense.[32]

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28. According to a 2013 study by the Pew Research Center, 48% of respondents in a national survey answered that "protection" is their primary reason for owning a gun. This is a dramatic departure from a 1999 study administered with the Washington Post, which found that only 26% of respondents owned a gun for "protection." *See Why Own a Gun? Protection Is Now Top Reason*, PEW RESEARCH CTR. (Mar. 12, 2013), http://www.people-press.org/2013/03/12/why-own-a-gun-protection-is-now-top-reason [http://perma.cc/K9DLZB8C].

29. McDonald v. City of Chicago, 561 U.S. 742, 742 (2010) (incorporating *Heller*'s central holding against the individual states); District of Columbia v. Heller, 544 U.S. 570, 570 (2008); Michael P. O'Shea, *Modeling the Second Amendment Right to Carry Arms (I): Judicial Tradition and the Scope of "Bearing Arms" for Self-Defense*, 61 AM. U. L. REV. 585, 587–88 (2012); Boots et al., *supra* note 14, at 517.

30. *See, e.g.*, Boots et al., *supra* note 14, at 524 (finding that "23 of the 50 states have enacted expanded castle doctrine legislation from 2005 through December 2008"); P. Luevonda Ross, *The Transmogrification of Self-Defense by National Rifle Association Statutes*, 35 S.U. L. REV. 1 (2007); Daniel Sweeney, Note, *Standing Up to "Stand Your Ground" Laws: How the Modern NRA-Inspired Self-Defense Statutes Destroy the Principle of Necessity, Disrupt the Criminal Justice System, and Increase Overall Violence*, 64 CLEV. ST. L. REV. 715, 738 (2016) (discussing the politics of "Stand Your Ground").

31. Reva B. Siegel, Heller *& Originalism's Dead Hand—In Theory and Practice*, 56 UCLA L. REV. 1399, 1400, 1413 (2009).

32. Akhil Reed Amar, *When legal bullets bounce back,* N.Y. DAILY NEWS (Dec. 26, 2012), http://www.nydailynews.com/opinion/legal-bullets-bounce-back-article-1.1225737 [http://perma.cc/FKL6XXWQ] (noting how the *Heller* decision reignited a dormant legal

In raising these questions, *Heller* and *McDonald* also ignited a debate about the legal background of the Second Amendment and the presumed foundation of the Court's construction of a constitutional right guaranteeing armed self-defense.[33] That debate has focused largely on areas that touch on *Heller*'s and *McDonald*'s implications for legal provisions concerning rights to carry firearms in public, the relationship between citizenship rights and the Second Amendment, and the ramifications of incorporating the Second Amendment upon the individual states.[34] The definitive commonality within the post *Heller-McDonald* Second Amendment scholarship is the recognition of the Court's unambiguous association between the common law conception of self-defense and firearm ownership.[35] This association leads some to argue that *Heller* effectively constitutionalized a right to self-defense.[36] However, the social and philosophical underpinnings of *Heller*'s reasoning suggest that the Second Amendment codifies a specific *kind* of legal self-defense, namely the Castle Doctrine.

The purpose of this Article is thus twofold. First, it reexamines the association between firearm ownership and self-defense with an acute focus on the relationship between the underlying legal principles in *Heller* and those of the Castle Doctrine. Further, it suggests that the reasoning the majority employed in *Heller*, and again embraced in *McDonald*, creates a fundamental kinship between the Second Amendment and the Castle Doctrine. This kinship establishes a peculiar constitutional linkage between justifiable uses of self-defense within one's home, often defined by state statutes, and the Second Amendment—so long as the self-defense is carried out with a firearm.

The second purpose of this Article is to excavate the historical, cultural, and political ideologies underpinning the Castle Doctrine, and consequently imbued within the Second Amendment, to bring to the fore the valuation of the "true man" contained therein. To this point, I argue that the Court entangles the Second Amendment with the Castle Doctrine's implicit valuation of manhood, which reifies

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doctrine and offered important legal "ammunition" for both political liberals and political conservatives alike).

33. *See* Jonathan Meltzer, *Open Carry for All:* Heller *and Our Nineteenth-Century Second Amendment*, 123 YALE L. J. 1486, 1492–93 (2014).

34. *See* O'Shea, *supra* note 29, at 587–89; Joseph Blocher, *Rights To and Not To*, 100 CALIF. L. REV. 761, 763 (2012); Joseph Blocher, *Reverse Incorporation of State Constitutional Law*, 84 S. CAL. L. REV. 323, 380–82 (2011); Pratheepan Gulasekaram, *"The People" of the Second Amendment: Citizenship and the Right to Bear Arms*, 85 N.Y.U. L. REV. 1521, 1523 (2010).

35. *See, e.g.*, Gulasekaram, *supra* note 34, at 1528.

36. *See* Siegel, *supra* note 31, at 1415; Gulasekaram, *supra* note 34, at 1522.

the notion that "true men" do not retreat in the face of danger. In so entangling, the Court establishes an association between the perceptions of—and responses to—vulnerability and the legitimate use of force. This association fetishizes the firearm as both a tool of defense and as a manifestation of a particular masculine ideology. *Heller* thus allows for an interpretation of the Second Amendment that constitutionally galvanizes a particular masculine typology, and that carves out a dominant masculinity predicated upon firearm ownership within our public reason. This interpretation complicates the social evolution of subordinated masculinities, and is central to the performance of gendered identities more generally.

This Article proceeds in three Parts. Part I addresses the judicial construction of the Second Amendment in *Heller* and *McDonald*, and specifically engages how the Court's reasoning embraces an association between self-defense and gun ownership that mirrors the underlying rationale and practical effect of the common law understanding of the Castle Doctrine. Further, this Part examines the Castle Doctrine's historical infatuation with manhood and raises important concerns for a constitutional right that is predicated on implicit social mandates for masculine conduct.

Part II examines the "true man" ideology that informs *Heller*'s controlling language and confronts it as a cultural narrative of and ethos for masculinity in America. Arguing that constitutional values exist as dominant social facts within our public consciousness, this Part suggests that *Heller* and *McDonald* shift the social hierarchy of masculinities in a way that empowers and privileges gun-owning men. By situating a masculine typology within the context of the Second Amendment, these decisions reify problematic conceptions of American manhood and embed the same within the physical possession and use of the firearm. This Part considers further the promise, if any, of a feminist argument for the Second Amendment, and argues that *Heller*'s apparent contradictions generate an illusory freedom that is politically free in theory but legally male in practice.

Finally, Part III concludes by suggesting that the processes of social transformation by which conceptions of masculinity are defined and redefined are constricted by the Second Amendment's place within our public reason, and thus by the act of gun owning.

I. *HELLER* AND THE CASTLE DOCTRINE

District of Columbia v. Heller marks the first case in nearly seventy years in which the Court directly examined the Second

Amendment's central meaning.[37] The case challenged the District of Columbia's prohibition on privately owned handguns, under which D.C. residents were required to obtain a special license from the D.C. chief of police to possess a handgun, and that required all privately owned firearms to be kept unloaded, disassembled, or trigger-locked.[38] After being denied a license to keep a handgun in his home for the purpose of self-defense, Dick Heller, a D.C. resident and security guard, challenged this law on the grounds that the licensing and trigger-lock requirements violated the Second Amendment.[39] In holding that the Amendment guarantees an individual right to gun ownership for purposes of self-defense within the home, it is little wonder why *Heller*'s otherwise controversial outcome seems so familiar; it at once appeals to America's obsession with self-defense and builds legal symmetry with a historical tradition that sanctifies the security of the home.[40] Thus, inasmuch as *Heller* purports that the Second Amendment "codified a pre-existing right," scholars have located it in the common law understanding of the Castle Doctrine.[41] Aside from the common law, this same scholarship contends that

37. Linda Greenhouse, *Justices to Decide on Right to Keep Handgun*, N.Y. TIMES (Nov. 21, 2007), http://www.nytimes.com/2007/11/21/us/21scotus.html?Pagewanted=al [http://perma.cc/C3SF6WME].

38. District of Columbia v. Heller, 554 U.S. 570, 575 (2008).

39. *Id.* at 575–76; Robert Barnes, *Justices To Rule On D.C. Gun Ban*, WASH. POST (Nov. 21, 2007), http://www.washingtonpost.com/wp-dyn/content/article/2007/11/20/AR2007112000893.html [http://perma.cc/YC3LC6MK].

40. Daniel J. Sharfstein, *Atrocity, Entitlement, and Personhood in Property*, 98 VA. L. REV. 635, 639 (2012) ("Judges routinely anticipate that people will resort to deadly force over even the most picayune trespasses."). Even the dissenting opinions in *Heller* and *McDonald* acknowledge this point. *See McDonald*, 561 U.S. at 886 (Stevens J., dissenting) ("[O]ur law has long recognized that the home provides a kind of special sanctuary in modern life.").

41. *Heller*, 554 U.S. at 592 (emphasis removed). *See* Darrell Miller, *Guns As Smut: Defending The Home-Bound Second Amendment*, 109 COLUM. L. REV. 1278, 1350 (2009) (arguing that understanding the Second Amendment as a "narrow form of castle doctrine . . . . reflects the least historically contested threat that could have animated the right to keep and bear arms in the first place . . . ."). Though perhaps a clever doctrinal analogy, Miller's argument for "guns as smut" dangerously contributes to the same gendered imbalance built into the Second Amendment that is depicted in much smut itself: male domination and women subjugation. To be sure, I do not claim that Miller does so intentionally, but his analysis participates in precisely the sort of legal fetishism that obscures our social realities by prizing the black letter over the lived experience. Above all else, it is our lived experiences that take precedence in the foregoing analysis; O'Shea, *supra* note 29, at 594 (suggesting that the "traditional expression of self-defense law has been qualified by so-called 'Castle Doctrine' statutes . . . ."); Burkett, *supra* note 25, at 79 (tracing the cultural mythology informing the Second Amendment to a vision of an armed individual defending his "castle"); Stephen P. Halbrook, *Personal Security, Personal Liberty, and "the Constitutional Right to Bear Arms": Visions of the Framers of the Fourteenth Amendment,* 5 SETON HALL CONST. L. J. 341, 362 (1995) (quoting Senator Garrett Davis of Kentucky (1886) suggesting the Framers agreed every man should bear arms "in his house, his castle, for his own defense.").

Heller's reverence for the protection of the home affirms a recurrent commitment in "the Bill of Rights as a whole."[42] Working in chorus with the Third and Fourth Amendments' express concerns for the home, this scholarship suggests a Second Amendment right predicated on home protection "complements a long and durable line of cases and reaffirms 'our tradition [that] the State is not omnipresent in the home.'"[43]

Yet rationalizing *Heller*'s reading of the Second Amendment, either by way of established common law, appeals to tradition, or some greater principle of constitutional congruency, elides the potential implications the association between the firearm and the home—and particularly the linkages between the Castle Doctrine and the Second Amendment—have for the criminal law. Perhaps more critically, accepting as constitutional authority a pre-existing common law right to self-defense, previously unqualified by a specific tool of force, underscores a shared tradition at the expense of obscuring problematic practical effects and masking troublesome social forces. To understand more completely the cultural narrative *Heller* relies on and contributes to thus requires that we pay precise attention to both. Put a different way, we must connect its semiotics with the legal apparatus designed to provide for "the least historically contested threat that could have animated the right to keep and bear arms in the first place"—the Castle Doctrine.[44]

A. Our Homes Ourselves

By placing the right to self-defense within the home at the heart of the Second Amendment, *Heller* entangles two distinct theories of self-help: defense of habitation and self-defense.[45] Together, these common law protections entitle an individual by natural right to use force to protect (a) one's dwelling and (b) one's body, respectively.[46] In combination, the rationale and effect of these two common law theories constitute the basic formulation of the Castle Doctrine.[47] Within the walls of the home, the logic informing the Castle Doctrine

42. Michael C. Dorf, *Does* Heller *Protect a Right to Carry Guns Outside the Home?*, 59 SYRACUSE L. REV. 225, 232 (2008); Miller, *supra* note 41, at 1305.

43. Miller, *supra* note 41, at 1305 (quoting Lawrence v. Texas, 539 U.S. 558, 562 (2003)).

44. *Id.* at 1350.

45. *See, e.g.*, Siegel, *supra* note 31, at 1420.

46. *See, e.g.*, WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 223 ("[T]he law of England has so particular and tender a regard to the immunity of a man's house, that it [considers] it his castle, and will never suffer it to be violated with impunity . . . .").

