

STATE V. THURSTON: AN EXAMINATION OF
ASSAULT, SELF-DEFENSE, AND TRESPASS IN
RELATION TO DOMESTIC VIOLENCE

Megan E. Magoon

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*STATE V. THURSTON: AN EXAMINATION OF
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I. INTRODUCTION

Darrell Thurston and Suzanne Harmon were romantically involved on an intermittent basis for five years and had one child together.¹ As a result of an altercation that took place at Harmon's home in Sullivan, Maine, on September 27, 2007, between Thurston and Harmon,² Thurston was charged with assault,³ criminal mischief,⁴ and obstructing report of crime or injury.⁵ The testimony during the trial illuminated the major factual differences between Thurston's and Harmon's accounts of the night the incident took place.⁶ Thurston requested a self-defense⁷ jury instruction based on his version of what had happened, which the trial court ultimately denied.⁸ Following the jury trial, Thurston was found guilty of assault and criminal mischief.⁹ Thurston appealed the decision to the Maine Supreme Judicial Court, sitting as the Law Court, and argued that in regard to the assault charge, the evidence presented at trial was sufficient to warrant a self-defense jury instruction and that the trial court erred by failing to provide the instruction.¹⁰

In *State v. Thurston*¹¹ the Law Court held that the evidence presented at trial did in fact generate a self-defense instruction, and because the trial court refused to give the instruction, the Law Court vacated Thurston's assault conviction.¹² Justice Gorman, on behalf of the majority, reasoned that the evidence, when viewed in a

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1. *State v. Thurston*, 2009 ME 41, ¶ 2, 969 A.2d 906, 908.

2. *Id.*

3. ME. REV. STAT. ANN. tit. 17-A, § 207(1)(A) (2006).

4. *Id.* at § 806(1)(A) (2006).

5. *Id.* at § 758(1)(A) (2006).

6. Trial Proceedings, *State v. Thurston*, No. CR-07-277 (Me. Super. Ct., Han. Cty., Mar. 11, 2008).

7. ME. REV. STAT. ANN. tit. 17-A, § 108(1)(A) (2006 & Supp. 2008-2009). The statute reads:

A person is justified in using a reasonable degree of nondeadly force upon another person in order to defend the person or a 3rd person from what the person reasonably believes to be the imminent use of unlawful, nondeadly force by such other person, and the person may use a degree of such force that the person reasonably believes to be necessary for such purpose.

Id.

8. *Thurston*, 2009 ME 41, ¶ 5, 969 A.2d at 908.

9. *Id.* ¶ 1, 969 A.2d at 907.

10. *Id.* ¶ 7, 969 A.2d at 909.

11. 2009 ME 41, 969 A.2d 906.

12. *Id.* ¶ 1, 969 A.2d at 907-08.

light most favorable to the defendant,¹³ warranted a self-defense instruction.¹⁴ The majority took a detailed look at the “he said, she said” stories proffered by Thurston and Harmon.¹⁵ Ultimately, the majority decided that because the complaint did not specify which of Thurston’s actions constituted the assault, the jury was free to accept his recitation of the facts and, in doing so, could reasonably come to the conclusion that he only grabbed Harmon once—after she picked up a knife and threatened him.¹⁶ The majority also directly countered the dissent’s interpretation of Maine’s criminal trespass statute,¹⁷ and contended that based on the facts,¹⁸ Thurston was licensed and privileged to be in the home,¹⁹ and therefore any actions by Thurston—lawful or unlawful—did not automatically justify Harmon’s use of force.²⁰

Justice Alexander, writing for the dissent, interpreted the evidence differently. Unlike the majority, the dissent focused on the fact that Harmon did not invite Thurston into her home—in fact, she explicitly told him not to come to her home on the night in question.²¹ Justice Alexander reasoned that because Thurston had no right to be in the home, Harmon was justified in using force to eject him, and any actions she took to remove Thurston were lawful.²² As such, the dissent held that a self-defense instruction, which is only available to individuals acting in defense of unlawful force, was not warranted for Thurston, and therefore would have affirmed Thurston’s assault conviction.²³

The *Thurston* decision turned on the court’s evaluation of two main factors—the testimony of Thurston and Harmon regarding their relationship, and, in turn,

13. See *State v. Glassman*, 2001 ME 91, ¶ 12, 772 A.2d 863, 866. In that case, involving the availability of a self-defense instruction, the court held that “[i]n evaluating whether a defense is generated, the court must view the evidence in the light most favorable to the defendant.” *Id.*

14. *Thurston*, 2009 ME 41, ¶ 1, 969 A.2d at 907-08.

