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Kimberly Kessler Ferzan

University of Pennsylvania Carey Law School

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DEFENDING IMMINENCE: FROM BATTERED WOMEN TO IRAQ

Kimberly Kessler Ferzan*

I. INTRODUCTION

On March 19, 2003, the United States launched Operation Iraqi Freedom. Notably, over seventy percent of Americans supported going to war against Iraq.¹ Irrespective of the United States' ultimate ability to find weapons of mass destruction,² at the time the United States went to war, the average American believed that the attack was a justifiable act of self-defense.³

* Associate Professor of Law and Co-Director of the Institute for Law & Philosophy, Rutgers University, School of Law, Camden. For comments on drafts of this Article, I thank Vera Bergelson, Roger Clark, Michael Dorff, Joshua Dressler, Doug Husak, Ken Kessler, Jeff McMahan, Rick Singer, Allan Stein, and Beth Stephens. I also benefited from early conversations with Gary Bass, Stephen Morse, and Paul Robinson. Special thanks are due to Larry Alexander and Dennis Patterson for probing critiques that tested the limits of my arguments. Invaluable research assistance was provided by Heather Baker, Elizabeth Kearney, Sarah Rubino, Sarah Sanders, and Bryan Sgrignoli.

1. See ABC News, *Washington Post Poll: Latest*, at <http://www.pollingreport.com/iraq.htm> (Apr. 16, 2003) (N=504 adults nationwide. MoE \pm 4.5. Fieldwork by TNS Intersearch):

Do you support or oppose the United States having gone to war with Iraq?

	Support %	Oppose %	No Opinion %
4/16/03	78	20	2
4/9/03	80	17	3
4/2-6/03	77	16	7
4/3/03	73	24	4
3/27/03	73	24	4
3/23/03	72	26	2
3/20/03	72	26	2

2. Cf. *infra* note 93 (noting post-war events, including the United States' inability to find weapons of mass destruction and reported errors in President Bush's State of the Union address).

3. See, e.g., Richard Pearsall & Jim Walsh, *S. Jersey Transfixed by Onset of War*, COURIER-POST, Mar. 20, 2003, at 1A (quoting one New Jersey resident as saying, "It's scary. It really is scary for our country and our children As a country, we have to back

The Bush Administration made three legal arguments to justify the war. The first two claims were that the Security Council implicitly authorized the use of force and that the attacks would liberate the Iraqi people.⁴ The third, and arguably most important, claim was that of self-defense.⁵ As President Bush described during his State of the Union:

Imagine those 19 hijackers with other weapons, and other plans, this time armed by Saddam Hussein. It would take just one vial, one canister, one crate slipped into this country to bring a day of horror like none we have ever known. We will do everything in our power to make sure that day never comes.⁶

In claiming the war against Iraq was an act of self-defense, the United States staked out a position contrary to established international law. International law holds that self-defense may be employed against an attack that has already occurred,⁷ and there is an ongoing dispute over whether even a threat that is imminent, *i.e.*, “instant, overwhelming, and leaving no choice of means, and no moment of deliberation,” suffices for the use of defensive force.⁸ Yet, at the time the United States went to war, Iraq had not invaded American soil, nor were Iraqi troops amassed on its borders.

him [Bush] up. He’s doing this for the protection of our country and our safety.”); *September 11 Group Condemns Iraq War*, CNN.com, at <http://www.cnn.com/2003/US/03/20/sprj.irq.911.reaction/index.html> (Mar. 20, 2003) (quoting one September 11th group member as opining, “Contrary to popular opinion, Saddam Hussein has not had three months to disarm, he has had 10 years and that’s important for the public to know. We aren’t rushing into this. If we don’t act now to get these weapons away from him, we are going to suffer.”); Michael Symons, *Most NJ Residents Fear More Attacks*, COURIER-POST ONLINE, at <http://www.southjerseynews.com/issues/september/m090802b.htm> (Sept. 8, 2002) (noting one person’s support for the war: “I certainly feel there’s a need to have something done. I believe there’s enough evidence that I’ve seen to convince me that he’s [Saddam] certainly our enemy at this point, and we need to do something.”); Gene Vernacchio & Jason Nark, *Debate Reveals Division Among College Students*, COURIER-POST, Mar. 20, 2003, at 9A (noting a college student’s reaction that “This is our last resort. I think we have to do this. Saddam has already used weapons of mass destruction against his own people and I don’t see why he wouldn’t use them again.”).

4. Letter from the Permanent Representative of the United States of America to the United Nations addressed to the President of the Security Council, UN Doc. S/2003/351 (Mar. 20, 2003) [hereinafter “March 20, 2003 Letter”]; MARK A. DRUMBL, SELF-DEFENSE, PREEMPTION, FEAR: IRAQ, AND BEYOND 5–6, 36 (Wash. & Lee Pub. Law & Legal Theory, Working Paper No. 03-04, 2003), available at <http://ssrn.com/abstract=382863>. International law scholars are skeptical of the United States’ claim of implied United Nations’ authorization. *See, e.g.*, DRUMBL, *supra*, at 19–20; Carsten Stahn, *Terrorist Acts as “Armed Attack”: The Right to Self-Defense, Article 51 (1/2) of the UN Charter, and International Terrorism*, 27 FLETCHER F. OF WORLD AFF. 35, 40 (2003) (discussing problems with United States’ reliance on Security Council Resolutions 678, 1154, and 1441).

5. March 20, 2003 Letter, *supra* note 4; DRUMBL, *supra* note 4, at 5.

6. Michael R. Gordon, *Bush Enlarges Case for War by Linking Iraq with Terrorists*, N.Y. TIMES, Jan. 29, 2003, at A1; *see also* DRUMBL, *supra* note 4, at 5.

7. *See infra* text accompanying notes 64–65.

8. *See infra* text accompanying notes 65–82.

Rather, weapons of mass destruction and terrorism motivated the change in the United States' policy.⁹ The Bush Administration claimed that it was no longer fair to require a state to wait until a threat is imminent. With weapons of mass destruction, an enemy must be stopped upon or prior to possession of these weapons, because once an enemy uses these materials, it is too late. As the United States' National Security Strategy, adopted in the wake of the September 11th attacks, articulates, "[w]e must adapt the concept of imminent threat to the capabilities and objectives of today's adversaries."¹⁰ With the implementation of this strategy in March 2003, the United States rejected international law's stringent imminence requirement.

This attack on imminence is not novel. Rather, in domestic criminal law, the same battle rages. Domestic self-defense doctrine requires that defensive force be employed to ward off an imminent threat.¹¹ Thus, a battered woman who kills her sleeping abuser is denied a self-defense instruction.¹² Although nonconfrontational killings are less frequent than their "Burning Bed"¹³ popular image suggests,¹⁴ these cases likewise call into question the importance of a strict imminence requirement.

While not imminent, the harm to a battered woman may be inevitable.¹⁵ A battered woman may lack any meaningful alternatives to the use of deadly force.

9. See *infra* text accompanying notes 84–86 and notes 158–59.

10. WHITE HOUSE, NATIONAL SECURITY STRATEGY OF THE UNITED STATES OF AMERICA 15 (2002), available at <http://www.whitehouse.gov/nsc/nss.pdf> [hereinafter "NSS"].

11. See *infra* text accompanying notes 54–62.

12. See *infra* Section II.C.

13. FAITH McNULTY, *THE BURNING BED* (1980).

14. See *infra* note 131.

15. Of course, we should be hesitant to stereotype the "battered woman." See LENORE E.A. WALKER, *THE BATTERED WOMAN SYNDROME* 16 (2d ed. 2000) (noting that battered women come from all classes and demographic groups); Mary Ann Dutton, *Critique of the "Battered Woman Syndrome" Model*, available at <http://www.vaw.umn.edu/documents/vawnet/bws/bws.html> (last revised Jan. 1997) (noting that there is no one way that battering affects women, and that "[v]ariations in women's traumatic response to battering are based on characteristics of (1) the violence and abuse, (2) the battered victim, and (3) the context or environment in which battering occurs and in which the battered woman must respond to and heal from it, e.g., based on racial and cultural factors, social class, social support."); Martha R. Mahoney, *Legal Images of Battered Women: Redefining the Issue of Separation*, 90 MICH. L. REV. 1, 8–20 (1991) (arguing that stereotypes of "battered women" cause many abused women to reject that they fall into that category and thus these abused women fail to see the dangerous situations of which they are a part); Stephen J. Schulhofer, *The Gender Question in Criminal Law*, 7 SOC. PHIL. & POL'Y 105, 117 (1990) (noting that the denotation of "battered woman" covers and perhaps masks a wide array of diverse experiences, ranging from minor incidents to very serious abuse); Evan Stark, *Re-Presenting Woman Battering: From Battered Woman Syndrome to Coercive Control*, 58 ALB. L. REV. 973, 1002 (1995) ("Contrary to popular belief, most battered women actively use help-seeking and escape strategies throughout their battering relationships. Battered women seek medical care for their injuries even more promptly than auto accident victims and . . . are typically forthright about their situation when asked.").

She may be unable to leave because of socioeconomic factors.¹⁶ Her area may lack shelters, and the police may be unable to protect her from her abuser everywhere and all the time.¹⁷ Indeed, in a number of cases, police have counseled battered women not to file complaints so as to avoid provoking their abusive husbands.¹⁸ Moreover, when battered women have attempted to leave, these attempts have proven particularly deadly.¹⁹

The battered women, who cannot leave, stay in their homes at the mercy of their husbands. Lacking the size and strength to defend themselves when a threat is imminent, some battered women likewise seek to modify the concept of imminence to the capabilities and objectives of their adversaries. These battered women kill their abusers in nonconfrontational settings, such as when their abusers are sleeping.

While President Bush is certainly no battered woman, the attacks on the imminence requirement are strikingly parallel. Both President Bush and the battered woman argue that the harm is inevitable, and this inevitability triggers their rights to self-defense. Both claim the imminence requirement is ill-equipped to mediate their situations, be it abusive husbands or weapons of mass destruction. If the harm is inevitable, why, they ask, must we wait until it is imminent?

The war against Iraq and nonconfrontational killings by battered women are thus two recent examples of a more general theoretical problem. The underlying question is *when* may a defender act in self-defense. While some nineteenth century common law cases vested the rights in the defender, arguing that it was unfair to force her to live in fear,²⁰ contemporary domestic and

Despite these legitimate objections to stereotyping battered women, there exist real women who cannot leave and have opted to kill their abusers in nonconfrontational settings. It is immaterial whether these instances represent that majority or minority of "battered women" cases because whatever their proportion, these nonconfrontational killings present a real dilemma for criminal law doctrine.

16. Alafair S. Burke, *Rational Actors, Self-Defense, and Duress: Making Sense, Not Syndromes Out of the Battered Woman*, 81 N.C. L. REV. 211, 271 (2002) ("It may be economically infeasible for the woman to leave because she has no money, job, child care, or housing."); Schulhofer, *supra* note 15, at 119 ("The difficulties of leaving are in part social and economic. Women lack resources to move out, to support themselves and their children."). These women also risk losing their children. Battered woman's syndrome has also proven a tool for batterers, as abusive husbands use the learned helplessness theory to argue that their wives are unfit parents and thereby gain custody of the children. Melanie Frager Griffith, *Battered Woman Syndrome: A Tool for Batterers?*, 64 FORDHAM L. REV. 141, 180 (1995).

17. Schulhofer, *supra* note 15, at 119. For a haunting depiction of the police's lack of either ability or desire to protect a woman who was being stalked by a fellow officer, see *Pennsylvania v. Stonehouse*, 555 A.2d 772 (Pa. 1989).

18. Schulhofer, *supra* note 15, at 119.

19. See WALKER, *supra* note 15, at 11 ("[T]he most dangerous point in the domestic violence relationship is at the point of separation."); Mahoney, *supra* note 15, at 5-6 ("At the moment of separation or attempted separation . . . the batterer's quest for control often becomes most acutely violent and potentially lethal.").

20. Richard G. Singer, *The Resurgence of Mens Rea: II—Honest But Unreasonable Mistake of Fact in Self Defense*, 28 B.C. L. REV. 459, 497 n.212 (1987) ("A

international law cast the balance decidedly on the side of the aggressor, by forcing the defender to wait until the aggressor's attack is imminent.²¹ President Bush and the battered woman simply ask whether the pendulum swung too far in the aggressor's favor. Why wait for imminence, if the defender needs to act earlier?

In response to the plight of battered women, many criminal law scholars advocate jettisoning the imminence requirement. They contend that imminence's role is simply to establish necessity. It thus follows that in those situations where imminence proves to be a poor proxy for necessity, the need to act trumps the imminence requirement. Exporting such reasoning to international law yields the conclusion that America's war against Iraq could also be justified by a showing of sufficient need.

This Article claims that the significance of the imminence requirement is independent of the needs of the defender. Self-defense is not merely self-preferential acting. Rather, self-defense is best understood as a limited right to respond to aggression. Imminence serves as the *actus reus* for aggression, separating those threats that we may properly defend against from mere inchoate and potential threats. Thus, when one seeks to pull at the thread of imminence, the fabric of self-defense itself unravels.

This Article proceeds as follows. Part II sets forth the international and domestic laws of self-defense and describe the recent challenges posed by the war against Iraq and by battered women. Part III argues that these two challenges rest on the same moral claim: that a defender should be able to act when necessary. Part III then discusses the arguments for an "immediately necessary" standard for self-defense, a standard that has been proposed by many criminal law scholars, and shows how this view purports to answer the concerns of international law theorists. Part IV argues that the "immediately necessary" standard is misguided. It collapses

number of cases in the nineteenth century allowed a preemptive strike, even if they otherwise required there be a reasonable belief as to the threat's imminence."); *e.g.*, *Carico v. Kentucky*, 7 Bush 124, 127 (Ky. 1870).

Now, if a man feels unsure that his life is in *continual danger*, and that to take the life of his menacing enemy is his only safe security, does not the *rationale* of the principle as thus defined allow him to kill that enemy whenever and wherever he gives him a chance and there is no sign of relenting?

Id.; see also *Philips v. Kentucky*, 2 Duv. 328, 330–32 (Ky. 1865) (holding no duty to retreat in instances where actor had been previously threatened by a "determined and persevering enemy" because neither "the public interest [nor] the reason of law require[d] the appellant to continue to skulk and endure the agony of impending death"). *But cf.* *Oder v. Kentucky*, 80 Ky. 32, 37 (Ky. 1882) (self-defense does not authorize the defendant "to hunt down or seek another for the purpose of killing him"); *Williams v. Tennessee*, 3 Heisk. 376, 400 (Tenn. 1872).

That the defendant did the killing under an apprehension, honestly entertained, that the deceased might, or would, in some of his drunken moments, gratify his thirst for his blood, we think the proof fully shows; but that at the time of the killing, he was in any danger whatever of then losing his life, or that he so believed, the proof wholly fails to show.

Id.

21. See *infra* text accompanying notes 54–82.

the important distinction between self-defense and other necessary acts of self-preference. Moreover, it mistakenly presupposes that the purpose of the imminence requirement is simply to establish necessity. The importance of imminence, however, lies in how it informs our understanding of the types of threats that trigger a legitimate defensive response. Imminence, in effect, serves as the *actus reus* of aggression. The claim that imminence can be subsumed within the necessity calculation misunderstands the relevance of this requirement to our conception of self-defense.