47. Benjamin Levin, Note, *A Defensible Defense?: Reexamining Castle Doctrine Statutes*, 47 HARV. J. ON LEGIS. 523, 530 (2010).

as a positive defense for uses of deadly force that might otherwise constitute murder "assumes that so many otherwise law-abiding men and women would use deadly force in such circumstances that excusing these homicides is necessary to keep the law legitimately in line with social practice."[48]

To the extent that the Castle Doctrine works to align law with a tendency towards violence in situations that jeopardize the sanctity of one's body or one's property, such alignment functionally muddles the distinction between the doctrine's component parts. Although defense of habitation is properly understood as a right of property, self-defense is a right of body.[49] The former is rooted in the view that one's home is one's castle, and the violation of its sacrosanctity is what affords the right to force in its defense.[50] The degree to which the home is violated, however, need not precipitate a threat of violence to the body for defense of habitation to justify or excuse the use of deadly force.[51] Though it does not apply in cases of mere trespass, it requires only that force be used to prevent the commission of any forcible felony within one's personal dwelling.[52] The latter, on the other hand, maintains that one may meet force with force in situations that avail themselves of no other immediate solution.[53] Self-defense under the common law provides, and always has provided, that one has the right to use deadly force in the face of clear and present danger.[54] Although the doctrines of necessity and proportionality limit this right in the public sphere, a space that also has historically imposed a duty to retreat, these limitations have in their turn been abrogated within the private confines of the home.[55] By integrating seamlessly both defenses, the Castle Doctrine

48. Sharfstein, *supra* note 40, at 639. For an example of how courts carve out such exceptions to fall in line with social practice, *see* Jacque v. Steenberg Homes, Inc., 563 N.W.2d 154, 161 (Wis. 1997) ("Although dueling is rarely a modern form of self-help, one can easily imagine a frustrated landowner taking the law into his or her own hands when faced with a brazen trespasser . . . who refuses to heed no trespass warnings.").

49. *See* Levin, *supra* note 47, at 530.

50. *See id.*; State v. Carothers, 594 N.W.2d 897, 900 (Minn. 1999) ("Minnesota has long adhered to the common law recognition of the home's importance, holding that 'the house has a peculiar immunity [in] that it is sacred for the protection of [a person's] family.'") (quoting State v. Touri, 112 N.W. 422, 424 (Minn. 1907)).

51. Sarah Pohlman, Comment, *Shooting from the Hip: Missouri's New Approach to Defense of Habitation*, 56 ST. LOUIS L. J. 857, 859–60 (2012).

52. *Id.* at 859.

53. *Id.* at 863.

54. Beard v. United States, 158 U.S. 550, 564 (1895) (holding that one is "entitled to stand his ground and meet any attack made upon him with a deadly weapon, in such way and with such force as, under all the circumstances, he, at the moment, honestly believed, and had reasonable grounds to believe, was necessary to save his own life or to protect himself from great bodily injury.").

55. *See* Pohlman, *supra* note 51, at 863.

thus carves out an exception for the use of deadly force in pursuit of a right to either body or property, conceptually and practically obscuring the distinction between the two.

Not unlike the Castle Doctrine itself, *Heller* blurs the distinction between the rationales for self-defense with that of defense of habitation:

> [T]he inherent right of self-defense has been central to the Second Amendment right. The handgun ban amounts to a prohibition of an entire class of "arms" that is overwhelmingly chosen by American society for that lawful purpose. The prohibition extends, moreover, to the home, where the need for *defense of self, family, and property* is most acute. Under any of the standards of scrutiny that we have applied to enumerated constitutional rights, banning from the home "the most preferred firearm in the nation to 'keep' and use for protection *of one's home* and family," would fail constitutional muster.[56]

Here, "the inherent right of self-defense," particularly "for protection of one's home," signals that the right to gun ownership is protected to satisfy (a) one's personal safety and (b) one's proprietary interests.[57] Simply construing the Second Amendment to provide an individual right to gun ownership for the purposes of personal protection in the home would not be beyond the scope of the long-established doctrine of self-defense. However, construing the Second Amendment such that it provides a right "for protection *of* one's home" links self-defense and defense of habitation in the same stroke.[58] Importantly, *Heller* demarcates the Amendment's spatial application with the preposition "of," rather than "in."[59] To argue that the Amendment provides for one's personal protection "in" the home would do little more than affirm the recognized common law tradition that one may respond to imminent danger with force, especially within the personal dwelling, where he who occupies his home enjoys the privilege of nonretreat.[60] But to ground the right in the protection "of" one's home speaks to the notion that one may use force to protect from any array felonious acts, even if non-violent, which may affect one's property. Properly understood, *Heller*'s reading of the Second Amendment thus creates a constitutional right to

56. District of Columbia v. Heller, 554 U.S. 570, 628–29 (2008) (emphasis added).
57. *Id.*
58. *Id.* (emphasis added).
59. *Id.*
60. Catherine L. Carpenter, *Of the Enemy Within, the Castle Doctrine, and Self-Defense*, 86 MARQ. L. REV. 653, 656 (2003).

possess a firearm for the purposes of defending *both* one's body and one's property, whether under threat together or separately.

In the same vein, *Heller* constitutionally abrogates the duty to retreat once within the confines of the home. Although historically the common law imposed upon individuals a duty to retreat until one's back was "to the wall"[61] before acting in self-defense, this was seldom required within the walls of the home.[62] By logical necessity, defense of habitation would lack all practical effect if the same doctrine affording an individual the right to use force for the prevention of the commission of a felony within his home also required him to flee from it.[63] So, too, the pride of place granted to the privacy of the personal dwelling has long offered a similar privilege of non-retreat for the use of force in self-defense.[64] Once within the privacy of his home, English common law considered a man to have entered an area outside the public domain, and thus as having retreated as far as the law could reasonably expect.[65] And this tradition carried easily over into early American courts.[66] *Heller*'s recognition of the "acute" need for self-defense within the home and its commitment to the protection "of" one's property within the same render impractical any expectation that one retreat before effectuating their Second Amendment right.[67] On the one hand, this may seem a relatively uncontroversial instance of a common law standard leeching into our constitutional jurisprudence. To this point, the Court long ago recognized that in the face of imminent danger there is no duty to retreat.[68] On the other, however, this affirms the home as the "moral nexus between liberty, privacy, and freedom of association."[69] It thus reifies, perpetuates, and even endorses the problematic tendency for

61. SANFORD H. KADISH ET AL., CRIMINAL LAW AND ITS PROCESSES: CASES AND MATERIALS 865 (9th ed. 2012) ("The English common law imposed a strict duty to retreat; a person could use deadly force in self-defense only after exhausting every chance to flee, when he had his 'back to the wall.'").

62. Lydia Zbrzeznj, Note, *Florida's Controversial Gun Policy: Liberally Permitting Citizens to Arm Themselves and Broadly Recognizing the Right to Act in Self-Defense*, 13 FL. COASTAL L. REV. 231, 235 (2012).

63. State v. Blue, 565 S.E.2d 133, 139 (N.C. 2002) ("In neither case [of defense of habitation and self-defense] is the defendant required to retreat."); s*ee also* State v. Miller, 148 S.E.2d 279, 281 (N.C. 1966) (acknowledging that "the law does not require such householder to flee or to remain in his house until his assailant is upon him, but he may open his door and shoot his assailant, if such course is apparently necessary for the protection of himself or family.") (quoting State v. Gray, 77 S.E. 833, 833 (N.C. 1913)).

64. *See Blue*, 565 S.E.2d at 139.

65. Levin, *supra* note 47, at 530.

66. *Id.* at 531.

67. District of Columbia v. Heller, 554 U.S. 570, 628 (2008).

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

69. MARGARET JANE RADIN, REINTERPRETING PROPERTY 56 (1993); D. Benjamin Barros, *Home as a Legal Concept*, 46 SANTA CLARA L. REV. 225, 259–76 (2006).

homeowners to identify themselves with and through their property. This goes beyond simply affording the privilege of nonretreat in cases of self-defense by extending the right not merely to one's body, but one's material interests.

B. Necessity and Proportionality in Heller

Heller's implication that the Second Amendment countenances a right to armed defense of one's body and one's property gestures toward a situation in which the use of force is a matter of absolute necessity. For in both cases, defense of habitation or self-defense, the common law has historically granted a presumption of necessity within the home.[70] Typically, to invoke a defense of necessity, a defendant must demonstrate that the crime committed (a) was to prevent a significant harm, (b) was without any other adequate legal alternative, and that (c) the harm caused was not "disproportionate to the harm avoided."[71] Whether in defense of self or of property, that *Heller* held the Second Amendment to provide for "immediate self-defense" presumes, perhaps uncontroversially, that a risk to either (a) constitutes a significant harm, and that (b) self-help is the only viable means for immediate resolution when assailed within the home.[72] To talk about one's right to gun ownership, and perhaps self-defense with a firearm more generally, post-*Heller* is thus to speak in the key of necessity.

For its privileging the register of necessity, *Heller* collapses the requirement of proportionality.[73] To be sure, not only does a defense of necessity require the harm caused be proportionate to the harm avoided, but self-defense has long held the same.[74] And this is where *Heller*'s reliance on the rationale that informs defense of habitation becomes problematic. Although we postulate whether a "reasonable person" would have used *x* amount of force under circumstances of self-defense, acting in defense of habitation is not held to the same

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70. *See* Christine Catalfamo, *Stand Your Ground: Florida's Castle Doctrine for the Twenty-First Century*, 4 RUTGERS J. L. & PUB. POL'Y 504, 530 (2007); Pohlman, *supra* note 51, at 860.

71. Nelson v. State, 597 P.2d 977, 979 (Alaska 1979) (noting agreement amongst legal commentators on the "three essential elements" to the defense of necessity); WAYNE R. LAFAVE & AUSTIN W. SCOTT JR., HANDBOOK ON CRIMINAL LAW § 50 (1972); Edward B. Arnolds & Norman F. Garland, *The Defense of Necessity in Criminal Law: The Right to Choose the Lesser Evil*, 65 J. CRIM. L. & CRIMINOLOGY 289, 291–92 (1974).

72. District of Columbia v. Heller, 554 U.S. 570, 635 (2008).

73. *See id.* at 576, 597, 619 (discussing necessity).

74. George P. Fletcher, *Domination in the Theory of Justification and Excuse*, 57 U. PITT. L. REV. 553, 561 (1996) (describing proportionality as one of three "objective characteristics" of self-defense claims, the others being imminence and necessity).

standard of reflection.[75] Instead of meeting force with force, defense of habitation meets a perceived felonious violation of one's home, regardless of actual threat of death or grievous injury to the body, with force; "[t]hus, apparently, the harm inflicted may be disproportionate to the harm threatened."[76] Either defense, separately or combined as the Castle Doctrine, may provide for the use of deadly force, but they also protect the use of lesser force under the same circumstances.[77] *Heller*, however, ties these common law theories directly to the use of firearms, which are generally accepted as a tool intended for deadly force.[78] Indeed, many state statutes define deadly force to include the discharging of a firearm towards another person.[79] To the extent that *Heller*'s justification for individual gun ownership is buttressed in the rationales of self-defense and defense of habitation, it also implicitly transforms the proportionality requirement of these protections. It literally "empowers individuals to kill."[80] Consequently, according to the *Heller* majority, the Second Amendment's right to firearm ownership protects not only force used in the name of self-defense within one's home or in the defense of one's home, but in particular, it protects deadly force used for such purposes.[81] Because the majority in *Heller* bases the right to own a handgun on the idea that handguns are the "quintessential self-defense weapon," the fact that guns are commonly understood as implements of deadly

75. *See* People v. Bruggy, 29 P. 26, 27 (Cal. 1892) (describing the standard for reasonableness thusly: "The rule in such a case is this: What would a reasonable person,—a person with ordinary caution, judgment, and observation,—in the position of the defendant, seeing what he saw, and knowing what he knew, suppose from his situation and his surroundings?"); V.F. Nourse, *Self-Defense and Subjectivity*, 68 U. CHI. L. REV. 1235, 1246–77 (2001).

76. Stuart P. Green, *Castles and Carjackers: Proportionality and the Use of Deadly Force in Defense of Dwellings and Vehicles*, 1999 U. ILL. L. REV. 1, 9 (1999).

77. *See, e.g.*, LAFAVE & SCOTT, *supra* note 71, at § 50.

78. Model Penal Code § 3.11(2) ("Purposely firing a firearm in the direction of another person or at a vehicle in which another person is believed to be constitutes deadly force.").

79. Consider, for example, Florida's legal definition of deadly force under Chapter 776, section 6 of the Florida Statutes: "(1) [T]he term 'deadly force' means force that is likely to cause death or great bodily harm and includes, but is not limited to: (a) the firing of a firearm in the direction of the person to be arrested, even though no intent exists to kill or inflict great bodily harm . . . ." *Id. Cf.* N.J.S.A. § 2C:3-11.b (2006) ("Purposely firing a firearm in the direction of another person or at a vehicle, building or structure in which another person is believed to be constitutes deadly force unless the firearm is loaded with less-lethal ammunition and fired by a law enforcement officer in the performance of the officer's official duties."); V.T.C.A., Penal Code § 1.07(a)(17)(A) (defining deadly weapon to include "a firearm or anything manifestly designed, made, or adapted for the purpose of inflicting death or serious bodily injury.").

