

# DEFENDING THE SPIRIT: THE RIGHT TO SELF-DEFENSE AGAINST PSYCHOLOGICAL ASSAULT

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*The law criminalizes individuals who physically resist emotional or psychological violence, even though emotional injuries can cause greater harm than their physical counterparts. As the law exists today, if a victim of extreme psychological and emotional violence meets that violence with comparatively minor physical force, he or she risks criminal conviction while the emotional aggressor will most likely be legally protected. This article suggests that the legally accepted view of harm is outmoded and should be updated to reflect the accepted realities in current psychological and sociological science. I argue that a self-defense instruction is warranted when an individual uses non-deadly physical force to ward off psychological attacks that create a substantial risk of serious psychological injuries such as post-traumatic stress, depression, or anxiety. The article offers a statutory model designed to help decriminalize those who act reasonably in defense of their spirits. It also explores, briefly, the potential for the Second Amendment to serve as a constitutional basis for the use of physical force in protecting the liberty, psychological, and dignity interest of citizens—that is, a justification for defending the spirit as well as the body.*

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#### INTRODUCTION

The term *bullying* evokes images of the mean kid at school taking the lunch money of his more vulnerable counterpart. While this is a serious problem in and of itself, it obscures the range of behavior that constitutes bullying and the various interlocutors it might involve. Bullying, which can be broadly defined as repetitive, aggressive conduct growing out of an advantage in power and a desire to control,<sup>1</sup> exists on a continuum from individuals on a playground to nations in conflict. The United States, for example, was created in large part to extricate the colonists from the grip of Britain, a country the founding fathers deemed to be the national equivalent of a bully.<sup>2</sup> The term they used for this more systematic and more powerful form of bullying was “tyranny,” which more specifically can be defined as “oppressive power,” particularly when it is “exerted by the government.”<sup>3</sup>

<sup>1</sup> Rachel Summer, Note, *Don't Blame the Bully: Holding Preschools Accountable for Bullying Against Students with Disabilities*, 43 HOFSTRA L. REV. 909, 918 (2015).

<sup>2</sup> The British government imposed a tea tax on the colonist against their will, which led to the Boston Tea Party where a group of colonists destroyed several tons of tea. See ROBERT MIDDLEKAUFF, THE GLORIOUS CAUSE: THE AMERICAN REVOLUTION, 1763–1789 229–40 (David M. Kennedy ed., 2005). After the Boston Tea Party the British Parliament passed the Coercive Acts, a series of laws meant to punish the colonists for the Boston Tea Party and quell any future acts of defiance. *Id.*

<sup>3</sup> *Tyranny*, MERRIAM-WEBSTER ONLINE DICTIONARY, <https://www.merriam-webster.com/dictionary/tyranny> (last updated July 28, 2018).

By the same logic, when bullying by an individual rises to a certain level, either through repeated acts of psychological violence, accumulated effect on the target, or because of the extreme magnitude of a single encounter, it constitutes a form of oppression or tyranny. Therefore, the more appropriate way to view the more extreme forms of bullying is psychological tyranny occurring in a social rather than political context and perpetrated by an individual as oppose to a government. This view is more succinctly described as Socio-Psychological Tyranny (SPT), as coined herein. The problem of SPT is without a solution in American law. The law has simply failed to protect the emotionally vulnerable and instead criminalizes the vulnerable who respond with physical force as a last resort.<sup>4</sup>

Part I of this article defines the term “spirit” as it relates to psychological violence. Part I also reviews the clinical data weighing harm to the spirit against physical pain and suffering. Part II of this article defines SPT and bullying in general. Part III describes the types of bullying and the kinds of harm caused by each type, including workplace bullying, domestic bullying, casual bullying, micro aggressions, and the use of the word “nigger.” Part IV discusses the inadequacy of current legal protections related to bullying and SPT. Part V analyzes the power arrangements that elevate physical safety over emotional and psychological health and thus protect emotional assailants. Part VI provides a background of self-defense law. It also explores the rationale behind criminal defenses that recognize protectable interest distinguishable from physical safety. These defenses include the castle doctrine, stand your grounds laws, and the common law right to resist an unlawful arrest. Part VII presents a statutory model designed to protect victims of severe emotional and psychological abuse from criminal penalties when they respond to severe psychological threats with physical force. Part VIII argues the Second Amendment basis for the statutory model. The Conclusion summarizes the arguments.

## I. THE SPIRIT VS. THE BODY

The legally accepted view of harm is outmoded and should be updated to reflect the accepted realities in current psychological and sociological science. Psychological attacks, including bullying, are arguably more likely to cause long-term injury than physical assaults that lack the same psychological components.<sup>5</sup> This is particularly the case when bullying rises to the level of tyranny and creates a substantial risk of causing serious psychological injuries such as post-traumatic stress, depression, and anxiety.

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<sup>4</sup> See *infra* Part IV.

<sup>5</sup> *Mental Health Harm: Psychological-Emotional-Mental Injuries*, WORKPLACE BULLYING INST., <http://www.workplacebullying.org/individuals/impact/mental-health-harm/> (last visited Aug. 1, 2018).

*A. The Spirit Defined*

The spirit, as used herein, is the psyche, the seat of consciousness; the portion of the human identity that recognizes itself as separate from its parents, children, and friends.<sup>6</sup> The spirit encompasses character, inclusive of thoughts, beliefs, and emotions.<sup>7</sup>

Social convention has been effective in painting the ego as a negative trait, as an aspect of the self to be surgically removed.<sup>8</sup> However, the ego allows individuals to determine the boundaries of the self. As Carol S. Pearson notes, the ego serves most importantly to “defend and to protect the psyche.”<sup>9</sup>

Pearson argues that when the ego is “[p]roperly developed,” it “grows but then empties itself, becoming the container” of the aspect of self that can contribute most effectively to society.<sup>10</sup> She notes, however, that “[w]ithout the well-built container, there can be no real psychological or spiritual development, because there is no safe place to put it.”<sup>11</sup> Pearson suggests that “[a] confrontation with the unconscious or with the transpersonal can crack an inadequately developed Ego and result in psychosis.”<sup>12</sup>

The dilemma with SPT is that society actually discourages the development of the emotional and psychological tools necessary to fend off emotional assailants who endeavor to crack the container of spirit. Pearson describes the social discomfort with ego as simply an unhealthy, and undeveloped form of egotism.<sup>13</sup> She argues that “[t]he primitive Ego is simply afraid . . . [that] the process of individuation, by the attendant exploration of previously repressed material, and by any sense of union with another . . . will get us in trouble in the external world, . . . [and] swallow us up.”<sup>14</sup>

The problem is that society provides no external avenues for protecting the vulnerability that it itself has encouraged.<sup>15</sup> So eventually the socially-created vulnerable face the choice of physical defense or transpersonal death. In the case of the former, I argue here that the law should provide a defense.

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<sup>6</sup> CAROL S. PEARSON, AWAKENING THE HEROES WITHIN: TWELVE ARCHETYPES TO HELP US FIND OURSELVES AND TRANSFORM OUR WORLD 30 (1991).

<sup>7</sup> *See id.* at 38.

<sup>8</sup> *Id.* at 35.

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> *Id.* at 36–37.

*B. Mental v. Physical Pain*

Emotional pain is real. Infants, for instance, who suffer from the deprivation of emotional nourishment, even if their physical needs are well taken care of, can die as a result of the emotional deprivation.<sup>16</sup>

Furthermore, emotional and psychological violence are arguably more damaging than the much more punishable physical counterpart, but we tend to underestimate the emotional pain of others.<sup>17</sup> As Guy Winch writes, “emotional pain often impacts our lives far more than physical pain.”<sup>18</sup> He provides four reasons why.

First, memories can trigger emotional pain, but not physical pain.<sup>19</sup> For example, one may experience distress or hurt when recalling a painful break-up but will not re-experience the physical pain of being punched in the face when remembering a fight.

Second, individuals may welcome physical pain that distracts them from emotional pain, but will not typically welcome emotional pain as a distraction from a physical ailment.<sup>20</sup> Self-cutting demonstrates this, where individuals distract themselves from emotional agony through inflicting physical pain.<sup>21</sup>

Third, emotional pain reverberates in ways that physical pain does not. This includes the re-experiencing of emotional pain through coming into contact with the things, persons, places, foods, and sounds we associate with the original painful event.<sup>22</sup> For example, an individual who witnesses a drive by shooting while eating a particular kind of ice cream may experience an emotional flashback when subsequently eating that brand of ice cream.

Fourth, the effects of single-incident, emotionally painful experiences frequently last longer and are more damaging than single-incident physically painful experiences.<sup>23</sup> As Guy Winch points out, for example, “failing an exam in college can create anxiety and a fear of failure, a single painful rejection can lead to years of avoidance and loneliness, bullying in middle school can make us shy and introverted as adults, and a critical boss can damage our self-esteem

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<sup>16</sup> Cf. Danya Glaser, *Emotional Abuse and Neglect (Psychological Maltreatment): A Conceptual Framework*, 26 CHILD ABUSE & NEGLECT 697, 698 (2002) (explaining that emotional abuse and neglect cause significant harm to the child’s development).

<sup>17</sup> Steven Stosny, *Effects of Emotional Abuse: It Hurts When I Love*, PSYCHOL. TODAY (Aug. 26, 2008), <https://www.psychologytoday.com/blog/anger-in-the-age-entitlement/200808/effects-emotional-abuse-it-hurts-when-i-love> [<https://perma.cc/Q2CT-6UPY>].

<sup>18</sup> Guy Winch, *5 Ways Emotional Pain Is Worse Than Physical Pain*, PSYCHOL. TODAY (July 20, 2014), <https://www.psychologytoday.com/blog/the-squeaky-wheel/201407/5-ways-emotional-pain-is-worse-physical-pain> [<https://perma.cc/73TB-U3PJ>].