II. TWO RECENT CHALLENGES TO THE IMMINENCE REQUIREMENT

A. *The Right to Self-Defense: Domestic and International Law*

Both domestic and international law recognize a right to self-defense. Self-defense is typically viewed as a justification, not an excuse.²² When an actor's conduct is justified, we claim that she did the right or permissible thing.²³ An actor is excused, on the other hand, when she has done something wrongful, but cannot fairly be blamed or punished for this wrongdoing.²⁴ A classic instance of excuse is insanity.²⁵ This dichotomy is often articulated as the distinction between speaking to the character of the act (justification) and speaking to the accountability of the actor (excuse).²⁶

Despite the fact that both defenses result in acquittal, the distinction is relevant to send clear moral messages regarding permissible and wrongful conduct; to determine the liability of accomplices; and to determine the permissibility of second and third-party conduct.²⁷ Hence, if self-defense is justified, the actor did the right or permissible thing. Others are authorized to come to her aid, and her aggressor is prohibited from resisting.

22. MODEL PENAL CODE § 3.04 (casting "Use of Force in Self-Protection" under Article 3's "General Principles of Justification"); PAUL H. ROBINSON, *STRUCTURE AND FUNCTION IN CRIMINAL LAW* 95 (1997).

23. Joshua Dressler, *Justifications and Excuses: A Brief Review of the Concepts and the Literature*, 33 WAYNE L. REV. 1155, 1161 (1987). There is some debate as to whether justifications are rights or permissions. See *id.* at 1161 n.22 (noting that self-defense may be permissible as opposed to "right"); YORAM DINSTEIN, *WAR, AGGRESSION AND SELF-DEFENSE* 178–79 (2d ed. 1994) (noting that international lawyers view self-defense as a "right" but not a "duty"); Claire O. Finkelstein, *Self-Defense as Rational Excuse*, 57 U. PITT. L. REV. 621, 624 (1996) ("In the criminal law, to call a violation of a prohibitory norm *justified* is to say not only that it is *permissible*, but that it is *encouraged*."); George P. Fletcher, *Should Intolerable Prison Conditions Generate a Justification or an Excuse for Escape?*, 26 UCLA L. REV. 1355, 1359 (1979) (rejecting permissibility definition in favor of a view of justification as right action); Hibi Pendleton, *A Critique of Rational Excuse Defense: A Reply to Finkelstein*, 57 U. PITT. L. REV. 651, 665 (1996) (critiquing Finkelstein's narrow definition of justification).

24. Dressler, *supra* note 23, at 1163.

25. ROBINSON, *supra* note 22, at 69.

26. *Id.*; GEORGE FLETCHER, *RETHINKING CRIMINAL LAW* 759 (1978).

27. JOSHUA DRESSLER, *UNDERSTANDING CRIMINAL LAW* § 17.05, at 217–18 (3d ed. 2001); ROBINSON, *supra* note 22, at 105.

In addressing the need for the imminence requirement, it is important to resist the temptation to hide behind the justification/excuse dichotomy. Criminal theorists love to recast these lines,²⁸ and the easy course would simply be to ask whether attacks without imminence may be excused, even if they are not justified.

Indeed, the battered woman's situation, at least, may fit within the excuse paradigm. That is, rather than claiming that what she did was right, the battered woman may claim that she should be excused because her rationality was impaired because of her partner's persistent abuse and psychological domination.²⁹ Alternatively, in lieu of invoking a quasi-insanity excuse,³⁰ a battered woman might claim that she lacked a fair opportunity to do otherwise, and thus, she should be treated similarly to a person acting under duress.³¹ Thus, the battered woman's acquittal might be secured by simply turning to excuse.

28. See, e.g., Larry Alexander, *A Unified Excuse of Preemptive Self-Protection*, 74 NOTRE DAME L. REV. 1475, 1494 (1999) (offering a broad excuse of preemptive self-protection while simultaneously limiting the scope of justifiable self-defense); Finkelstein, *supra* note 23, at 647 (offering a theory of rational excuse to encompass permissible self-defense).

29. See, e.g., Cathryn Jo Rosen, *The Excuse of Self-Defense: Correcting a Historical Accident on Behalf of Battered Women Who Kill*, 36 AM. U. L. REV. 11, 42–43 (1986) (arguing the reasonable battered woman standard is a theory of excuse, not justification).

30. The impaired rationality excuse for battered women is now being rejected because it pathologizes battered women and treats them as irrational and excused, rather than rational and right. See Burke, *supra* note 16, at 301–08 (arguing that the imminence requirement should be abandoned but that the reasonable person standard should not be subjectivized to include the psychological make-up of the battered woman and contending that this approach has the benefits of acknowledging diversity among battered women, treating women as competent, rational decision makers, and avoiding the “abuse excuse” of which modern juries tend to be skeptical); Anne M. Coughlin, *Excusing Women*, 82 CAL. L. REV. 1, 87 (1994) (“the battered woman syndrome defense, at least as it is presently constituted, is profoundly anti-feminist”); Joshua Dressler, *Battered Women Who Kill Their Sleeping Tormenters: Reflections on Maintaining Respect for Human Life while Killing Moral Monsters*, in CRIMINAL LAW THEORY: DOCTRINES OF THE GENERAL PART 259, 268 (Stephen Shute & A.P. Simester, eds., 2002) (battered woman's syndrome pathologizes women and “replaces the stereotype of the hysterical woman with the battered one”); Dutton, *supra* note 15 (“Battered woman syndrome language creates a stereotyped image of pathology.”); Schulhofer, *supra* note 15, at 122.

The highly individualized, highly contextualized standard sought on behalf of battered women not only legitimates the notion that women . . . are fundamentally different from men, but it does so in a context where those differences carry powerfully negative connotations. The Walker approach sees these women as passive, self-effacing, volatile and sometimes irrational.

Id.

31. E.g., Dressler, *supra* note 30, at 276–78 (advocating a “lack of fair opportunity” excuse for battered women to avoid the pathologizing effect of placing them within incapacity excuses); see generally Alexander, *supra* note 28, at 1494 (suggesting the unified excuse of preemptive self-protection: “It shall be a defense to any crime that the defendant committed it to avoid harm to himself or others, and a ‘person of reasonable firmness’ in the defendant's situation would have committed the crime.”).

Such a move, however, would rob the defender's claim of moral justification, and in so doing, would fail to address the concerns of international lawyers. After all, among the international community, one country does not generally "excuse" another, accepting that the nation did wrong but this wrong was understandable.³² More importantly, the attack on imminence sounds in justification, not excuse. It is a claim of right, not a plea of irresponsibility. Indeed, justifications are *action-guiding* but excuses are not.³³ Thus, we should refrain from simply moving this to a claim of excuse. The question here is whether imminence is a required element of *justified* self-defense.

Self-defense is not punishment.³⁴ Rather, self-defense is a limited right to engage in preemptive action.³⁵ It is the possibility of future harm that triggers the right to act in self-defense.³⁶

While the law may unfortunately blur the lines between prevention and punishment,³⁷ it is imperative that we place self-defense clearly on the prevention side of the divide. Punishment intuitions are irrelevant to the employment of defensive force. Thus, despite any intuitions that an abusive husband got exactly what he deserved, these intuitions, sounding in *desert* and therefore *retribution*, are irrelevant. A battered woman "cannot put herself in the position of judge and executioner."³⁸ Citizens may not punish.³⁹

32. Maybe, however, it should. Cf. Alexander, *supra* note 28, at 1498 (arguing that since societies are comprised of individuals perhaps excuse should apply to societies as well); Singer, *supra* note 20, at 497 n.212 ("There is little discussion of whether a state which honestly, though reasonably [sic], believes itself in danger can legitimately wage a 'preventive war.'").

33. SUZANNE UNIACKE, PERMISSIBLE KILLING: THE SELF-DEFENSE JUSTIFICATION OF HOMICIDE 23 n.28 (1994).

34. George P. Fletcher, *Domination in the Theory of Justification and Excuse*, 57 U. PITT. L. REV. 553, 562 (1996) ("the distinction between punishment and self-defense is fundamental").

35. DRESSLER, *supra* note 27, § 18.02[D][1], at 230; Alexander, *supra* note 28, at 1476 ("Self-defensive force is always preemptive.").

36. Alexander, *supra* note 28, at 1477 ("It is analogous to civil commitment of the dangerous, gun control, 'no contact' orders, preemptive military strikes, and other practices in which the future dangerousness of others, not their past transgressions, is taken to justify depriving them of life, liberty, or property.").

37. See Stephen J. Morse, *Neither Desert Nor Disease*, 5 LEGAL THEORY 265, 277 (1999) (trenchantly criticizing the United States Supreme Court's opinion in *Kansas v. Hendricks*, 117 S. Ct. 2072 (1997), as "a transparent attempt to fill the gap [between criminal and civil confinement] with a make-weight justification that seeks to bring the Kansas scheme within the confines of traditional civil confinement"); Paul Robinson, *Punishing Dangerousness: Cloaking Preventive Detention as Criminal Justice*, 114 HARV. L. REV. 1429, 1434–39 (2001) (discussing instances where the criminal law is "punishing dangerousness").

38. Fletcher, *supra* note 34, at 556.

39. Accord Dressler, *supra* note 30, at 272 ("If the 'penalty' of death is going to be imposed—if the judgement that a person deserves to die is going to be made—it ought to come from society as a whole, upon conviction by a jury.").

This distinction is far more clearly drawn in the domestic context than in the international sphere. For example, Operation Enduring Freedom was justified as self-defense.⁴⁰ But the United States' actions did not really fit the paradigm of self-defense: the justifying armed attack had come and gone. Rather, the United States' actions were actually in accord with either punishment or war.⁴¹ However, for purposes of evaluating the legitimacy of preemptive strikes, such as the United States' war against Iraq, the justification of such actions will turn on the right to prevent, not the right to punish.

Domestically, self-defense is a general exception to the prohibition against harming others. Every state adopts the defense and it is applicable, as one might expect, to the offense of homicide.⁴²

40. Jack M. Beard, *America's New War on Terrorism*, 25 HARV. J.L. & PUB. POL'Y 559, 560 (2002).

41. *Accord id.* at 584 (“[T]he distinction between reprisal and self-defense may sometimes be difficult to discern in responding to specific acts of terror.”). See generally LEILA NADYA SADAT, *TERRORISM AND THE RULE OF LAW* (Wash. Univ. School of Law Working Paper No. 03-01-02, 2003), available at <http://ssrn.com/abstract=387460> (criticizing the treatment of the September 11 attacks as war, rather than crime, and discussing the negative repercussions of such a position).

42. ALA. CODE § 13A-3-23 (2003) (use of force in defense of person); ALASKA STAT. § 11.81.335 (Michie 2003) (justification: use of deadly force in defense of self); ARIZ. REV. STAT. ANN. § 13-404 (West 2003) (justification; self-defense); ARK. CODE ANN. § 5-2-607 (Michie 2002) (use of deadly force in defense of a person); CAL. PENAL CODE § 197 (West 2003) (justifiable homicide; any person); COLO. REV. STAT. ANN. § 18-1-704 (West 2003) (use of physical force in defense of a person); CONN. GEN. STAT. ANN. § 53a-19 (West 2003) (use of physical force in defense of person); DEL. CODE ANN. tit. 11, § 464 (2002) (use of force in self-protection); *United States v. Peterson*, 483 F.2d 1222 (D.C. Cir. 1973); FL. STAT. ch. 782.02 (2003) (justifiable use of deadly force); GA. CODE ANN. § 16-3-21 (2003) (use of force in defense of self or others, including justifiable homicide; conflicting rules); HAW. REV. STAT. § 703-304 (2002) (use of force in self-protection); IDAHO CODE § 18-4009 (Michie 2003) (justifiable homicide by any person); 720 ILL. COMP. STAT. ANN. § 5/7-1 (West 2003) (use of force in defense of person); IND. CODE ANN. § 35-41-3-2 (West 2003) (use of force to protect person or property); IOWA CODE ANN. § 704.3 (West 2003) (defense of self or another); KAN. STAT. ANN. § 21-3211 (2002) (use of force in defense of person); KY. REV. STAT. ANN. § 503.050 (Michie 2003) (use of force in self-protection); LA. REV. STAT. ANN. § 14:20 (West 2003) (justifiable homicide); ME. REV. STAT. ANN. tit. 17-A, § 108 (West 2003) (physical force in defense of person); *Wilson v. Maryland*, 276 A.2d 214 (Md. 1971); *Massachusetts v. Crowley*, 43 N.E. 509 (Mass. 1896); *Michigan v. Heflin*, 456 N.W.2d 10 (Mich. 1990); MINN. STAT. § 609.065 (2002) (justifiable taking of life); MISS. CODE ANN. § 97-3-15 (2003) (justifiable homicide); MO. REV. STAT. § 563.031 (2003) (use of force in defense of persons); MONT. CODE ANN. § 45-3-102 (2003) (use of force in defense of person); NEB. REV. STAT. § 28-1409 (2002) (use of force in self-protection); NEV. REV. STAT. § 200.120 (2002) (“justifiable homicide” defined); N.H. REV. STAT. ANN. § 627:4 (2002) (physical force in defense of person); N.J. REV. STAT. § 2C:3-4 (2003) (use of force in self-protection); N.M. STAT. ANN. § 30-2-7 (Michie 2002) (justifiable homicide by citizen); N.Y. PENAL LAW § 35.20 (McKinney 2003) (justifiable homicide by citizen); *North Carolina v. Gappins*, 357 S.E.2d 654 (N.C. 1987); N.D. CENT. CODE § 12.1-05-03 (2001) (self-defense); *Ohio v. Robbins*, 388 N.E.2d 755 (Ohio 1979); OKLA. STAT. tit. 21, § 643 (2002) (force against another not unlawful, when—self-defense—defense of property); OR. REV. STAT. § 161.219 (2003) (limitations on use of

Likewise, self-defense is an exception to the international community's ban on the use of force. Article 2(4) of the United Nations Charter broadly prohibits the use of force.⁴³ Nations are forbidden, not just from waging war, but also from force short of war and from issuing threats of force.⁴⁴ One exception to the ban on force is Article 51, which permits nations to engage in self-defense:⁴⁵ "Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security."⁴⁶

Both domestic and international law require that the self-defensive force be necessary. This necessity component has two parts: the actor may only act *when* necessary and *to the extent* necessary.⁴⁷ The latter requirement is one of proportionality.

Domestic self-defense doctrine defines proportionality broadly. Indeed, killing is authorized in self-defense even when it is impermissible as punishment.⁴⁸ Thus, criminal law permits the use of deadly force to be employed in self-defense against threats of death, grievous bodily harm, rape, and kidnapping.⁴⁹ The

deadly force); 18 PA. CONS. STAT. ANN. § 505 (West 2002) (use of force in self-protection); Rhode Island v. Tribble, 428 A.2d 1079 (R.I. 1981); South Carolina v. Day, 535 S.E.2d 431 (S.C. 2000); S.D. CODIFIED LAWS § 22-18-4 (Michie 2003); TENN. CODE ANN. § 39-11-611 (2002) (self defense); TEX. PENAL CODE ANN. § 9.31 (Vernon 2003) (self-defense); UTAH CODE ANN. § 76-2-402 (2002) (force in defense of person); Vermont v. Shaw, 721 A.2d 486 (Vt. 1998); Virginia v. Gilbert, 506 S.E.2d 543 (Va. Ct. App. 1998); WASH. REV. CODE ANN. § 9A.16.050 (West 2003) (homicide—by other person—when justifiable); West Virginia v. Headley, 558 S.E.2d 324 (W. Va. 2001); WIS. STAT. § 939.48 (2003) (self-defense and defense of others); Nunez v. Wyoming, 383 P.2d 726 (Wyo. 1963).