80. Robin L. West, *Tragic Rights: The Rights Critique in the Age of Obama*, 53 WM. & MARY L. REV. 713, 728 (2011).

81. *See id.*

force is as fundamental to *Heller*'s reading of the Second Amendment as is the need for self-defense in the home.[82]

C. A Man's Gun Is His Castle?[83]

It is axiomatic that "[a] constitutional right implies the ability to have and effectuate that right."[84] Inherent within the right to possess tools of deadly force to protect one's self and one's home is the right to use deadly force in order to operationalize that right. *Heller*'s language acknowledges as much, creating not merely a right to own a gun, but an "inherent right" to use it in defense of "hearth and home."[85] And in the enterprise of law, no rights are ever granted "by the constitution for an unlawful or unjustifiable purpose."[86] Thus, by the Supreme Court granting the right to firearm possession for self-defense within the home and for defense of the home, the right to use a firearm to pursue these ends might be presumptively justified in the face of acute danger. This is not to say, of course, that an individual is justified *prima facie* any and every time they shoot a home intruder. But, as Part III will explore further, the fundamental kinship between the Second Amendment and the Castle Doctrine carves out not only a legal shelter for the use of deadly force with a firearm, but in doing so relies on conceptual and spatial terrain over which there is seldom disagreement.[87]

The linkage that the majority in *Heller* creates between the Castle Doctrine and the Second Amendment becomes increasingly clear from the evidence Justice Scalia provides to reconstruct the Second Amendment's central meaning.[88] As one commentator notes, "[t]here is more evidence in the majority opinion establishing the existence of a common law right of self defense than there is demonstrating that such a right was constitutionalized by the Second Amendment's eighteenth-century ratifiers."[89] Because the right to

82. District of Columbia v. Heller, 554 U.S. 570, 629 (2008).

83. An earlier version of this argument can be found in Colin Christensen, *A Man's Gun is His Castle?: Re-Examining the Implications of Incorporating the Second Amendment*, 7 COLUM. UNDERGRAD. L. REV. 50, 50–70 (2013).

84. David I. Caplan & Sue Wimmershoff-Caplan, *Postmodernism and the Model Penal Code v. the Fourth, Fifth, and Fourteenth Amendments—and the Castle Privacy Doctrine in the Twenty-First Century*, 73 UMKC L. REV. 1073, 1105 (2005).

85. *Heller*, 554 U.S. at 628, 635; West, *supra* note 80, at 728–29 (arguing that *Heller* and its progeny, *McDonald*, grant "a citizen the right to not only purchase and own a handgun but also the fundamental or 'inherent' right to use it.").

86. *Heller*, 554 U.S. at 612 (citing *United States v. Sheldon*, in 5 Transactions of the Supreme Court of the Territory of Michigan 337, 346 (W. Blume ed. 1940)).

87. Miller, *supra* note 41, at 1350.

88. *See, e.g.*, *Heller*, 554 U.S. at 580–85.

89. Siegel, *supra* note 31, at 1415.

armed defense posited in *Heller* stands on fundamental common law ideas, the Court not only creates a powerful association between the Second Amendment and the common law, but also suggests an inherent sameness between the two by employing language identical in rationale and effect to these specific common law theories.[90] This specificity raises particularly dubious consequences. Whether one accepts *Heller* as good, bad, or somewhere in-between, the constitutional freedom it provides creates a set of peculiar problems for understanding self-defense. The right to self-defense is, and always has been, a right guaranteed to any citizen in the face of present danger.[91] To this point many scholars cite Justice Oliver Wendell Holmes's oft-quoted declaration that "[d]etached reflection cannot be demanded in the presence of an uplifted knife."[92] But the right to self-defense has never been limited or qualified by laws stipulating the specific tool of force one may use in the face of immediate danger.

Heller complicates this. By codifying the right to self-defense within Second Amendment doctrine, *Heller* establishes a unique set of stipulations that, although they may not necessarily limit the right to self-defense, nonetheless place those wielding a firearm under a constitutional shelter not enjoyed by those without.

The rights unique to the Constitution are the most secure legal shelter within the American scheme of ordered liberty. *Heller*'s transposition of common law defenses to constitutional guarantees of self-help within the home, so long as it is pursued with a firearm, carries constitutional gravity, whereas self-help pursued with any other implement of force does not.[93] *Heller* thus disproportionally disadvantages those who do not possess a firearm by "elevat[ing] above all other interests the right of law-abiding, responsible citizens to use arms in defense of hearth and home."[94] Likewise, *Heller*'s language does not create a right to self-defense categorically, as with the common law, but a specific variety of self-defense, namely the Castle Doctrine. Together, the use of common law evidence and the specific application of and justification for *Heller*'s reading of the Second Amendment create an unambiguous kinship between the authority of the Castle Doctrine and the possession and use of firearms. *Heller* thus creates the possibility of a constitutionally recognized Castle Doctrine defense predicated on the use of a firearm. To be sure, many versions of the Castle Doctrine exist within

90. *See, e.g.*, *Heller*, 554 U.S. at 594.

91. Joseph H. Beale, Jr., *Retreat from a Murderous Assault*, 16 HARV. L. REV. 567, 573 (1903).

92. Brown v. United States, 256 U.S. 335, 343 (1921).

93. *See id.*

94. *Heller*, 554 U.S. at 652.

the individual states, each prescribing different requirements for the use of force and the circumstances under which self-help may be justified.[95] However, with the Court's decision in *McDonald v. City of Chicago*, which incorporated the central holding in *Heller* against the individual states, *Heller*'s reasoning sets a constitutional baseline for Castle Doctrine defenses.[96] Indeed, as *Heller* constructs the Second Amendment for the "defense of self, family, and property" and for the "defense of hearth and home," the Castle defense recognized by this constitutional doctrine would: (a) only guarantee protection if the actor used a firearm in his application of force; (b) necessarily justify the use of deadly force by virtue of the firearm's understood purpose; (c) justify the use of deadly force in the defense of self and of other persons; and (d) justify the use of deadly force in the defense of one's dwelling and property therein.[97]

D. The Castle Doctrine and the "True Man"

Beginning in the late 19th century, the English common law tradition recognizing the home as the sole place where there was no duty to retreat began to take on a peculiarly American flavor.[98] Although the Blackstonian conception of self-defense within the home was colored by the notion that one could not be expected to retreat any further from the public domain once within the privacy of the home, many American judges rejected the requirement of any duty to retreat as "contrary to the tendency of the American mind."[99] This departure from the English tradition was inspired by the emergence of the "true man" doctrine, an approach to self-defense which stood for the proposition that a "true man" who is without fault owes no duty to retreat, even if he could otherwise safely do so, before resorting to physical force, including deadly force, in thwarting an assailant.[100] In many state courts, particularly those in the American West and South, the "true man" doctrine was recognized as a legitimate manner of self-defense beyond the walls of the home, carrying over into any public space in which one had a lawful right

95. *See, e.g.*, Boots et al., *supra* note 14.

96. McDonald v. City of Chicago, 561 U.S. 742, 767–68 (2010).

97. *Heller*, 570 U.S. at 628, 635.

98. RICHARD MAXWELL BROWN, NO DUTY TO RETREAT: VIOLENCE AND VALUES IN AMERICAN HISTORY AND SOCIETY 5 (1991). *Cf.* Levin, *supra* note 47, at 531 (discussing American retention of aspects of English common law).

99. BLACKSTONE, *supra* note 46, at 223 ("[T]he law . . . has so particular and tender a regard to the immunity of a man's house, that it stiles [sic] it his castle . . . ."); BROWN, *supra* note 98, at 10.

100. BROWN, *supra* note 98, at 5–10.

to be.[101] Yet, despite its expansion into the public sphere, the origins of the "true man" doctrine remain tightly bound within the walls of the home, rendering the Castle Doctrine the "paradigmatic case for understanding how the 'true man' ought to be expected to behave."[102]

The ideology informing the "true man" doctrine thus embedded within both state castle laws and America's broader public consciousness normative judgments about the traditional role of and expectations for men as guardians of hearth and home.[103] At the heart of this ideology is, of course, a conception of manliness, and thus what it means to be a "man."[104] But this conception of manliness is quite loaded. On one hand, its meaning suggests that the "true man" is honest and makes decisions based on what he believes to be true.[105] It is in this sense that the "true man" should not be held to the duty to retreat from his assailant because he presumably did not provoke the assault.[106] On another, however, cultural narratives that implicate classic gender stereotypes also inform this meaning. Among these, the "true man" protected his wife and children who were economically and morally dependent upon him.[107] What's more, as a microcosm of the state, the "true man" protected not only his household, but so too, his country.[108] In this sense, the "true man" was a sort of American patriot, who, in protecting his home, protected the legal rights and fundamental freedoms of the state.[109] The rhetoric of the "true man" doctrine thus valorized the man's role as "citizen-protector," at once defending his home and his family from murderous assault while simultaneously preserving the sanctity of the law-abiding citizen.[110]

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101. *Id.* at 34–35.

102. Levin, *supra* note 47, at 531.

103. Katelyn E. Keegan, Note, *The True Man & the Battered Woman: Prospects for Gender-Neutral Narratives in Self-Defense Doctrines*, 65 HASTINGS L. J. 259, 261 (2013).

104. *See, e.g.*, John M. Kang, *Manliness's Paradox*, *in* MASCULINITIES AND THE LAW 136, 137–38 (Frank Rudy Cooper & Ann C. McGinley eds., 2012).

105. *See* BROWN, *supra* note 98, at 10.

106. *See id.*

107. *See* Jeannie Suk, *The True Woman: Scenes From the Law of Self-Defense*, 31 HARV. J. L. & GENDER 237, 244 (2008).

108. *See id.* at 245.

109. *Id.*

110. *See id.* at 244. The term "citizen-protector" is taken here from Jennifer Carlson's recent sociological study of gun carrying in Michigan. According to Carlson, the contemporary citizen-protector model is meant to capture "the braiding of masculine duty with moral respectability that moves the use of lethal force from the criminal side of the moral ledger to the lawful and respectable side." CARLSON, *supra* note 24, at 97. *Cf.* Pamela Haag, THE GUNNING OF AMERICA 75 (describing gun customers in mid-19th-century America as "not a soldier but a citizen-defender . . . an individual with a force of some fifty men, embattled on his home turf.").

Many of the social meanings defining the "true man" doctrine rely implicitly, and at times explicitly, upon norms of honor and male virtue.[111] The "true man" as citizen-protector evokes normative values of courage, self-reliance, moral respectability, and chivalry—each of which being traditionally associated as a distinctly male virtue.[112] If nowhere else, the home represents the archetypal space in which the "true man" could claim a lawful right to be, and thus demonstrate such virtues by effectuating his right to defend his home and protect his family.[113] This masculine ideology underpinning the "true man" doctrine creates both a normative guidepost for "manliness" while concomitantly providing a legal shelter for the exercise of the same. But it also demonstrates a peculiar shift in social imperatives. The leap made from the Blackstonian Castle Doctrine, which permitted self-defense in the home, to the American "true man" doctrine, which inscribes expectations of action, represents an important shift from 'may' to 'must.' Under the traditional English Castle Doctrine, the citizen 'may' defend one's self when their back is against the wall; under the "true man" doctrine, however, the citizen 'must' defend one's self when a certain type of threat arises. In other words, whereas the Castle Doctrine was historically concerned with adjudicating whether self-defense was the product of either acquiescence or defiance of intrusion into bodily and proprietary autonomy, the "true man" doctrine is concerned with whether men satisfy expectations of an honorable citizen or whether they instead cravenly decline, when expected to 'man up.'[114]

That the Second Amendment appeals substantively to the ideology of the "true man" doctrine transcends the symbolic, and implicates the doctrine's practical effect. In other words, *Heller*'s language does more than merely echo the cultural tropes and social meanings underpinning the "true man" as a legal ideology. Indeed, because this doctrine departs from the English common law by both legally normalizing and socially mandating the privilege of nonretreat—especially within the home—the doctrine's practical effect serves as a justification for one's decision to stand and fight when he is assailed to no fault of his own.[115] Moreover, on account of the fact that the Second Amendment regards the right to own, possess, and use

111. *See* Dan M. Kahan, *The Secret Ambition of Deterrence*, 113 HARV. L. REV. 413, 456–57 (1999).

112. *Id.*; *see also* CARLSON, *supra* note 24, at 97 (discussing morality, masculinity, and guns).

113. Suk, *supra* note 107, at 247.

114. I am indebted to Johann Koehler's instructive comments for helping me develop this point.

115. *See* Suk, *supra* note 107, at 239.

for personal defense a firearm—a tool intended primarily for deadly force—*Heller* mirrors the Castle Doctrine as justification for the use of deadly force.[116] Not only, then, do the purposes for which one may own a firearm parallel the rationale and effect of the Castle Doctrine, but so too, they reproduce the cultural tropes and social meanings of the "true man" ideology that underpin both.

II. *HELLER*'S CONSTITUTIONAL NARRATIVE: A MASCULINE MYSTIQUE

What sets *Heller* apart, then? Beyond the transposition of common law rights to Constitutional guarantees, what is the problem? Very little sets it apart—and this is precisely the problem. The doctrinal kinship between the Castle Doctrine and *Heller*'s Second Amendment is the product of a masculine genealogy. The history here does not mark a progression from rights-oriented political liberalism bastardized to masculinist protectionism with legal bite. Or, the other way around, *Heller*'s "true man" underpinnings are not an artifact of the nineteenth century. They animate our contemporary moment, and *Heller* is but a flashpoint. Put yet a different way, *Heller* is not the *culmination* of gendered expectations shaping legal authority but the *representation* of how American law has configured the right to self-defense with male agency all along. The problem arises when these normative judgments of and imperatives for masculinity are positioned within our premier legal doctrine—the Constitution.

Constitutional provisions are more than collectively held or individually enjoyed guarantees to certain rights and privileges. Against the backdrop of American political thought, they are a set of social, political, and intellectual practices that are at once constituted by and constitutive of American culture and our shared communal values.[117] Far more than merely a legal instrument, the Constitution is an integral part of our shared language, community, and cultural ideals.[118] It generates both social and political norms, shapes our thoughts and practices, and exists simultaneously as a sphere of legal rules and a larger normative constellation apart from textual rules of law altogether.[119] Thus when considering the social meaning of the Second Amendment, what's at stake is not only a justification

116. *See infra* Part I.D.