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

for years to come.”<sup>24</sup> On the other hand, “[p]hysical pain has to be quite extreme to affect our personalities and damage our mental health.”<sup>25</sup>

Furthermore, the detrimental effects of serious emotional violence extend past the immediate participants. Children who grow up in families characterized by emotional violence are also at risk of developing chronic depression, anxiety, post-traumatic stress disorder, and dissociation through mere exposure.<sup>26</sup>

A study of bullying in the home uncovered that 72 percent of battered women included in the study found emotional violence to be more damaging than the physically abusive aspects of their relationships.<sup>27</sup> Furthermore, emotional violence in domestic relationships is the most reliable predictor of a physical response by the target of the emotional violence.<sup>28</sup> While emotional violence is popularly perceived to be less severe when engaged in by women,<sup>29</sup> men who suffer from emotional violence at the hands of their female partners can also experience depression, post-traumatic stress disorder, drug addiction, and alcoholism.<sup>30</sup>

## II. BULLYING AND SPT DEFINED

SPT, which encompasses the more extreme forms of bullying, forms that threaten serious long-term emotional or psychological harm such as depression and post-traumatic stress, exists in all quarters of American social life. It is present in the workplace, in the home, in systems of incarceration, in schools, and

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<sup>24</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> Diana J. English et al., *At-Risk and Maltreated Children Exposed to Intimate Partner Aggression/Violence: What the Conflict Looks Like and Its Relationship to Child Outcomes*, 14 *CHILD MALTREATMENT* 157, 158 (2009).

<sup>27</sup> 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, 872 (1993).

<sup>28</sup> Christopher M. Murphy & K. Daniel O’Leary, *Psychological Aggression Predicts Physical Aggression in Early Marriage*, 57 *J. CONSULTING & CLINICAL PSYCHOL.* 579, 579–82 (1989).

<sup>29</sup> Susan B. Sorenson & Catherine A. Taylor, *Female Aggression Toward Male Intimate Partners: An Examination of Social Norms in a Community-Based Sample*, 29 *PSYCHOL. WOMEN Q.* 78, 79, 94 (2005).

<sup>30</sup> *Cf.* Denise A. Hines & Kathleen Malley-Morrison, *Psychological Effects of Partner Abuse Against Men: A Neglected Research Area*, 2 *PSYCHOL. MEN & MASCULINITY* 75, 80, 83–84 (2001). The paper discusses the effects of emotional abuse against men in intimate relationships. The authors presented the paper at the Annual Convention of the American Psychological Association, San Francisco, CA:

[T]he more emotional abuse . . . men experienced in their relationships, the higher their symptom counts for PTSD and alcoholism. . . . The research so far has shown that it occurs in a large percentage of relationships, and one qualitative and two quantitative studies have demonstrated that emotionally abused men can experience depression, psychological distress, alcoholism, PTSD, weight loss, fear, and self-blame.

*Id.* at 83–84.

in casual social encounters.<sup>31</sup> SPT presents most problematically in domestic, school, and working relationships that include power imbalances.<sup>32</sup>

The foundation of SPT is bullying. Psychologists describe bullying as “the deliberate, hurtful and repeated mistreatment” of an individual “that is driven by the bully’s desire to control” the other person.<sup>33</sup> While the techniques of bullies vary, their object almost always is to gain control over the victim by engendering shame, anguish, fear, and/or humiliation.<sup>34</sup> Bullying also includes extreme psychological tools meant to control, such as brainwashing.<sup>35</sup> However, when bullying rises to this level it is more appropriately viewed as a form of SPT.

Heinz Leymann defines bullying as “hostile and unethical communication towards an individual.”<sup>36</sup> Bullies typically single out the powerless while deferring to those more powerful.<sup>37</sup> Bullying results in the victim feeling helpless, trapped, and defenseless,<sup>38</sup> and, when it rises to the level of SPT, can result in a complete eradication of the victim’s self-concept and independence.<sup>39</sup>

The psychological effects of bullying range from temporary emotional maladies to chronic mental illnesses. Most victims of bullying experience guilt,

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<sup>31</sup> See Elise D. Berlan et al., *Sexual Orientation and Bullying Among Adolescents in the Growing Up Today Study*, 46 J. ADOLESCENT HEALTH 366, 367 (2010); Charlotte Rayner & Loreleigh Keashly, *Bullying at Work: A Perspective from Britain and North America*, in COUNTERPRODUCTIVE WORK BEHAVIOR: INVESTIGATIONS OF ACTORS AND TARGETS 271, 271–296 (Suzy Fox & Paul E. Spector eds., 2005).

<sup>32</sup> See generally Leslie A. Sackett & Daniel G. Saunders, *The Impact of Different Forms of Psychological Abuse on Battered Women*, in PSYCHOLOGICAL ABUSE IN VIOLENT DOMESTIC RELATIONS 197, 197–98 (Daniel K. O’Leary & Roland D. Maiuro eds., 2001); WORLD HEALTH ORG., GLOBAL AND REGIONAL ESTIMATES OF VIOLENCE AGAINST WOMEN: PREVALENCE AND HEALTH EFFECTS OF INTIMATE PARTNER VIOLENCE AND NON-PARTNER SEXUAL VIOLENCE, 7 (2013); HUMAN RIGHTS WATCH, NO ESCAPE: MALE RAPE IN U.S. PRISONS (2001), <https://www.hrw.org/reports/2001/prison/report.html> [<https://perma.cc/C56F-4KML>]; Murray A. Straus & Carolyn J. Field, *Psychological Aggression by American Parents: National Data on Prevalence, Chronicity, and Severity*, 65 J. MARRIAGE & FAM. 795, 795 (2003); Sandra Graham, *Bullying: A Module for Teachers*, AM. PSYCHOL. ASS’N, <http://www.apa.org/education/k12/bullying.aspx> (last visited on Oct. 25, 2018).

<sup>33</sup> David C. Yamada, *The Phenomenon of “Workplace Bullying” and the Need for Status-Blind Hostile Work Environment Protection*, 88 GEO. L.J. 475, 480 (2000) (quoting GARY NAMIE & RUTH NAMIE, BULLYPROOF YOURSELF AT WORK! 17 (1999)).

<sup>34</sup> See Gary Namie & Ruth Namie, *Workplace Bullying: How to Address America’s Silent Epidemic*, 8 EMP. RTS. & EMP. POL’Y J. 315, 316–17 (2004).

<sup>35</sup> Lesly Tamarin Mega et al., *Brainwashing and Battering Fatigue: Psychological Abuse in Domestic Violence*, 61 N.C. MED. J. 260, 260–65 (2000) [hereinafter *Brainwashing*].

<sup>36</sup> Heinz Leymann & Annelie Gustafsson, *Mobbing at Work and the Development of Post-traumatic Stress Disorders*, 5 EUR. J. WORK & ORGANIZATIONAL PSYCHOL. 251, 252 (1996).

<sup>37</sup> Jordan F. Kaplan, Comment, *Help Is on the Way: A Recent Case Sheds Light on Workplace Bullying*, 47 HOUS. L. REV. 141, 146 (2010).

<sup>38</sup> *Id.* at 144.

<sup>39</sup> See *Brainwashing*, *supra* note 35, at 262.

shame, fear, embarrassment, and diminished self-worth.<sup>40</sup> These effects can lead to anxiety disorders, depression, and insomnia.<sup>41</sup> The targets of SPT also have an increased risk of suicide and other forms of self-harm.<sup>42</sup>

Some victims of SPT suffer from post-traumatic stress disorder.<sup>43</sup> Suzet Tanya Lereya et al. compare the effects of peer bullying and maltreatment in childhood to the types of symptoms “suffered by those who experienced prison camps or war.”<sup>44</sup> At least one study determined that the levels of the stress hormone cortisol in victims of SPT were similar to the cortisol levels of individuals with post-traumatic stress disorder.<sup>45</sup>

SPT occurs in the home, at school, and online. There are varying types of bullying/SPT, including workplace, domestic, cyber bullying, micro-aggressions, as well as racially and gender-charged psychological assault.

### III. TYPES OF SPT

The problem of psychological assault appears across ethnic, gender, and socio-economic lines, but may have a greater impact on marginalized social groups such as women, children, African Americans, and the LGBT community.<sup>46</sup> There are also many factors that may contribute to turning normal bullying into SPT. Workplace bullying illustrates a number of these factors.

#### A. *Workplace SPT*

Workplace bullying is one of the most damaging problems facing the modern workplace. It includes repetitious and systematic hostile behavior “designed to empower the bully at the expense of the victim.”<sup>47</sup> David Yamada lists the following behavior as typifying workplace bullying:

aggressive eye contact [(mean-mugging)], . . . giving the silent treatment; intimidating physical gestures, including finger pointing and slamming or throwing objects; yelling, screaming, and/or cursing at the target; angry outbursts or temper tantrums; nasty, rude, and hostile behavior toward the target; accusations of wrongdoing; insulting or belittling the target, often in front of other workers; ex-

<sup>40</sup> See Dan Calvin, *Workplace Bullying Statutes and the Potential Effect on Small Business*, 7 OHIO ST. ENTREPRENEURIAL BUS. L.J. 167, 173 (2012) (“Common psychological effects can include stress, mood swings, depression, loss of sleep (and resulting fatigue) and feelings of shame, embarrassment, guilt and low self-esteem”); Kaplan, *supra* note 37, at 146–49; Summer, *supra* note 1, at 935.

<sup>41</sup> See Kaplan, *supra* note 37, at 148–49.

<sup>42</sup> Suzet Tanya Lereya et al., *Adult Mental Health Consequences of Peer Bullying and Maltreatment in Childhood: Two Cohorts in Two Countries*, 2 LANCET PSYCHIATRY 524, 524–25 (2015).

<sup>43</sup> See Kaplan, *supra* note 37, at 148.

<sup>44</sup> *Id.* at 149; Lereya et al., *supra* note 42, at 524.

<sup>45</sup> See Kaplan, *supra* note 37, at 149.

<sup>46</sup> Vicente J. Llorent et al., *Bullying and Cyberbullying in Minorities: Are They More Vulnerable than the Majority Group?*, 7 FRONTIERS IN PSYCHOL. 1, 8 (2016).