15. *Id.* ¶¶ 2-4, 969 A.2d at 908. Harmon testified that when Thurston arrived at her home, the couple began to argue, and Thurston threw the meatballs she was cooking into the trash. Harmon said that Thurston then threw her on the ground, kicked and punched her in the head, broke her cell phone, and then picked up a knife. She said that at that point she also picked up a knife, presumably to protect herself.

Thurston testified that Harmon grabbed a knife after he threw the meatballs in the trash and smashed her cell phone. He said that once she put the knife down, he grabbed her shoulders to stop her from picking it up again and that is the only time that he touched Harmon. *Id.*

16. *Id.* ¶ 12, 969 A.2d at 910.

17. ME. REV. STAT. ANN. tit. 17-A, § 402(1)(A), (D) (2006). The statute provides, in relevant part, “[a] person is guilty of criminal trespass if, knowing that that person is not licensed or privileged to do so, that person: A. Enters any dwelling place; . . . [or] D. Remains in any place in defiance of a lawful order to leave . . .” *Id.*

18. *Thurston*, 2009 ME 41, ¶ 14, 969 A.2d at 910. The majority highlighted the fact that Harmon and Thurston “had been involved in an ‘on again off again’ relationship for approximately five years, and that they had been living together . . . for more than a month at the time of these events.” *Id.*

19. *Id.* ¶ 15, 969 A.2d at 910.

20. *Id.*

21. *Id.* ¶ 20, 969 A.2d at 911.

22. *Id.* ¶ 21, 969 A.2d at 911-12. See ME. REV. STAT. ANN. tit. 17-A, § 104(1) (2006 & Supp. 2008-2009). The statute provides, in relevant part, “[a] person in possession or control of premises or a person who is licensed or privileged to be thereon is justified in using nondeadly force upon another person when and to the extent that the person reasonably believes it necessary to prevent or terminate the commission of a criminal trespass . . .” *Id.*

23. *Thurston*, 2009 ME 41, ¶¶ 21 & 26, 969 A.2d at 911-12.

whether or not Thurston was licensed and privileged to enter Harmon's home that night.

This Note begins by exploring the development of the self-defense jury instruction in Maine, and also examines the history of what it means to be "licensed and privileged" in relation to Maine's criminal trespass statute. In Part III, this Note summarizes the *Thurston* decision and touches on the important factual issues that were before the court. Next, in Part IV, this Note analyzes the court's factual and legal interpretation of the lower court's decision that ultimately allowed or precluded a self-defense instruction.

After examining the majority and dissenting opinions, this Note concludes that the dissenting opinion offers the more appropriate analysis in this case. While the majority opinion does provide an opinion which is founded on Maine case law, the analysis surrounding the issue of trespass as it relates to individuals in domestic relationships creates a broad and ambiguous standard for determining whether someone is licensed and privileged to be in their partner's home. The majority reasoned that Thurston was licensed and privileged to be in Harmon's home after living with her for only a short period of time. The majority failed to draw a clear line regarding the types of factors (verbal cues, specific living arrangements, or expense sharing, etc.) that they felt would be sufficient to give an individual license and privilege to enter a domestic partner's home. The dissenting opinion, however, placed more emphasis on the initial factual inquiry—whether Thurston was lawfully in the home. It appears that the dissent was uncomfortable allowing Thurston to garner a licensed and privileged status when he had not been living in Harmon's home for longer than one month, and Harmon had asked him not to come to her home that evening. The dissent's opinion maintained a higher standard of the facts that must be in place to give someone license and privilege to be in a domestic partner's home. While Maine law is far from settled regarding the "licensed and privileged" status in domestic relationships, the dissenting opinion provides a more cautious and logical approach to interpreting precarious domestic altercations.²⁴

II. THE HISTORY OF SELF-DEFENSE IN MAINE

The law of self-defense is a centuries-old concept based on the notion that one should not be punished criminally for actions that are not "morally blameworthy."²⁵ The Maine self-defense statute²⁶ was enacted in its familiar form during the 1975 overhaul of Maine's Criminal Code.²⁷ There was much legislative debate about the

24. See generally Maine Coalition to End Domestic Violence, Statistics & Facts, <http://www.mcedv.org/news/statistics.htm> (last visited January 25, 2010) (providing statistics regarding the prevalence of domestic violence in Maine).