43. U.N. CHARTER art. 2, para. 4; Mary Ellen O'Connell, *The Myth of Preemptive Self-Defense* 3 (Aug. 6, 2002), available at <http://www.asil.org/taskforce/oconnell.pdf>.

44. DINSTEIN, *supra* note 23, at 84.

45. The utopia envisioned by the drafters of the Charter was one in which the United Nations could effectively, in almost all instances, prevent aggression and when such prevention failed, there would be a global, United Nations-led, response. THOMAS M. FRANCK, *RECOURSE TO FORCE* 2–3 (2002). As Thomas Franck notes, the UN Charter envisions a "bifurcated regime": "one that postulates a common, absolute global response to aggression, but which also makes realistic allowance for state action during the potentially prolonged transition from contemporary realpolitik to an ideal future of UN-orchestrated collective security." *Id.* at 3.

46. U.N. CHARTER art. 51 (emphasis added).

47. CHRISTINE GRAY, *INTERNATIONAL LAW AND THE USE OF FORCE* 105 (2000); 2 PAUL ROBINSON, *CRIMINAL LAW DEFENSES* § 131(c), at 77 (1984).

48. See *Coker v. Georgia*, 433 U.S. 584 (1977) (death penalty for rape is unconstitutional); GEORGE P. FLETCHER, *A CRIME OF SELF-DEFENSE: BERNHARD GOETZ AND THE LAW ON TRIAL* 29 (1988) ("Even legal systems that have abolished the death penalty permit the use of deadly force in the defense of vital interests.").

49. *E.g.*, NEB. REV. STAT. § 28-1409(4) (2003) (authorizing deadly force against "death, serious bodily harm, kidnapping or sexual intercourse compelled by force or threat"); N.D. CENT. CODE 12.1-05-03 (2003) (authorizing force to defendant against "unlawful bodily injury, sexual assault, or detention by such other person").

important relationship for the self-defense proportionality requirement is between the degree of force threatened and the degree of force used to repel that threat.⁵⁰

While in domestic law, necessity is a question of whether force is needed to repel a harmful attack, the international corollary is that the use of force must be employed to achieve a legitimate military objective.⁵¹ The proportionality requirement necessitates the balancing of that military objective with the innocent lives that may be lost.⁵² Finally, international law contains an immediacy requirement—the defender must not wait too long before responding to an armed attack.⁵³

Only certain types of threats trigger the right to self-defense. The threat must be of imminent, unlawful force. Hence, an actor may not defend against the lawful use of force by a police officer.⁵⁴ However, “unlawful” broadly encompasses conduct that would constitute a tort or a crime, thus authorizing defensive force against even the insane and the immature.⁵⁵ A threat is imminent if it will occur “immediately” or “at once.”⁵⁶ This requirement has two temporal aspects.⁵⁷ Force may not be employed too soon, but it also may not be employed too late.⁵⁸ Retaliation is not self-defense.⁵⁹

Domestic self-defense is wholly preventative, authorizing the defender to use force before an attack occurs. In predicting the threat, the actor must honestly and reasonably believe that she needs to use force. Even if her belief is mistaken, so long as a reasonable person would also have such a belief, her self-defense

50. Despite the adoption of a proportionality rule, most jurisdictions do not require retreat before the use of deadly force, and no jurisdiction requires retreat before the use of non-deadly force. DRESSLER, *supra* note 27, § 18.02[C][2], at 226–27; ROBINSON, *supra* note 47, § 131(d)(3), at 85. Even in those jurisdictions that require retreat, the defendant is not required to retreat from her home. DRESSLER, *supra* note 27, § 18.02[C][3], at 228. A rare exception to the “castle exception” is when the aggressor and defendant are both co-dwellers. *Id.* § 18.02[C][3], at 229.

In failing to require the victim to retreat, the law may be viewed as contradictory. *See* FLETCHER, *supra* note 48, at 27 (“Terms like imminence, necessity, and proportionality take on differing connotations, depending on the theory in which they are anchored.”); Alexander, *supra* note 28, at 1480 (noting that some codes do not require retreat but adopt a proportionality requirement and calling such codes “internally contradictory”); Sanford H. Kadish, *Respect for Life and Regard for Rights in the Criminal Law*, 64 CAL. L. REV. 871, 887 (1976) (noting the “uneasy tension” between the principle of autonomy and the principle of aggression); V.F. Nourse, *Self-Defense and Subjectivity*, 68 U. CHI. L. REV. 1235, 1271–72 (2001) (discussing the two conflicting views of necessity).

51. O’Connell, *supra* note 43, at 7–8.

52. *Id.* at 8.

53. DINSTEIN, *supra* note 23, at 235–36.

54. DRESSLER, *supra* note 27, § 18.03[D][2], at 231.

55. *Id.*

56. *Id.* § 18.02[D][1], at 229 (quoting BLACK’S LAW DICTIONARY).

57. FLETCHER, *supra* note 48, at 18–20.

58. *Id.*

59. *Id.*

claim obtains.⁶⁰ When the actor honestly believes that self-defense is necessary but this belief is unreasonable, the actor either fully or partially loses the defense.⁶¹ The defendant also loses the defense if she provokes the fight or is the initial aggressor.⁶² Thus, domestic self-defense must always confront the question—at what point is a defender authorized to use force? How far must the aggressor have come? How good a prediction must it be?

In the international context, self-defense—and the validity of repelling an imminent attack—is a more complex matter. In the international domain, two types of self-defense are possible: preemptive and reactive. Acting against an imminent threat is preemptive, as it predicts that an attack will occur and seeks to abate it ahead of time. Within the range of preemptive actions, self-defense may respond to imminent attacks—“anticipatory self-defense” or contingent and possible threats—“preventative” or “precautionary” self-defense.⁶³

But self-defense may also be reactive. For example, if one country invades another, the victim country acts in self-defense when it repels the invaders. In such instances, the attack has already occurred; the victim country is not *predicting* future harm.

By its language, Article 51 of the United Nations Charter only authorizes reactive self-defense: “Nothing in the present Charter shall impair the inherent right of individual or collective self-defence *if an armed attack occurs.*” International law scholars are divided on the question of whether there exists a post-Charter right to preemptive self-defense.⁶⁴ Some international law scholars, “restrictionists,” believe that Article 51 restricts the use of defensive force to

60. DRESSLER, *supra* note 27, § 18.01[E], at 222. One may legitimately question, why, to be excused, the battered woman’s belief needs to be reasonable under any standard, as opposed to simply honestly held. *See* Singer, *supra* note 20, at 513 (“If, as I believe, moral stigma is not merely relevant but indeed the only distinguishing factor of the criminal law from civil law, it follows that any mistake of fact, no matter how unreasonable, should exculpate.”). The question of whether the reasonably mistaken actor is justified or excused is hotly debated in the literature. *See, e.g.*, ROBINSON, *supra* note 22, at 101 (arguing a reasonably mistaken actor is excused); Joshua Dressler, *New Thoughts About the Concept of Justification in the Criminal Law: A Critique of Fletcher’s Thinking and Rethinking*, 32 UCLA L. REV. 61, 93–95 (1984) (arguing against Fletcher’s view of mistakes and maintaining, *inter alia*, that our intuitions tell us that reasonably mistaken actors may be justified and that a rule utilitarian may wish to encourage individuals to act on reasonable beliefs); Fletcher, *supra* note 34, at 564 (arguing that a reasonable mistake is excused); Kent Greenawalt, *The Perplexing Borders of Justification and Excuse*, 84 COLUM. L. REV. 1897, 1903, 1919–20 (1984) (arguing that the reasonably mistaken actor is justified).

61. DRESSLER, *supra* note 27, § 18.01[E], at 223. At common law, the defendant was guilty of murder; however, an increasing number of jurisdictions allow for imperfect self-defense, which reduces the murder to manslaughter. *Id.* Under the Model Penal Code, if the actor is reckless or negligent in her belief, she is guilty of manslaughter or negligent homicide respectively. MODEL PENAL CODE § 3.09.

62. DRESSLER, *supra* note 27, § 18.02[B], at 224; *e.g.*, ME. REV. STAT. ANN. tit. 17-A, § 108 (West 2003) (defensive force is not justifiable if the person “provoked the use of unlawful, nondeadly force by such other person” or “was the initial aggressor”).

63. DRUMBL, *supra* note 4, at 29–30.

64. *See generally* GRAY, *supra* note 47, at 86–87 (summarizing the positions).

situations where an armed attack has already occurred,⁶⁵ while other international law scholars, “anti-restrictionists,” view the reference to “inherent right” as incorporating a right to anticipatory self-defense.⁶⁶

Even for anti-restrictionists, the attack must be imminent. They claim that customary international law as embodied by the *Caroline* precedent continues to set the parameters of anticipatory self-defense:⁶⁷ the necessity of force must be “instant, overwhelming, and leaving no choice of means, and no moment for deliberation.”⁶⁸

Anti-restrictionists support their claim by pointing to the discourse surrounding the Cuban Missile Crisis, the Six-Day War, and the Israeli attack on

65. E.g., DINSTEIN, *supra* note 23, at 183–86 (“the right of self-defense is circumscribed to counter-force stimulated by an armed attack”); FRANCK, *supra* note 45, at 50 (quoting a leader of the U.S. delegation, Gov. Harold Stassen, as affirming that the language was intended to trigger the right to self-defense only after an attack had occurred); see also George P. Fletcher, *How Would the Bush Administration’s Claims of Self-Defense, Used As Justifications for the War Against Iraq, Fare Under Domestic Rules of Self-Defense?* (Sept. 10, 2002), available at http://writ.findlaw.com/commentary/20020910_fletcher.html (“[The UN Charter] language implies the attack must be underway for self-defense to be justified. It also implies that the right of self-defense between nations is even more restricted than that between individuals in domestic society. That seems counterintuitive: It is hard to believe that it could be the rule that between nations, not even an imminent attack (troops massing on the border; missiles halfway through the sequence to launch) will suffice. But that seems to be what the Charter says.”).

There is strong historical support for the restrictionist position. Ironically, it was the United States that proposed the “armed attack” language to follow the reference to the inherent right to self-defense. FRANCK, *supra* note 45, at 50. When the Charter was drafted, the United States and other “Big Powers” believed that collective security under their auspices would be sufficient to prevent aggression. *Id.* at 48.

66. E.g., Anthony Clark Arend, *International Law and the Preemptive Use of Force*, 26 WASH. Q. 89, 92 (2003); DRUMBL, *supra* note 4, at 23 (arguing that the “inherent right” language refers to customary international law); Guy R. Phillips, *Rules of Engagement: A Primer*, ARMY L. 4, 12 (July 1993).

67. The *Caroline* incident involved an English attack on United States citizens, who were aiding the Canadian rebels, during the MacKenzie Rebellion. ANTHONY CLARK AREND & ROBERT J. BECK, *INTERNATIONAL LAW AND THE USE OF FORCE: BEYOND THE UN CHARTER PARADIGM* 18 (1993); DINSTEIN, *supra* note 23, at 243. The United States protested Britain’s act, but the British claimed self-defense. Five years later, Secretary of State Daniel Webster, in his correspondence about the incident with British envoys, said that for a claim of self-defense, Britain must “show a necessity of self-defense, instant, overwhelming, leaving no choice of means, and no moment for deliberation.” DINSTEIN, *supra* note 23, at 243. He also wrote that actions taken must involve “nothing unreasonable or excessive; since the act, justified by the necessity of self-defence, must be limited by that necessity, and kept clearly within it.” *Id.* This language since became the standard for self-defense. Arend, *supra* note 66, at 96; Thomas Graham, *National Self-Defense, International Law, and Weapons of Mass Destruction*, 4 CHI. J. INT’L L. 1, 7 (2003) (“[*Caroline*] sets forth a rule that is still binding precedent.”).

68. JOHN BASSETT MOORE, 2 A DIGEST OF INTERNATIONAL LAW § 217, at 412 (1906) (quoting correspondence between Mr. Webster, the US Secretary of State, and Lord Ashburton, the British plenipotentiary, in relation to the famous *Caroline* incident).

the Osirak reactor.⁶⁹ While nations were reluctant to invoke openly a right to anticipatory self-defense,⁷⁰ underlying the discussions within the United Nations was the viability of such a right.

First, with respect to the Cuban Missile Crisis, the opponents of the United States' conduct took the position that the United States was the aggressor and Cuba and the Soviet Union, the defenders.⁷¹ But such a position implies that if the United States had been acting defensively, the conduct would have been justified.⁷² After all, if the United States' behavior was not authorized, even as an act of self-defense, then it mattered little who was the aggressor and who was the defender.⁷³

The discourse concerning the Six Day War further supports the anti-restrictionists' claim.⁷⁴ While the UN debates did not openly discuss anticipatory self-defense, the failure of most states to condemn Israel's actions speaks to the implicit viability of the preemptive claim.⁷⁵

69. "Although there are undoubtedly many ways to explore state practice relating to preemption in the post-UN Charter world, perhaps one of the most useful is to examine debates in the Security Council in cases where questions of preemptive force were raised." Arend, *supra* note 66, at 94; *see also* DRUMBL, *supra* note 4, at 2 (arguing that international law derives from both the UN Charter and customary international law and that the latter can be assessed by reviewing state practice).

70. GRAY, *supra* note 47, at 112 ("the actual invocation of the right to anticipatory self-defence in practice is rare"). Rather, states claim to have acted in accord with Articles 2(4) and 51. Thus, the United States claimed that its actions during the Cuban Missile Crisis were not "force" as set forth by 2(4) and were authorized by the Charter's regional peace-keeping provisions. *See* FRANCK, *supra* note 45, at 99 (United States argued that the quarantine did not amount to the use of force forbidden by the Charter); GRAY, *supra* note 47, at 113–15 (US relied on peacekeeping provisions thus evincing the controversial status of anticipatory self-defense as the justification for the use of force); *see also* Graham, *supra* note 67, at 3 (arguing that the United States "came close to a preemptive use of military force," involving air strikes and a ground invasion, but ultimately did not do so, opting instead for a naval quarantine and a peaceful settlement). *But see* AREND & BECK, *supra* note 67, at 75 ("Under generally accepted norms of international law, a blockade, whether termed a quarantine or not, constitutes a violation of Article 2(4).").

Likewise, in supporting its attack on Egypt resulting in the Six Day War, Israel argued that Egypt's behavior constituted an "armed attack" and thus, Israel's response was within the literal authorization of Article 51. FRANCK, *supra* note 45, at 104; GRAY, *supra* note 47, at 113.

71. AREND & BECK, *supra* note 67, at 75–76.

72. *Id.*

73. *Id.*

74. Egypt's behavior was not an armed attack, but was ominous enough. Egypt closed the Straits of Tiran to Israeli shipping and amassed troops on the Israeli border. FLETCHER, *supra* note 48, at 20–21. Nasser made threats against Israel and secured command of the armies of both Jordan and Iraq. *Id.*

75. FRANCK, *supra* note 45, at 105.

Most states, on the basis of evidence available to them, did however apparently conclude that such an armed attack was imminent, that Israel had reasonably surmised that it stood a better chance of survival if the

In 1981, when Israel bombed Osirak, an Iraqi nuclear reactor, it invoked the right to anticipatory self-defense.⁷⁶ While the Security Council passed a unanimous resolution, strongly condemning the act,⁷⁷ states had different reasons for the condemnation. Some took a restrictionist view of Article 51 and said that self-defense can only be used in response to an armed attack.⁷⁸ However, many other states seemed to support the doctrine of anticipatory self-defense, but felt there was not enough evidence in this instance to show that the attack was truly imminent.⁷⁹ England, for example, maintained that Iraq's purported attack was not imminent under *Caroline*.⁸⁰

In light of these post-Charter events, and the explicit and implicit reliance on a right to act preemptively, anti-restrictionists claim that *Caroline* remains the standard for anticipatory attacks.⁸¹ Hence, even to the anti-restrictionist, preemptive attacks are permissible only when the necessity of force is "instant, overwhelming, and leaving no choice of means, and no moment for deliberation."⁸² Thus, an imminence standard sets the outer boundaries for the use of defensive force in international law.