<sup>47</sup> Kaplan, *supra* note 37, at 142.



cessive or harsh criticism of the target's work performance; spreading false rumors about the target; breaching the target's confidentiality; making unreasonable work demands of the target; withholding needed information; [and] taking credit for the target's work.<sup>48</sup>

Workplace bullying also includes expressions of hostility, such as “[f]launting status/acting in a condescending manner,” threatening physical violence, as well as destroying, stealing, or sabotaging the target's work materials.<sup>49</sup>

Workplace bullies generally target the vulnerable (or those perceived as vulnerable).<sup>50</sup> These individuals are usually the sweet-tempered, and workplace superstars.<sup>51</sup> The vulnerable and the sweet-tempered are targeted because they are not likely to fight back, and the superstars are targeted because they threaten the bully's “presumption of superiority.”<sup>52</sup>

Bullying can develop into mobbing, which is a form of group-reinforced psychological assault. As the Workplace Bullying Institute describes mobbing, “[i]t begins when an individual becomes the target of disrespectful and harmful behavior. Through innuendo, rumors, and public discrediting, a hostile environment is created in which one individual gathers others to willingly, or unwillingly, participate in continuous malevolent actions to force a person out of the workplace.”<sup>53</sup>

Approximately 37 percent of employees have been victimized by workplace bullying.<sup>54</sup> When workplace bullying is reported, 62 percent of employers ignore the reports.<sup>55</sup>

The psychological effects of workplace bullying are similar to the effects of other brands of bullying. However, the nature of the workplace environment makes it more likely that targets will be subjected to repeated acts of psychological and emotional violence.<sup>56</sup> This type of sustained exposure places the targets of workplace bullying at greater risk of sustaining long-term psychological disabilities such as insomnia, depression, and anxiety disorder.<sup>57</sup> The workplace, thus, becomes a breeding ground for SPT.

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<sup>48</sup> Yamada, *supra* note 33, at 481–82 (quoting Christine M. Pearson, *Incivility and Aggression at Work: Executive Summary*) (unpublished manuscript, on file with author).

<sup>49</sup> *Id.* at 482 (quoting Joel H. Neuman & Robert A. Baron, *Workplace Violence and Workplace Aggression: Evidence Concerning Specific Forms, Potential Causes, and Preferred Targets*, 24 J. MGMT. 396 (1998)) (citation omitted).

<sup>50</sup> Yamada, *supra* note 33, at 482.

<sup>51</sup> *Id.*

<sup>52</sup> *Id.*

<sup>53</sup> *Id.* at 481 (quoting NOA DAVENPORT ET AL., *THE MOBBING SYNDROME: EMOTIONAL ABUSE IN THE AMERICAN WORKPLACE* 10 (1999)).

<sup>54</sup> 2007 WBI U.S. Workplace Bullying Survey, WORKPLACE BULLYING INST. (2007), <https://www.workplacebullying.org/wbiresearch/wbi-2007/> [<https://perma.cc/3CUJ-RGZ6>].

<sup>55</sup> *Id.*

<sup>56</sup> Kaplan, *supra* note 37, at 148–49.

<sup>57</sup> *Id.* at 149.

Also, targets of workplace bullying have been compared to prisoners of war, because both groups suffer symptoms of post-traumatic stress disorder.<sup>58</sup> Jordan F. Kaplan points out that once these disorders exist, they can “worse[n] over time and it can be difficult to recover.”<sup>59</sup>

The targets of workplace tyranny are in heightened need of a solution or protection from legal consequences in the event they are forced to act in their own defense.

### B. Domestic SPT

Like workplace tyranny, a target’s continued exposure to bullying in the domestic environment increases the risk of long-term psychological harm.<sup>60</sup> Domestic abuse or domestic violence is defined as systematic mistreatment occurring in intimate familial relationships.<sup>61</sup> Some studies suggest that the seeds of all SPT are planted in the home.<sup>62</sup> Murray A. Straus and Carolyn J. Field describe verbal attacks on children as “just about universal.”<sup>63</sup> Emotional abuse of children in the home has been shown to adversely impact social, psychological, emotional, and cognitive growth.<sup>64</sup> Psychological aggression in dating is so commonplace that many regard it as part and parcel of the courtship.<sup>65</sup>

Joy M. Bingham notes that domestic violence is usually an element in “a systematic pattern of dominance and control.”<sup>66</sup> Bingham identifies domestic violence as typically including “controlling the victim’s access to finances, isolating the victim from family and friends, damaging or destroying the victim’s personal property, physically hitting or throwing objects at a surface nearby the victim, or conducting surveillance of the victim.”<sup>67</sup> While most perpetrators of physical abuse are men, women are just as likely to engage in emotional and psychological violence as are their male counterparts.<sup>68</sup> In fact, in heterosexual

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<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

<sup>60</sup> See English et al., *supra* note 26, at 158.

<sup>61</sup> See PSYCHOLOGICAL ABUSE IN VIOLENT DOMESTIC RELATIONS, *supra* note 32, at ix–x.

<sup>62</sup> See Straus & Field, *supra* note 32, at 795.

<sup>63</sup> *Id.*

<sup>64</sup> See generally DOUGLAS J. BESHAROV, *RECOGNIZING CHILD ABUSE: A GUIDE FOR THE CONCERNED 2* (1990).

<sup>65</sup> Marina J. Muñoz-Rivas et al., *Physical and Psychological Aggression in Dating Relationships in Spanish University Students*, 19 *PSICOTHEMA* 102, 102 (2007).

<sup>66</sup> Joy M. Bingham, Note, *Protecting Victims by Working Around the System and Within the System: Statutory Protection for Emotional Abuse in the Domestic Violence Context*, 81 *N.D. L. REV.* 837, 837 (2005).

<sup>67</sup> *Id.* at 840–41.

<sup>68</sup> See generally JOHN HAMEL, *GENDER-INCLUSIVE TREATMENT OF INTIMATE PARTNER ABUSE: EVIDENCE-BASED APPROACHES 2* (2d ed. 2014).

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relationships, female partners are more likely to engage in psychological violence than their male partners.<sup>69</sup>

The systematic nature of bullying in domestic cases coupled with the more intimate nature of the relationship can create a situation that's difficult for the target to escape. Because of this, targets of the more extreme versions of psychological assault may be in more need of self-help, than targets in other situations.

### C. *Casual Bullying: Cyber Bullying and Micro-Aggressions*

Cyber bullying uses social networking technology to accomplish its end.<sup>70</sup> The ubiquitous nature of the internet makes it particularly pernicious. Since so much of life takes place on the internet, it may be difficult for the target to escape the bullying.<sup>71</sup> Furthermore, the ease of instantaneously publishing damaging material to a large number of people increases substantially the potential for embarrassment and humiliation.<sup>72</sup> The internet also potentially makes bullying easier due to a sense of safety it provides the bully through anonymity and/or physical distance.<sup>73</sup> However, because of the lack of physical proximity that characterizes cyber-bullying, self-help remedies involving physicality are more difficult to justify. This may also be the case when the cumulative effects of SPT stem from several distinct sources, as is the case with micro-aggressions.

### D. *Micro-Aggressions*

Micro-aggressions are “denigrating messages toward women and ethnic minorities.”<sup>74</sup> Eden B. King et al. describe racial micro-aggressions as “brief and commonplace daily verbal, behavioral, or environmental indignities, whether intentional or unintentional, that communicate hostile, derogatory, or negative racial slights and insults toward the target person or group.”<sup>75</sup> Micro-aggressions may be even more commonplace and damaging against sexual minorities.<sup>76</sup>

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<sup>69</sup> See Murray A. Straus et al., *The Revised Conflict Tactics Scale (CTS2): Development and Preliminary Psychometric Data*, 17 J. FAM. ISSUES 283, 298 (1996).

<sup>70</sup> *What is Cyberbullying*, STOPBULLYING (July 26, 2018), <http://www.stopbullying.gov/cyberbullying/what-is-it/index.html> [<https://perma.cc/6NEC-DLJS>].

<sup>71</sup> *Id.*

<sup>72</sup> *Id.*

<sup>73</sup> *Id.*

<sup>74</sup> Eden B. King et al., *Discrimination in the 21st Century: Are Science and the Law Aligned?*, 17 PSYCHOL. PUB. POL'Y & L. 54, 54 (2011).

<sup>75</sup> *Id.* at 56.

<sup>76</sup> Ronald Wheeler, *About Microaggressions*, 108 LAW LIBR. J. 321, 326 (2016).

Micro-aggressions occur in almost every sector of American life.<sup>77</sup> They manifest in scenarios as diverse as the white sales clerk who suspiciously follows the black customer around the store to the supervisor making racially and gender-charged jokes to the bigoted customer who glares contemptuously at the transgendered sales clerk. The more identifiable types of micro-aggressions are related to recognized forms of discrimination. These include the use of racially derogatory language and symbols (e.g., noose, swastika, burning cross). Another form of micro-aggressions includes “behaviors that are insensitive, rude, or inconsiderate of a person’s identity.”<sup>78</sup> Micro-aggressions are often calibrated to “minimize[] the psychological thoughts, feelings, or experiences of targets.”<sup>79</sup>

The combined effect of repeated exposure to micro-aggressions can cause long-term emotional and psychological damage.<sup>80</sup> One empirical study of black service workers found that the level of race-based incivility they experienced related directly to their levels of stress and emotional fatigue.<sup>81</sup>

Micro-aggressions are particularly difficult to address, although their combined effect on an individual can be catastrophic. As such, alternative protections, such as the model of psychological self-defense advanced herein, may be more needed. The dominant social response to micro-aggressions seems to be “toughen up.” That is, the targets of micro-aggressions are all too often dismissed as insecure and sensitive.<sup>82</sup> This derives, at least partially, from the fact that the dominant society does not experience the accumulated effect of micro-aggressions and thus, as a group, lacks empathy for the experience. Members of the dominant social group tend to assess micro-aggressions as isolated acts.<sup>83</sup> In reality, the effect of micro-aggressions is comparable to what happens in the game of piñata.<sup>84</sup> That is, it is the repetition of subtle attacks that eventually wears the victim down to the point of emotional and/or psychological breakage.<sup>85</sup> Furthermore, this repetition may even create the sensitivity of which its victims are accused when they name it.

Micro-aggressions are among the most difficult forms of SPT to address. The conceptual difficulty is attributable to the fact that a single individual is usually only responsible for a small portion of the micro-aggressions’ combined effect.<sup>86</sup> The triggers for micro-aggressions as well as other forms of

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<sup>77</sup> *Id.* at 321.

<sup>78</sup> *See* King, *supra* note 74, at 56.

<sup>79</sup> *Id.*

<sup>80</sup> *Id.* at 57.

<sup>81</sup> *Id.*

<sup>82</sup> Catharine Wells, *Microaggressions in the Context of Academic Communities*, 12 SEATTLE J. SOC. JUST. 319, 322 (2013).

<sup>83</sup> *Id.*

<sup>84</sup> *Id.* at 337.

<sup>85</sup> *Id.*

<sup>86</sup> *Id.* at 330.

identity-based bullying are different from those present in traditional bullying. With micro-aggressions, the impetus is usually the disadvantaged or marginalized identity of the target; thus, micro-aggressions reflect notions of gender, sexuality, and/or race that pervade society as a whole.<sup>87</sup> The micro-aggression can be seen as a tool in an unspoken conspiracy whereby the conspirators have no specific knowledge of each other but all share a common goal: the subjugation and/or diminishment of the group to which the target belongs.