25. Jean K. Gilles Phillips & Elizabeth Cateforis, *Self-Defense: What's a Jury Got To Do with It?*, 57 U. KAN. L. REV. 1143, 1153 (2009). This conclusion was based on the notion that "the natural law gave a person the right to protect himself from harm, if a person acted in self-defense and not with a guilty mind . . ." *Id.*

26. ME. REV. STAT. ANN. tit. 17-A, § 108 (2006 & Supp. 2008-2009).

27. *Id.* In the 1975 Comment, the Legislature outlined that the purpose of the amendment was "to clarify and articulate the law relating to self-defense and to the circumstances in which force may be used against another . . ." *Id.* comment (1975).

specific wording of the statute, but the final legislation ultimately mirrored the traditionally accepted theory of self-defense.²⁸ The new code provision dealing with self-defense required specific prerequisites that were to be met before the defense could be utilized.²⁹ The limitations on the defense included maintaining a reasonable belief that the circumstances warranted the use of force, and further, that the use of force was necessary in order to prevent bodily harm.³⁰ The intention of the legislature was that force was only to be used when it was the “only viable remedy under the circumstances.”³¹

A complete understanding of the historical background of the self-defense statute and the attendant implications requires an investigation into the legal concept that serves as the backbone of the self-defense instruction. Historically, it has been the opinion of the Law Court that to secure a self-defense instruction, one must first establish the sufficiency of the evidence presented.³² Once the sufficiency is established, regardless of the underlying unreasonableness, an instruction must be given to avoid obvious error.³³ The court also implemented a burden shift upon the showing of sufficiency—the court reasoned that when the defendant proffers evidence of self-defense, the burden lies with the prosecution to disprove it beyond a reasonable doubt.³⁴

The Law Court has consistently held that if there is no contradictory evidence that the victim of the alleged assault was using unlawful force on the defendant, then a self-defense instruction is not warranted.³⁵ The court further narrowed its reasoning regarding self-defense instructions when it pointed out that there is no duty for the court to “suspend its disbelief” or believe either party’s story unconditionally.³⁶ If the fact-finder does not feel that the facts warrant an action in

28. Legis. Rec. 787 (1976). Even with the extensive debate, the legislature made it clear that one of the main purposes of the statute was to allow individuals in their own homes to use lawful force to eject a trespasser. *Id.*

29. *Id.* at 788.

30. *Id.*

31. *Id.*

32. See *State v. Knowles*, 495 A.2d 335, 338 (Me. 1985) (concluding that “[a] defendant is entitled to a jury instruction on a particular defense when he ‘can point to the existence of . . . evidence sufficient to make the existence of all the facts constituting the defense a reasonable hypothesis for the fact-finder to entertain’”) (internal citations omitted); *State v. Carmichael*, 405 A.2d 732, 736 (Me. 1979) (stating that “[t]he theory of the defense must be submitted to the jury, provided it has support in the evidence”); *State v. Benson*, 155 Me. 115, 123, 151 A.2d 266, 270 (1959) (reasoning that in order for a self-defense instruction to be given, “the evidence should be sufficient fairly to raise the question involved therein”).

33. *State v. Davis*, 528 A.2d 1267, 1270 (Me. 1987). See also *State v. Sullivan*, 1997 ME 71, ¶ 8, 695 A.2d 115, 118 (holding that a self-defense instruction was warranted even though the evidence in favor of the defendant’s belief in the need for self-defense could certainly be seen as “objectively unreasonable”).

34. *State v. McKenzie*, 605 A.2d 72, 74 (Me. 1992) (holding that defendant failed to generate evidence showing that actions were taken in self-defense).

35. See, e.g., *State v. Forbes*, 2003 ME 106, ¶ 15, 830 A.2d 417, 421; *State v. Winchenbach*, 658 A.2d 1083, 1085 (Me. 1995).

36. *Forbes*, 2003 ME 106, ¶ 13, 830 A.2d at 420-21. The court noted that “[t]he issue of self-defense is generated when ‘the evidence is sufficient to make the existence of all the facts constituting the defense a reasonable hypothesis for the factfinder to entertain.’” *Id.* ¶ 14, 830 A.2d at 421 (quoting *State v. Michaud*, 1998 ME 251, ¶ 16, 724 A.2d 1222, 1229) (internal citations omitted).

self-defense, then the self-defense instruction may be declined.³⁷

While the Law Court has repeatedly examined the sufficiency standard for self-defense and has examined the circumstances under which the instruction should be given to the jury, it has a much more limited history regarding the interplay of self-defense instructions and one of the main aspects of this case—domestic trespass. In the case of *State v. Benson*, the court took a strong definitive stance on the issue of trespass and what it meant to be on someone's land unlawfully.³⁸ The court held that the failure to give a self-defense instruction was not in error, as the jury could reasonably have believed that the defendants forced their way into the home, and after being asked to leave, the defendants became the initial aggressors and used unwarranted force against the homeowners.³⁹ The court reasoned that the jury may not have believed the defendants' story detailing why the use of force was necessary, and that giving a self-defense instruction would not have changed the jury's opinion regarding the facts at the center of the case.⁴⁰ Even after *Benson*, however, the questions still remained: (1) what factors make one's presence "unlawful"; and (2) when is one required to vacate another's home or land upon request? The closest the court has come to answering these questions was in *State v. Neild*, where the court examined a situation in which an individual was given permission to be in a home, and found that he was "licensed and privileged" to be on the property, and thus was there lawfully.⁴¹ The court noted that the key requirement for a lawful presence is that the homeowner consents to the defendant's presence in the home.⁴²