117. *See* JAMES BOYD WHITE, WHEN WORDS LOSE THEIR MEANING: CONSTITUTIONS AND RECONSTITUTIONS OF LANGUAGE, CHARACTER, AND COMMUNITY 273 (1984).

118. *See id*.

119. H. JEFFERSON POWELL, A COMMUNITY BUILT ON WORDS: THE CONSTITUTION IN HISTORY AND POLITICS 207–10 (2002).

for gun ownership, but a cultural narrative of and ethos for self-defense more broadly. By embedding within the central purpose of the Second Amendment the social meaning and legal reality of the "true man" doctrine, *Heller* constitutionally galvanizes cultural expectations for ways of acting, thinking, and feeling about gun ownership predicated upon a peculiarly American imperative for manliness.

A. Second Amendment as Hegemonic Masculinity

To whatever extent the Constitution functions as the American master narrative by which dominant social and political norms and expectations are established, it is certainly not the only generative force behind all normative values or cultural ideals. Indeed, many of these, though perhaps affixed to and at times reified by, exist independently of the plain text of the Constitution and the meaning imparted upon it by judicial fiat. Central among such social forces that shape and order nearly every aspect of our lives is gender, the socially constructed collections of "cultural meanings and prescriptions" attached to our biological sex.[120] To discuss the "true man" doctrine as a masculine legal ideology is thus to describe a place in gender relations—the practices through which men and women effectuate their identities and the ways in which such practices affect and are affected by individual experience and shared culture—and to give it institutional authority.[121] But like all other social processes, gender is a constantly changing collection of meanings.[122] Such meanings are an inherently relational dynamic between ourselves as both individuals as well as members of a shared community; we are constantly negotiating the characteristics by which we are differentiated, and thus ultimately shaping and reshaping the conceptual definitions and operational mandates for what it means to be a "man" or a "woman"—masculine or feminine.[123]

Although we affix meanings to gender, there is nothing fixed or natural about them. Gender is, according to Judith Butler, performative—our gendered identities are not the source of our conduct but the product of our practices, discourses, and institutions.[124] To take gender as performative is to deny gender of an inherent substance.[125] Gender as such is thus not a state of being but an act of

120. MICHAEL S. KIMMEL, MANHOOD IN AMERICA: A CULTURAL HISTORY 2 (2d ed. 2006).
121. CONNELL, *supra* note 23, at 71.
122. *See* KIMMEL, *supra* note 120, at 3.
123. *Id.*
124. *See* JUDITH BUTLER, GENDER TROUBLE: FEMINISM AND THE SUBVERSION OF IDENTITY 24–25 (1990).
125. *Id.*

doing. For, Butler argues, "[t]here is no gender identity behind the expressions of gender; that identity is performatively constituted by the very 'expressions' that are said to be its results."[126] Importantly, Butler's theoretical framework is buttressed in the discursive, meaning that performativity is an act of linguistic signification by which we participate in discourse that repetitiously speaks, describes, and identifies.[127] It is this repetition that sets up the fluidity of gender; in signifying our gendered identities through discursive performance we are able to make subtle changes to each iteration and reiteration, altering as we go the meanings affixed to our performed identities.[128] In this sense, what we mean by terms such as "masculine" or "feminine" is "unfixed and unfixable"—their referents are displaced to some degree or another with every variation in the repetition of their performance.[129] To speak of the "true man" is thus to engage in a discursive performance that signifies the ideal type of the masculine, to describe the proper actions taken and to be taken by "real" men. But, critically, as I take up in Part III, participating in this discursive performance through legal speech, and constitutional discourse in particular, presents an interruption to the "orbit of the compulsion to repeat" by virtue of law's institutional durability and often protracted evolution.[130] To speak of the "true man doctrine" is thus to grant manhood a substance, to reify a "'being' behind [the] doing."[131]

By implication, the effect of the early nineteenth century judges that initially carved out the "true man" doctrine as a legitimate shelter within the American legal consciousness extended beyond simply defining a new way of understanding one's right to self-defense apart from its Blackstonian heritage.[132] It defined what it meant to be a "true" American man—the most venerable and socially desirable of men—and enshrined the act of standing one's ground as the *substance* of the same, creating both a legal entitlement and a social imperative. Although *Heller* demonstrates that the masculine

126. *Id.* at 25; *cf.* FRIEDRICH NIETZSCHE, ON THE GENEALOGY OF MORALS 45 (Walter Kaufmann & R.J. Hollingdale trans., 1967) (Butler's theory of gender performativity is influenced by Nietzsche's claim that "there is no 'being' behind the doing, effecting, becoming; 'the doer' is merely a fiction added to the deed—the deed is everything.").

127. BERNARD E. HARCOURT, LANGUAGE OF THE GUN: YOUTH, CRIME, AND PUBLIC POLICY 162–63 (2006).

128. *Id.* at 162.

129. JUDITH BUTLER, EXCITABLE SPEECH: A POLITICS OF THE PERFORMATIVE 14 (1997).

130. BUTLER, *supra* note 124, at 145.

131. NIETZSCHE, *supra* note 126, at 45.

132. While scholars like Professor Suk view this effect as translating "the idea of territorial boundary-crossing into a violation of a person's rights," this rights orientation overlooks the "person" as a discursively constructed, gendered subject. *See* Suk, *supra* note 107, at 245.

ideology of the "true man" doctrine still deeply captivates the American mind it, along with its nineteenth century counterparts, ignores the differences between idealized manhood and experienced masculinities as part of an actual lived identity.[133] In other words, regardless of whether most men view as fundamental to their masculine identities the ability and willingness to stand and fight in protection of their personal autonomy and proprietary interests, let alone whether or not most men ever have or ever will have the chance to actually do so, *Heller* creates a particular definition of masculinity that, by virtue of its place within our constitutional narrative, stands as the paradigmatic model for masculinity against which American men are measured.

Sociologists and gender theorists readily acknowledge that the differences between men render the idea of a unified conception of masculinity all but impossible.[134] Yet, the social reality that there are multiple masculinities defining men's actual experiences is in constant tension with some vision of a singular ideal type of masculinity, what sociologist R.W. Connell seminally termed as "hegemonic masculinity."[135] For Connell, hegemonic masculinity embodies the pattern of practices that perpetuate men's dominance over women, licensed by institutional authority, cultural ideal types, and individual exemplars.[136] Hegemonic masculinity is not so much about men's actual practices as it is the social expectations that guide their actions.[137] Accordingly, hegemonic masculinity has a subversive, and indeed coercive, quality—defining how "real" men ought to behave, regardless of the number of men that actually practice such behaviors.[138]

Decades before Connell first published her theory of hegemonic masculinity, prominent social theorist Erving Goffman asserted that the exemplar of American manhood was "a young, married, white, urban, northern, heterosexual Protestant father of college education, fully employed, of good complexion, weight, and height, and a recent record in sports."[139] To fail to meet any of these masculine qualifications, Goffman suggested, is to be viewed as "unworthy, incomplete, and inferior."[140] Though some of these characteristics

133. *See* District of Columbia v. Heller, 554 U.S. 570, 615–16, 628 (discussing a man's duty to protect his home and family).

134. CONNELL, *supra* note 23, at 76.

135. *Id.* at 77.

136. *Id.* at 76–77.

137. *See id.* at 77.

138. *See id.*

139. ERVING GOFFMAN, STIGMA: NOTES ON THE MANAGEMENT OF SPOILED IDENTITY 128 (1963).

140. *Id.*

may indeed remain active in defining the archetypal American man, the concept of hegemonic masculinity is not wedded to a static character type such as the one Goffman describes.[141] Rather, hegemonic masculinity ought to be understood—as contemporary sociologists widely accept—as the conception of masculinity that occupies the dominant position within gender relations at a particular moment in time and place.[142] If gender is a product of ongoing social and performative negotiation, then the hegemonic ideal is simply the one that is currently winning the day—even if it is up for renegotiation the next.[143] Hegemonic masculinity is therefore the product of a cultural dynamic that legitimates and sustains the dominant gender practices that define men's positions in social life, concurrently subordinating women categorically, as well as men that do not fulfill the hegemonic ideal.[144]

Although the very semantics of the "true man" doctrine point to a normative judgment regarding manhood in America, the mark of hegemony "is the successful claim to authority," which first requires "some correspondence between cultural ideal and institutional power."[145] In historical context, that the "true man" doctrine and the social meanings attached to it became the dominant American paradigm for justifiable self-defense in both state and federal courts indicates its hegemony by connecting the cultural ideal of masculinity underpinning the doctrine to the institutional power of the courts which affirmed the same. And this masculine ideology is further hegemonized by statutorily defined Castle laws enacted by individual states, as the Castle Doctrine illuminates the paradigmatic case for how the "true man" ought to act in the face of danger within the home.[146] Ultimately, then, *Heller* galvanizes the "true man" doctrine as a singular hegemonic masculinity—the ideal vision for manhood in America—by buttressing its social meaning and practical effect within constitutional doctrine, simultaneously imbuing its normative judgments of and imperatives for masculinity within the American master narrative and foremost institutional authority.

Consequently, this vision for manhood is not simply one version of hegemonic masculinity amongst a multiplicity of masculinities up for constant and continued discursive renegotiation, but a kind of *supreme* hegemonic masculinity suspended in a discursive paralysis by virtue of our protracted constitutional evolution. Problematically,

141. CONNELL, *supra* note 23, at 76.
142. *See id.* at 77.
143. *See id.*
144. *Id.* at 77–78.
145. *Id.* at 77.
146. Levin, *supra* note 47, at 531.

this paralysis thus supplies a language of and vocabulary for exercises of masculinity and expectations for masculine behavior enjoyed by gun-owning males and denied to their non-gun-owning counterparts.

B. The Illusion of a Feminist Second Amendment

Despite the historicity of the "true man" doctrine being deeply rooted in ideals of male virtue, perhaps, as some have argued, the modern understanding of the Second Amendment has little purchase on American manhood, and instead functions to empower women by legally equipping them with a tool for self-defense that successfully reduces, if not eliminates, the physical advantages of their would-be male assailants.[147] In this respect, the Second Amendment embodies a certain democratic virtue, offering both equal access and equal opportunity to successful self-defense.[148] Indeed, many pro-gun activists, male and female alike, employ the rhetorical imagery of a woman fending off a potential rapist with the handgun guaranteed to her by the Second Amendment to advance claims to gun rights.[149] Among them, Marion Hammer, the first female president of the National Rifle Association, credits her Colt pistol as the "equalizer" that prevented her attempted gang rape in a parking garage.[150] Current NRA Executive Vice President, Wayne LaPierre, has echoed this message proclaiming, "the one thing a violent rapist deserves to face is a good woman with a gun."[151] Other pro-gun feminist activist groups argue that the Second Amendment right to firearm ownership for self-defense within the home enhances their ability to protect themselves and their children from domestic violence and male spousal abuse.[152]

Intuitively, because the current state of Second Amendment jurisprudence is bound within the walls of home, the most legally salient of these feminist perspectives is the argument that gun ownership offers women protection from domestic violence.[153] Pragmatically,

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147. *See* Brief of Amicae Curiae 126 Women State Legislators and Academics in Support of Respondent at 2, District of Columbia v. Heller, 554 U.S. 570 (2008) (No. 07-290) [hereinafter Amicae 126 Women State Legislators] (arguing that the D.C. gun ban impairs women's ability to protect themselves and their children against male violence in the home).

148. *See id*. at 35.

149. Suk, *supra* note 107, at 266.

150. Merrie Skinner, *Pistol-Packing Growing Quickly for Women Alone*, NEW ORLEANS TIMES PICAYUNE, Sept. 9, 1990, at A2.

151. Daniel Blackman, *Wayne LaPierre, Gun Salesman*, HARV. POL. REV. (Mar. 21, 2013), http://harvardpolitics.com/united-states/wayne-lapierre-gun-salesman/ [https://perma.cc/A3U2NFJ7].

152. *See* Amicae 126 Women State Legislators, *supra* note 147, at 2.

153. *See id*. (discussing gun rights and violence against women).

too, this perspective is most salient, as women's violent confrontations are most likely to involve cohabitants.[154] For some scholars, such as Jeannie Suk and Joshua Dressler, the proposition that the "true man" doctrine stands as the ideological framework for current Second Amendment jurisprudence would not reify a masculine imperative.[155] Instead, they maintain that modern self-defense laws, in particular modern Castle Doctrine statutes, have been reformed to embrace the female domestic violence victim.[156] Even if the Second Amendment embraces the common law understanding of the Castle Doctrine, the contemporary social meaning of the Doctrine, they suggest, has abandoned its "true man" origins.[157] As a result, it is not only the true man that stands his ground against a murderous intruder, but also the "true woman" who stands her ground against her violent male cohabitant.[158]

Yet the Castle Doctrine presents a problematic delicacy for cases of domestic violence, and particularly those in which a female co-occupant kills her male counterpart.[159] Whereas the historical origins of the Castle Doctrine speak to a situation in which an intruder from without assails one within the privacy of their home, domestic violence presents a situation of violence between cohabitants.[160] Unlike an intruder who has no lawful claim to be in the home, "the cohabitant shares in the possession of the property and generally cannot be excluded from it."[161] Consequently, because the authority of the Castle Doctrine is directed towards instances of violent intrusion and external threat, a co-occupant killing in self-defense faces the difficulty that their aggressor enjoys a legal title to the same space. Thus, although the Castle Doctrine endows the home dweller with the privilege of nonretreat, many courts have observed a cohabitant exception, requiring the innocent cohabitant to retreat from their aggressor.[162]

The gendered impact of the Castle Doctrine as a legal defense for the use of deadly force within the home has given rise to two distinct theories of self-defense that inform its application.[163] On the

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154. Mary Anne Franks, *Real Men Advance, Real Women Retreat: Stand Your Ground, Battered Women's Syndrome, and Violence as Male Privilege*, 68 U. MIAMI L. REV. 1099, 1108–09 (2014).