Title VII of the Civil Rights Act provides the most minimal of protections for victims of micro-aggressions, and only for those who experience them in their most extreme forms, and even then generally only for those in the workplace.<sup>88</sup> If a target eventually acts physically to protect what remains of her self-concept as a result of the combined effects of micro-aggressions from multitudinous and diverse quarters, she is susceptible to criminal prosecution.<sup>89</sup> The perpetrators of micro-aggressions, however, receive every protection possible under the law.<sup>90</sup>

#### E. Role-Based SPT (LGBTQ Bullying)

By far, the group most bullied are sexual minorities. The suicide rate among LGBT youth is more than twice as high as for their heterosexual counterparts.<sup>91</sup> According to Kevin Berrill, Director of the Anti-Violence Project of the National Gay and Lesbian Task Force, “The increased risk of suicide facing these youth is linked to growing up in a society that teaches them to hide and to hate themselves.”<sup>92</sup>

As many as 84 percent of LGBT teens have experienced some form of harassment, discrimination, or abuse.<sup>93</sup> One study found that of the 84 percent experiencing abuse, 40 percent were physically mistreated while nearly 19 percent had actually been physical assaulted.<sup>94</sup>

One-third of LGBT teens have been verbally or physically attacked by a family member for coming out.<sup>95</sup> One-half of lesbian and gay teenagers have been rejected to some degree by their parents.<sup>96</sup> More than half of the students

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<sup>87</sup> *Id.* at 326.

<sup>88</sup> See 42 U.S.C. § 2000e-2(a) (2012).

<sup>89</sup> See *infra* Part IV.

<sup>90</sup> See *infra* Part IV.

<sup>91</sup> Lisa C. Connolly, *Anti-Gay Bullying in Schools—Are Anti-Bullying Statutes the Solution?*, 87 N.Y.U. L. REV. 248, 256 (2012).

<sup>92</sup> Laurie Lindop, *Gay, Lesbian, Bisexual, Transgender Youth Suicide*, HEALTHYPLACE (Mar. 14, 2016), <https://www.healthyplace.com/gender/gay-is-ok/gay-lesbian-bisexual-transgender-youth-suicide> [<https://perma.cc/MWZ2-RL29>].

<sup>93</sup> JOSEPH G. KOSCIW ET AL., THE 2009 NATIONAL SCHOOL CLIMATE SURVEY: THE EXPERIENCES OF LESBIAN, GAY, BISEXUAL AND TRANSGENDER YOUTH IN OUR NATION’S SCHOOLS xvi (2010).

<sup>94</sup> *Id.*

<sup>95</sup> Connolly, *supra* note 91, at 255.

<sup>96</sup> *Id.*

who experience school bullying due to transgendered status attempt suicide.<sup>97</sup> The need for psychological self-defense in the LGBT community is great.

*F. The Word “Nigger” as a Weapon of Psychological Destruction*

The use of the word “nigger,”<sup>98</sup> when directed with ill-intent by a person of European descent who harbors racial animus against black people (particularly black people from a culture with a long history of racial oppression), is per se SPT. The use of the word “nigger” under these circumstances carries the force of generations of racial tyranny, the scars of which are transgenerational and continuously aggravated by fresh acts of social oppression.<sup>99</sup> As critical race theorist Mari Matsuda points out, the word “nigger” is “a mechanism of subordination,” that reinforces “a historical vertical relationship.”<sup>100</sup>

More specifically, as Michele Goodwin notes:

Theoretically, the purpose behind the creation and use of racial epithets is the re-inforcement (psychologically and otherwise) of the perception of weakness, immorality, inadequacy, or ineptitude of the intended target. “Nigger” reminds blacks of an unshakeable “otherness,” an outsider status in the larger social, economic, and political dynamics of a given society. This outsider status finds its origins in involuntary servitude, which was justified through the creation of “nigger”: the indolent, heathenish, wretched individual, legally on par with chattel.<sup>101</sup>

Goodwin notes that the word “nigger” gained force after Emancipation.<sup>102</sup> The social power of the word helped to engender and justify “violence against blacks in the forms of lynching, police violence, and racial profiling.”<sup>103</sup> The word “nigger” came to characterize the social and legal identity of the African American community.<sup>104</sup>

Because of the racial scars many African Americans carry, the word “nigger,” when used by certain people in certain contexts, is the atomic bomb of SPT. As Goodwin notes, it “inspires fear, shame, guilt, anger, and even hate” among African Americans.<sup>105</sup> Arguments to the effect that the use of the word is acceptable because “black people use it” ignore history, intent and “the com-

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<sup>97</sup> Jennifer Levi, *Bullying and the Laws Pertaining to It*, 34 GPSOLO 30, 32 (2017).

<sup>98</sup> The author struggled with whether to include the actual word instead of replacing it each time with “the N-word.” The full word is included to demonstrate the effect of the word on the reader to make a larger point about the psychologically destructive potential of the word.

<sup>99</sup> Michele Goodwin, *Nigger and the Construction of Citizenship*, 76 TEMP. L. REV. 129, 141 (2003).

<sup>100</sup> Mari J. Matsuda, *Public Response to Racist Speech: Considering the Victim’s Story*, 87 MICH. L. REV. 2320, 2358 (1989).

<sup>101</sup> Goodwin, *supra* note 99, at 141.

<sup>102</sup> *Id.* at 171.

<sup>103</sup> *Id.* at 129.

<sup>104</sup> *See id.*

<sup>105</sup> *Id.* at 130.

plex nature of internalized racism.”<sup>106</sup> Many whites who use the word, particularly in confrontational settings, intend for the word to damage the target and indeed expect such precisely because of the history of degradation and inferiority that impregnates the word.

The weaponized use of the word “nigger” can possibly trigger a condition at least one expert contends is unique to black people. Dr. Joy DeGruy Leary argues that due to the history of degradation and subordination of the African American community many black people suffer from what she terms post traumatic slave syndrome, “a condition that exists when a population has experienced multigenerational trauma resulting from centuries of slavery and continues to experience oppression and institutionalized racism today.”<sup>107</sup> She outlines the traditional causes and symptoms of posttraumatic stress and contextualizes those causes in terms of the African American experience.<sup>108</sup> The word nigger indelibly invokes this history when a white American uses it.

DeGruy’s list of the independent and sufficient conditions that may give rise to post traumatic stress, even if they occur just once, are as follows:

- A serious threat or harm to one’s life or physical integrity.
- A threat or harm to one’s children, spouse, or close relative.
- Sudden destruction of one’s home or community.
- Seeing another person injured or killed as a result of accident or physical violence.
- Learning about a serious threat to a relative or close friend being kidnapped, tortured or killed.
- Stressor is experienced with intense fear, terror and helplessness
- Stressor and disorder is considered to be more serious and will last longer when the stressor is of human design.<sup>109</sup>

DeGruy notes that African slaves experienced these conditions in combination and repeatedly.<sup>110</sup> She goes on to list the symptoms of post-traumatic stress as outlined by the American Psychiatric Association and identifies them as also being symptoms of post traumatic slave syndrome:

- Intense psychological distress at exposure to internal or external cues that symbolize or resemble an aspect of the traumatic event.
- Physiological reactivity on exposure to internal or external cues.
- Marked diminished interest or participation in significant activities.
- Feeling of detachment or estrangement from others.
- Restricted range of affect.
- Sense of foreshortened future (in other words, does not expect to have a career, marriage, children or normal life span)
- Difficulty falling or staying asleep.

<sup>106</sup> *Id.* at 133.

<sup>107</sup> JOY DEGRUY, POST TRAUMATIC SLAVE SYNDROME: AMERICA’S LEGACY OF ENDURING INJURY AND HEALING 121 (2005).

<sup>108</sup> *Id.* at 114.

<sup>109</sup> *Id.* (alteration in original) (citation omitted).

<sup>110</sup> *Id.*

Irritability or outbursts of anger.  
Difficulty concentrating []<sup>111</sup>

DeGruy then outlines the effects of post traumatic slave syndrome as follows: “(1) Vacant Esteem, (2) Ever Present Anger, and (3) Racist Socialization.”<sup>112</sup> Vacant esteem refers to a lack of positive “beliefs about our value, our value to our families, our friends, [our] community and the world at large.”<sup>113</sup> She suggests that healthy ego development is the result of an “accurate and honest assessment of one’s worth, worth being the degree to which one contributes.”<sup>114</sup> DeGruy further posits that three factors determine individual self-esteem: “first, . . . the appraisals of the significant others in their lives; later, . . . having their contributions appropriately recognized; and finally, . . . the meaningfulness of their own lives.”<sup>115</sup> She explains her concept of vacant self-esteem as “the state of believing oneself to have little or no worth, exacerbated by the group and societal pronouncement of inferiority.”<sup>116</sup> DeGruy establishes that laws, institutions, policies, and media can create vacant esteem, and that a community’s “agreed-upon beliefs about their members’ worth,” as well as “standards and values regarding acceptable behavior, educational attainment and professional possibilities”; and the family through parental values, beliefs and attainment can reinforce vacant self-esteem.<sup>117</sup> She goes on to argue that these institutions by and large “promote a disparaging and limiting identity” from which the sufferers of post traumatic slave syndrome believe themselves to be inescapable.<sup>118</sup>

DeGruy’s concept of ever present anger builds on a lecture presented by J.R. Samuels in 1980 in which he states, “[i]n its simplest form anger is the normal emotional response to a blocked goal. Often, if a person’s goal remains blocked over time, they will begin to consider the possibility of failure and so experience fear, and when we are fearful we also lash out in anger.”<sup>119</sup> DeGruy argues that “[o]ne of the most significant goals that have been blocked consistently by the dominant culture has been that of the African American community’s integration into the greater society with all the responsibilities, rights and privileges concomitant with membership.”<sup>120</sup>

Racist Socialization refers to what other commentators describe as internalized oppression, the process by which the oppressed take on the beliefs, atti-

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<sup>111</sup> *Id.* at 114–15 (alteration in original) (citation omitted).

<sup>112</sup> *Id.* at 121.

<sup>113</sup> *Id.* at 123.

<sup>114</sup> *Id.*

<sup>115</sup> *Id.* at 124.

<sup>116</sup> *Id.* at 125.