The *Thurston* case involved all of the above-mentioned issues, but raised yet another issue, which is not well outlined by the court's history: if the defendant does not have explicit permission to be in the home, and he does not himself own the home, but rather is the current or former intimate partner of the homeowner, how does the court determine if he is in fact licensed and privileged to be in the home? This issue was central to the court's determination of whether *Thurston* had presented evidence sufficient to warrant a self-defense instruction.

III. THE *THURSTON* DECISION

The altercation at the center of this case occurred on September 27, 2007, at Suzanne Harmon's home in Sullivan, Maine.⁴³ Suzanne resides permanently at the residence with her three children, one of which was fathered by the defendant, Darrell Thurston.⁴⁴ According to both Harmon and Thurston, they had resided together in the past, had reunited, and had been living together for approximately

37. *Michaud*, 1998 ME 251, ¶ 19, 724 A.2d 1222, 1230.

38. 155 Me. 115, 120 A.2d at 266, 269 (1959).

39. *Id.* at 121, 120 A.2d at 269.

40. *Id.* at 123, 120 A.2d at 271.

41. 2006 ME 91, ¶11, 903 A.2d 339, 341.

42. *Id.* The court did not, however, give any further definition of the meaning of "licensed and privileged."

43. *Thurston*, 2009 ME 41, ¶ 2, 969 A.2d at 908.

44. Brief of Appellee State of Maine at 1, *State v. Thurston*, 2009 ME 41, 969 A.2d 906 (No. HAN-08-205).

one month on an intermittent basis.⁴⁵ On the night in question, Thurston called Harmon while on his way home from work to say he was coming over, and Harmon told him not to come.⁴⁶ Regardless, Thurston came to the house and admitted that when he arrived he was told “he was not welcome there.”⁴⁷ This is where the parties’ versions of the events begin to differ, but they do agree that an altercation took place. Harmon said that Thurston threw her on the ground and then kicked and hit her in the head.⁴⁸ She said that Thurston threw the meatballs she was cooking into the trash, took her phone and smashed it, and then grabbed a knife.⁴⁹ Harmon says that she then picked up a knife in defense but put it down when her child requested that she do so.⁵⁰ Harmon also says that when she tried to run outside, Thurston shoved her to the ground.⁵¹ According to Thurston’s testimony, after they began arguing, he smashed Harmon’s cell phone and then threw the meatballs in the trash.⁵² Thurston said that was when Harmon grabbed a knife, and he had to grab her by the shoulders to stop her—and that was the only time he used any force against her.⁵³

Thurston was charged in Hancock County Superior Court with assault, criminal mischief, and obstructing report of crime or injury.⁵⁴ A jury found Thurston guilty of assault and criminal mischief but not guilty of obstructing report of crime or injury.⁵⁵ On appeal, Thurston argued that there was sufficient evidence presented to generate an instruction as to self-defense, and the Superior Court justice erred in refusing to give such an instruction.⁵⁶ Previously, the Superior Court justice rejected the request for a self-defense instruction because he concluded that the evidence, as presented, did not provide any basis upon which a jury could find that it was necessary for the defendant to take the actions that he did.⁵⁷

On appeal to the Law Court, Thurston argued three main points: (1) there was no physical evidence supporting the alleged victim’s version of the events; (2) his testimony clearly stated that the only time he touched the alleged victim was when

45. *Id.* Harmon said they had been in a relationship for approximately five years, and Thurston sometimes stayed at her residence, and sometimes he did not. *Id.* Thurston admitted that he and Harmon had a “tumultuous” history, and said that on September 27, they “were again residing together.” Brief of Appellant Darrell Thurston at 3, *State v. Thurston*, 2009 ME 41, 969 A.2d 906 (No. HAN-08-205). He admitted that he had “hooked up” and stayed with a woman named Carly in the months immediately prior to the incident. *Id.* See also Eric Russell, *Grand Jury Indicts Suspect in Bar Harbor Rape*, BANGOR DAILY NEWS, Dec. 5, 2007, at B2 (listing the local indictments: “Darrell J. Thurston, 37, Seal Cove, assault, criminal mischief, obstructing the report of a crime.” It is important to note that Thurston listed his residence as Seal Cove rather than Sullivan.).