155. *See* Suk, *supra* note 107, at 240; *see also* Joshua Dressler, *Feminist (or "Feminist") Reform of Self-Defense Law: Some Critical Reflections*, 93 MARQ. L. REV. 1475, 1479 (2010).

156. Suk, *supra* note 107, at 240; Dressler, *supra* note 155, at 1484–85.

157. Suk, *supra* note 107, at 240.

158. *Id.* at 257.

159. Franks, *supra* note 154, at 1111.

160. *Id.*

161. Carpenter, *supra* note 60, at 671.

162. *Id.* at 671.

163. Keegan, *supra* note 103, at 260.

one hand is the "true man" doctrine.[164] On the other is the Battered Women's Syndrome defense, which suggests that an abused female cohabitant lacks the autonomy to retreat from her repeatedly abusive male counterpart, and because she is subordinated and helpless, is left with no other option but to kill her abuser.[165] According to Lenore Walker, the syndromatic affect of the battered woman is the product of a twofold theoretical intersection that explains why abused women do not "just leave" their abusive situation: "learned helplessness" and "the cycle theory of violence."[166] For the latter, violent domestic relationships unfold in three phases beginning with "tension building," escalating to an "acute battering incident," and culminating with the abuser's "loving contrition," which displaces the battered woman's desire to just leave under the belief that her situation will improve.[167] As a matter of course, tensions build again, and round and round the cycle goes. Repeated revolutions of this cycle over time, according to Walker's theory, instill in the battered woman a "learned helplessness" that curtails her motivation to respond and perceives her attempts to escape her violent situation as futile.[168] Combined, these theories help to explain why battered women remain in violent relationships by presenting an image of the female victim whose repeated abuses diminish her "cognitive capacity to perceive the possibility of success and an inability to visualize alternatives to the battering relationship."[169]

Whereas the "true man" doctrine allows a male to invoke his masculinity as a justification for his use of deadly force, the battered woman syndrome is presented as an excusatory defense, tolerable only because of the mental and emotional impact of repeated abuses.[170] This is an important social and legal distinction. Legally, justifications are objective and general.[171] Contrarily, excuses are subjective

164. *Id.*

165. *Id.*

166. LENORE E. WALKER, THE BATTERED WOMAN 43–54, 55–70 (1979); Alafair S. Burke, *Rational Actors, Self-Defense, and Duress: Making Sense, Not Syndromes, Out of the Battered Woman*, 81 N.C. L. REV. 211, 222 (2002) (describing the aspersions cast on why battered women don't 'just leave' as "one of the most commonly asked questions about domestic violence.").

167. WALKER, *supra* note 166, at 95–96. *Cf.* Burke, *supra* note 166, at 221–23.

168. WALKER, *supra* note 166, at 87–88. Walker's view of "learned helplessness" borrows from Martin Seligman's experimentation on caged dogs, which found that dogs subjected to electric shocks without any escape ultimately ceased trying to escape, even when provided the opportunity. *See also* Martin E. P. Seligman, Steven F. Maier, & James H. Geer, *Alleviation of Learned Helplessness in the Dog*, 73. J. ABNORMAL PSYCHOL. 256, 256 (1968).

169. Burke, *supra* note 166, at 224.

170. Keegan, *supra* note 103, at 261–62.

171. Joshua Dressler, J*ustifications and Excuses: A Brief Review of the Concepts and the Literature*, 33 WAYNE L. REV. 1155, 1157–67 (1987).

and individual. The former arise from some sort of natural principle, the latter from one's personal characteristics.[172] One is a rule, the other an exception.[173] Though both may potentially lead to an acquittal, the former suggests a defendant has done something morally permissible and socially desirable, while the latter suggests a defendant has acted in the wrong but, as in the case of the battered woman, "is so defective in some significant sense that she cannot be held accountable for her own actions."[174] These are normative judgments with tremendous gravity. By implication, that many state courts recognize Battered Women's Syndrome defenses "frequently sends the legal and social message that women should retreat even from their own homes in the face of objective, repeated harm to their bodies", whereas the "true man" doctrine sends the legal and social message that men can advance against an assailant on the basis that they owe no duty to retreat.[175] In other words, the private home presents a space in which men are likely to face violent confrontation from without, whereas women are likely to face violent confrontation from within.[176] And although men are expected to stand and fight, women are expected to run and flee.[177]

The Castle Doctrine's presumption of reasonableness suggests that a man can presume that an intruder attempting to enter his home, whether presenting a real threat of violence or not, intends to injure him; being a "true man," he is entitled to use deadly force against them.[178] However, under this same legal defense, a woman cannot presume that her male cohabitant intends to injure her, regardless of known abuses or a history of violence, unless he has unlawfully entered the home.[179] As a result, the distinction between the Castle Doctrine defense based on a "true man" claim and one based on a Battered Women's Syndrome claim reifies traditional gender norms that subordinate and disenfranchise women. The stark contrast between the evidentiary burdens for each claim reveal the social reality of this gendered imbalance, as the "true man" can testify with his personal account of a deadly confrontation to demonstrate the imminence and necessity of his use of deadly force,

172. Kent Greenawalt, *The Perplexing Borders of Justification and Excuse*, 84 COLUM. L. REV. 1897, 1915–18 (1984) (discussing the moral and legal methods by which justifications are distinguished from excuses).

173. *Id.* at 1900.

174. Franks, *supra* note 154, at 1122.

175. *Id.* at 1103.

176. *Id.* at 1112.

177. *Id.*

178. *See* Keegan, *supra* note 103, at 263.

179. Franks, *supra* note 154, at 1116.

whereas a Battered Women's Syndrome defendant often requires expert testimony or state-mandated psychological evaluations, and in some cases even an insanity plea, in order to demonstrate the same.[180]

Consider this imbalance in the context of *Commonwealth v. Jody Bradley*.[181] Mr. Bradley's defense reduces the fatal encounter to this: "What happens there is Jody Bradley being in a place he is allowed to be, his own home, at night, with a hooded figure crouched down in his attic, at night, hiding . . . Without thinking, Jody fires the one shot."[182] There is no clear and present danger. There is literally no thought at all. There is a man in his own home and a boy lying defenseless on his back.[183] But, apparently, this is what true men do. We can hardly even imagine how this scenario might have unfolded had Mr. Bradley's daughter, Sarah, fought back against her father as he stormed the attic stairs in search of Barker. Mr. Bradley was a grown man, frustrated by defiant children. Sarah was a child, terrified by an enraged father with a history of domestic abuse and armed with a gun.[184] Yet, somehow, turning this scenario on its head presents a more complicated legal issue.

Relying on the recent legal innovations to Florida's self-defense statutes as illustrative of a new paradigm for Castle laws, Professor Suk argues, "the modern Castle Doctrine leverages the subordinated woman into a general model of self-defense rooted in the imperative to protect the home and family from attack."[185] According to her account, the influence of late twentieth-century legal feminism caused several Castle Doctrine states to recognize the home as a space of female subordination, treating subordination in the form of domestic violence as the crime equivocal to the felonious intrusion within the home for which the Castle Doctrine was envisioned to provide legal remedy.[186] This "new Castle Doctrine," therefore, takes as its end the empowerment of women by leveraging the victimization of domestic violence as a legally recognized reason to extend the privilege of nonretreat to cohabitants.[187] Yet, as Suk acknowledges,

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180. *Id.* at 1123.

181. Commonwealth of Virginia v. Bradley (Shenandoah Cty. Ct. 2009) (CR09000122-00).

182. Transcript of Closing Arguments at 521–31, Virginia v. Bradley (2009) (CR09000 122-00).

183. *Id.*

184. Transcript of Sarah Bradley Testimony at 217, 234, 237 Commonwealth of Virginia v. Bradley (2009) (CR09000122-00).

185. Suk, *supra* note 107, at 240.

186. *Id.* at 252.

187. *Id.* at 267–68.

this new iteration of the Castle Doctrine does not license the use of deadly force in self-defense against a lawful cohabitant *unless* there is an injunction for protection from domestic violence against the cohabitant aggressor.[188] Thus, if the cohabitation rule is an exception to the Castle Doctrine's privilege of nonretreat, this new provision is an exception to the exception. However, this also means, in effect, that women must obtain some sort of acknowledgment of their domestic abuse from the state before exerting their autonomy to stand their ground within the home. Inasmuch as the state is a traditionally and predominately masculine institution—predicated upon and advancing male dominance—this, too, reinforces the power men have over women, subordinating a woman's natural right to self-help in the face of ongoing danger to male approval by way of state bureaucracy.[189]

Though Suk's argument is appealing, her understanding of the "new Castle Doctrine" is problematic for several reasons. First, in a strict legal sense, that the protective order cohabitation exception in the "new Castle Doctrine" endows the victim of domestic violence with the privilege of nonretreat is inaccurate. Rarely is a protection order for domestic violence issued without some form of spatial restraint attached to it.[190] As a result, an individual against whom a protection order applies is unlikely to occupy the same dwelling as the victim for whom the order protects. In effect, the protection order functions not as an exception to the cohabitation exception under traditional Castle Doctrine law, but as a *legal suspension* of the parties' cohabitant status. Indeed, if the protective order requires some form of spatial separation, often in the form of an order to vacate, then the two parties are not legal cohabiters during the period in which the order is in effect.[191] Curiously, Suk acknowledges this elsewhere, referring to the spatial restraint accompanying the protective order for domestic violence as "state-imposed de facto divorce."[192] Yet, there too, Suk claims that "the matter [protection from domestic violence] is conceived as a public one concerning the state, the crime, and the criminal defendant."[193] The "true woman"

188. *Id.* at 268–69.

189. *See* CATHERINE MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE 161–62 (1989) (claiming "the sees and treats women the way men see and treat women").

190. Catherine F. Klein & Leslye E. Orloff, *Providing Legal Protection for Battered Women: An Analysis of State Statutes and Case Law,* 21 HOFSTRA L. REV. 801, 931–37 (1993) (demonstrating that 48 states have statutorily provided for the inclusion of a vacate order with a civil protection order, with two others providing the same bundle of protections by authority of case law, effectively evicting a respondent from the residence).

191. Franks, *supra* note 154, at 1114.

192. JEANNIE SUK, AT HOME IN THE LAW 35 (2009).

193. *Id.* at 45.

is nowhere to be found in this formulation. The abuser in this case thus remains identical to the intruder under the traditional understanding of the Castle Doctrine, regardless of any claim to cohabitation. What's more, as other scholars have argued, Suk's claim that the protective order exception benefits victims of domestic violence "assume[s] that protective orders are common, easily obtained, and timely."[194] In short, this view overlooks a host of sociological factors that confound the reality of domestic violence victims' desire and ability to obtain a protective order.

Second, Suk's claim that this vision of the new Castle Doctrine "reinscribes and revises the true man ideal by re-imagining violence within the home as intrusion"[195] both overstates the role of the protection order and ignores the social meaning of the true man ideology. Though violence within the home may warrant a protective order—assuming one is sought—it does not in fact convert violence in the home to intrusion. To be sure, once the protective order is in place, either by way of criminal or civil procedure, the terms of the parties' cohabitation status are suspended, and therefore intrusion should be understood no differently than its traditional common law definition.[196] But Suk's claim that this vision transforms the "true man" ideal into that of the "true woman" is perhaps most troubling. Recall that the true man ideology is rooted in the idea that the true man exercises his autonomy to protect himself, his family, and his home from violent intrusion, owing no duty to retreat from within the walls of his own home. Suk's "true woman," even if seeking a civil protection order, which assumes no prior state intervention in her domestic situation as per a criminal protection order, requires the victim of domestic violence to seek the state's approval.[197] Whereas the true man does not need the state's approval to act in defense of hearth and home, the autonomy of Suk's "true woman" is at the will of an institution outside herself. The imperative that ensues is not one of true womanhood in the same sense that entitles the true man to stand his ground and meet force with force, but one that demands permission from an already masculine institution.[198] In either case—criminal or civil—the trueness of Suk's "true woman" does not take

194. *Id.*

195. Suk, *supra* note 107, at 272.

196. Franks, *supra* note 154, at 1114.

197. For an example of this state approval, consider the instructions and requirements to obtain a domestic violence protection order provided by the Oklahoma County clerk's office: "Please do not sign your form before presenting it to the court clerk's office. *We must watch you sign the form*." (italics added). *See, e.g.*, *VPO Information,* OKLAHOMA COUNTY, http://oklahomacounty.org/courtclerk/VPO.aspx [https://perma.cc/2EVGQF4M] (last visited Jan. 21, 2017). SUK, *supra* note 192, at 47 (distinguishing between criminal and civil protection orders for domestic violence).