<sup>117</sup> *Id.*

<sup>118</sup> *Id.*

<sup>119</sup> *Id.* at 130 (quoting J.R. Samuels, *The M.O. Scale*, Lecture presented at the Mentat School, Inc (1980)) (alteration in original omitted).

<sup>120</sup> *Id.* at 132.



tudes, and judgments of their oppressors.<sup>121</sup> In the case of African Americans, internalized oppression describes the process by which blacks adopt the belief structure of white supremacy.<sup>122</sup> DeGruy argues that internalized oppression presents in the adoption of white standards of beauty, the belief in black immorality and intellectual inferiority, the development of a crabs-in-a-barrel mentality,<sup>123</sup> the denial of the role of the civil rights struggle in their success, and the rejection of social policies such as affirmative action designed to provide equal opportunities.<sup>124</sup>

The link between the psychological wounds slavery created and the post traumatic slave syndrome is multilayered. The initial wounds of slavery were never treated. DeGruy argues that the traumas never ceased and continue to be aggravated, reinforced, and reintroduced to this day.<sup>125</sup>

The system of slavery required the subjugation of the will of the slave in order to get them to toil without recompense.<sup>126</sup> The systematic effort to break the will of African slaves as a method of control continues with their descendants.<sup>127</sup> The desire to control and subordinate, of course, lies at the heart of most forms of bullying but has been entrenched in social policy with respect to African Americans since slavery.<sup>128</sup>

DeGruy suggests that the fears, stressors, and psychology associated with slavery was embedded culturally and passed down from generation to generation.<sup>129</sup> That is, while the slave experience engendered a positive legacy of endurance, resourcefulness, and resilience, the dysfunctional thinking, learned acquiescence, fear, and ill-feelings generated by that experience were taught or learned either directly and indirectly by succeeding generations.<sup>130</sup>

The existence of multi or transgenerational disorders is well documented, particularly in communities with histories of trauma such as Holocaust survivors. A number of studies have found that the children of parents who experienced significant life trauma are more likely to develop symptoms associated

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<sup>121</sup> See *id.* at 133–34.

<sup>122</sup> *Id.* at 134–35.

<sup>123</sup> Purportedly, crabs caught by a fisherman and stored in a barrel exhibit strange behavior. Crabs that are on the bottom of the barrel tend to pull crabs that attempt to climb the barrel walls back down to the bottom. See Todd J. Clark, “My President Is Black and I Be God-damned If My Agent Ain’t Too,” 2 GEO. J. L. & MOD. CRITICAL RACE PERSP. 107, 129 (2011).

<sup>124</sup> DEGRUY, *supra* note 107, at 135.

<sup>125</sup> *Id.* at 119.

<sup>126</sup> *Enslavement: Master/Slave*, NAT’L HUMAN. CTR. (Mar. 2007), <http://nationalhumanitiescenter.org/pds/maai/enslavement/text6/text6read.htm> [<https://perma.cc/RD5K-QMAL>].

<sup>127</sup> DEGRUY, *supra* note 107, at 120.

<sup>128</sup> See generally MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS 2* (2010).

<sup>129</sup> DEGRUY, *supra* note 107, at 125.

<sup>130</sup> *Id.* at 142.

with post-traumatic-stress disorder after witnessing violence.<sup>131</sup> Furthermore, the offspring of Holocaust survivors were more likely to develop psychological distress after experiencing unrelated, difficult life experiences including suffering from breast cancer.<sup>132</sup> Of greater relevance to African Americans today, the grandchildren of Holocaust survivors were three times as likely as members of the dominant community to be referred to a child psychiatry clinic for evaluation.<sup>133</sup> In addition, the effects of trauma extend past individual families and spill over into communities and cultures. Marcelo M. Suárez-Orozco and Antonius C.G.M. Robben point out that “the consequences of massive trauma afflict not only individuals but also social groups and cultural formations.”<sup>134</sup>

Genetic studies also suggest that continued exposure to psychological stressors can affect the structure of DNA, adding a potential biological link to the mix.<sup>135</sup>

The word “nigger”—replete with the debilitating history of degradation it represents—when wielded with intent by those who represent the historical sources of African American oppression, can be said to aggravate the pre-existing condition of post-traumatic-slave syndrome. Under such circumstances, an individual should not be criminalized when he or she responds with relatively minor physical force.

A recent movie, entitled *Get Hard*, starring African American comedian Kevin Hart and European American comedian Will Ferrell, comically illuminates the reaction of many blacks to the use of the word “nigger.”<sup>136</sup> In one particular scene, Kevin Hart’s character, Darnell, is trying to teach Will Ferrell’s character, James, to act like a white supremacist in order to receive the hate group’s protection when Farrell’s character goes to prison.<sup>137</sup> Darnell attempts to convince James to practice using the word “nigger” so as to be more convincing to the white supremacist.<sup>138</sup> James is extremely uncomfortable using the word, so Darnell proposes he say two unrelated words that when put together make a similar sound to the word “nigger.”<sup>139</sup> When James complies,

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<sup>131</sup> Charles Portney, *Intergenerational Transmission of Trauma: An Introduction for the Clinician*, PSYCHIATRIC TIMES (Apr. 1, 2003), <http://www.psychiatrictimes.com/articles/intergenerational-transmission-trauma-introduction-clinician> [https://perma.cc/7HJR-2L6Y].

<sup>132</sup> *Id.*

<sup>133</sup> Pierre Fossion et al., *Family Approach with Grandchildren of Holocaust Survivors*, 57 AM. J. PSYCHOTHERAPY 519, 520 (2003).

<sup>134</sup> CULTURES UNDER SIEGE: COLLECTIVE VIOLENCE AND TRAUMA 1 (Antonius C. G. M. Robben & Marcelo M. Suárez-Orozco eds., 2000).

<sup>135</sup> Stacy Lu, *How Chronic Stress is Harming Our DNA*, 45 MONITOR ON PSYCHOL. 28, 28 (2014), <http://www.apa.org/monitor/2014/10/chronic-stress.aspx> [https://perma.cc/7DG6-JV TM].

<sup>136</sup> GET HARD (Warner Brothers Pictures 2015).

<sup>137</sup> *Id.*

<sup>138</sup> *Id.*

<sup>139</sup> *Id.*

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Darnell reflexively hits him in the mouth.<sup>140</sup> He apologizes, but suggests it was a natural and irresistible reflex.<sup>141</sup>

A 2009 case suggests Darnell's likely fate in the real world. Comedian Katt Williams was arrested, charged, and convicted of assault after he punched a white clerk at Target who called him a "nigger."<sup>142</sup> Despite the obvious deep and profound psychological and emotional issues the word can create or exacerbate when used with destructive intent, there are no state-based criminal defenses that take the seriousness of this reality into account.

Those who physically respond to this type of psychological violence are not protected by law. It should also be noted that words with destructive emotional power are not limited to the African American community. Words like "bitch," "ho," and "cunt" have been used with destructive force towards women and womanhood. Words like "faggot," "dike," and "sissy" have been used to attack the esteem of sexual minorities. In all cases, if the targets respond with justifiable physical force, they are subject to criminal prosecution despite the lack of legal alternatives to force.

The same is true for targets of workplace tyranny, cyber bullying, domestic psychological abuse, and micro-aggressions.

#### IV. THE PROBLEM (INADEQUACY OF EXISTING PROTECTIONS)

America is behind many other countries when it comes to criminal penalties for psychological and emotional violence. France, England, and Sweden have outlawed workplace bullying.<sup>143</sup> In other countries, like Germany, the common law has developed remedies for workplace bullying.<sup>144</sup>

In America, laws protecting the victims of psychological and emotional assault are sparse. Criminal protections against SPT are virtually non-existent, and civil remedies are largely ineffective.

As the sections below describe, the limited criminal penalties that do exist for emotionally violent behavior tend to either implicate the fighting words doctrine or hate crime statutes.

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<sup>140</sup> *Id.*

<sup>141</sup> *See id.*

<sup>142</sup> *See Katt Williams Arrested, Gets Hearing for Slapping Target Employee*, MTV NEWS (Dec. 8, 2012), <http://www.mtv.com/news/2499909/kat-williams-arrested-court-hearing-slapping-target-employee/> [<https://perma.cc/L8SK-K3A6>]; *Katt Williams Slapped Target Employee for Calling Him the N-Word, Actor Claims*, HUFFINGTON POST CELEBRITY (Dec. 20, 2012 9:15 AM), [http://www.huffingtonpost.com/2012/12/20/katt-williams-slapped-target-employee-n-word\\_n\\_2337063.html](http://www.huffingtonpost.com/2012/12/20/katt-williams-slapped-target-employee-n-word_n_2337063.html) [<https://perma.cc/VR8U-TS8Q>].

<sup>143</sup> Kaplan, *supra* note 37, at 142–43.

<sup>144</sup> *Id.*

*A. Fighting Words*

Theoretically, states can criminalize words and expressions intended to cause psychological injury, without violating the First Amendment freedom of speech clause. The vehicle that potentially allows this is the fighting words doctrine. The fighting words doctrine was established in *Chaplinsky v. New Hampshire*. In *Chaplinsky*, the Supreme Court defined fighting words as “those which by their very utterance inflict injury or tend to incite an immediate breach of the peace.”<sup>145</sup> A 1992 Supreme Court case elaborates, “[f]ighting words are not a means of exchanging views, rallying supporters, or registering a protest; they are directed against individuals to provoke violence or to inflict injury.”<sup>146</sup> Michael J. Mannheimer reports that fighting words include words or expressions that are “‘inherently’ capable of causing harm,” and have “little or no value as speech” and or thus “regnable [sic] at will.”<sup>147</sup> A variety of state statutes and city ordinances against breaches of the peace and disorderly conduct prohibit fighting words.<sup>148</sup> However, the fighting words doctrine has an extremely complicated and controversial history.

There is no bright line rule circumscribing the words or phrases that constitute fighting words.<sup>149</sup> Instead the doctrine allows courts to analyze the totality of the circumstances.<sup>150</sup> Friedlieb describes the common standard as “whether a particular expression of speech directed to a particular listener in a particular situation is sufficiently likely to provoke a breach of the peace by an ordinary listener in that situation.”<sup>151</sup>

Importantly, the ideas conveyed by fighting words are constitutionally protected. Thus, it is not the ideas fighting words express but the fact that “their content embodies a particularly intolerable (and socially unnecessary) *mode* of expressing *whatever* idea the speaker wishes to convey.”<sup>152</sup> For instance, the belief that African American’s are intellectually inferior would be constitutionally protected, even if factually incorrect, if expressed matter-of-factly by a white American to an African American as follows: “I believe African American’s have lower IQ’s than white people.” If that belief instead was expressed with hostility as “niggers are dumb,” the fighting words doctrine, theoretically, may be implicated.