46. Brief of Appellee, *supra* note 44, at 1 (Thurston makes no mention of this phone call.).

47. Brief of Appellant, *supra* note 45, at 3.

48. Brief of Appellee, *supra* note 44, at 1.

49. *Id.*

50. *Id.* at 1-2.

51. *Id.*

52. Brief of Appellant, *supra* note 45, at 3.

53. *Id.*

54. Brief of Appellee, *supra* note 44, at 2.

55. *Thurston*, 2009 ME 41, ¶¶ 1-2, 969 A.2d at 907-08.

56. *Id.* ¶ 7, 969 A.2d at 909.

57. Brief of Appellant, *supra* note 45, at 10.

she went for the knife; and (3) the jury was free to consider both versions of the events, and, if they accepted Thurston's version, they should have been allowed to consider that he acted in self-defense.⁵⁸ Relying on *State v. Bard*,⁵⁹ Thurston further argued that because the complaint did not specify the exact act that constituted the assault, the jury was free to interpret from all of the evidence to which act the assault charge referred.⁶⁰ The prosecution never raised the issue of whether Thurston was lawfully in the home, so Thurston did not address it in his appeal.

The prosecution argued that the court did not err by declining to give the self-defense instruction⁶¹ because Thurston did not admit to the use of force during the assault where he allegedly pushed Harmon in the home or the assault where he pushed her down in the driveway.⁶² The State argued that, unlike *Bard*, a self-defense instruction was not warranted because Thurston did not "present evidence of self-defense with respect to any of the conduct testified to by the state's witnesses."⁶³ The State argued that in order to get the self-defense instruction, Thurston needed to present evidence of self-defense that directly rebutted the evidence of assault provided by the State's witnesses.⁶⁴

The majority opinion in *Thurston* first explained that in analyzing whether a self-defense instruction was warranted, it needed to view the evidence in the "light most favorable to the defendant."⁶⁵ Furthermore, the court stated that if the evidence presented was sufficient to issue a self-defense instruction and the court failed to give the instruction, Thurston would have been deprived of a fair trial, and the omission would amount to obvious error.⁶⁶ The court directly analogized to *Bard*, and reasoned that the facts of this case very closely mirrored the facts of that case, wherein an assault conviction was vacated due to the failure to provide an instruction as to self-defense.⁶⁷ Based on the facts as alleged by Thurston, the court held that the jury could reasonably base their guilty assault verdict on his evidence, and therefore a self-defense instruction was ultimately necessary.⁶⁸

Justice Alexander's dissent focused on an area of the law that neither the State nor Thurston addressed in their individual briefs. The dissenting opinion looked closely at the circumstances surrounding Thurston's status as either a guest or occupant of Harmon's home.⁶⁹ The dissent concluded that Thurston's own version of the events indicated that Thurston had no "right" to be in Harmon's home once

58. *Id.* at 11.

59. *State v. Bard*, 2002 ME 49, ¶ 13, 793 A.2d 509, 513 (vacating an assault charge). Although the jury found *Bard* guilty of assault, it also acquitted him of other charges, and as such, there was no way to identify if the jury based its assault verdict on the evidence presented by *Bard* which warranted a self-defense instruction.

60. *Thurston*, 2009 ME 41, ¶ 7, 969 A.2d at 909.

61. Brief of Appellee, *supra* note 44, at 5.

62. *Id.*

63. *Id.* at 6.

64. *Thurston*, 2009 ME 41, ¶ 8, 969 A.2d at 909.

65. *Id.* ¶ 9, 969 A.2d at 909 (quoting *Glassman*, 2001 ME 91, ¶ 12, 772 A.2d at 866).

66. *Thurston*, 2009 ME 41, ¶ 9, 969 A.2d at 909.

67. *Id.* ¶ 11, 969 A.2d at 910.

68. *Id.* ¶ 12, 969 A.2d at 910.

69. *Id.* ¶ 19, 969 A.2d at 911 (Alexander, J., dissenting).

she told him to leave, and that just because he had stayed overnight on previous occasions, that did not give him the right to remain in the home.⁷⁰ Once he was requested by Harmon to leave the home, and he failed to do so, Harmon gained the right to lawfully eject Thurston by threatening to use a knife, as he was then rendered a trespasser.⁷¹ Because Thurston was trespassing, Harmon's alleged use of the knife would have been entirely lawful, and would not entitle Thurston to use force. Therefore, a self-defense instruction was not available to him.⁷² The dissent also attacked the majority's interpretation of *Bard*, and differentiated between the invitation into the victim's home in that case and the demands of the victim in *Thurston* for the defendant to not come to the home, and, once he was there, to leave.⁷³