In summary, both domestic and international law recognize a right to self-defense. Self-defense is best understood as a justification, a claim that the defendant engaged in right or permissible action. Self-defense is motivated by the need to prevent future harm, and it is limited by the principles of necessity and proportionality. While domestic criminal law allows defenders to respond to imminent attacks, international law remains unsettled as to whether even an imminent attack is sufficient to justify self-defense. One point remains clear, however: in both domestic and international law, a defender is not authorized to act before an attack becomes imminent. The United States' war against Iraq and the plight of battered women both pose challenges to this standard. It is to these challenges that we now turn.

B. The Challenge to Imminence in International Law: The War Against Iraq

In March 2003, the United States went to war against Iraq. The war implemented the "Bush Preemption Doctrine" set forth in the National Security Strategy ("NSS").

attack were pre-empted, and that, therefore, in the circumstances, it had not acted unreasonably. This does not amount to an open-ended endorsement of a general right to anticipatory self-defense, but it does recognize that, in demonstrable circumstances of extreme necessity, anticipatory self-defense may be a legitimate exercise of a state's right to ensure its survival.

Id.

76. AREND & BECK, *supra* note 67, at 77–78; GRAY, *supra* note 47, at 114–15.

77. S.C. Res. 487 (1981); FRANCK, *supra* note 45, at 105–06.

78. AREND & BECK, *supra* note 67, at 78.

79. *Id.*

80. *Id.* at 79.

81. Arend, *supra* note 66, at 96; Graham, *supra* note 67, at 7 ("[*Caroline*] sets forth a rule that is still binding precedent.").

82. MOORE, *supra* note 68, § 217, at 412.

Within the Bush Preemption Doctrine lie a number of important claims. First, the Bush Preemption Doctrine casts itself as a claim of self-defense:

*And, as a matter of common sense and self-defense, America will act against such emerging threats before they are fully formed. We cannot defend America and our friends by hoping for the best. So we must be prepared to defeat our enemies' plans, using the best intelligence and proceeding with deliberation. History will judge harshly those who saw this coming danger but failed to act. In the new world we have entered, the only path to peace and security is the path of action.*⁸³

Second, as a policy of self-defense, the Bush Preemption Doctrine articulates the earlier *Caroline* doctrine as the then-governing standard of international law:

For centuries, international law recognized that nations need not suffer an attack before they can lawfully take action to defend themselves against forces that present an imminent danger of attack. *Legal scholars and international jurists often conditioned the legitimacy of preemption on the existence of an imminent threat—most often a visible mobilization of armies, navies, and air forces preparing to attack.*⁸⁴

Third, it rejects *Caroline*'s stringent temporal requirement, arguing that it is outdated. Modern warfare problems, namely terrorism, rogue states, and weapons of mass destruction ("WMD"), render *Caroline* obsolete:

We must adapt the concept of imminent threat to the capabilities and objectives of today's adversaries. Rogue states and terrorists do not seek to attack us using conventional means. They know such attacks would fail. Instead, they rely on acts of terror and, potentially, the use of weapons of mass destruction—weapons that can be easily concealed, delivered covertly, and used without warning.

....

The United States has long maintained the option of preemptive actions to counter a sufficient threat to our national security. The greater the threat, the greater the risk of inaction—and the more compelling the case for taking anticipatory action to defend ourselves, even if uncertainty remains as to the time and place of the enemy's attack. *To forestall or prevent such hostile acts by our adversaries, the United States will, if necessary, act preemptively.*⁸⁵

Thus, the Bush Preemption Doctrine stakes out a self-defense position far broader than *Caroline*.⁸⁶ *Caroline* authorizes self-defense in those instances where

83. NSS, *supra* note 10, at v (emphasis added).

84. *Id.* (emphasis added).

85. *Id.* at 15 (emphasis added).

86. As one critic characterized the NSS:

The US government is working towards a fundamental change in the existing international law. When Bush says he doesn't need to ask for

the necessity of force is “instant, overwhelming, and leaving no choice of means, and no moment for deliberation.”⁸⁷ But the NSS’s “path of action” includes taking “anticipatory action” “even if uncertainty remains as to the time and place of the enemy’s attack.”⁸⁸ Thus, far from the immediacy of *Caroline*, the NSS authorizes first strikes that are planned and are the product of much deliberation.

Despite the claim that the Bush Preemption Doctrine seeks to modify imminence, it actually seeks to discard it. One might think that the harm posed by an enemy with weapons of mass destruction is “always imminent” or that imminence simply needs to be “adapted.” But “always imminent” is a contradiction in terms. An imminent threat is one that will happen “in an instant” or “at once.” Yet, an enemy with weapons of mass destruction may act immediately or in several months or even never. The fear of harm, and in this sense, the threat of harm, may be ever-present, but harm is imminent only when it is about to happen.

The misuse of the term, “imminence,” may be due in part to two different senses of the word, “threat.”⁸⁹ A threat may be an assault—that is, a forthcoming battery. Thus, a missile that is currently moving towards a target is a threat to that target. But a threat may also be something far more inchoate. The possession of nuclear weapons by North Korea is a threat, not because of the weapons are about to hit the United States, but because those weapons vest North Korea with significant power that it could choose to exercise against the United States. Indeed, this latter more inchoate sense of threats may be what is contemplated in the United Nations Charter Article 39, providing for Security Council intervention for “threats to the peace.”⁹⁰ These “threats to the peace” are distinguished from “breaches of the peace” and “acts of aggression.”⁹¹ But inchoate threats are not imminent. Rather, it is with regard to assaultive threats that the term “imminence”

anyone’s approval, that is not just the arrogance of power speaking. It’s also a legal claim. Bush really means it’s legally alright for the US to make war whenever it deems necessary for its own security. This ‘Bush doctrine’ was not pronounced in passing, but in a document of critical importance, the “National Security Strategy” released in September 2002. Attack is the best defence, it says there. . . . Though pre-emptive self-defence was previously allowed only in case of imminent aggression, the criterion of imminence is now to be discarded. In the case of “rogue states,” the mere possibility of their deploying weapons of mass destruction at some point in time is regarded as sufficient justification for war.

Dietrich Murswiek, *The Exclusive Right of Aggression* (Apr. 2003), available at <http://www.goethe.de/kug/ges/rch/thm/en41619.htm>.

87. MOORE, *supra* note 68, § 217, at 412.

88. NSS, *supra* note 10, at 15.

89. I owe the insights in this paragraph to Roger Clark.

90. U.N. CHARTER art. 39 (providing “[t]he Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security”).

91. *Id.*

applies. Hence, when the United States seeks to act against inchoate threats, it is not adapting imminence; it is abandoning it.

When the United States went to war with Iraq in March 2003, the Bush Preemption Doctrine was translated from policy to practice. The argument that the war against Iraq was a justifiable act of self-defense rested upon two claims. The first was that Iraq had weapons of mass destruction and harbored evil intentions toward the United States, and the second claim was that given this fact, the United States was justified in attacking Iraq. The first question is empirical, and any dispute regarding this question concerns the degree of certainty that an actor must have before attacking. The second claim, however, is a moral claim: that the United States was entitled to attack Iraq as an act of *justifiable self-defense*.

Both of these arguments were subjected to challenge. Many commentators were skeptical that the United States had sufficient evidence of Iraq's possession of weapons of mass destruction. Conversely, the U.S. Department of State vigorously argued for a lower evidentiary standard.⁹²

Thus, one dispute is over the degree of certainty. What is the burden of proof for the person or nation who wishes to act in self-defense? In the aftermath of the war, the United States' claim to have satisfied the burden has become increasingly undermined by empirical fact and political overstatement.⁹³

But the burden of proof is only part of the problem. The second question is whether even if Iraq had weapons of mass destruction, its possession of such weaponry would be sufficient to justify the war. Many scholars thought not.⁹⁴

92. The State Department's website contains an article by Philip Bobbitt that originally appeared in the Times of London. Bobbitt argues:

We must recognise that the demand for conclusive evidence of weapons acquisition is an inadequate requirement in the world we are entering. It confuses deterrence with indictment, as if Saddam were guilty of violating an international gun control law. In fact, deterrence of WMD acquisitions has failed once the overt act is committed or the covert act unmasked. It must be better to take action before we know that the situation we most fear has indeed come about if we are clear with regard to his intentions.

Philip Bobbitt, *Why the US and the UK Are Right to Target Iraq* (Jan. 28, 2003), available at <http://usinfo.state.gov/regional/nea/iraq/press/0128usuk.htm>.

93. See Thomas L. Friedman, *The War over the War*, N.Y. TIMES, Aug. 3, 2003, at 4–11 (arguing that because Prime Minister Blair could not sell the good reasons for the war, both Blair and Bush “hyped the direct threat from Iraq and highlighted flimsy intelligence suggesting that Saddam was not just a potential problem, but an immediate, undeterrable threat to British and American mainlands”); James Risen, *Bush Aides Now Say Claim on Uranium Was Accurate*, N.Y. TIMES, July 14, 2003, at A7 (discussing the failure to find WMD, the failure to discover ties to Al Qaeda, and Bush's reliance in his State of the Union address on “evidence that was based in part on fabricated documents and in part on uncorroborated reports from abroad”).

94. See, e.g., Michael C. Dorf, *Is the War on Iraq Lawful?*, FINDLAW, Mar. 19, 2003, available at <http://writ.news.findlaw.com/dorf/20030319.html> (noting “the argument for self-defense must be based on an expansion of that concept—from self-defense as repelling an ongoing or imminent attack, to self-defense as pre-emption of a feared attack”); Graham, *supra* note 67, at 17 (arguing that the NSS, as implemented in our war against Iraq,

Indeed, it is certainly true that the United States' self-defense claim was not viable under international law and the *Caroline* precedent.⁹⁵ Still, the question remains whether international law *should* remain wed to a stringent temporal imminence requirement. That is, if the United States' belief that Iraq had weapons of mass destruction had been justified, would that belief have been sufficient to justify acting in self-defense?

International law is fluid. "[I]t derives from state behavior and it affects state behavior."⁹⁶ The United States acted in defiance of *Caroline*, and other nations supported its decision.⁹⁷ Given that weapons of mass destruction and terrorism are realities of the world in which we live, the war against Iraq should cause us to reflect on whether the right to self-defense should obtain at the time of need or upon the imminence of harm.

C. Imminence in Criminal Law: The Problem of Battered Women

While the United States can act in what has been described as a "flagrant violation of international law" with little or no repercussions,⁹⁸ the battered woman, who kills in a nonconfrontational setting, does not fare as well. Ignoring the law is a violation of the law, and indeed, one for which these women are sentenced to lengthy jail time.⁹⁹ Thus, if the imminence requirement is not a necessary element of self-defense, battered women are paying the price for our failure to delineate the defense properly. Indeed, "[t]he central debate in the theory of self-defense for the last decade has been whether we should maintain a strict requirement of imminence in assessing which attacks trigger a legitimate defensive

"is not consistent with international law"); Int'l Ass'n Lawyers Against Nuclear Arms, *International Appeal by Lawyers and Jurists Against the "Preventive" Use of Force* (Mar. 2003), available at <http://www.lcnp.org/global/LawyersandJuristsAppeal.htm> (arguing "[t]here is no precedent in international law for use of force as a preventative measure when there has been no actual or imminent attack by the offending State"); Murswiek, *supra* note 86 ("The US clearly cannot invoke its right to self-defence to justify the war in Iraq, as all the experts on international law agree. Without the authorization of the Security Council the American attack is therefore a flagrant violation of international law."); O'Connell, *supra* note 43, at 3 ("the reality is that the United States has no right to use force to prevent possible, as distinct from actual, armed attacks").

95. A related question is whether the United States would have been justified in attacking Iraq if it had a reasonable, but ultimately mistaken, belief that Iraq possessed weapons of mass destruction. The question of whether a reasonably mistaken actor is justified is debated within the criminal law literature. See *supra* note 60.

96. DRUMBL, *supra* note 4, at 9.

97. *Id.* at 33 (addressing the various countries that supported the United States in ways that ranged from words to troops).

98. See Murswiek, *supra* note 86.

99. See CHARLES PATRICK EWING, *BATTERED WOMEN WHO KILL: PSYCHOLOGICAL SELF-DEFENSE AS LEGAL JUSTIFICATION* 5 (1987) (many battered women who kill their mates "receive stiff prison sentences including, in some cases, life imprisonment without parole."). Executive clemency is sometimes available. See Richard A. Rosen, *On Self-Defense, Imminence, and Women Who Kill Their Batters*, 71 N.C. L. REV. 371, 391 & n.56 (1993) (discussing the Judy Norman case).

response.”¹⁰⁰ The problem that has provoked this debate is the case of battered women.¹⁰¹

100. Fletcher, *supra* note 34, at 567.

101. There is no general defense of “being a battered woman.” DRESSLER, *supra* note 27, § 18.05[B][4], at 244. Rather, when a battered woman kills her sleeping abuser, her claim sounds in self-defense. Issues of abuse may also have bearing on provocation and duress. See SAMUEL H. PILLSBURY, JUDGING EVIL: RETHINKING THE LAW OF MURDER AND MANSLAUGHTER 153–55 (1998) (discussing the question of timing within the context of provocation); Burke, *supra* note 16, at 253 (discussing the application of battered woman syndrome to duress claims).

Dr. Lenore Walker, who developed the concept of battered woman syndrome (BWS) in the late 1970s, describes the battered woman’s life as involving a cycle of violence. WALKER, *supra* note 15, at 126. The cycle of violence is composed of three distinct phases: the tension-building phase; the acute battering incident; and the tranquil, sometimes even loving, phase. *Id.* at 126–27. In addition, Walker claims that battered women do not leave because they suffer from learned helplessness. *Id.* at 117; Dutton, *supra* note 15; see generally Martin E. P. Seligman et al., *Alleviation of Learned Helplessness in the Dog*, 73 J. ABNORMAL PSYCHOL. 256 (1968). The more recent formulation of BWS describes the syndrome as a version of post-traumatic stress disorder (PTSD). WALKER, *supra* note 15, at 117; Dutton, *supra* note 15. Some scholars have been quite critical of the underlying science of BWS. E.g., David L. Faigman & Amy J. Wright, *The Battered Woman Syndrome in the Age of Science*, 39 ARIZ. L. REV. 67, 109–10 (1997) (“The battered woman syndrome remains little more than an unsubstantiated hypothesis that, despite being extant for over fifteen years, has yet to be tested adequately or, when adequately tested, has failed to be corroborated.”).

Battered women challenge traditional self-defense doctrine in ways beyond the scope of this paper. For example, in those jurisdictions that adopt a retreat requirement and the castle exception, there is the question whether one must retreat when the aggressor is a co-dweller. DRESSLER, *supra* note 27, § 18.02[C][3], at 228. Any requirement to retreat from one’s home may have an adverse impact on victims of domestic violence. *Id.*; see also *Weiland v. Florida*, 732 So. 2d 1044, 1056 (Fla. 1999).

[A] duty to retreat from the home adversely affects victims of domestic violence by placing them at great risk of death or great bodily harm. In addition, failing to inform jurors that the defendant had no duty to retreat from the residence when attacked by a co-occupant may actually reinforce commonly held myths concerning domestic violence victims.