Courts have recognized two categories of fighting words: words or expressions that cause psychic injury directly and words or expressions that provoke a

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<sup>145</sup> *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942).

<sup>146</sup> *R.A.V. v. City of St. Paul*, 505 U.S. 377, 401 (1992).

<sup>147</sup> Michael J. Mannheimer, *The Fighting Words Doctrine*, 93 COLUM. L. REV. 1527, 1536 (1993).

<sup>148</sup> Linda Friedlieb, *The Epitome of an Insult: A Constitutional Approach to Designated Fighting Words*, 72 U. CHI. L. REV. 385, 391 (2005).

<sup>149</sup> *Id.*

<sup>150</sup> *Id.*

<sup>151</sup> *Id.* at 386.

<sup>152</sup> *R.A.V. v. City of St. Paul*, 505 U.S. 377, 393 (1992).

physically violent response.<sup>153</sup> So the fighting words doctrine theoretically applies to certain expressions that do not tend to provoke a physically violent response but that solely threaten psychic harm.<sup>154</sup>

The Supreme Court recognized the psychic injury brand of fighting words in *Chaplinsky v. New Hampshire*.<sup>155</sup> While the Court has never explicitly overruled the psychic harm category of fighting words, it has consistently disfavored it.<sup>156</sup> All the Supreme Court cases that have addressed state statutes outlawing speech based on psychic injury have struck down these statutes for one reason or another.<sup>157</sup>

Although, states can, theoretically, regulate words and expressions intended to wound, it is unclear in what form and to what degree they may do so. Thus, few, if any, states provide protections to the victims of emotional and psychological aggression based on the fighting words exception to First Amendment protection.

### B. Hate Crime Statutes

Many states have enacted criminal statutes that proscribe offensive conduct based on race, ethnicity, religious beliefs, gender, and/or sexual orientation.<sup>158</sup>

Generally, hate crime statutes can be divided into two categories: those that create a separate crime for previously outlawed conduct when motivated by bigotry and those that enhance the sentence for previously prohibited conduct when motivated by bigotry.<sup>159</sup>

A typical hate crimes statute reads as follows:

A person commits the crime of intimidation if, by reason of the actual or perceived race, color, religion, national origin or sexual orientation of another individual or group of individuals, he violates Section \_\_\_\_\_ of the Penal Code [insert code provision for criminal trespass, criminal mischief, harassment, menacing, assault and/or any other appropriate statutorily proscribed criminal conduct].<sup>160</sup>

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<sup>153</sup> Stephen W. Gard, *Fighting Words as Free Speech*, 58 WASH. U. L.Q. 531, 536–37 (1980).

<sup>154</sup> Mannheim, *supra* note 147, at 1537.

<sup>155</sup> See generally *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942).

<sup>156</sup> Note, *The Demise of the Chaplinsky Fighting Words Doctrine: An Argument for Its Interment*, 106 HARV. L. REV. 1129, 1129 (1993).

<sup>157</sup> *Id.* at 1137–38.

<sup>158</sup> George L. Blum, *Validity, Construction, and Effect of “Hate Crimes” Statutes, “Ethnic Intimidation” Statutes, or the Like*, 22 A.L.R. 5th 261 (1994).

<sup>159</sup> Craig Peyton Gaumer, *Punishment for Prejudice: A Commentary on the Constitutionality and Utility of State Statutory Responses to the Problem of Hate Crimes*, 39 S.D. L. REV. 1, 2–3 (1994).

<sup>160</sup> Blum, *supra* note 158, at § 2(b).

However, because most hate crime statutes only further penalize acts that are already criminal under other laws,<sup>161</sup> these statutes generally provide no threshold protection against emotionally or psychologically abusive conduct.

### C. *Civil Remedies*

The U.S. civil system, like its criminal counterpart, has not served to adequately protect individuals against most forms of SPT.<sup>162</sup> The obstacles to civil relief for nondiscriminatory bullying are, according to Sarah Morris, “nearly insurmountable.”<sup>163</sup> Although civil rights laws have developed to address workplace harassment, “[d]iscrimination laws limit harassment coverage to protected classes, leading to the phenomenon that the ‘equal opportunity harasser’ has a pass under harassment law.”<sup>164</sup>

Yamada has proposed, without success, the Healthy Workplace Bill to address bullying that does not involve membership in a protected class.<sup>165</sup>

The model legislation proposed a civil cause of action against employers who subjected employees to abusive work environments.<sup>166</sup> The model bill described the environment it sought to prevent, as an environment where “the defendant, acting with malice, subjects the complainant to abusive conduct so severe that it causes tangible harm to the complainant.”<sup>167</sup> It further defines such abusive conduct as “‘conduct that a reasonable person would find hostile, offensive, and unrelated to an employer’s legitimate business interests.’”<sup>168</sup> The bill continues:

In considering whether abusive conduct is present, a trier of fact should weigh the severity, nature, and frequency of the defendant’s conduct. Abusive conduct may include, but is not limited to: repeated infliction of verbal abuse such as the use of derogatory remarks, insults, and epithets; verbal or physical conduct that a reasonable person would find threatening, intimidating, or humiliating; or the gratuitous sabotage or undermining of a person’s work performance. A single act normally will not constitute abusive conduct, but an especially severe and egregious act may meet this standard.<sup>169</sup>

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<sup>161</sup> JAMES B. JACOBS & KIMBERLY POTTER, *HATE CRIMES: CRIMINAL LAW AND IDENTITY POLITICS* 42 (Oxford Univ. Press 2001).

<sup>162</sup> Sarah Morris, *The Anti-Bullying Legislative Movement: Too Quick to Quash Common Law Remedies?*, BENCH & BAR OF MINN. (Nov. 1, 2008), <http://mnbenchbar.com/2008/11/anti-bullying-legislative/> [https://perma.cc/8QXC-D43K].

<sup>163</sup> *Id.*

<sup>164</sup> *Id.*

<sup>165</sup> *Id.*

<sup>166</sup> *Id.*

<sup>167</sup> *Id.*

<sup>168</sup> *Id.*

<sup>169</sup> David C. Yamada, *Crafting a Legislative Response to Workplace Bullying*, 8 EMP. RTS. & EMP. POL’Y J. 475, 498 (2004).

Thirteen states have attempted to prohibit workplace bullying based on Yamada's model, but the legislation has unanimously failed.<sup>170</sup> According to Yamada, the briefs of the opponents of the legislation typically argued that "malicious, psychological abuse of an employee is all part of healthy competition, a form of social Darwinism that separates the wheat from the chaff and frees people to excel."<sup>171</sup>

In the absence of direct laws prohibiting workplace bullying, claimants must rely on civil rights statutes, such as Title VII and the Americans with Disabilities act, or on tort law claims such as intentional infliction of emotional distress ("IIED"), in order to advance their claims. However, these avenues also present substantial hurdles.

#### D. Title VII

Title VII of the Civil Rights Act prohibits employers from discrimination on the basis of "race, color, religion, sex, or national origin."<sup>172</sup> Title VII only applies if the discrimination works to "alter the conditions of the victim's employment and create an abusive working environment."<sup>173</sup> Courts have applied a two-part test to determine whether an employee was victimized by a hostile work environment.<sup>174</sup> First, the environment must be such that a reasonable person would find it hostile or abusive.<sup>175</sup> Second, the employee must have perceived that the environment was abusive.<sup>176</sup>

While Title VII potentially provides a workable framework for workplace bullying, it only applies to members of protected classes.

#### E. The Americans with Disabilities Act

The Americans with Disabilities Act (ADA) adds people with disabilities to protected classes.<sup>177</sup> Employees who have relied on the ADA to vindicate claims of workplace bullying generally assert that workplace bullying led to psychiatric disorders substantially limiting their life activities.<sup>178</sup>

However, most claims against bullying under the ADA have not been successful.<sup>179</sup> Courts tend to view the stresses that come with workplace bullying as a virtual condition of employment inherent in work environments.<sup>180</sup>

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<sup>170</sup> Morris, *supra* note 162.

<sup>171</sup> David C. Yamada, *Workplace Bullying and American Employment Law: A Ten-Year Progress Report and Assessment*, 32 COMP. LAB. L. & POL'Y J. 251, 270 (2010).

<sup>172</sup> 42 U.S.C. § 2000e-2(a)(1) (2012).

<sup>173</sup> Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 67 (1986).

<sup>174</sup> Harris v. Forklift Sys., Inc., 510 U.S. 17, 21–22 (1993).

<sup>175</sup> *Id.*

<sup>176</sup> *Id.*

<sup>177</sup> 42 U.S.C. § 12112(a) (2012).

<sup>178</sup> Kaplan, *supra* note 37, at 159.

<sup>179</sup> *Id.*

*F. Intentional Infliction of Emotional Distress*

IIED is defined as “extreme and outrageous conduct intentionally or recklessly” causing “severe emotional distress.”<sup>181</sup> Claims of IIED often fail because courts rule that the abuse is not severe enough to constitute violative conduct.<sup>182</sup> Yamada reports that “typical workplace bullying, especially conduct unrelated to sexual harassment or other forms of protected-class discrimination, seldom resulted in liability for IIED.”<sup>183</sup> He notes that courts generally restrict IIED claims to cases in which the abuse “emotionally destroys its target.”<sup>184</sup>

*Holloman v. Keadle* provides an example of how high the bar to recovery is in IIED cases, even when the offending behavior rises to the level of SPT. In *Holloman* the Arkansas Supreme Court held that the plaintiff, who had been cursed at repeatedly and called a “white nigger,” “slut,” and “whore” in her workplace, and who suffered stomach issues, anxiety, insomnia, and loss of self-esteem as a result, had no claim.<sup>185</sup> The court reasoned that an ordinary person would be able to handle this level of psychological aggression, and that the plaintiff failed to establish that the defendant was aware of what the court deemed to be her unique sensitivity to emotional distress.<sup>186</sup>

*G. Self-Help*

According to Yamada, “the best way to deal with a workplace bully is to stand up to him,” suggesting that “[t]he typical bully often is a coward underneath, so if the target of his wrath directly confronts him, he may stop the offending behavior.”<sup>187</sup> However, the legal protections available to employees who confront bullies are limited and employees who do so may be subjected to disciplinary action.<sup>188</sup>

Yamada argues that “the law should protect workers who engage in self-help measures to address the problem.”<sup>189</sup> He suggests that, as a partial solution, “[l]egal protections for targets who choose to confront their tormentors would, at the very least, satisfy the policy goal of self-help and could help to shape a workplace culture that discourages bullying.”<sup>190</sup>

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<sup>180</sup> Yamada, *supra* note 171, at 258.