198. CONNELL, *supra* note 23, at 73.

female autonomy nor agency as its fundament, leaving this figure's enfranchisement illusory, not emboldened.[199]

Feminist arguments, not unlike Suk's, fall short because they conflate political sentiment with legal reality. Put a different way, a feminist Second Amendment imbricates a democratic imaginary with a criminal legal apparatus that imagines male heroism. Perhaps there may be a certain democratic sentiment to a feminist argument in support of the Second Amendment as an individual right. But this is not *Heller*'s sentiment. Although on the surface *Heller* purports to speak to our democratic sensibilities by its appeal to the categorical "law-abiding citizen," the common law on which it relies and the statutory scheme that puts into operation its practical effect speak to a character far different. This is not a democratic character, but a patriarchal one. *Heller*'s harmful illusion is a right to armed defense that is politically free but legally male. It expresses not a preoccupation with or concern for the public good or civic virtue or social solidarity, but the individual's—the true man's—right to withdraw from the state and secure himself, his property, and his family with his gun.[200] If any overarching political ethos is to be discerned from *Heller*, it is one that professes neither democracy nor republicanism,[201] but "bastardized liberalism" of the sort that romanticizes the individual's natural, unfettered autonomy, apprehends a condition of constant insecurity, and reserves the right to kill when the position of either is acutely vulnerable, the reasonability of which adjudged not by an objective standard but a masculinized one.[202]

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199. To be sure, Suk gestures to this point, arguing that the legal innovations in domestic violence and Castle Doctrine law "present as opportunity for critical reflection on the increasing subordination of individual autonomy in domestic space to state control of the home in the name of public interest." SUK, *supra* note 192, at 54. Yet, Suk leaves us with a conflictual account that holds, on the one hand, the expansion of state control—an expansion inextricably bound up in paternalism and masculinist protectionism—and the empowerment of female agency, on the other, as coextensive phenomena. Simply put, it seems there can be one, or the other, but not both.

200. *See* West, *supra* note 80, at 743 (arguing that the right provided by the Second Amendment, and "rights peculiar to the age of Obama" more generally, are "the romantic individual's right to withdraw from an utterly incapacitated state.").

201. David C. Williams, *Civic Republicanism and the Citizen Militia: The Terrifying Second Amendment,* 101 YALE L.J. 551 (1991).

202. Wendy Brown, Comment, *Guns, Cowboys, Philadelphia Mayors, and Civic Republicanism: On Sanford Levinson's* The Embarrassing Second Amendment, 99 YALE L. J. 661, 663 (1989) (describing Levinson's 'republican' argument for the Second Amendment as an individual right as "not republicanism but a kind of bastardized liberalism, in which a diffident and depoliticized populace squares off against the state, in which there is no political heart at all but only hands and head and feet all armed against one other."). *Cf.* Sanford Levinson, Comment, *The Embarrassing Second Amendment*, 99 YALE L. J. 637, 648 (1989) (arguing that even in its infancy, America's founders considered the risk of tyranny by providing the populace with a way to resist such tyranny).

C. Heller*'s Art of Manliness*

1. Navigating Heller*'s Paradox*

Importantly, the Second Amendment speaks directly to neither the "true man" nor the "true woman." Yet, its substantive source of legitimation is not a democratic political ideal. Rather, its democratic commitments to the "law-abiding citizen" are a mist that envelops a system of masculinist power. But how can this be? Simply put, words don't always mean what we think they do. Text and practice are not the same. Often they say one thing, but mean another. They may even purport to be truth, when the material reality to which they speak is actually far different. Rhetorical discontinuities present us with regularity a string of paradoxes. And as these paradoxes grow in complexity, we all too often cast them away as contradictions—perhaps as an act of summary dismissal, perhaps as opprobrious derision. But, as Ludwig Wittgenstein reminds us, even when we think we understand words, "their meaning lies in their use."[203]

For many in the legal academy, *Heller*'s glaring contradictions have proven a reliable source of publishable discussion.[204] How is it that *Heller* can at once be hailed a "triumph of originalism," yet stand as textbook illustration of living constitutionalism?[205] To what extent can we really rely on *Heller*'s categoricalism[206] when its constitutional calculus is a thinly veiled exercise in pragmatism and interest balancing?[207] Is the right to armed self-defense in public really as historically indeterminate as some suggest?[208] Substantively, how

203. LUDWIG WITTGENSTEIN, PHILOSOPHICAL INVESTIGATIONS 197 [68] (G.E.M. Anscombe, trans., 2001) (For we say that there isn't any doubt that we understand the word, and on other hand "[its] meaning lies in [its] use.").

204. For an excellent survey of the literature on *Heller*'s contradictions, see Adam Winkler, Heller*'s Catch-22*, 56 UCLA L. REV. 1551, 1551 (2009).

205. *See* Winkler, *supra* note 204, at 1557; Linda Greenhouse, *3 Defining Opinions*, N.Y. TIMES (July 13, 2008), http://www.nytimes.com/2008/07/13/weekinreview/13greebox.html [https://perma.cc/3QXN2YVP]; J. Harvie Wilkinson III, *Of Guns, Abortions, and the Unraveling Rule of Law*, 95 VA. L. REV. 253, 256 (2009) (describing *Heller* as having "left only originalism as the foundation of conservative jurisprudence.").

206. Joseph Blocher, *Categoricalism and Balancing in First and Second Amendment Analysis*, 84 N.Y.U. L. REV. 375, 375–76 (2009).

207. Josh Blackman, *The Constitutionality of Social Cost*, 34 HARV. J.L. & PUB. POL'Y 951, 973–78 (2011) (arguing *Heller*'s logic is bound up in a framework of "concerns about the social costs of the Second Amendment.").

208. *See* Jonathan Meltzer, *Open Carry for All:* Heller *and Our Nineteenth-Century Second Amendment*, 123 YALE L. J. 1486, 1490 (arguing that *Heller*'s historical sources compel a right to self-defense beyond the home); Miller, *supra* note 41, at 1321 (arguing that "[t]he history of the right to public self-defense generally, and the Second Amendment in particular, is conflicted and fragmented."); Winkler, *supra* note 204, at 1570 (noting that of the sources on which the Court relies for its self-defense rationale "none of them limit that right to the home.").

do we square an "inherent" individual right to armed self-defense with limitations barring certain classes of people from owning a firearm or the possession of firearms in "sensitive places" or concealed and otherwise public carry or specific types of commercial sales?[209] In short, it is unclear what we should make of a decision plagued by inconsistencies in its fundamental technique of reasoning, evidentiary findings, and practical application and implementation.[210]

The rhetoric of individual rights is often condemned as overexaggerated, absolutist and, ultimately, divisive.[211] Yet the assertion of individual rights with steadfast resolution—or even absolutism—serves an important discursive purpose: it conveys power, or at least a desire for it, and under the right circumstances it is an intoxicating, coercive technique of persuasion. But to speak of individual rights with absoluteness is to advance an illusory vision of the subject for which the right exists; it is to perpetuate a false, harmful account of who—and what—we are.[212] Rights are never completely our own, never free from limitation nor immune to exception. Absolutism, however, opens up the space of paradox. It generates the very possibility of an identical opposite, an internal contradiction, and in so doing presents us with a challenge to negotiate, not a problem to resolve.[213] How then might we decipher precisely the

209. *See* District of Columbia v. Heller, 554 U.S. 570, 626–28 (2008) ("[N]othing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill . . . ."; also noting the ruling does not strike down "laws forbidding the carrying of firearms in sensitive places such as schools and government buildings" nor "laws imposing conditions and qualifications on the commercial sale of arms."). *See also* Joseph Blocher, *The Right Not to Keep or Bear Arms*, 64 STAN. L. REV. 1, 16 (2012) (acknowledging that in cases where one may need to resort to self-defense, *Heller* "recognizes a right to have and carry guns"); Michael P. O'Shea, *The Right to Defensive Arms After* District of Columbia v. Heller, 111 W. VA. L. REV. 349, 377 (2009) (observing *Heller*'s own reasoning suggests the Second Amendment "protects a meaningful right to carry arms regularly for defense.") (emphasis removed); O'Shea, *supra* note 29, at 621–22 ("It is a statistical truth that most violent crimes that can be lawfully defended against with firearms occur outside the home, not in or near the home."); Eugene Volokh, *Implementing the Right to Keep and Bear Arms for Self-Defense: An Analytical Framework and a Research Agenda*, 56 UCLA L. REV. 1443, 1515 (2009) (asserting that "self-defense has to take place wherever the person happens to be."); Winkler, *supra* note 204, at 1569 (noting that "prohibitions on concealed carry also interfere with self-defense.").

210. For inconsistencies in *Heller*'s implementation, see Winkler, *supra* note 204, at 1565–66 (claiming that as of January 2009, "lower federal courts had decided over seventy-five different cases challenging gun control laws under the Second Amendment . . . . Remarkably, not one gun control law has been declared unconstitutional on the basis of the Second Amendment since *Heller*.").

211. *See, e.g.*, MARY ANN GLENDON, RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE 14 (1991); J. Harvie Wilkinson III, *The Dual Lives of Rights: The Rhetoric and Practice of Rights in America*, 98 CAL. L. REV. 277, 304 (2010).

212. Wilkinson, *supra* note 205, at 305.

213. BONNIE HONIG, EMERGENCY POLITICS: PARADOX, LAW, DEMOCRACY 13 (2009).

illusory subject built into *Heller*'s language and, importantly, navigate its paradoxes such that the rhetorical efficacy of claims to self-defense reveal their socially contingent, rather than politically absolute, character? Although many attempt to correct *Heller*'s internal contradictions, at times in favor of a more expansive Second Amendment, at times not, perhaps they don't require correction to discern a unifying ethos.[214] Perhaps, like Wittgenstein, we ought to look for meaning in the ways in which we use *Heller*'s language in practice—in how *Heller*'s appeals to masculinity function not only as a peculiar cultural narrative but as an art of persuasion, a rhetorical flourish with legal significance.[215] In other words, rather than taking up *Heller*'s logical contradictions for one side or another, we ought to take *Heller*'s reasoning as bound up in a paradox with deep social and political richness—to interpret the gulf separating *Heller*'s words from their use, and attend to the ethos they instantiate through their articulation.[216]

The subject for whom *Heller* purportedly speaks is the "law-abiding, responsible citizen."[217] Though on the surface this language parlays a seductively democratic quality, as Part II.B demonstrated, this is hardly the reality in practice. The masculine ideology informing both *Heller*'s subject *and* the apparatus of criminal law that enables the Second Amendment's practical effect—namely, the Castle Doctrine—never explicitly names itself. Even if a nineteenth-century "true man" haunts the Amendment's twenty-first-century jurisprudence, this masculine specter is rarely, if ever, articulated as such. Indeed, it would even seem laughable to advance a Castle defense in court on the explicit grounds that one was standing up for their manhood. But our words need not speak of "manliness" to be used in such a way that treats manliness as the substantive source of legitimation. Aristotle's tripartite framework for the technical means of persuasion offers the clearest indication of how this works.[218] For Aristotle's account in *Rhetoric*, there are three primary modes of appeal: ethos, pathos, and logos.[219] Whereas the authority

214. *See* Meltzer, *supra* note 208, at 1940; Winkler, *supra* note 204, at 1570.

215. WITTGENSTEIN, *supra* note 203, at 197.

216. *See, e.g.*, LEFT LEGALISM/LEFT CRITIQUE 432 (Wendy Brown & Janet Halley eds., 2002) ("How might attention to paradox help formulate a political struggle for rights in which they are conceived neither as instruments nor as ends, but as articulating through their instantiation what equality and freedom might consist in that exceeds them?"); HONIG, *supra* note 213, at 77 ("Without interpretation, law which is general and broad can never be applied, implemented, or understood. Without interpretation, law is insensitive to particularity and nuance.").

217. District of Columbia v. Heller, 554 U.S. 570, 635 (2008).

218. *See* ARISTOTLE, RHETORIC 24–25 (W. Rhys Roberts trans., Modern Library 1st ed. 1954).

219. *Id.*

of logos is bound to the logic or reason of the argument itself, and whereas pathos relies on the emotion of and emotive appeals to the audience, the power of ethos resides in the character and authority of the speaker.[220] For Aristotle, ethos is the most important of the three, as it "designates the image of self built by the orator in his speech in order to exert an influence on his audience."[221] It operates on the register of the conventional, it invokes cultural norms and ideals, and it creates an image of the speaker that emphasizes his alignment with collectively held virtues.[222] Ethos in this Aristotelian framework is foremost a speech act.[223] It is a discursive act that exercises, that asserts truths and demands recognition, and thus constructs a character through speech; consequently, it manifests in the speaker "the virtues most valued by the culture to and for which one speaks."[224]

The persuasive capacity of ethos is, however, bound up in a complex set of social relations.[225] The authority of the speaker's character, no matter how well in tune to dominant cultural values their speech may be, cannot be dissociated from their social position.[226] The classical Aristotelian conception of ethos is thus interwoven with the sociological valence provided by Pierre Bourdieu such that "a discourse cannot be authoritative unless it is pronounced by the person legitimated to pronounce it in a legitimate situation."[227] Aristotle's view of ethos as a discursive construction and Bourdieu's reminder that the power of discourse depends on institutional positionality, and therefore authority, are both complementary and reciprocal.[228] To understand the power of ethos requires that we be mindful of both who is speaking, the social position from which they speak, and the extent to which their speech is built upon collective representations and cultural models that the audience endows with positive value.[229] And to understand the masculine ethos that *Heller* endows with constitutional authority requires that we pay careful attention to

220. *Id.* ("Of the modes of persuasion furnished by the spoken word there are three kinds. The first kind depends on the personal character of the speaker [ethos]; the second on putting the audience into a certain frame of mind [pathos]; the third on the proof, or apparent proof, provided by the words of the speech itself [logos].").