Id.

The question of how the reasonable person standard should be contextualized is highly problematic in the battered woman context. That is, when asking whether the defendant’s belief was reasonable, should the jury consider a reasonable person of the defendant’s gender? Size? The history between the victim and defendant? Should the jury consider what a “reasonable battered woman” would do, thus incorporating the psychological syndrome that affects her perception of events and alternatives? See, e.g., *Kansas v. Hundley*, 693 P.2d 475, 478–80 (Kan. 1985) (“reasonably prudent battered wife”); *North Dakota v. Leidholm*, 334 N.W.2d 811, 818 (N.D. 1983) (holding the jury should assume “the physical and psychological properties peculiar to the accused”); *Pennsylvania v. Stonehouse*, 555 A.2d 772, 784 (Pa. 1989) (“reasonably prudent battered woman”); *Jahkne v. Wyoming*, 682 P.2d 991, 1012–18 (Wyo. 1984) (Rose, J., dissenting) (arguing that the reasonable person standard should have included defendant’s psychological state of being a battered child). Scholars are quite critical of the “reasonable battered woman standard.” See Dressler, *supra* note 30, at 269 (“Put simply, without distorting the meaning of reasonableness beyond

The saga of Judy Norman illustrates the plight of a battered woman who could not overcome the imminence requirement. When she was fourteen-years-old, Judy Norman married John Thomas (J.T.) Norman.¹⁰² For twenty-years of their marriage, Judy endured J.T.'s abuse.¹⁰³ J.T. threw hot coffee at her, put cigarettes out on her, and broke glass against her face.¹⁰⁴ He forced Judy to earn

sensible recognition, a 'reasonable person' does not fear instantaneous death from a sleeping person."); Stephen J. Morse, *The "New Syndrome Excuse Syndrome,"* 14 CRIM. J. ETHICS 3, 13 (Winter/Spring 1995) (arguing the reasonable battered woman test "makes a mockery of objective standards and of the entire notion of justification, collapsing the important distinction between justification and excuse").

Some background facts are relevant, however. After all, if the man sitting on your couch is a person you have a restraining order against, who has pistol-whipped you, assaulted you with a knife, and struck you on the head with a tire iron (leading to your hospitalization), chances are—that when he shows up saying, "I guess I'm just going to have to kill you sonofabitch. Did you hear me that time?"—he means it. *Allery v. Washington*, 682 P.2d 312, 313 (Wash. 1984); *see also New Jersey v. Kelly*, 478 A.2d 364, 378 (N.J. 1984) ("the expert's testimony might also enable the jury to find that the battered wife, because of the prior beatings, numerous beatings, as often as once a week, for seven years, from the day they were married to the day he died, is particularly able to predict accurately the likely extent of violence in any attack on her"); *Gallegos v. New Mexico*, 719 P.2d 1268, 1271 (N.M. Ct. App. 1986) ("Remarks or gestures which are merely offensive or perhaps even meaningless to the general public may be understood by the abused individual as an affirmation of impending physical abuse."); Dressler, *supra* note 30, at 264 (noting that experts claim battered women become more attuned to when an attack will occur and how grave the attack will be). *But see* Robert F. Schopp et al., *Battered Woman Syndrome, Expert Testimony, and the Distinction Between Justification and Excuse*, 1994 U. ILL. L. REV. 45, 73 ("[S]ome battered women may well be able to predict forthcoming abuse with sufficient accuracy to support a reasonable belief, but these beliefs are the product of neither a special capacity nor the battered woman syndrome. They reflect an ordinary process of inductive inference from past behavior in similar circumstances.").

Testimony regarding battered woman's syndrome and the learned helplessness theory helps to establish why the battered woman does not leave, thus supporting the battered woman's credibility. *See Kelly*, 478 A.2d at 377 ("experts point out that one of the common myths, apparently believed by most people, is that battered wives are free to leave"); Dressler, *supra* note 30, at 264 ("learned helplessness testimony may offset the belief of jurors that claims of prior abuse are untrue . . . or that, even if true, a woman who remains in an abusive relationship has a masochistic desire to be beaten"). However, some scholars argue that BWS lacks descriptive power because it fails to explain why women overcome learned helplessness and in so doing, choose, not to leave, but to employ deadly force. *Burke, supra* note 16, at 246 ("If the battered woman has overcome her learned helplessness and can appreciate exit options, then the syndrome fails to explain why she exercises the option of deadly force."); Faigman & Wright, *supra* note 101, at 79 ("From a theoretical perspective . . . one would predict that if battered women suffered from learned helplessness they would not assert control over their environment; certainly, one would not predict such a positive assertion as killing the batterer."); Schulhofer, *supra* note 15, at 122 (arguing that the use of BWS to explain imminence and necessity undermines the explanation of why the woman ultimately killed her husband).

102. *North Carolina v. Norman*, 378 S.E.2d 8, 10 (N.C. 1989).

103. *Id.*

104. *Id.*

their family's only income by working as a prostitute.¹⁰⁵ At home, he literally treated her like a dog, forcing her to eat pet food out of pet bowls, to bark like a dog, and often to sleep on the floor.¹⁰⁶ When Judy was pregnant with their fifth child, J.T. kicked her down a flight of stairs, causing the baby to be born prematurely.¹⁰⁷ J.T. threatened to kill Judy and specifically threatened to cut her heart out.¹⁰⁸ Judy tried to leave several times.¹⁰⁹ J.T. always found her, took her home, and beat her.¹¹⁰

The day before he died, J.T. was arrested for DUI, which angered him immensely thus causing an escalation in his violence towards Judy.¹¹¹ The police were called to the Norman household, but Judy refused to file a complaint out of fear that her husband would kill her.¹¹² Less than an hour later, Judy attempted suicide.¹¹³ Judy was released from the hospital that evening, and she went home with her mother.¹¹⁴

The next day, J.T. followed Judy to the social services office where she was attempting to obtain welfare benefits, and J.T. forced Judy to return home with him.¹¹⁵ Once Judy was back in his control, J.T. subjected Judy to further torment. He kicked her in the side of the head while she was driving and threatened to "cut her breast off and shove it up her rear end."¹¹⁶ J.T. refused to let Judy eat.¹¹⁷ When J.T. napped on the bed that afternoon, he made Judy sleep on the concrete floor.¹¹⁸ J.T. also barraged Judy with threats that he would cut her throat, kill her, and cut off her breast.¹¹⁹ Judy's daughter informed Judy's mother about the abuse and the latter called the sheriff's department.¹²⁰ No one came.¹²¹

Later that evening, while J.T. slept, the granddaughter whom Judy was babysitting began to cry.¹²² Afraid the crying would wake her husband, Judy took the child to her mother's house.¹²³ There, she took a pistol from her mother's purse.¹²⁴ Judy returned home and shot J.T. in the back of the head.¹²⁵

105. *Id.*

106. *Id.*

107. North Carolina v. Norman, 366 S.E.2d 586, 587 (N.C. Ct. App. 1988), *rev'd* 378 S.E.2d 8 (N.C. 1989).

108. *Id.*

109. North Carolina v. Norman, 378 S.E.2d 8, 10 (N.C. 1989).

110. *Id.*

111. *Id.* at 10.

112. *Id.*

113. *Id.*

114. *Id.*

115. *Id.* at 11.

116. North Carolina v. Norman, 366 S.E.2d 586, 588 (N.C. Ct. App. 1988).

117. *Norman*, 378 S.E.2d at 11.

118. *Id.*

119. *Norman*, 366 S.E.2d at 588.

120. *Id.*

121. *Id.*

122. *Id.*

123. *Id.* at 588–89.

124. *Id.* at 589.

Judy Norman was convicted of voluntary manslaughter.¹²⁶ The North Carolina Court of Appeals reversed, holding that the district court should have instructed the jury on self-defense.¹²⁷ The Supreme Court of North Carolina reversed.¹²⁸ It held that Judy Norman was not entitled to a self-defense instruction.¹²⁹ The harm was not imminent.¹³⁰

What was Judy Norman to do? She believed her death to be inevitable, and perhaps a reasonable person would as well. But her self-defense claim did not go to the jury. The requirement that the harm be imminent stood in her way. Assuming that Judy Norman was doomed to a life of abuse, that one day she would die at J.T.'s hand, that she had no chance of overpowering him during a confrontation, and that she had no means of escape, were Judy Norman's actions wrong? Why was Judy Norman denied the ability to cloak herself with the justification of self-defense?

Judy Norman is not an aberration.¹³¹ In *Whipple v. Indiana*, the defendant killed his two abusive parents while they slept.¹³² The Indiana Supreme Court held that "the absence of imminent or impending danger . . . precludes the successful assertion of the defense of self or defense of others as a matter of law."¹³³ Victoria

125. *Id.*

126. *North Carolina v. Norman*, 378 S.E.2d 8, 9 (N.C. 1989).

127. *Id.*

128. *Id.*

129. *Id.*

130. *Id.*

131. The nonconfrontational setting, where the defendant kills a sleeping victim, is not the prototypical case it is assumed to be. Rather, most self-defense cases arise in confrontational settings. In Victoria Nourse's empirical survey, she found that only 30% of battered spouse cases were nonconfrontational. She also found that of overall self-defense cases only 16% were nonconfrontational. Nourse, *supra* note 50, at 1253. Holly Maguigan's empirical survey, which focused specifically on battered women, found that 75% of cases were confrontational. Holly Maguigan, *Battered Women and Self-Defense: Myths and Misconceptions in Current Reform Proposals*, 140 U. PA. L. REV. 379, 397 (1991). Of the non-confrontational cases, 8% were sleeping man cases, 8% were woman as initial aggressor during a lull in violence cases, 4% were contract killings, and 5% were indeterminate because of the dearth of facts in the opinion. *Id.*

The number of instances, however, does not bear on the ultimate moral question—which is whether the imminence requirement unduly restricts a morally legitimate claim of self-defense. *Accord Rosen, supra* note 99, at 403 ("Norman is not the sort of isolated, aberrational incident—like shipwrecked sailors forced to eat their comrades to save their own lives—that can be relegated safely to executive clemency.").

For other nonconfrontational killings by battered victims, see *Reed v. Indiana*, 479 N.E.2d 1248, 1253 (Ind. 1985) (defendant not entitled to self-defense instruction because he shot his parents while they were sleeping); *West Virginia v. Smith*, 481 S.E.2d 747, 751 (W. Va. 1996) (defendant who assisted her son in shooting her live-in boyfriend was not entitled to self-defense instruction because the boyfriend was sleeping and thus did not constitute an "imminent" threat).

132. 523 N.E.2d 1363, 1366 (Ind. 1988).

133. *Id.* at 1367. Admittedly, the facts (at least as reported by the Indiana Supreme Court) are a bit fishy. But ultimately, the credibility of the witnesses is a jury determination, and the refusal to instruct on self-defense prevents precisely this inquiry.

Sands was likewise denied a self-defense instruction.¹³⁴ Sands, who had been beaten and threatened with a gun intermittently that day, failed to meet the imminence requirement when she killed her husband while he took a break from beating her to lie in bed and watch television.¹³⁵

And then there is Nelda Lane.¹³⁶ When Lane left her husband, he called her and told her that he was going to kill her, graphically describing how he was going to “slit her open like a wild animal and pull her guts out.”¹³⁷ He told her he would track her down, and he would also kill their daughter.¹³⁸ His last words to her, at 12:30 a.m., were “You’re dead meat, bitch.”¹³⁹ Lane believed him, and after spending all night pacing, Lane got in her car, drove eight miles, entered their house, and shot her husband three times in the head while he slept.¹⁴⁰

Evidence at trial arguably supported the reasonableness of Lane’s fear. When Lane left, her husband told two of his friends that he planned to “gut the bitch” and wanted to “put a hit” out on her.¹⁴¹ But the harm to Lane was not imminent and therefore she was not entitled to a self-defense instruction.¹⁴² Lane’s murder conviction was affirmed on appeal.¹⁴³

While Lane was the most aggressive in her actions, her fear of death was quite well-founded. Not only had her husband graphically threatened her, but also he had communicated this threat to others. Experience has taught us that at the time of separation, abusive husbands tend to be at their most violent, and that temporary restraining orders do little to prevent an attack.¹⁴⁴ At what point may Lane act? May she act when he buys the weapon? Comes to her house? Breaks in? Or will current self-defense doctrine force her to wait until the gun is pointed or the knife is raised?

Norman, Sands, and Lane each acted before the threat was imminent. They fell into what Anthony Sebok has cleverly dubbed the “*Cape Fear* gap.”¹⁴⁵

134. Virginia v. Sands, 553 S.E.2d 733 (Va. 2001).

135. *Id.* at 737.

136. Lane v. Texas, 957 S.W.2d 584 (Tex. Ct. App. 1997).

137. *Id.* at 585–86.

138. *Id.* at 586.

139. *Id.* at 589 (James, J., dissenting).

140. *Id.* at 586 (majority opinion).

141. *Id.* at 589 n.1 (James, J., dissenting).

142. *Id.* at 586 (arguing verbal threats were not sufficient for fear of immediate harm) (majority opinion).

143. *Id.* at 585 (majority opinion).

144. Mahoney, *supra* note 15, at 57–58 (noting that depending on the motivations of the abuser and his need to control his wife, temporary restraining orders and separation may be either “extremely effective or tremendously dangerous for women”); Rosen, *supra* note 99, at 395 (“The professional literature recently has developed evidence to support the contention that a woman who is already being battered by an abusive man, and who tries to leave or get help, is placing her life at risk. In fact, the time of most danger for the woman is when she attempts to leave; women are often killed when, and because, they attempt escape. Efforts to involve outside agencies, including the police, similarly escalate the risk to the woman.”).

145. CAPE FEAR (MCA/Universal 1961); CAPE FEAR (MCA/Universal 1991).

That is, there may be a time period when a putative defender may reasonably fear a deadly attack by a putative aggressor, but the law requires this defender to wait.¹⁴⁶ Indeed, the defender must wait until the attack is imminent.

Domestic criminal law and its international law counterpart both require that a threat be imminent before the defender can lawfully employ defensive force. Yet, recent experience has led us to question this stringent temporal requirement. Internationally, the September 11 attacks raised concerns over the traditional conceptions of enemies, warfare, and weaponry. The United States went to war with Iraq to prevent a future attack, fearing that the U.S. would be unable to defend itself if and when the enemy engaged. Likewise, in the domestic context, some battered women have opted for preemptive strikes, recognizing that only when the enemy is sleeping does she stand a fighting chance.

III. THE UNDERLYING MORAL CLAIM: NECESSITY AND SELF-DEFENSE

A. *The Underlying Claim*

Fundamentally, the domestic and international challenges to the imminence requirement rest on the same dilemma. The battered woman fears that her husband will one day kill her. The American people fear terrorism and weapons of mass destruction. The only recourse in both situations is to strike first. However, the law condemns such action because an imminent threat is necessary for the right of self-defense.

While there are differences between the two spheres,¹⁴⁷ none of the differences has any bearing on the theoretical issue underlying both claims. One

146. As Sebok explains:

In both versions of the film, an ex-convict wages a carefully constructed terror campaign against his former lawyer and his family. Despite the fact that the convict never directly confronts or threatens his targets, both the police and the lawyer quickly conclude with reasonable certainty that the convict intends to cause grave harm. The problem the film raises is this: when can the lawyer kill the convict? . . . *Cape Fear* is a frightening movie because it reveals that there is a gap between the risks that society demands we accept and the amount of protection that society is capable of providing.

Anthony J. Sebok, *Does an Objective Theory of Self-Defense Demand Too Much?*, 57 U. PITT. L. REV. 725, 744 (1996).