<sup>181</sup> RESTATEMENT (SECOND) OF TORTS § 46 (AM LAW. INST. 1965).

<sup>182</sup> *Id.* at cmt. d.

<sup>183</sup> Yamada, *supra* note 171, at 257.

<sup>184</sup> *Id.*

<sup>185</sup> *Holloman v. Keadle*, 931 S.W.2d 413, 414, 417 (Ark. 1996).

<sup>186</sup> *Id.* at 417.

<sup>187</sup> Yamada, *supra* note 33, at 522.

<sup>188</sup> *Id.*

<sup>189</sup> *Id.* at 492.

<sup>190</sup> *Id.* at 522.



Martha Beck argues that there is an art to defending oneself from psychological attacks.<sup>191</sup> She suggests that the costs of enduring such attacks without response are wounds to the emotional self.<sup>192</sup> She compares psychological self-defense with martial arts and argues that psychological defense requires a fighting stance that equates to emotional balance.<sup>193</sup> According to Beck, emotional balance is self-acceptance, integrity (living by your own code of character), self-forgiveness, and compassion for oneself.<sup>194</sup> Another tool of psychological self-defense is the cease and desist order.<sup>195</sup> This consists of telling the emotional assailant to stop or there will be consequences.<sup>196</sup> Beck then goes on to list a number of psychologically advanced defensive techniques, however, many, if not all, require practice.<sup>197</sup> Herein lies the problem.

Psychological self-defense is a skill one has to develop; it would seem that it may even require training. So how do people who have no psychological defensive skills survive extreme psychological and emotional attacks? The answer all too often is that they do not, at least from a psychological perspective.

#### V. POWER ARRANGEMENTS THAT PROTECT THE TYRANNICAL

The current state of the law reflects society's power arrangements and favors those in a position to inflict psychological and emotional violence as a control mechanism without providing a check on that power. The lack of legal remedy for workplace bullying, for example, reflects a legal preference for supervisors, the most common perpetrators of workplace bullying.<sup>198</sup> As Yamada argues, "only employers and their supervisors retain the right to hurt someone's feelings, to express an unflattering opinion, and to unburden their tempers by blowing off steam on their subordinates" in the workplace.<sup>199</sup> Given at-will employment law<sup>200</sup>, if the workers were to respond to such abuses of power they could be summarily dismissed.<sup>201</sup> As Yamada notes, our legal system "has

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<sup>191</sup> Martha Beck, *Verbal Assaults—How to Defend Yourself*, CNN (Nov. 19, 2008, 10:13 AM), <http://www.cnn.com/2008/LIVING/personal/11/18/o.handle.verbal.ambushes/index.html> [<https://perma.cc/LRW6-QQ2G>].

<sup>192</sup> *Id.*

<sup>193</sup> *Id.*

<sup>194</sup> *Id.*

<sup>195</sup> *Id.*

<sup>196</sup> *Id.*

<sup>197</sup> *Id.*

<sup>198</sup> Yamada, *supra* note 33, at 509.

<sup>199</sup> *Id.*

<sup>200</sup> At-will employment doctrine holds that employees "hired for an indefinite period of time were considered employees at-will, terminable at any time for any reason." Chad A. Atkins, Note, *The Whistleblower Exception to the At-Will Employment Doctrine: An Economic Analysis of Environmental Policy Enforcement*, 70 DENV. U. L. REV. 537, 540 (1993).

<sup>201</sup> Yamada, *supra* note 33, at 509.

created, in effect, a boxing match in which workers take the punches but may not fight back.”<sup>202</sup>

## VI. SELF-DEFENSE AND NON-PHYSICAL INTERESTS

State-based self-defense law currently criminalizes direct physical responses to severe emotional violence. However, in some circumstances, such as those involving stand your ground laws and the common law right to resist an unlawful arrest, state law elevates dignity and liberty interests above interests involving physical safety.

### A. *Self-Defense Law*

The general doctrine of self-defense allows an individual to use a reasonable degree of force to protect herself from an unlawful physical attack, if she is without fault in initiating the conflict.<sup>203</sup> However, both the use of force and the amount of force used must be necessary for her protection.<sup>204</sup> So if the force is not proportionate to the threat or the threat is not immediate, the defense will generally not be available.<sup>205</sup>

### B. *Non-Physical Interests Protected by Self-Defense Doctrines*

Although the law is currently without protections for those who use physical force in defense of their emotional and psychological well-being, American jurisprudence has always vindicated the idea of physical force when certain non-physical interests of the victim are at stake.<sup>206</sup> The non-physical interests traditionally protected include dignity, liberty, and other such principles elevated at the founding of this country.<sup>207</sup> The common law right to use of physical force in resisting an unlawful arrest, the castle doctrine and, more recently, stand your ground laws all vindicate these principles. The recognition of non-physical interests in the use of self-defense also appears, although more implicitly, in the battered woman’s syndrome defense.<sup>208</sup>

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<sup>202</sup> *Id.*

<sup>203</sup> Cynthia Kwei Yung Lee, *Race and Self-Defense: Toward a Normative Conception of Reasonableness*, 81 MINN. L. REV. 367, 377 (1996).

<sup>204</sup> *Id.*

<sup>205</sup> *Id.*

<sup>206</sup> See *Queen v. Tooley*, (1710) 92 Eng. Rep. 349, 352; 2 LD. RAYM. 1296, 1301 (K.B.); JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 231 (5th ed. 2009); Craig Hemmens & Daniel Levin, “*Not a Law at All*”: *A Call for a Return to the Common Law Right to Resist Unlawful Arrest*, 29 SW. U. L. REV. 1, 6 (1999).

<sup>207</sup> THE DECLARATION OF INDEPENDENCE (U.S. 1776) (“all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty, and the pursuit of Happiness.”); U.S. CONST. amends. I–VI.

<sup>208</sup> See *supra* Part VI.

*C. Resisting Unlawful Arrest*

Under English common law, from which the American doctrine was derived, citizens had a right to resist unlawful arrests. In fact, individuals were entitled to use whatever degree of force was necessary to resist unlawful arrests.<sup>209</sup> The principle underlying the right was that some unlawful arrests are so egregious and unjust that they justifiably provoke violent responses, even from bystanders.<sup>210</sup>

The common law case *Queen v. Tooley* established the original justification for the resisting unlawful arrest doctrine.<sup>211</sup> *Tooley* involved three civilian citizens who came to the rescue of a woman they didn't know. The woman had been unlawfully arrested by a constable.<sup>212</sup> After the three men approached the constable with drawn swords, a civilian by the name of Dent attempted to defend the constable.<sup>213</sup> One of the strangers, Tooley, ultimately killed Dent.<sup>214</sup> The defendants argued that the constable was not acting as an agent of the law, but as "a common oppressor."<sup>215</sup> The King's Bench held that the unlawful arrest served as sufficient provocation to mitigate Tooley's offense from murder to manslaughter.<sup>216</sup> The court considered the unlawful arrest an affront to the Magna Carta and, thus, an affront to all Englishmen, and considered Tooley's passion justifiable.<sup>217</sup>

Many states have abridged the common law right to resist an unlawful arrest and the modern trend has been to dissipate the right.<sup>218</sup> However, the abrogation of this right may be unconstitutional because the history of the right and the interests it protects are so much a part of the American tradition.<sup>219</sup> That is, the right resist an unlawful arrest is arguably a right protected by the Second Amendment. The Supreme Court's reasoning in two cases, *Heller* and *McDonald*, supports this view.<sup>220</sup> Whatever the case, the recognition of the importance of non-physical interest in traditional American jurisprudence is clear.

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<sup>209</sup> Darrell A.H. Miller, *Retail Rebellion and the Second Amendment*, 86 IND. L.J. 940, 948 (2011).

<sup>210</sup> Hemmens & Levin, *supra* note 206, at 6.

<sup>211</sup> *Queen v. Tooley*, (1710) 92 Eng. Rep. 349, 349; 2 LD. RAYM. 1296, 1296 (K.B.).

<sup>212</sup> *Id.* at 352.

<sup>213</sup> *Id.* at 350.

<sup>214</sup> *Id.*

<sup>215</sup> *Id.* at 352.

<sup>216</sup> *Id.*

<sup>217</sup> *Id.*

<sup>218</sup> Craig Hemmens, *Resisting Unlawful Arrest in Mississippi: Resisting the Modern Trend*, 2 CAL. CRIM. L. REV. 2, ¶ 21 (2000); Andrew P. Wright, *Resisting Unlawful Arrests: Inviting Anarchy or Protecting Individual Freedom?*, 46 DRAKE L. REV. 383, 387–88 (1997).

<sup>219</sup> See Miller, *supra* note 209, at 955.

<sup>220</sup> *Id.* at 956.

*D. Castle Doctrine*

The castle doctrine is also an instance where the criminal law subordinates physical interests in favor of a non-physical ones. At common law, victims threatened with physical aggression were required to retreat if they could safely do so, before responding with force.<sup>221</sup> If the victim were to respond with physical force when she could safely retreat, she would be charged with a crime concomitant with the amount of force used and the harm done to the aggressor.<sup>222</sup> However, the common law recognized an exception in cases where the confrontation occurred inside the victim's home.<sup>223</sup> Commonly referred to as the castle doctrine, this exception was premised on the notion that a person's home is his or her castle and thus, dignity interests and the sanctity of the home trump the duty to retreat.<sup>224</sup> Therefore, the dignity interests of the victim together with the victim's non-physical interests superseded the physical interest of the aggressor.<sup>225</sup>

*E. Stand Your Ground*

In the last ten years, the majority of states have extended the castle doctrine to both public and private places.<sup>226</sup> In these jurisdictions, everywhere a person stands is his or her castle. That is, most states have jettisoned the duty to retreat.<sup>227</sup> The justifications for stand your ground laws are non-physical for the most part. One justification is principle, the notion that right should never give way to wrong.<sup>228</sup> The major justification for stand your ground laws is summarized most succinctly by the Supreme Court of New Jersey in *State v. Abbott*: "the law 'should not denounce conduct as criminal when it accords with the behavior of reasonable men . . . . [T]he manly thing is to hold one's ground, and hence society should not demand what smacks of cowardice.'"<sup>229</sup> It is obvious that the interests to be protected by stand your ground laws are dignity and pride. So, if pride is a protectable interest to be buttressed at the expense of life, why should the law not protect other emotional and psychological interests that may pose even greater threats?