In its opinion, the majority directly responded to the reasoning of the dissent on the issue of trespass. The majority opinion acknowledged that whether a self-defense instruction was generated "hinged" upon Thurston's right to be in the home.⁷⁴ The majority interpreted the testimony of Harmon and Thurston in a completely different manner than the dissent. The majority interpreted the facts in their totality—Thurston and Harmon had been in an "on again off again" relationship for five years, they had a daughter together, and they had been living together for over a month—as proving that Thurston had a license to be in the home because he lived with Harmon at the time of the incident.⁷⁵ Therefore, according to the majority, Thurston's assertion that he acted in self-defense mandated a jury instruction.⁷⁶ Based on the finding that the failure to give a self-defense instruction was obvious error, the court vacated the assault conviction against Thurston, but affirmed his conviction for criminal mischief.⁷⁷

IV. ANALYSIS

The *Thurston* decision, at first glance, appears to show a rift in the legal analysis of the majority and dissenting opinions. The majority ultimately held that a self-defense instruction was warranted, whereas the dissent reasoned that the facts did not provide for a self-defense jury instruction, and Thurston's conviction should be upheld.

The *Thurston* decision represents the common situation in which the testimony of the victim and defendant are ultimately at odds, and the court must make a judgment call as to the sufficiency of the evidence. The difference in the *Thurston* case, however, is that this factual evaluation ultimately hinged on a legal concept

70. *Id.* See *State v. Benson*, 155 Me. 115, 119, 151 A.2d 266, 268 (holding that intruders could not receive a self-defense instruction because "[o]ne who has the opportunity to withdraw and fails to avail himself of it is thereafter unlawfully where he has no business to be, and therefore cannot claim self defense").

71. *Thurston*, 2009 ME 41, ¶ 21, 969 A.2d at 912.

72. *Id.* ¶ 23, 969 A.2d at 912.

73. *Id.* at ¶ 22.

74. *Id.* ¶ 13, 969 A.2d at 910.

75. *Id.* at ¶ 15.

76. *Id.*

77. *Thurston*, 2009 ME 41, ¶ 16, 969 A.2d at 911 (regarding the charge of criminal mischief, the court failed to provide any written opinion to show its reasoning for affirming the conviction).

that is far from settled in Maine. While both the majority and dissent considered the availability of self-defense in relation to trespass, and most importantly, whether Thurston was licensed and privileged to be on the property, neither the majority nor the dissent provided legal reasoning for why they decided Thurston was or was not licensed and privileged. Rather, the court only provided their respective personal opinions as to whether the facts, taken as a whole, represented a license or privilege on the part of Thurston to be in Harmon's home.

The language of 17-A M.R.S.A. section 104 makes it very clear that an individual may use non-deadly force to prevent or terminate a criminal trespass.⁷⁸ The baseline issue in *Thurston*, which the court noted must be determined before getting to whether a self-defense instruction was generated, was whether Thurston was trespassing when he was at Harmon's home on the night of the incident.⁷⁹ To answer this question, both the majority and dissent took a detailed look at the facts that they believed constituted Thurston's privilege or lack thereof to be in the home.

Justice Gorman's majority opinion first looked at the fact that both Thurston and Harmon said they had been involved in an "on again off again" relationship for about five years and had been living together again for about one month before the incident.⁸⁰ Justice Gorman further reasoned that when determining whether a self-defense instruction is generated, the court must "consider the record in the light most favorable to Thurston."⁸¹ Without any further explanation, the majority concluded that based on these facts alone, the record "more than supports" the conclusion that Thurston lived with Harmon at the time of the incident and was therefore licensed and privileged to be in the home.⁸² The majority went so far as to say that even Harmon's statements telling Thurston not to come home were not enough to eliminate his privilege to enter her home.⁸³

In direct contrast, the dissent looked at the same set of facts, and came to the opposite conclusion. In his dissent, Justice Alexander looked at the testimony regarding Thurston's habit of staying with Harmon and concluded that just because Harmon "had permitted Thurston to spend the night on past occasions . . . that does not diminish her authority to order him not to enter, to order him to leave when he arrived, and to use force to attempt to eject him from her home"⁸⁴ The dissent's interpretation of the facts placed Thurston in the role of trespasser, and therefore, eliminated the availability of his self-defense request.

It is interesting to consider the possible unstated rationale for the majority and dissent's divergence regarding Thurston's status as a trespasser. This case involves two individuals who at some point in time were in an intimate relationship. The altercation that took place between them was domestic in nature. Judging from the opinions, it appears as though the dissent may have believed that there were issues

78. ME. REV. STAT. ANN. tit. 17-A, § 104(1) (2006 & Supp. 2008-2009).

79. *Thurston*, 2009 ME 41, ¶ 13, 969 A.2d at 910 ("Whether a self-defense instruction was generated, therefore, hinges on whether Thurston had a right to be in the home.").