147. Some theorists claim that the relationship between nations is not equivalent to the relationship among individuals. See, e.g., PHILIP BOBBITT, *THE SHIELD OF ACHILLES: WAR, PEACE, AND THE COURSE OF HISTORY* 361 (2002) (“The universal view of international law is flawed in two important respects . . . First, it mixes the equality of states, a legal concept, with the decision to use force, a strategic concept, in a way that is fatal to both, and thus eerily recapitulates the early prehistory of the State, which was first constituted out of the separation of these two concepts. Thus it treats the society of states as if it were a society of individuals.”); David J. Luban, *Preventive War*, available at <http://papers.ssrn.com/abstract=469862>, at 39 (“States are unlike people in virtually every way.”). While notions of equality may differ, this does not translate into a “might makes right” view of international law as David Luban rightly notes: “[T]he claim that the double

difference between international law and criminal law is the relationship between law and morality. According to Dinstein, a right to self-defense must be proven to exist in positive international law.¹⁴⁸ Moreover, Dinstein asserts that international law could eliminate the right to self-defense.¹⁴⁹ On the other hand, the individual's right to self-defense is a moral right, which we believe the state is obligated to extend to citizens as a legal right.¹⁵⁰

At the heart of the United States' argument, however, lies a moral claim. Positive international law views the National Security Strategy and the war against Iraq as illegal. But the Bush Administration claims that the law must change, and the reason the law must change is because it fails to provide nations with the ability to defend themselves effectively. The Bush Administration is advancing *an argument* against imminence. It is a moral argument about the parameters of self-defense and how self-defense must be construed to be fair and responsive to the needs of defenders.¹⁵¹

International law should be responsive to such a moral claim. In another context, Thomas Franck argues that international law should accept the moral principle of necessity because rule of law is undermined by the failure to allow for right action.¹⁵² Thus, despite the fact that international law may be more staunchly positivist than domestic criminal law, moral principles are important in each sphere.¹⁵³

Another difference between the two fields is their dispute resolution systems.¹⁵⁴ But the difference between the United Nations and the American

standard represents a *moral* theory of international politics requires some defense beyond the assertion that America has the power to act as she sees fit." *Id.* at 40.

148. DINSTEN, *supra* note 23, at 180.

149. *Id.* at 181.

150. See generally Claire Oakes Finkelstein, *On the Obligation of the State to Extend a Right of Self-Defense to Its Citizens*, 147 U. PA. L. REV. 1361 (1999) (noting this is the common assumption and the difficulties inherent therein). Some theorists situate the right to self-defense within political theory. See *infra* text accompanying notes 173–74.

151. Cf. George P. Fletcher, *Rights and Excuses*, 3 CRIM. J. ETHICS 17, 19 (1984).

In these situations of justification, the infliction of harm is either right as a matter of principle or at least permissible in view of the interests at stake. The actor need not feel remorse about inflicting harm in order to stifle a wrongful aggressor; what he is doing is right. Further, this claim of right is plausible regardless whether the right is anchored in the enacted law at [the time of trial]. Self-defense is right as a matter of principle.

Id.

152. Cf. FRANCK, *supra* note 45, at 174–91 (arguing, in the context of humanitarian intervention in the absence of Security Council approval, that positive international law, like the criminal law in *Regina v. Dudley and Stephens*, must recognize what is morally right or the law itself will be undermined).

153. It is true that the United States as a superpower has a much greater ability to *change* the law than does the battered woman. But the ability to change the law does not affect the question of whether the law should be changed.

154. See Burke, *supra* note 16, at 282 (“[T]he individual/sovereign analogy falls short because it ignores the everyday role that jurors play in American criminal cases. To

judicial system, while important in some respects, has no bearing on the imminence requirement. A state claiming self-defense acts first and reports to the United Nations second. A person acting in self-defense acts first and appears before our judicial system second. Neither system intervenes until the self-defensive action is underway or over. But, the imminence requirement sets forth an *ex ante* rule of conduct. If this requirement has meaning, then any distinction as to the adjudication of its breach has little bearing on the question of its content.¹⁵⁵

At the end of the day, both the United States and the battered woman are making two related claims.¹⁵⁶ The first claim is that a right to self-defense entails a right to effective self-defense.¹⁵⁷ The battered wife claims that if she waits for a confrontational situation, she will lose. Likewise, the Bush Administration claims that any countermeasure to WMD will occur too late.¹⁵⁸ Or, as Ruth Wedgwood

permit armies to engage in preemptive attacks is disastrous in part because there is no feasible and credible process for resolving a dispute about whether an attack is necessary.”)

155. *Cf.* FRANCK, *supra* note 45, at 186 (“The [UN] political organs have demonstrated their ability and readiness when faced with states’ recourse to force, to calibrate their responses by sophisticated judgment, taking into account the full panoply of specific circumstances.”).

156. A third possible claim is that some harm now means less harm overall. For example, we might want to intervene prior to another nation’s acquiring nuclear weapons. David Sloss, *Is Int’l Law Relevant to Arms Control?: Forcible Arms Control: Preemptive Attacks on Nuclear Facilities*, 4 CHI. J. INT’L L. 39, 53–54 (2003). The reason for this early intervention is that any use of force *now* will result in less overall injury than a major nuclear war. *Id.*; *cf.* Leo Katz, *Preempting Oneself: The Right and the Duty to Forestall One’s Own Wrongdoing*, 5 LEGAL THEORY 339, 347 (1999). But this argument does not modify self-defense; it seeks to trump it. There is good reason to set the bar very high for such a consequentialist claim, and require only extreme necessity before rights are trumped. For a real life example, consider this analysis by Michael Walzer:

The argument used between 1942 and 1945 in defense of terror bombing was utilitarian in character, its emphasis not on victory itself but on the time and price of victory. The city raids, it was claimed by men such as Harris, would end the war sooner than it would otherwise end and, despite the large number of civilian casualties inflicted, at a lower cost to human life.

....

We can recognize [the horror of these deaths] only when we have acknowledged the personality and value of the men and women we destroy in committing them. It is the acknowledgement of rights that puts a stop to such calculations and forces us to realize that the destruction of the innocent, whatever its purposes, is a kind of blasphemy against our deepest moral commitments.

MICHAEL WALZER, *JUST AND UNJUST WARS* 261–62 (3d ed. 2000).

157. *E.g.*, ROBINSON, *supra* note 47, § 131(c)(1), at 78 (“If a threatened harm is such that it cannot be avoided if the intended victim waits until the last moment, the principle of self-defense must permit him to act earlier—as early as is required to defend himself effectively.”) (emphasis added).

158. Arend, *supra* note 66, at 98.

It can be very difficult to determine whether a state possesses WMD, and by the time its use is imminent, it could be extremely difficult for a state to mount an effective defense. Similarly, terrorists use tactics that make

notes, “a ‘just in time’ defense may not work in an age of instant deliverables.”¹⁵⁹ Thus, does the right to act in self-defense obtain when the defender needs to act?

A second claim is that it is unfair for the putative victim to bear the risk here.¹⁶⁰ While an imminence rule favors the would-be aggressor, a broader time frame favors the would-be victim. The victim points to past conduct of the aggressor as evidence that the aggressor will strike again. And the victim claims that if another strike is likely, why is it that the aggressor is given the benefit of the doubt, while the victim’s life hangs in the balance?

Both of these claims underlie the moral force of the attack on imminence. After all, if we believed that an attack would occur but that defensive force could be effectively employed, we would be far less sympathetic to the claim that the putative victim must act now. Moreover, we are sympathetic to the would-be victim’s claim that it is unfair to ask her to wait in fear because doing so shifts the risk of harm to her from the aggressor.

B. Self-Defense and the Necessity of Action

Ultimately, both the Bush Administration and the battered woman want to act when it is necessary to defend themselves. The putative defender claims that

it all but impossible to detect an action until it is well underway or even finished.

Id.; see also BOBBITT, *supra* note 147, at xxi.

We are at a moment in world affairs when the essential ideas that govern statecraft must change. For five centuries it has taken the resources of a state to destroy another state: only states could muster the huge revenues, conscript the vast armies, and equip the divisions required to threaten the survival of other states. Indeed posing such threats, and meeting them, created the modern state. In such a world, every state knew that its enemy would be drawn from a small class of potential adversaries. This is no longer true, owing to advances in international telecommunications, rapid computation, and weapons of mass destruction. The change in statecraft that will accompany these developments will be as profound as any that the State has thus far undergone.

BOBBITT, *supra* note 147, at xxi.

159. Ruth Wedgwood, *Strike at Saddam Now*, NAT’L L.J., Oct. 28, 2002, at A16.

160. Jeremy Horder, *Killing the Passive Abuser: A Theoretical Defense*, in CRIMINAL LAW THEORY: DOCTRINES OF THE GENERAL PART 283, 292 (Stephen Shute & A.P. Simester eds., 2002).

A strictly construed imminence or immediacy requirement is the optimum rule for aggressors in general. It shifts the burden of risk (the defendant may lose a chance to make a pre-emptive strike, or may lose the chance to incorporate a necessary element of surprise in his or her response, and so forth) on to the defender. It shifts the burden in this way by insisting that defenders stay their hand until it appears there can be no reasonable doubt about the putative aggressor’s intentions.

Id.

she must act *now* to ensure that she will be able to effectively defend herself. Thus, the claim is that the right to self-defense obtains when one needs to act.¹⁶¹

Many criminal law scholars agree. They argue that the question of necessity, and not imminence, is the appropriate focus.¹⁶² These theorists argue that the imminence requirement should be altogether abandoned because the necessity requirement does all the moral heavy lifting. Imminence, they argue, just helps establish necessity.¹⁶³ Simply put, if necessity remains part of the elements of self-defense, imminence—which is just intended as a specific articulation of this standard—does no work.

Paul Robinson observes that:

Although the word “imminent” appears to modify the nature of the triggering conditions, it seems, and the drafters of the Model Penal Code agree, that the restriction is more properly viewed as a modification of the necessity requirement. That is, as a practical matter actions taken in the absence of an imminent threat may not be necessary.¹⁶⁴

Hence, “proper application of the necessity requirement would seem adequate to prevent potential abuse of a justification defense in cases where the force is not imminent.”¹⁶⁵

To fully understand the relationship between imminence and necessity, consider Robinson’s famous hypothetical. Robinson imagines that “*A* kidnaps and confines *D* with the announced intention of killing him one week later. *D* has an opportunity to kill *A* and escape each morning as *A* brings him his daily ration.”¹⁶⁶ Must *D* wait “until *A* is standing over him with a knife?”¹⁶⁷ Robinson thinks not:

If the concern of the limitation is to exclude threats of harm that are too remote to require a response, the problem is adequately handled by requiring simply that the response be “necessary.” The proper

161. Rosen, *supra* note 99, at 375–76 (“By relying on the imminence requirement, the North Carolina Supreme Court never answered the question whether it was *necessary* for Ms. Norman to kill her husband to avoid great bodily harm or death. And is not *this* the proper question that should be addressed in *Norman* and similar cases?”).

162. Burke, *supra* note 16, at 279 (“Because the requirement of imminence is an imperfect proxy to ensure that a defendant’s use of force is necessary, a better standard would require that the use of force be necessary.”); Jeffrey B. Murdoch, Comment, *Is Imminence Really Necessary? Reconciling Traditional Self-Defense Doctrine with the Battered Woman Syndrome*, 20 N. ILL. U. L. REV. 191, 217 (2000) (“Whether a killing was necessary is a question of fact. Eliminating the imminence requirement from self-defense merely allows juries to realistically consider, given the totality of the facts of any given situation, whether the use of defensive force was necessary.”); Rosen, *supra* note 99, at 380 (“In self-defense, the concept of imminence has no significance independent of the notion of necessity. It is, in other words, a ‘translator’ of the underlying principle of necessity.”).

163. Rosen, *supra* note 99, at 392 (“Imminence remains, as do the other factors in the case, relevant to the jury’s core inquiry: Was the killing necessary?”).

164. ROBINSON, *supra* note 47, § 131(b)(3), at 76.

165. *Id.* at 76–77.

166. *Id.* § 131(c)(1), at 78.

167. *Id.*

inquiry is not the immediacy of the threat but the immediacy of the response necessary in defense. If a threatened harm is such that it cannot be avoided if the intended victim waits until the last moment, the principle of self-defense must permit him to act earlier—as early as is required to defend himself effectively.¹⁶⁸

Robinson's focus is important here. To him, this inquiry boils down to a necessity determination and the proper focus is on the intended victim. The question is not "is the aggressor acting now?" but "must the intended victim act now?"

This view has a significant following.¹⁶⁹ Indeed, many scholars believe the Model Penal Code's requirement of "immediately necessary" correctly casts the balance between defenders and aggressors.¹⁷⁰ It is believed that "immediately necessary" will encompass those cases in which the harm is not imminent,¹⁷¹ but, as Robinson would say, the response is necessary.¹⁷²

168. *Id.*

169. Stephen Morse, for example, concludes that loosening the imminence requirement would be unproblematic because the actor would still need to show necessity, "a showing [which in many locations and under most circumstances], may be difficult or impossible if the threat is not temporally immediate." Morse, *supra* note 37, at 309. Richard Rosen advocates a burden-shifting approach in which "the trial judge could instruct the jury that a killing in self-defense must be in response to an imminent danger unless the defendant is able to meet an initial burden of production by presenting substantial evidence that the killing was necessary even though the danger was not imminent." Rosen, *supra* note 99, at 405.

170. Schopp, *supra* note 101, at 69 ("Immediate necessity, not imminence of harm, should be considered essential to self-defense claims, including those asserted by battered women."); Schulhofer, *supra* note 15, at 127 ("Imminence is relevant only because it helps identify cases where flight or legal intervention will be impossible, so that violent self-help becomes truly necessary. The decisive factor is necessity, not imminence *per se*. Thus, the proper approach is . . . to require, as proposed in Model Penal Code § 3.04, that the use of force be 'necessary on the present occasion.'").

The Model Penal Code, § 3.04, reads, "the use of force upon or toward another person is justifiable when the actor believes that such force is *immediately necessary* for the purpose of protecting himself against the use of unlawful force by such other person on the present occasion." (emphasis added).

The use of "immediately necessary" does not resolve all problems, however. It still fails to tell us when Robinson's captive must act. Is it immediately necessary to act on the first day of his capture? How long must he wait? Robinson also views the Model Penal Code's immediately necessary formulation as insufficient. "Under such a formulation, *D* may have to wait until his last chance to kill *A*, that is, on the morning of his impending execution." ROBINSON, *supra* note 47, § 131(c)(2), at 79.

171. Curiously, in practice, states adopting the immediately necessary standard have typically imposed a more stringent temporal requirement. See Maguigan, *supra* note 131, at 450 ("The immediacy requirement results in a higher threshold showing for admission of evidence and in a lower likelihood that instructions are given to the jury on the relevance of evidence received about the history of other violence, the history of abuse, and expert testimony."); see, e.g., *Arizona v. Reid*, 747 P.2d 560, 564 (Ariz. 1987) (finding insufficient facts to show defendant was in immediate danger where abused daughter killed her father while he was sleeping); *Kansas v. Hernandez*, 861 P.2d 814, 820 (Kan. 1993)

Moreover, two theorists who purport to give imminence independent content actually advance sophisticated “imminence as necessity” arguments. George Fletcher, for example, grounds imminence in political, not moral, theory.¹⁷³ Fletcher argues that the citizen may only act for the good when the state lacks the opportunity to do so:

[T]he imminence requirement expresses the limits of governmental competence: when the danger to a protected interest is imminent and unavoidable, the legislature can no longer make reliable judgments about which of the conflicting interests should prevail . . . the police are no longer in a position to intervene The individual right to self-defense kicks in precisely because immediate action is necessary.¹⁷⁴

Fletcher’s position is just a sophisticated “imminence as proxy for necessity” argument. He simply claims that only when it is really, really necessary may the defendant act. Notice how he views the right to self-defense as “kicking in” because “immediate action is necessary.” Curiously, Fletcher rejects battered women’s claims despite striking evidence that battered women make significant efforts to receive police assistance.¹⁷⁵ Yet, according to Fletcher, the right to engage in self-defense is contingent on the ability of the state to intervene.¹⁷⁶ Thus, one would expect that if a battered woman makes a showing that the police have failed to protect her, she should be entitled to an instruction on self-defense.¹⁷⁷ But the debate is still about necessity.