221. Ruth Amossy, *Ethos at the Crossroads of Disciplines: Rhetoric, Pragmatics, Sociology*, 22 POETICS TODAY 1, 1 (2001).

222. S. Michael Halloran, *Aristotle's Concept of Ethos, or If Not His Somebody Else's*, 1 RHETORIC REV. 58, 60 (1982).

223. *See id.*

224. Halloran, *supra* note 222, at 60; *see* MARIANNE CONSTABLE, OUR WORD IS OUR BOND: HOW LEGAL SPEECH ACTS 131–40 (2014).

225. Amossy, *supra* note 221, at 2, 9.

226. *Id.* at 3.

227. *Id.* (citing PIERRE BOURDIEU, LANGUAGE AND SYMBOLIC POWER 107 (1991)).

228. *Id.* at 12.

229. *Id.* at 6–8.

the cultural values it embodies and the pragmatic, sociological reality of those endowed with the legitimate authority to embody them.

Heller's paradox: a rule without a rule.[230] Nowhere in the words of the Second Amendment is there mention of self-defense or defense of "hearth and home."[231] Nowhere does it speak to an "individual right."[232] Yet this is precisely the rule the Court created.[233] Perhaps this is because the vast majority of Americans "believe" the Amendment stands for an individual right to own a gun.[234] Even if the rule doesn't exist within the formal language of the Amendment, "[e]veryone believes that the rule exists, but, because it doesn't, it cannot be repealed or repudiated."[235] This is, according to Adam Winkler, *Heller*'s "catch-22."[236] That so much ink has been spilt in attempts to square this rule with some sort of existing statutory schema, in lieu of challenging the rule's legitimacy as such, signals that its authority is not to be found in its words, but somewhere else.[237] Indeed, to challenge one's right to bear arms is to challenge, at least ostensibly, one's right to protect themselves, which is wholly unpalatable. Of *Heller*'s many problematics, not one exists outside of this paradoxical situation. And it is in precisely the tension of this paradox that we find the somewhere else. In other words, though the Second Amendment's words aren't what they seem to be, they are used in a way that is so familiar to us that to give them any other meaning borders the inconceivable. Their power follows not from logos, but from ethos; they are granted with almost uncontestable authority not by virtue of sound logic but because they articulate a cultural model and instantiate a character that is endowed with positive value. The paradox of a rule that doesn't exist in the form of rules is thus negotiated by a discursive appeal to cultural norms and collectively held ideals that transcend the formal boundaries of law and speak to and on behalf of a character peculiar to and venerated by the American mind: the true man and his gun.

Questions pertaining to the proper scope and application of the Second Amendment are entangled in this same paradox, and they are engaged in the same negotiative process by which we contest,

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230. Winkler, *supra* note 204.

231. District of Columbia v. Heller, 554 U.S. 570, 635 (2008); *see* U.S. CONST. amend. 2 ("A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.").

232. *Id.* at 636.

233. *Id.* at 595, 635.

234. Winkler, *supra* note 204, at 1559–60 (analogizing *Heller*'s decision to Joseph Heller's novel, *CATCH-22*).

235. *Id.* at 1559.

236. *Id.* at 1565.

237. *See id.* at 1566–69 (describing the lack of statutory authority for *Heller*'s rule).

reshape, and construct the meaning of gender. To grapple with the barriers to *Heller*'s implementation is to reflect on the practices that are deemed necessary in order to be a "true man." To ask where guns may be legally carried is to demarcate the proper space of masculinity. To limit what types of persons may legally possess a firearm is to intentionally emasculate them, perhaps because they are deemed unworthy of the recognition, perhaps because they are perceived as already hypermasculine.[238] To restrict the sorts of firearms one may legally possess is to pass normative judgment on the actions required of real men and to dismiss certain classes of firearms as unnecessary to them.[239] To regulate the commercial sale of arms is to affirm an economic structure that privileges one class of men at the expense of others.[240] To speak with the ethos animating the Second Amendment is to instantiate one's masculinity, to perpetuate the Amendment's masculine mystique, and to participate in a false promise and democratic illusion that reifies violence as male privilege.[241] All of this, importantly, legitimates and is legitimated by a set of institutional structures that position the male figure as he who is endowed with the authority to ask these questions, and critically, to determine their answers.

2. Ethos and Legal Performance

Attention to the discursive function of ethos does not resolve *Heller*'s paradoxical ruling—but it does maneuver its tensions with seeming social acceptability, rhetorical palatability, and legal significance. Although the masculine ethos instantiated within the Second

238. The border between the masculine and the hypermasculine has important racial implications, as indeed black men are often perceived as being *de facto* hypermasculine by virtue of their existential blackness—a form of stereotype threat that only grows more problematic—and more dangerous—with the presences of firearms. *See, e.g.*, Devon W. Carbado, *Masculinity by Law*, *in* MASCULINITIES AND THE LAW 51–77 (Ann C. McGinley & Frank Rudy Cooper eds., 2012) (arguing that Black and Latino males must demonstrate "surplus compliance" to mitigate fears of their perceived hypermasculinity). Burkett, *supra* note 25, at 58 (describing the Second Amendment's history of racial oppression).

239. *See, e.g.*, Kolbe v. Hogan, 849 F.3d 114, 137 (4th Cir. 2017) (holding that the Second Amendment does not extend to assault rifles and high-capacity magazines: "Whatever their potential uses—including self-defense—the AR-15, other assault weapons, and large-capacity magazines prohibited by the FSA are unquestionably most useful in military service. That is, the banned assault weapons are designed to kill or disable the enemy on the battlefield") (citations and quotations omitted). In this context, we might read this to distinguish the true man envisioned by *Heller*—the citizen-protector—from a sort of hypermasculine citizen-*warrior* that would ensue from allowing constitutional access to assault weapons.

240. *See* CARLSON, *supra* note 24, at 54–56 (observing that there is an inextricable link between gun ownership and one's financial situation in a period of neoliberal economic decline).

241. Franks, *supra* note 154, at 1099.

Amendment's newly adjusted valence relies on gendered assumptions that essentialize otherwise performative and socially constructed expectations for masculinity, it also galvanizes the persuasive power of the masculine character it speaks to and for in everyday legal practice. Though gender is performed in the courtroom as much as it is anywhere else, ethos as a discursive construct functions inextricably bound to, yet distinct from, this type of performance.[242] Speaking with the ethos of the "true man" advances a set of claims that confirm one's performative alignment with expectations for manliness, but only in retrospect. Indeed, the legal speech acts we offer in court speak of past action.[243] Their outcomes perform gender, but so, too, the process by which ethos is used as a tool of persuasion allows gender performativity to become a legal performance that has power over our very freedom. When our performed gender identities enter the courthouse, legal speech that relies on a fundamentally gendered ethos, and the legal institutions that embrace the same, allows masculinity to control situations of life and death. In other words, the masculine ethos underpinning the Castle Doctrine and animating our Second Amendment jurisprudence—both of which implicate rights to kill—thus becomes both a way in which manhood is performed *and* a way in which we justify its performance. By implication, *Heller*'s masculine ideology forms not merely a problematic cultural narrative that is troublingly gendered but, so, too, it empowers a masculine ethos to dominate everyday legal practice.

Recalling that the rationale and effect of *Heller*'s language mirrors those of the Castle Doctrine, it is worth noting that this Doctrine, too, represents a tense paradox.[244] Indeed, Castle defenses serve to justify acts of violence that would otherwise be understood as murder.[245] The American Castle Doctrine's infatuation with "true" manhood signals, not unlike *Heller*, the capacity for masculinity as an ethos to negotiate legal dissonance. Thus, to understand how *Heller*'s masculine ethos functions in everyday legal practice, consider its

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242. Amossy, *supra* note 221, at 2.

243. For ARISTOTLE, *supra* note 218, at 32, there are three different kinds of rhetoric—political, forensic, and ceremonial—that each refer to three distinct kinds of time:

> The political orator is concerned with the future: it is about things to be done hereafter that he advises, for or against. *The party in a case at law is concerned with the past; one man accuses the other, and the other defends himself, with reference to things already done.* The ceremonial orator is, properly speaking, concerned with the present, since all men praise or blame in view of the state of things existing at the time, though they often find it useful also to recall the past and to make guesses at the future.

(Emphasis added.)

244. *See* discussion, *supra* Section I.B–II.C.

245. Sharfstein, *supra* note 40, at 639.

practical legal apparatus—the Castle Doctrine—and the illustration with which this Article began: *Commonwealth v. Jody Bradley*.[246]

Importantly, Mr. Bradley's claim occupies the same paradoxical space as the very defense he offers for his actions. Though he shot an innocent child, Barker, in the head, he also claims that it is he who is innocent.[247] And he advances a castle defense that, too, is predicated on the paradoxical justification of otherwise unjustifiable violence.[248] By way of the "true man" ethos he attempts to maneuver both. Consider, for instance, the discourse used to frame Mr. Bradley's thought process:

> 'I am in my house. I've got somebody unknown in my house. Maybe with my daughter. It may not be with my daughter. I don't know.' He arms himself to go up to his own attic. He gets his own gun, from his own house, to go into another part of his own house. . . .
>
> What happens there is Jody Bradley being in a place he is allowed to be, his own home, at night, with a hooded figure crouched down in his attic, at night, hiding himself in a location he has been barred by law from being. . . Without thinking, Jody fires the one shot.[249]

Here, and throughout Mr. Bradley's closing defense, the "true man" ideology is the emphatic rhetorical device used to influence the jury. First, the defense makes perfectly clear that Mr. Bradley was in his own home—a place where he has a lawful right to be—throughout the entire course of events precipitating his decision to shoot and kill Barker.[250] What is more, the defense engages and re-engages the notion of rightful property ownership and thus rightful belonging by reminding the jury it was his "own gun," not a friend's or any other third party's gun, and that he was simply moving into another part of his "own house."[251] Indeed, if the "true man" doctrine is predicated upon the idea that a "true man" will stand his ground and protect his home and family, then Mr. Bradley's defense illustrates that he is

246. Commonwealth of Virginia v. Bradley (Shenandoah Cty. Ct. 2009) (CR09000122-00).

247. Transcript of Closing Arguments at 521–31, Virginia v. Bradley (2009) (CR09000 122-00).

248. *See Bradley's Murder Trial Begins in Shenandoah County,* WHSV (Aug. 18, 2009), http://www.whsv.com/home/headlines/53598307.html [https://perma.cc/Q2VNN5VM].

249. Transcript of Closing Arguments at 521–31, Virginia v. Bradley (2009) (CR09000 122-00).

250. *See id.*

251. *Id.*

doing exactly that. And because Mr. Bradley presumably did nothing to provoke an intruder to darken the threshold of his home, then, too, he was in a place he was legally entitled to be and honestly investigating the perceived threat to his home and to his daughter.

But in addition to casting Mr. Bradley's actions in the context of the "true man"—both in the sense that a true man does not retreat in the face of danger, as indeed Mr. Bradley did not call upon the police but exercised his prerogative to use private force, and in the sense that he was doing what any honest, rational, and true man would—the defense also invokes his role as a father.[252] It is in this context also that Mr. Bradley's defense illustrates, the stereotypical gender norms embedded in the "true man" ideology. If the "true man" does whatever is necessary to protect his wife and children who, importantly, are understood to be dependent upon him, then to the extent that the defense suggests Mr. Bradley was acting to protect his daughter, his actions fulfill his proper role as father and protector, especially as he was defending her within the walls of the home that he provided. As a result, Mr. Bradley was not acting to protect merely himself, but his daughter and the physical space and sanctity of his home. If anything, according to his defense, Mr. Bradley was an exemplar of the manly virtues of courage, self-reliance, and chivalry—the same characteristics informing the normative expectations of the paradigmatic "true man."[253]

Just as Mr. Bradley's castle defense demonstrates the rhetoric of the "true man" doctrine, and thus how the Castle Doctrine is in effect the prototypical "true man" case, so too, it animates the rationale of self-defense within the home upon which the Court has constructed the Second Amendment. In so animating, it highlights the cultural norms associated with and evoked by the role of men in the preservation of hearth and home towards which *Heller*'s reasoning gestures. Recall that *Heller* constructs the Second Amendment for the "defense of self, family, and property," the central meaning of which "elevates above all other interests the right of law-abiding, responsible citizens to use arms in defense of hearth and home."[254] Certainly, Mr. Bradley's narrative appeals to these very interests: a simple, law-abiding farmer, who acted in defense of himself, his daughter, and his home. Yet, in appealing to these interests, Mr. Bradley's narrative relies on the cultural trope of the "true man"

252. Transcript of Closing Arguments at 521–31, Virginia v. Bradley (2009) (CR09000 122-00).

253. This chivalry becomes particularly perverse when one considers the defense's claim: "That shot is not fired with malice. What it is, it is not fired with malice, if it is fired with anything, it is fired with love for his daughter." *Id.* at 528.