80. *Id.* ¶ 14, 969 A.2d at 910.

81. *Id.*

82. *Id.* ¶ 15, 969 A.2d at 910.

83. *Id.*, 969 A.2d at 911.

84. *Id.* ¶ 20, 969 A.2d at 911.

of domestic abuse in the relationship between Thurston and Harmon, and thus factored that possibility into their opinion. The dissent's opinion provides a more generous respect for Harmon's personal property rights than the opinion of the majority. While the dissent clearly could not take prior acts of abuse or other facts outside of the record into consideration, if there actually was any abuse, the dissent's analysis and opinion was the most effective means of dealing with it.

While factual and evidentiary interpretations are an important part of the court's role, the *Thurston* decision highlights an area in which the court could seemingly benefit from the establishment of some objective, rather than purely subjective, set of rules. As it currently stands, there is no objective means through which the court determines at what point an individual in an intimate relationship becomes licensed and privileged to be in their partner's dwelling. In traditional cases of trespass, whereby a stranger enters another's land or home, it is easy to draw the line at what constitutes trespass. Intimate partnerships, however, present a more challenging analysis for the court. There are many different ways in which people describe the relationships that they have with others. How is the court to decide whether someone who sleeps at a partner's home twice a week is licensed to be in the home? What if someone maintains all of their possessions at a partner's home, but rarely sleeps there? While clearly some circumstances will warrant a more subjective view due to special circumstances, a more objective standard would benefit both the court and the public, by providing some notice of the rules the court will follow.

Maine's case law on "license and privilege" in domestic situations is quite limited. The decision in *State v. Neild*,⁸⁵ although not exactly on point for guidance in *Thurston*, does provide some important judicial reasoning from which the court could build. In *Neild*, the defendant was deemed to be licensed and privileged to be in his girlfriend's home because she had invited him there.⁸⁶ Therefore, when the girlfriend's ex-boyfriend showed up, and the defendant got in an altercation with him, the defendant's use of force was held to be lawful.⁸⁷ Furthermore, because the girlfriend told her ex-boyfriend to leave, his presence in the home was unlawful, and any actions the defendant took against him were lawful.⁸⁸ In *Neild*, the expression of permission from a homeowner to an intimate partner was held to be determinative of a license to be in the home. However, this still fails to provide guidance as to when one is licensed to be in another's home absent express permission to be there.

Looking to other states, it is apparent that much of the case law regarding license and privilege in domestic relationships relates specifically to spousal relationships.⁸⁹ In an effort to provide a bright line rule about when individuals are

85. 2006 ME 91, 903 A.2d 339.

86. *Id.* ¶ 11, 903 A.2d at 341.

87. *Id.* ¶ 14, 903 A.2d at 342.

88. *Id.*

89. *See, e.g.*, *Iowa v. Hagedorn*, 679 N.W.2d 666 (Iowa 2004) (holding that defendant had no right, license, or privilege to enter marital home of estranged wife when he moved out one month prior and was told not to enter the home); *People v. Davenport*, 219 Cal. App.3d 885 (Cal. Ct. App. 1990) (holding that husband's right to enter marital home ended after he had moved out of the home five months prior). *See also* John M. Leventhal, *Spousal Rights or Spousal Crime: Where and When Are the*

licensed and privileged after entering a partner's home, it is also useful to look at how other states define "cohabitation."⁹⁰ The Ohio Supreme Court, in *State v. Williams*, set forth a useful example of the type of rule that the court could establish and utilize in the future.⁹¹ The court stated that the essential elements of cohabitation are "(1) sharing of familial or financial responsibilities and (2) consortium."⁹² The decision laid out specific factors that the court can use as guideposts in determining whether two individuals are in effect cohabitating.⁹³ The *Williams* court stated that sharing familial or financial responsibility could include "provisions for shelter, food, clothing, utilities, and/or commingled assets."⁹⁴ The court expanded consortium to include "mutual respect, fidelity, affection, society, cooperation, solace, comfort, aid of each other, friendship, and conjugal relations."⁹⁵ In establishing the rule, the Ohio court stressed that although they were setting forth specific factors to aid in determining cohabitation status, the "factors are unique to each case and how much weight, if any, to give to each of these factors must be decided on a case-by-case basis"⁹⁶

Both the majority and dissenting opinions in *Thurston* could have benefited from employing the type of detailed analysis that was undertaken in *Williams*. The *Thurston* case provided the court with a prime opportunity to outline the specific factors present in the relationship between Thurston and Harmon, which they saw as either supporting or disproving Thurston's actions as trespass. For example, instead of merely stating that there was no trespass because Thurston had lived in Harmon's home for over one month, the majority could have detailed the specific live-in time period they saw as a cutoff, or elaborated on other factors they may have considered in their decision (sharing expenses, meals, or parenting responsibilities). By providing more detailed criteria, the court could have set a more clear precedent, and perhaps more importantly, sounded a warning signal to individuals inviting their partners into their home—after "x" number of days living together, you may be giving your partner an unlimited license to be in your home.