(“Although the term imminent describes a broader time frame than immediate, the term imminent is not without limit.”)

172. Indeed, English law only requires reasonableness, and Glanville Williams contends that this requirement implies imminence. GLANVILLE WILLIAMS, *TEXTBOOK OF CRIMINAL LAW* 450 (1978).

173. Fletcher, *supra* note 34, at 570.

174. *Id.*

175. See FLETCHER, *supra* note 48, at 21, 22 (“Retaliation, as opposed to defense, is a common problem in cases arising from wife battering and domestic violence.”) and (“Those who defend the use of violence rarely admit that their purpose is retaliation for a past wrong. The argument typically is that the actor feared a recurrence of past violence This is the standard maneuver in battered wife cases.”).

176. *Id.* at 18 (“When individuals are threatened with immediate aggression, when the police cannot protect them, the monopoly of the state gives way. The individual right of survival reasserts itself.”)

177. Benjamin Zipursky criticizes Fletcher on this very point:

The most serious qualification of Fletcher’s argument is that it shows only half of what it purports to show. What it shows is that *in cases where objective imminence exists, self-defense should be permitted*. However, that proposition (suitably qualified) has not been seriously in question. The more difficult proposition is that *in cases where objective imminence does not exist, self-defense should not be permitted*. Fletcher has said little explicitly in support of this latter proposition.

Benjamin C. Zipursky, *Self-Defense, Domination, and the Social Contract*, 57 U. PITT. L. REV. 579, 586 (1996) (emphasis added).

Joshua Dressler recently rejected an “inevitability” standard as justifying self-defense. Why not allow a battered woman to act whenever the harm is inevitable? The problem, according to Dressler, “lies in its speculativeness”:

Human beings are far less predictable than funnel clouds because they possess the capacity for free choice. They are the “wild cards” in any predictive game. This does not mean that human beings *always* defy predictions, or even that specific humans *usually* defy predictions; it is enough to say they *sometimes* defy predictions, and the likelihood of error rises dangerously when one is merely predicting some “inevitability,” well down the road.¹⁷⁸

This view, that we cannot predict that the aggressor will act until the harm is imminent, is yet another necessity argument. If we are not sure that the putative aggressor will eventually go through with the crime, then there is no need for the victim to act. And, for Dressler, we must wait until there is a need to act in order to give proper moral weight to the aggressor’s interests. On this account, the question of whether the putative aggressor will act drives the necessity calculation.

Hence, to many criminal law theorists, the appropriate question is whether it was necessary for Judy Norman to kill her husband. Norman would point to her husband’s threats and the escalation of abuse that occurred just prior to her actions. Norman would argue that her death was inevitable, that she lacked the ability to prevent death by nonlethal means, that she would not be protected by the police, and that she could not escape.¹⁷⁹ This, of course, is not to say that Norman would be acquitted.¹⁸⁰ But she would be entitled to have a jury determine whether her action was immediately necessary that evening.

Such a standard is not only responsive to the battered woman’s claim but also purports to alleviate the significant concerns raised by international law scholars. Many international law theorists argue that without the imminence requirement, self-defense lacks an objective criterion for the permissible use of force.¹⁸¹ In their view, without imminence, self-defense will deteriorate to nothing

178. Dressler, *supra* note 30, at 274–75.

179. Sebok, *supra* note 146, at 728 (arguing the need to meet these three elements).

180. Problematically for Norman, the North Carolina Supreme Court argued that a fear of death on Norman’s part was not reasonable given that she had never previously been subjected to deadly force. *North Carolina v. Norman*, 378 S.E.2d 8, 15 (N.C. 1989) (“Such predictions of future assaults to justify the defendant’s use of deadly force in this case would be entirely speculative, because there was no evidence that her husband had ever inflicted any harm upon her that approached life-threatening injury, even during the ‘reign of terror.’”); *see also* Sebok, *supra* note 146, at 746–47 (arguing that it would be difficult for Norman to prove that it was highly probable that her husband would ever kill her).

181. DRUMBL, *supra* note 4, at 44 (“On another note, were the Preemption Doctrine to gather steam, it will become necessary to spell out certain objective criteria that must be established before the use of force is to be permitted. In the absence of such objective criteria, the Doctrine could be invoked based on subjective fear and might become uncontrollable.”); O’Connell, *supra* note 43, at 19.

If America creates a precedent through its practice, that precedent will be available, like a loaded gun, for other states to use as well

more than subjective fear.¹⁸² A second, related concern is that this approach leads to devolution of decision-making power from the United Nations to the individual nations. Thus, there will be increased violence and it may be less organized, leading to an “increase [in] instability and anarchy.”¹⁸³

The “immediately necessary” standard seems to answer these concerns. “Immediately necessary” is an objective determination that the international community should be equipped to adjudicate. Indeed, international law must currently cope with adjudicating whether an attack is “imminent.” Thus, so long as an objective determination is being made, international use of force should not deteriorate to subjective fears.

Moreover, while many scholars believe the Security Council should retain control over handling threats that are not imminent, this claim fails for the same reason that urging battered women to seek police protection fails.¹⁸⁴ Indeed, the Security Council is more political and has less legitimacy than a local police force. As Dinstein notes, “[j]ust as the Council may take action against a threat to the

Preemptive self-defense would provide legal justification for Pakistan to attack India, for Iran to attack Iraq, for Russia to attack Georgia, for Azerbaijan to attack Armenia, for North Korea to attack South Korea, and so on. Any state that believes another regime poses a possible future threat—regardless of the evidence—could cite the United States invasion of Iraq.

Id.

182. *E.g.*, Stahn, *supra* note 4, at 45.

To replace the requirement of an imminent danger by that of a “sufficient danger” transforms the very essence of self-defense. It would allow unilateral action by a state on its own decision, on the basis of its own findings, and on its own characterization of those facts. Such an empowerment of the “self” shakes the foundations of the concept of self-defense because it breaks with the principle that “no state is actually the sole judge of its own cause” when exercising self-defense.

Id. Dietrich Murswiek argues:

Should this view prevail and become a new rule of international law, the general prohibition of the use of force will be abolished for all intents and purposes. There are many States ruled by “rogues.” If every nation is permitted to make war on every other nation it regards as a “rogue State,” there will be no more international security.

Murswiek, *supra* note 86.

183. DRUMBL, *supra* note 4, at 23. Mark Drumbl argues that “[a]s there is more and more scope for self-defense, the importance of the nation-state rises and the influence of international institutions in the decision whether or not to use force wanes. This may well create a situation in which the deployment of lethal force in self-defense becomes inconsistent, perhaps even indeterminate.” *Id.* at 35; *see also* Stahn, *supra* note 4, at 49 (“If the Bush doctrine became the new law, it would have devastating consequences for world public order. . . . It would transform the existing system from a rule of law-based framework to a balance of power system.”).

184. These scholars claim that while the right of self-defense for an attack that is actually instant and overwhelming will be preserved, when the imminence requirement is not met, the Security Council can evaluate evidence and determine when action is necessary. Stahn, *supra* note 4, at 49. Article VII vests the Security Council with authority to “maintain or restore international peace or security.” DINSTEIN, *supra* note 23, at 279.

peace which is imperceptible to the public eye, it may also decline to acknowledge the existence of a manifest threat to the peace.¹⁸⁵ Conversely, if UN action is possible, then actions will not be deemed “immediately necessary.”¹⁸⁶

Hence, articulating “necessary on the present occasion” should be the international lawyer’s agenda.¹⁸⁷ It is true that international lawyers will now have to think about what acts can give rise to an honest and reasonable belief,¹⁸⁸ but there is no reason to think that the objectivity of the defense is lost with the abandonment of imminence. Thus, there remains, in international law guise, a requirement of an honest and reasonable belief that the force is necessary. If this is still an element of self-defense, all the concerns that attacks will be based on subjective fears are misguided. Rather, the imminence requirement was helpful only insofar as it articulated a specific way in which that belief might be honest and reasonable.

The standard of “immediately necessary” speaks to the claims of battered women and nations threatened with weapons of mass destruction. It entitles them to act when they *must* so that they may protect themselves. Unfortunately, this standard rests on a faulty conception of self-defense and therefore fails.

Self-defense is not a simply a species of necessity. Rather, self-defense is a limited entitlement to respond to aggression. Imminence plays a pivotal role in

185. DINSTEN, *supra* note 23, at 283.

186. One problem with this approach is that the very authority found to be inept (the UN) is the same body that adjudicates whether it was inept. The domestic legal system can more easily resolve protection failures because the police do not adjudicate the necessity of action, a jury does.

187. See, e.g., Arend, *supra* note 66, at 98. Arend asks, “[w]here does one draw the line?” Is possession of WMD sufficient? But “[g]iven the current realities in the international system, India would be able to use force against Pakistan, and vice versa; Iraq could target Israel; and many states could target the United States, Great Britain, France, China, and Russia.” *Id.* What of hostile intent, which arguably could allow for intervention even before the possession of WMD? “In a sense, Israel was making this kind of claim when it struck the Osirak reactor in 1981.” *Id.*

188. Some scholars have already started to attempt to articulate those standards.

Thomas Graham suggests using four questions proffered by Richard Maxon to analyze a situation to determine if it can be justified by self-defense:

“Are there objective indications that an attack is imminent? Factors such as troop buildups, increase alert levels, increased training tempo, and reserve call-ups may suggest that an attack is imminent.”

“Does the past conduct or hostile declarations of the alleged aggressor reasonably lead to a conclusions that attack is probable?”

“What is the nature of the weapons available to the alleged aggressor nation, and does it have the ability to use them effectively?”

“Is the use of force the last resort after exhausting all practicable, peaceful means?” Diplomacy is always the best course to take for long-term success if possible.

Graham, *supra* note 67, at 9 (quoting Richard G. Maxon, *Nature’s Eldest Law: A Survey of a Nation’s Right to Act in Self Defense*, 25 *PARAMETERS* 55, 62–63 (1995) (emphasis omitted)). David Sloss advocates Security Council intervention prior to a country’s introduction of nuclear material into a facility. Sloss, *supra* note 156, at 53–54.

the right to self-defense as it defines what types of threats constitute aggression, and separates self-defense from self-privilege.

IV. IMMINENCE AND THE RIGHT TO SELF-DEFENSE

Imminence should not be subsumed within necessity. The “immediately necessary” standard obfuscates the important distinction between self-defense and self-preference. Moreover, theorists who contend that imminence is simply a proxy for necessity mistakenly presuppose that imminence has no import of its own. However, imminence does have an independent purpose as it serves as the *actus reus* of aggression and it is our understanding of aggression and threats that distinguishes self-defense from other acts of self-preference.

A. The Failures of the “Immediately Necessary” Standard

Despite the intuitive plausibility of the “immediately necessary” standard, it should be rejected. First, the “immediately necessary” standard obscures the important distinction between self-defense and other self-preferential acts. Second, proponents of the “immediately necessary” standard have simply assumed that the only purpose of the imminence requirement is to establish necessity. However, the challenge of battered women has led these theorists astray. The “immediately necessary” standard is being applied to Robinson’s hostage and to battered women, but the very fact that they are deemed *hostages* undermines the force of the argument. Ultimately, most battered women cases do not constitute challenges to the imminence requirement; they are merely examples of a kidnapping/hostage paradigm where imminence is not required.

1. Self-Defense and Self-Preference

Self-defense is distinguishable from other necessary acts of self-preservation. Consider two versions of the famous English case, *Regina v. Dudley and Stephens*.¹⁸⁹ In the first version, as it really happened, four men were in a lifeboat with almost nothing to eat for twenty days.¹⁹⁰ Dudley decided that they should kill and eat Richard Parker, the cabin boy.¹⁹¹ Parker, who had consumed significant amounts of seawater, was close to death.¹⁹² The men ultimately killed Parker and fed upon his body.¹⁹³ After being rescued, Dudley and Stephens were charged with murder.¹⁹⁴ In deciding whether the men had committed homicide, the court was quick to point out that Parker was not a threat to the men, and they were not acting in self-defense.¹⁹⁵ Because their claim did not sound in self-defense, the

189. 14 Q.B.D. 273 (1884).

190. *Id.* at 273–74.

191. *Id.* at 274.

192. *Id.*

193. *Id.*

194. *Id.* at 273.

195. *Id.* at 279 (“it is not even suggested that his death was due to any violence on his part attempted against, or even so much as feared by, those who killed him”).

justificatory claim was necessity—that the defendants had chosen the lesser evil.¹⁹⁶ However, the court did not allow necessity to be a defense to homicide,¹⁹⁷ a limitation that remains the rule in many jurisdictions.¹⁹⁸

Now imagine a scenario where the defendants would claim self-defense. Imagine that Parker blames Dudley for their situation. Parker then lunges at Dudley with a knife. Dudley may certainly kill Parker in self-defense.

In some respects, these cases are quite similar. In the actual case, Dudley and Stephens claimed their actions were necessary because they lacked an alternative source of food and did not foresee rescue prior to their deaths. In the hypothetical case, the use of defensive force is likewise premised upon an assessment of the probabilities and alternatives. For defensive force to be necessary, the self-defender must reasonably believe that harm to her is likely and that she has no alternative to the use of force.

The difference between the two cases is that the first is a *self-preferential* killing, while the second is *self-defensive*. All self-defense cases are instances of self-preference, but not all self-preferential actions constitute self-defense. What is unique about the self-defense case is that the act of force is employed to ward off an unjust immediate threat. Conversely, in the first scenario, the act was not defensive as Parker did not pose a threat to the men.¹⁹⁹

Self-defense is treated differently from other necessary acts of self-preservation. We may object to killing Richard Parker in *Regina v. Dudley and Stevens*, but we would not deny the right to kill in the case of self-defense. Existing law reflects this sentiment. The necessity justification is the least recognized justification,²⁰⁰ and many common law jurisdictions still retain the limitation that necessity (and duress) are not defenses to murder.²⁰¹ In contrast, no

196. DRESSLER, *supra* note 27, § 22.04, at 292–93.

197. *Id.* at 293.

198. *Id.* at 293–94; *see also infra* note 201.

199. UNIACKE, *supra* note 33, at 191.

The rights, and especially the equal rights, of other people limit the positive right to act directly to resist, repel, or ward off the infliction of unjust harm. For instance, I have no positive right to defend myself by forcibly using an unoffending person as a shield against attack, or by deflecting an unjust threat aimed at me to an innocent bystander who will then be killed.

Id.; *see also* FLETCHER, *supra* note 48, at 34 (noting the purpose of self-defense is to “repel the attack.”).