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<sup>221</sup> See DRESSLER, *supra* note 206, at 229–30.

<sup>222</sup> *Id.*

<sup>223</sup> *State v. Abbott*, 174 A.2d 881, 883 (N.J. 1961).

<sup>224</sup> DRESSLER, *supra* note 206, at 231.

<sup>225</sup> *Id.* at 231, 266–67.

<sup>226</sup> See *id.* at 246.

<sup>227</sup> See *id.*

<sup>228</sup> *Id.* at 229.

<sup>229</sup> *Id.* (quoting *State v. Abbott*, 174 A.2d 881, 884 (N.J. 1961)).

*F. Battered Women's Syndrome and Extended Imminence*

Domestic violence is another context in which some state laws tolerate a physical response to emotional abuse. Some jurisdictions allow victims of domestic violence to present a defense when an essential element of traditional self-defense law is seemingly missing, immediacy. Battered Women's Syndrome describes a condition where a victim of domestic abuse uses physical force against a partner in reaction to accumulated abuse even when the abuser presents no immediate threat of physical violence.<sup>230</sup> Such cases have challenged traditional notions of self-defense, which require the threat of physical violence to be immediate in order to justify a self-defense instruction.<sup>231</sup> The prototypical case occurs when a victim of sustained emotional and physical abuse kills the abuser in his sleep.<sup>232</sup> Traditional criminal law would consider such an act murder. However, due to the advancement of psychology and the rise of expert testimony, a minority of states allow an instruction for self-defense or duress under these circumstances.<sup>233</sup>

In such cases, the question turns on whether the defendant subjectively and objectively believed that her actions were necessary to repel an imminent deadly assault, irrespective of the presence of an actual immediate threat.<sup>234</sup> Expert testimony usually centers on the concept of "[l]earned helplessness" whereby the battered woman feels powerless to prevent the abuse and while simultaneously feeling trapped in the relationship.<sup>235</sup> Expert testimony is often necessary in order to explain to a jury why the woman acted with defensive force rather than leave the relationship.<sup>236</sup> Additionally, expert testimony is used to establish that the battered woman actually suffers from the syndrome and that she acted reasonably considering the condition.<sup>237</sup>

Battered woman's self-defense is distinguishable from what this article advocates. One justification for battered woman's syndrome lies, as does traditional self-defense, in the threat of physical violence. Defending the spirit does not contemplate a physical threat but a severe psychological and/or emotional one. However, the rise of the battered woman's defense has shed much needed light on the effect of psychological and emotional abuse.

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<sup>230</sup> *Id.* at 245–46.

<sup>231</sup> *Id.* at 246.

<sup>232</sup> *See, e.g.*, State v. Norman, 378 S.E.2d 8, 9 (N.C. 1989); State v. Leidholm, 334 N.W.2d 811, 813–14 (N.D. 1983).

<sup>233</sup> DRESSLER, *supra* note 206, at 246.

<sup>234</sup> *Id.*

<sup>235</sup> LENORE E. A. WALKER, THE BATTERED WOMAN SYNDROME 16–17 (Sheri W. Sussman ed., 4th ed. 2017).

<sup>236</sup> DRESSLER, *supra* note 206, at 246.

<sup>237</sup> *Id.*

## VII. STATUTORY MODEL

The statutory model I propose is as follows:

*A person is justified in using non-deadly physical force to ward off abusive conduct that the person reasonably perceives as creating a substantial risk of causing serious psychological injury.*

Yamada's definition of abusive conduct serves as a model for defending the spirit.<sup>238</sup> Yamada defines abusive conduct as "conduct that a reasonable person would find hostile, offensive" without superseding social, business or cultural value.<sup>239</sup> In determining whether offensive conduct rises to the level of abuse, courts should, as Yamada suggests, "weigh the severity, nature, and frequency of the [abuser's] conduct . . . . A single act normally will not constitute abusive conduct, but an especially severe and egregious act may meet this standard."<sup>240</sup> "Abusive conduct may include, but is not limited to: repeated infliction of verbal abuse such as the use of derogatory remarks, insults, and epithets; *verbal or physical conduct that a reasonable person would find threatening, intimidating, or humiliating.*"<sup>241</sup>

The defending the spirit model defines "serious psychological injury" as long-term injuries such as anxiety, depression, and post-traumatic stress.

The statutory model proposes that the question of whether the target's response was reasonable take into account what Yamada terms "power imbalances between the aggressor and the target," and whether the aggressor was previously aware of the target's "emotional vulnerability and needlessly attempt[ed] to exploit that vulnerability."<sup>242</sup>

The statutory model would serve to bridge the gap in protections for victims of severe psychological and emotional abuse. Furthermore, it would allow targets to preempt irreparable psychological harm by allowing the target to act and thus, regain autonomy before the abuse does irreparable damage. That is, the act of fighting back in and of itself is a form of psychological protection.

This statutory model will be controversial. However, advancements in the social sciences confirm that the damage emotional and psychological abuse causes is real, and in many cases more severe and longer lasting than physical abuse.<sup>243</sup> Moreover, the Second Amendment of the U.S. Constitution implies a right, currently unrecognized, to act in defense of the spirit.

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<sup>238</sup> Kaplan, *supra* note 37, at 145.

<sup>239</sup> *Id.* (quoting David C. Yamada, *Crafting a Legislative Response to Workplace Bullying*, 8 EMP. RTS. & EMP. POL'Y J. 475, 498–99 (2004)).

<sup>240</sup> *Id.* (quoting David C. Yamada, *Crafting a Legislative Response to Workplace Bullying*, 8 EMP. RTS. & EMP. POL'Y J. 475, 498–99 (2004)).

<sup>241</sup> *Id.* (quoting David C. Yamada, *Crafting a Legislative Response to Workplace Bullying*, 8 EMP. RTS. & EMP. POL'Y J. 475, 498–99 (2004)).

<sup>242</sup> Yamada, *supra* note 33, at 525.

<sup>243</sup> See *supra* Part I.

## VIII. SECOND AMENDMENT BASIS FOR STATUTORY MODEL

The Second Amendment provides a potential constitutional basis for the right to use of physical force to protect liberty, psychological, and dignity interests. That is, the Second Amendment was framed to empower citizens to counteract power imbalances.<sup>244</sup> More importantly, the history of the Second Amendment provides a compelling justification for the use of physical force to defend against SPT.

The English right to bear arms heavily influenced the framing of the Second Amendment.<sup>245</sup> Philosopher William Blackstone, whose jurisprudential philosophy informs much of American law, provides the most effective explanation of this right.<sup>246</sup> He observes it is founded upon “the natural right of resistance and self-preservation” available to people “when the sanctions of society and laws are found insufficient to restrain the violence of oppression.”<sup>247</sup> David B. Kopel points out that one of the founding motivations behind the Second Amendment was to “deter tyranny and allow popular revolution to unseat a tyrant.”<sup>248</sup> Joseph Story advances that:

The right of the citizens to keep and bear arms has justly been considered, as the palladium of the liberties of a republic; since it offers a strong moral check against the usurpation and arbitrary power of rulers; and will generally, even if these are successful in the first instance, enable the people to resist and triumph over them.<sup>249</sup>

The Supreme Court in *District of Columbia v. Heller* held that the core component of the Second Amendment was self-defense and that the right to use defensive force applies irrespective of whether the aggressor is a civilian or a tyrannical government.<sup>250</sup> That is, the Supreme Court has firmly held that the Second Amendment conferred “an individual right protecting against both public and private violence.”<sup>251</sup>

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<sup>244</sup> WALTER MILLIS, *ARMS AND MEN: A STUDY IN AMERICAN MILITARY HISTORY* 49 (3d ed. 1986) (“The Founders sought to balance military, as they did political, power between people, states and nation.”); Larry Elder, *Why Do We ‘Keep and Bear Arms’? Part 1*, TOWNHALL (July 3, 2008, 12:01 AM), <https://townhall.com/columnists/larryelder/2008/07/03/why-do-we-keep-and-bear-arms-part-1-n803267> [<https://perma.cc/68FR-J7JY>].

<sup>245</sup> See generally Joyce Lee Malcolm, *The Right of the People to Keep and Bear Arms: The Common Law Tradition*, 10 HASTINGS CONST. L.Q. 285, 286 (1983).

<sup>246</sup> David J. Shestokas, *The Second Amendment: A Personal Natural Right to Keep and Bear Arms*, DAVID J. SHESTOKAS (Aug. 31, 2013), <http://www.shestokas.com/constitution-educational-series/the-second-amendment-a-personal-natural-right-to-keep-and-bear-arms> [<https://perma.cc/63JB-PN3U>].

<sup>247</sup> 1 WILLIAM BLACKSTONE, COMMENTARIES \*139.

<sup>248</sup> David B. Kopel, *The Second Amendment in the Nineteenth Century*, 1998 BYU L. REV. 1359, 1392 (1998).

<sup>249</sup> 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION \*§ 1890.

<sup>250</sup> *District of Columbia v. Heller*, 554 U.S. 570, 629 (2008).

<sup>251</sup> *Id.* at 594.

Clearly, the Second Amendment is concerned with tyranny and oppression and the founder's notions of tyranny and oppression far exceeded the threat of physical violence. Severe emotional and psychological abuse, such as the use of the word nigger in certain contexts and sustained psychological violence in domestic situations, clearly constitute oppression. When the powerful commit it against the less powerful, it signifies a brand of tyranny: SPT.

#### CONCLUSION

SPT creates a complex problem for our legal system. Our system has not yet responded with adequate protections. Moreover, our system of laws has, in certain instances, added insult to injury by criminalizing the individuals it has failed to protect when they seek to protect themselves. Without proper civil and criminal protections designed to prevent and punish SPT, victims are often faced with the choice of fighting back or suffering in silence, often to the point of emotional and psychological breakdown. This article has argued that where the law fails to protect its citizens, its citizens should be allowed to protect themselves. Such a premise resonates not only in equity but undergirds our Country's founding thrust, as reflected in the Second Amendment.