The *Thurston* opinion, while clearly based on the legal issue of self-defense instructions, also has important policy considerations that bear mentioning. In the *Thurston* case, it was undisputed that the individuals were in some form of a domestic relationship. In evaluating this relationship, and determining whether individuals such as Thurston and Harmon are in effect cohabitating, and whether Thurston was licensed and privileged, it is important for judges to be able to step back from the situation, and at the very least recognize the possible presence of

Lines To Be Drawn?, UTAH L. REV. 351 (2006) (outlining the historical changes many crimes involving spouses have undergone).

90. See, e.g., *Ohio v. Williams*, 683 N.E.2d 1126 (Ohio 1997) (holding that where the parties did not live together on a regular basis, but the parties often stayed together more nights out of the week than apart, they were cohabitating); *Hawaii v. Archuleta*, 946 P.2d 620 (Haw. Ct. App. 1997) (holding that victim's testimony that defendant lived at her residence three to four times a week was proof that they were jointly residing together).

91. *Williams*, 683 N.E. 2d at 1130.

92. *Id.*

93. *Id.*

94. *Id.*

95. *Id.*

96. *Id.*

domestic violence. In cases such as *Thurston*, where judges are utilizing their own life experiences and opinions in determining whether two individuals were living together at the time a violent assault took place, it is imperative that the judges are equipped with adequate knowledge to guide them through the determinative process.⁹⁷

The implications of the *Thurston* decision are possibly quite serious. The *Thurston* decision begs the question—when exactly can a partner say “no”? While the *Thurston* decision never explicitly mentions domestic violence, it is clear that the violent altercation between Thurston and Harmon was domestic, and it likely was not the first time that an incident of that nature had occurred. Domestic violence is often hard to recognize.⁹⁸ Furthermore, current evidentiary models and criminal statutes are often inadequate in their ability to highlight and explain the full realm of domestic violence.⁹⁹ It is for these very reasons that the open-ended conclusion in the majority opinion is especially dangerous. For those individuals dealing with issues of domestic violence, it is a scary prospect to think that based on *Thurston*, their intimate partner will likely be afforded an unlimited license to be in their homes after living there “on an intermittent” basis for only one month, or possibly less.

V. CONCLUSION

Thurston in part represents a traditional factual conundrum—which witness to believe? The clashing opinions of the majority and dissent represent the failure of the court to agree upon a factual interpretation of the testimony. Based upon a broad interpretation of the facts of this case, the dissenting opinion more adequately considers the risks inherent in providing a self-defense instruction to a man who was a guest in his girlfriend’s home. The majority opinion provides an analysis of trespass, which while legally sound based on precedent, presents a dangerous rule for individuals involved in domestic relationships. Based on the court’s holding, the majority opens the door for individuals to claim privilege upon living in a partner’s home for a very short period of time. Even more troubling, the court decided that a homeowner’s demand for non-entry is not sufficient to prevent trespass when the “trespasser” has lived in the home for virtually *any* period of time.

The dissent, like the majority, took a subjective look at the facts, and decided that Thurston’s occasional overnight stays at Harmon’s home were not enough to strip her of her right to keep him out of her home or to remove him. Maine case law only partially dictated the outcome of the trespass portion of this case—it was

97. See Jacqueline St. Joan, *Sex, Sense, and Sensibility: Trespassing into the Culture of Domestic Abuse*, 20 HARV. WOMEN’S L.J. 263 (1997) (arguing that judges would benefit greatly from expanded training, including exposure to outside literature, in order to improve their background knowledge of domestic violence).

98. Mary Ann Dutton & Catherine L. Waltz, *Domestic Violence: Understanding Why It Happens and How To Recognize It*, FAM. ADVOC., Winter 1995, 14, 14 (“Even when there is evidence of injury or threats of severe violence, the complex dynamics of domestic violence and the secrecy and distortions that shroud it can lead professionals to minimize or fail to recognize it altogether.”).

99. Alafair S. Burke, *Domestic Violence as a Crime of Pattern and Intent: An Alternative Reconceptualization*, 75 GEO. WASH. L. REV. 552, 566 (2007).

primarily based on subjective judicial interpretation. It appears, however, that in a situation where the Maine case law was unsettled, the dissent took the more cautious approach, and, in the process, protected a single mother's right to safety in her own home.