254. District of Columbia v. Heller, 554 U.S. 570, 571, 635 (2008).

embedded within the social meaning and legal apparatus of the Castle Doctrine.[255] His threefold presentation of self corresponds to a unified ethos of the masculine shared by *Heller*. The kinship between the Castle Doctrine and the Second Amendment thus not only galvanizes within our constitutional doctrine the historical, social, and cultural substance of the "true man" ideology but also it creates the possibility for this ideology to function with constitutional authority by virtue of its discursive power and institutional legitimacy.

In sum, *Heller*'s categoricalism and absolute rhetoric of individual rights accomplishes more than just reciting a false, harmful story of who and what we are as a people. It shifts the normative valence of our civil rights and liberties such that manliness is endowed with constitutional authority.

III. AN IMPERATIVE TO KILL: SOCIAL TRANSFORMATION BEYOND *HELLER*

Gender is a complex structure of social relations that are always in flux.[256] Dominant ideals of masculinity are nothing more than particular configurations of practices and expectations that are subject to an ongoing process that social dynamics define and redefine.[257] This social kinesis renders claims to hegemony always contestable.[258] Although one vision of masculinity may dominate others in any given situation, space, or moment in time, hegemony remains part of this continuous social process, and the characteristics that subordinate or marginalize masculinities that do not fulfill the hegemonic pattern are not forever fixed.[259] Thus, *Heller* presents a unique problem for the social dynamics that define masculinity—both in relation to women and between groups of men—by imparting within our constitutional narrative a particular conception of masculinity vis-à-vis its embrace of the "true man" doctrine. Though we may engage regularly in constitutional discourse, making claims regarding the proper meaning, scope, and application of constitutional provisions, constitutional doctrine changes but gradually, and often with extended temporal gaps.[260] Indeed, *Heller* and *McDonald* notwithstanding, the 1939 case *United States v. Miller* marks the

255. *See* Franks, *supra* note 154, at 1111.
256. CONNELL, *supra* note 23, at 71–72.
257. *Id.* at 72.
258. *Id.* at 76.
259. *Id.* at 77.
260. *See* Jack M. Balkin, *What Brown Teaches us about Constitutional Theory*, 90 VA. L. REV. 1537, 1574 (2004) (claiming that "constitutional doctrine changes gradually in response to political mobilizations and countermobilizations").

last time the Supreme Court meaningfully grappled with the central purpose of the Second Amendment.[261] As a result of our historically protracted constitutional evolution, the masculine ideology embedded within current Second Amendment jurisprudence is effectively immunized from serious social contestation. It is stuck in a sort of discursive cement. Even if, pace Butler, gender's discursivity allows for subtle or even radical redistributions of the meanings we attach to it, we must be mindful of law's power to curtail this transformative capacity.[262] For the extent to which law may be a linguistic medium for discursive liberation, it all too often performs the opposite. And we see this in every encounter with ardent gun rights activists, or those of the conservative political right more generally; we need only recall the mantra "from my cold, dead hands!"[263] The uncompromising absolutism of Second Amendment rights rhetoric reveals its discursive impregnability. How can we expect to transform the masculine identity, to reverse its oppressive, disenfranchising and subordinating effects when the cultural dynamics by which it is transformed are stymied by the legal and political dynamics that render *Heller*'s voice within our constitutional narrative, our collective discursive register, unlikely to change in the near future?

For some, that the social meanings attached to constitutional doctrine often become deeply embedded within—and indeed form—our collective public consciousness poses little worry in the wake of *Heller*. But for others, the masculine ideology animated by the "true man" doctrine represents a problematic conception of and ethos for manhood in America.[264] Whether one accepts *Heller*'s controlling language as politically and socially desirable or morally repugnant, it should trouble all of us. By virtue of the fact that the ideology of the "true man" doctrine is contained within that part of the Constitution pertaining solely to firearms, the hegemonic masculinity created by *Heller* is grounded not merely in the social meanings of the "true man" but in the physical act of owning a firearm as well. As a result, men that do not own a firearm can fundamentally *not* fulfill the hegemonic pattern and cultural ideal of this "true man." Men that do not belong to the class of gun-owning males are thus subordinated within the hierarchy of masculinities, therefore privileging

261. United States v. Miller, 307 U.S. 174, 178 (1939) (holding that the Second Amendment does not protect an individual right).

262. BUTLER, *supra* note 124, at 148.

263. This, of course, is Charlton Heston's infamous call to arms in support of the Second Amendment. Charlton Heston, *From My Cold Dead Hands. Long Version*, YOUTUBE (Apr. 26, 2008), https://www.youtube.com/watch?v=5ju4Gla2odw [https://perma.cc/U9Q6 9N4M].

264. *See, e.g.*, Franks, *supra* note 154, at 1099.

gun-owning males as inherently more manly. This effectively reduces the ideal conception of masculinity in America to an essentialist character type predicated on gun ownership, muting the cacophony of social dynamics that define gender in practice. The very idea of masculinity that ensues is divorced from independent human characteristics and instead implanted in the physical object of the firearm. Although the "true man" ideology may be wedded to the act of standing one's ground in the face of danger, this act fails to meet the hegemonic ideal if not carried out with a firearm. Thus, so long as the Second Amendment mirrors the ideology of the "true man" doctrine, both symbolically and in practice, non-gun-owning men stand to be subordinated by their gun-owning counterparts, to say nothing of the American woman.

But perhaps most problematic are the social imperatives embedded within *Heller*'s masculine ideal. To some, *Heller*'s "right to kill" signals an era of an "incapacitated state" that entitles its citizens to violence rather than providing for their safety.[265] Yet, perhaps *Heller* signals a deeper emergency: a crisis of the normative masculine identity that has found some semblance of stability in the gun.[266] Whatever meaning has been found for masculinity in the ownership, possession, and use of firearms is coupled with a deeply troubling set of social mandates; its "true man" underpinning inscribes expectations of action, and this imperative fundamentally shifts the normative valence of Second Amendment jurisprudence. Recall the historical evolution of the Castle Doctrine in early American courts illustrates a transition from 'may' to 'must'[267]—departing from the Blackstonian understanding that one 'may' stand their ground within the home and embracing the peculiarly American conception that the true man 'must' stand his ground. *Heller* further entrenches this imperative. But, in addition, *Heller* enhances the social meaning and legal reality of this "true man" imperative by virtue of its substantive focus on defense with a firearm—and because firearms are necessarily a tool of deadly force, this imperative is remarkably more controversial.[268] Rather than simply an imperative to stand

265. West, *supra* note 80, at 728, 743.

266. Winkler, *supra* note 204 (observing that men "look to guns to validate their sense of masculinity"). *Cf.* Lisa Hickey, *Elliot Rodger and America's ongoing masculinity crisis*, SALON (May 28, 2014), http://www.salon.com/2014/05/28/elliot_rodger_and_americas_ongoing_masculinity_crisis_partner/ [https://perma.cc/SBR85MDY]; Jenny Carlson, *Why men feel the need to carry guns*, L.A. TIMES (May 26, 2015), http://www.latimes.com/opinion/op-ed/la-oe-carlson-gun-carry-culture-20150526-story.html [https://perma.cc/ANP8W4RN] (arguing that "the gun rights platform is not just about guns. It's also about a crisis of confidence in the American dream.").

267. *See supra* Part I.D.

268. *See* West, *supra* note 80.

and protect, it is an imperative to kill. It buttresses a normative judgment within our cultural narrative mandating that the "true man" stands in the face of danger and protects himself, his family, and his home with his firearm.[269] In other words, the "true man" fears neither danger nor the implications of discharging his firearm towards a home intruder. Whereas the transition from 'may' to 'must' might have always included the expectation to kill if necessary, firing a gun at another person includes the expectation that they will be killed. Ultimately, if the "true man" is both expected to and justified in using his firearm to shoot a home intruder, then the act of killing in defense of self, family, and home is both legitimate and morally acceptable. Killing with a firearm thus becomes both an imperative for American manhood and a perverse defining feature of our cultural identity.

CONCLUSION

Over a quarter century has passed since Wendy Brown asked of the Second Amendment: "Might there be something a bit 'gendered' about a formulation of freedom that depicts man, collectively or individually, securing his autonomy, his woman, and his territory with a gun . . . ?"[270] This Article answers emphatically in the affirmative. But whereas Brown left us to ponder a view of the Second Amendment that is far from unproblematic, I hope to leave one that is even more troubling, even more worrisome, and even more cause for serious social reflection about our shared values, political sentiments, and communal identity. For slow though it may be, the Second Amendment is not the dormant jurisprudence that it used to be. And as long as it is presented with active legal questions we are given opportunities to challenge, displace, and redistribute the social meanings and gendered mandates for which it stands.

Whether the Second Amendment creates a right to armed self-defense outside of the home has yet to be addressed by the Court. However, it is clear that the underlying common law tenets of and categorical basis for *Heller*'s individual right to self-defense render the task of operationalizing *Heller* beyond the walls of the home problematic.[271] Perhaps one immediate and particularly concerning implication of *Heller*'s reading of the Second Amendment, and *McDonald*'s incorporation of the same, is the potential for a constitutionalized

269. Carlson, *supra* note 266, at 3.

270. Brown, *supra* note 202, at 663–64.

271. Blocher, *supra* note 206, at 383 (noting that "[t]he Court's failure to clearly identify any such [underlying] values in *Heller*, or to clarify the conflicts between them, makes its use of categoricalism particularly problematic.").

Castle Doctrine defense that would be judicially recognized in states that have not previously statutorily recognized any form of the Castle Doctrine. To be sure, many states, if not a vast majority, maintain some form of the Castle Doctrine as a statutory defense.[272] But others, such as Virginia or Vermont, are especially susceptible to this legal development.[273] Ultimately, if the states cannot ban gun ownership because *Heller* constitutionalized the major theoretical underpinnings of the Castle Doctrine through the Second Amendment, then a state court that fails to recognize a Castle Doctrine defense presented by a defendant who used a firearm in defense of his "hearth and home" may run afoul of federally protected constitutional principles.

But because *Heller*'s reasoning—not unlike the American understanding of the Castle Doctrine more generally—appears motivated by the social meaning and legal reality of the "true man" doctrine, future Second Amendment jurisprudence may very well find meaningful purchase in the true man's imperative to stand his ground even outside the home. In this respect, the "true man" doctrine has long leveraged the ethos of stand your ground to provide a right to justifiable deadly force anywhere one has the lawful right to be. Perhaps expanding the Second Amendment based on this rationale diminishes *Heller*'s masculine supremacy and brings the rhetorical imagery of a woman fending off a violent rapist in a dark alley within constitutional harbor. Perhaps *then* the "true man" doctrine really *does* become the "true woman" doctrine—or maybe it creates a gender-neutral doctrine that entrenches the imperative to stand one's ground as an emphatically American ethos. Might this be the manifestation of what we may come to call the "true American" doctrine? Could this doctrine indirectly incentivize actors to stand their ground in cases of public confrontation that would otherwise not result in deadly force? And if so, what will become of the concepts of necessity and proportionality if the Second Amendment fundamentally protects the right to carry and use a tool of deadly force in public? Or perhaps this, too, will accomplish little more than to mask and exacerbate the gendered social reality of one's legal access to violence.[274]

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272. *See* Boots et al., *supra* note 14.

273. For instance, Vermont's statute on justifiable homicide does not stipulate any spatial or locational "castles" such as the personal dwelling. *See* 13 V.S.A § 2305 (2016); the Supreme Court of Virginia recently acknowledged that "when a party assaults a homeowner in his own home, as in this case, the homeowner has the right to use whatever force necessary to repel the aggressor." Hines v. Commonwealth, 791 S.E.2d 563, 564 (Va. 2016) (citing Fortune v. Commonwealth, 112 S.E. 861, 867 (Va. 1922)). Even so, Virginia's statutory code makes no mention of a castle doctrine.

274. *See* Franks, *supra* note 154, at 1108–16 (arguing that Stand Your Ground laws not unlike Florida's are "not for women").

These, among many others, are questions that must be raised and pondered as we wait to see how the Court will apply *Heller*'s line of reasoning in future Second Amendment jurisprudence.

In pondering them, however, we must look within ourselves and reflect deeply on the values we embrace as a matter of political course versus those we embrace in our social, daily lives. Is it really the case that Jody Bradley is the paradigmatic image of American manhood? I suspect not. I suspect we are more likely to revere those men capable of deescalating would-be violent conflicts for their positive example, for their manly example, than we are a diffident farmer who shot his daughter's boyfriend in the head. We'd do well to interrogate *Heller*'s translucent interest balancing, and ask ourselves if the character it prizes as a product of judicial fiat is aligned with the figures to whom we look as examples of civically engaged, law-abiding members of our communities. We'd do well to dispel the romanticized frontiersman as the myth that he is and contemplate those socially male virtues that we venerate independently of violence, and to disentangle our sentiments toward firearms, who may legitimately use them and for what purposes, from male protectionism. And we'd do well to remember the story of Brendon Barker—and the countless others who have lost their lives to America's masculinity crisis.