200. ROBINSON, *supra* note 22, at 97 (necessity is the least common justification in American criminal codes).

201. *See* ARIZ. REV. STAT. § 13-417(c) (2003) (“An accused person may not assert the defense under subsection A for offenses involving homicide or serious physical injury.”); *Peals v. Arkansas*, 584 S.W.2d 1, 4 (Ark 1979) (“However, justification as argued under Ark. Stat. Ann. § 41-504, (Repl. 1977), does not appear to be appropriate in a charge of homicide. We have found no case in any jurisdiction which holds that the ‘choice of evils’ justification has been applied to a homicide case when self-defense is argued by the accused.”); KY. REV. STAT. ANN. § 503.030(1) (2002) (“[N]o justification can exist under this section for an intentional homicide.”); MO. REV. STAT. § 563.026(1) (2003) (“conduct

jurisdiction rejects the right to self-defense.²⁰² And, of course, self-defense is a defense to murder.²⁰³

Additionally, self-defense allows the killing of any number of culpable aggressors. As Jeff McMahan notes, “[A]ccording to commonsense morality, an Innocent Victim is permitted to kill a [culpable aggressor] irrespective of differences in age, quality of life, or usefulness to society She may kill any number of [culpable aggressors] if this is necessary for self-defense.”²⁰⁴ Numbers count for necessity, but they do not for self-defense against culpable aggressors.

Finally, consider Tort law. *Vincent v. Lake Erie Transportation Company*²⁰⁵ was a classic instance of necessity. A boat was legally docked prior to a storm, and the boat owner made the reasonable decision not to leave the dock once a terrible storm began. However, in keeping the boat tied to the dock, the boat owner caused considerable damage to the dock.

Famously amending the rule in *Ploof v. Putnam*,²⁰⁶ the court held that the privilege of necessity was a limited one. Although the dock owner could not untie the boat, the dock owner was entitled to damages from the ship owner. The ship owner thus could not redistribute the loss from himself to the dock owner. The privilege to act in necessity is a privilege we pay for.

We need not, however, pay to exercise the right to self-defense. If A points a gun at B, and, B reasonably perceiving A to be a threat, kills A, A need not pay B’s family for the right to privilege her life over B’s. In the case of necessity, one must compensate for the infringement of the right; in the case of self-defense, we do not deem the aggressor’s right to be violated or infringed.²⁰⁷

which would otherwise constitute any crime other than a class A felony or murder is justifiable and not criminal when it is necessary as an emergency measure to avoid an imminent public or private injury”); MONT. CODE ANN. § 45-2-212 (2003) (“A person is not guilty of an offense, other than an offense punishable with death, by reason of conduct which he performs under [duress].”); *Esquibel v. New Mexico*, 576 P.2d 1129, 1132 (N.M. 1978) (“We hold that duress [necessity] is a defense available in New Mexico except when the crime charged is a homicide or a crime requiring intent to kill.”); WIS. STAT. § 939.47 (2003) (“[Necessity] is a defense to a prosecution for any crime based on that act, except that if the prosecution is for first-degree intentional homicide, the degree of the crime is reduced to 2nd-degree intentional homicide.”).

202. See *supra* note 42.

203. See *generally id.*

204. Jeff McMahan, *Self-Defense and the Problem of the Innocent Attacker*, 104 ETHICS 252, 261 (1994).

205. 124 N.W. 221 (Minn. 1910).

206. 71 A. 188 (Vt. 1908).

207. Cf. George P. Fletcher, *The Right to Life*, 13 GA. L. REV. 1371, 1386, 1388 (1979) (arguing that Thomson’s infringement/violation dichotomy, which she employs to explain why acts based on necessity require compensation, “doesn’t map neatly” onto self-defense and that when we act in self-defense we likewise infringe a right but that compensation is not owed); see *generally* Judith Jarvis Thomson, *Some Ruminations on Rights*, 19 ARIZ. L. REV. 45 (1977) (distinguishing rights violations from rights infringements).

In summary, self-defense is commonly distinguished from necessity. There are certainly instances where self-preference is allowed and results in the lesser evil. But we pay to prefer ourselves, and this preference may be limited. Self-defense, in contrast, is a special kind of self-preference. An individual who acts in self-defense does not owe compensation, and is permitted to harm, and even kill, other people.

The “immediately necessary” standard for self-defense elides the distinction between self-defense and self-preference. Recall that the argument for the abandonment of imminence is that a defender should be able to act *as early as is necessary to defend herself effectively*. Problematically, the “immediately necessary” standard operates independently of the intentions, capabilities, or actions of a putative aggressor.

First, the intentions of the putative aggressor are irrelevant. Assume that *A* is a friend of *B*.²⁰⁸ *A* always carries a gun and is a quick shot. *B* likewise carries a gun, but cannot draw quickly. Unbeknownst to *A*, *B* is having an affair with *A*'s wife. *B* also believes that sooner or later *A*'s wife will confess to the affair, and that *A* is quite hot-tempered and jealous. Thus, if *B* is around *A* when *A* finds out, *B* knows that he is dead. May *B* kill *A* now?

Assume that everything *B* believes is reasonable. And, if *B* does not act, there will come a time when *A* finds out, and *B* will not be able to act to defend himself against the attack. If the right to self-defense obtains *as early as is necessary to defend himself effectively*, *B* may kill *A* now. Thus, despite the fact that *A* lacks any intention to kill *B* now, the need to act may arise.²⁰⁹ Under an “immediately necessary” standard, one can no longer distinguish *Dudley and Stephens* from acts of self-defense on the basis of the “culpability” of the aggressor because the need to act may obtain prior to the formation of a culpable intention.

The same problem arises regarding capabilities. The United States currently must confront the embarrassing situation that no weapons of mass destruction have yet to be found in Iraq, nor does it seem that such weapons will ever be found.²¹⁰ But does that matter? President Bush recently argued that the war was nevertheless justified: “If [Saddam Hussein] were to acquire weapons, he would be the danger That’s what I’m trying to explain to you. A gathering

208. This is a slight variation of a hypothetical suggested to me by Larry Alexander.

209. Or, consider a country that has weapons of mass destruction and is currently on friendly terms with the United States. If the United States suspects that in an upcoming election, the citizens of that nation will elect a zealot with anti-Western ideas, may the United States strike now? Cf. David E. Sanger & Thom Shanker, *A Nuclear Headache: What if the Radicals Oust Musharraf?*, NYTIMES.COM (Dec. 30, 2003), at <http://www.nytimes.com/2003/12/30/international/asia/30DIPL.html>.

210. See Richard W. Stevenson & Thom Shanker, *Ex-Arms Monitor Urges an Inquiry on Iraqi Threat*, N.Y. TIMES, Jan. 29, 2004, at A1, available at <http://www.nytimes.com/2004/01/29/politics/29WEAP.html?th> (quoting Dr. David Kay, the former chief weapons inspector in Iraq, as stating that “we were all wrong” in believing that Iraq had large stockpiles of weapons of mass destruction at the start of the war).

threat, after 9/11, is a threat that needed to be dealt with, and it was done after 12 long years of the world saying the man's a danger."²¹¹

Under an "immediately necessary" standard, President Bush's claim is correct. If the President believed that when Saddam Hussein acquired weapons of mass destruction, he would attack, and believed that at that time the United States would have no way to abate the harm, then the right to self-defense would obtain prior to the acquisition of such weapons. After all, this early intervention is when the United States would have the ability to defend itself effectively.

Finally, not only does the necessity standard not require any current intention or capability on the part of the "aggressor" but it also treats the likelihood of threat and the availability of alternatives as even trade-offs. For example, at a point in time ("t1"), one might predict that the chances that *A* will try to kill *B* are 30%, but if *B* acts now, his likelihood of success is 70%. Later ("t2"), the likelihood that *A* will kill *B* might increase to 70%, but *B*'s likelihood of success may decrease to 30%. If the only standard is that *B* may act as early as is necessary to defend himself effectively, then *B* can act at t1. But this trade-off in probabilities is a trade-off of *A*'s life against *B*'s. While the necessity standard may allow *B* to act at t1, we may legitimately ask whether this is fair and appropriate.

Hence, the defender's need to act may arise prior to the formation of a culpable intention by the aggressor or the acquisition of armaments necessary to launch an attack. If the right to self-defense is simply a right to act as early as is necessary to defend oneself effectively, then the need to defend may very well arise far before the initiation of any aggression.

How, though, can an "immediately necessary" act of self-defense be distinguished from actions premised on the general justification of necessity? Both defenses seem to begin and end with an assessment of need based on probabilities and alternatives. The need to act is the only morally relevant feature for both. Thus, the "immediately necessary" standard collapses all instances of self-preference into self-defense.

Moreover, requiring that the action be "immediately" necessary will not prevent this collapse. It is "immediately" necessary for *B* to act at t1 if *B* wishes to preserve his chances of success. As Robinson notes, the immediacy requirement does little to resolve the question of whether his hostage may attack early or must wait until the knife is at his throat.²¹² Indeed, were Judy Norman's actions *immediately* necessary? It appears that any time the probabilities are in favor of the defender, the passage of time itself may affect that defender's effectiveness, thus rendering it necessary to act immediately to preserve one's chances of success. If action is authorized when necessary, the immediacy requirement does no work.

One might also wish to prevent this conceptual collapse by suggesting that the "immediately necessary" standard does not fully encompass the right to self-defense. Rather, the right to self-defense includes not only the need to act, but

211. Richard Stevenson, *Remember 'Weapons of Mass Destruction'? For Bush, They Are a Nonissue*, N.Y. TIMES, Dec. 18, 2003, at A26, available at <http://www.nytimes.com/2003/12/18/politics/18PREX.html?th>.

212. See *supra* note 170.

also more specifically, the need to respond to aggression.²¹³ The first part of the test need not fulfill the requirements of the second.

We may certainly wish to require not only that the defender's action be necessary but also that the threat be of a certain type. But this is the important point. The trouble with the "immediately necessary" standard is that it is singularly focused on the needs of the defender, thus ignoring the defining aspect of self-defense—that self-defense is an action against a *threat*. Hence, the need to act is itself insufficient to distinguish self-defense from other acts of self-preservation.

2. *The Role of Imminence*

Not only is the "immediately necessary" standard problematic because it fails to distinguish self-defense from other self-preferential acts, but also there is no reason to assume that the imminence requirement is subsumed within the necessity standard. As discussed above, many criminal law theorists view imminence as a way of establishing necessity. If a threat is imminent, the need to act is clear. Among a constellation of factors that are able to establish necessity, imminence provides one clear method for so doing.

It is certainly true that imminence does serve this role. When a threat is imminent, the actor is in a "do or die" situation. Conversely, if the aggressor's threat is not yet imminent, the need to act may not be apparent. The aggressor may change her mind. The defender may have time to seek out other alternatives to the use of force. A variety of other factors could foil the aggressor's plans. Thus, when a threat is not imminent, we may legitimately question whether the actor *needs* to act.

However, simply because imminence is a way of establishing necessity does not mean that imminence has no conceptual purchase of its own. Recall that Robinson imagines a captive victim, informed by a would-be aggressor that the aggressor will kill him at the end of the week.²¹⁴ Robinson claims that the captive victim need not wait until the knife is pointed at his throat.²¹⁵ According to Robinson, the proper focus is not how close the threat is to completion, but rather, when must the victim act to assure his defense.²¹⁶ Thus, it may be necessary for the victim to act, even before the threat is imminent.

Notably, when imminence conflicts with necessity, the argument goes that imminence simply drops out of the equation. Robinson asserts that his captive is authorized to act even when the imminence criterion requires waiting it out. However, the force of the argument comes from its conclusion—that people have a right to act when it is necessary, even when the harm is not imminent.

213. Robinson, for example, requires that "an aggressor unjustifiably threatens harm to any legally-protected interest." ROBINSON, *supra* note 47, § 131(a), at 73. He then defines an aggressor as "any person who *contributes* to the threat of harm to the defendant." *Id.* § 131(b)(1), at 73.

214. *Id.* § 131(c)(1), at 78.

215. *Id.*

216. *Id.*

But there is another possibility—one that Robinson only briefly acknowledges: in considering whether *D* should be required to wait until *A*'s threat is imminent, Robinson notes:

Such a view is not entirely inappropriate since it gives *A* the opportunity to change his mind about killing *D*, and it thereby avoids the loss of either life. But one may disagree as to whether it is appropriate to give the opportunity to *A* at *D*'s expense, by forcing *D* to risk the chance that *A* will decide to kill him a day earlier.²¹⁷

In the context of Robinson's hypothetical, his conclusion, that *D* may act now, certainly seems correct. But why? Robinson's hypothetical takes place during a kidnapping. One might believe that deadly force is necessary to stop the continuing offense of kidnapping irrespective of whether *A* threatens *D* with death or has promised *D* that he will release him upon payment of a ransom. If *D* cannot escape without killing *A*, this alone is sufficient justification for the use of deadly force. While Robinson's hypothetical illustrates an instance where the defender has no alternative to the use of deadly force, it does so by simultaneously introducing an alternative justification for the use of self-defense.

Most of our intuitions in battered women cases are likely the result of the kidnapping paradigm. If Judy Norman cannot escape her husband, she is a hostage. This hostage-analogy does significant work in advancing the claim of "immediately necessary" self-defense because the kidnapping itself is continually invading the victim's rights, and thus, while the kidnapping is occurring, there is no need to look to imminence.²¹⁸

While a full argument is beyond the scope of this paper, it seems that hostage-situations, like slavery, are the sorts of harms to persons that warrant deadly force. The abusive husband prevents the battered wife from pursuing her own projects and from defining herself. This denial of personhood warrants the employment of deadly force.²¹⁹

217. *Id.* § 131(c)(2), at 79.

218. In this respect, Martha Mahoney misses the true import of her theory of separation assaults because she employs the theory to argue that a temporal requirement has been met, rather than seeing that no temporal requirement is necessary. *See* Mahoney, *supra* note 15, at 87.

For an examination of the possibility of using the kidnapping standard that exists within current law, see Gregory A. Diamond, Note, *To Have But Not to Hold: Can "Resistance Against Kidnapping" Justify Lethal Self-Defense Against Incapacitated Batterers?*, 102 COLUM. L. REV. 729 (2002).

219. *Cf.* EWING, *supra* note 99, at 78–85 (offering a theory of psychological self-defense as legal justification); Jane Maslow Cohen, *Regimes of Private Tyranny: What Do They Mean to Morality and for the Criminal Law?*, 57 U. PITT. L. REV. 757, 799 (1996) (acceptance of imminence standard in battered women cases "implicates a refusal to grant significance to those ongoing relationships of domination, terror, and despair in which an efficient or, at the least, a clever tyrant may be able to deprive a subject of her freedom without resort to the use of the ultimate unlawful threat"); Horder, *supra* note 160, at 291 ("There are, it seems to me, important similarities between hostage situations and the relationships of domination, unpredictability, and violence in which battered women find

Indeed, the sanitized version of the Norman facts, offered by both appellate courts, fails to reveal the full contours of Judy Norman's situation. By foregrounding the search for the threat of deadly force, the courts obscure the other reasons why Norman properly used deadly force. Judy Norman married J.T. Norman when she was a child—she was but fourteen years of age. She could never escape him. During her time in captivity, she was “forced into prostitution”—that is, Judy Norman was repeatedly raped. It is not hard to believe that J.T. never planned to kill his captive, and why would he?²²⁰ He had a slave whose life (not whose death) he could dominate. There was not an imminent or inchoate threat of death. There was an ongoing and persistent denial of life.

Hence, ironically, the battered woman's situation that has created the greatest pressure on the imminence requirement does so because theorists continually stipulate to the most important fact: the battered woman's inability to leave. If it is in fact the case that the battered woman can show that she is a hostage and cannot escape her husband, this alone should be sufficient for the exercise of deadly force.²²¹

themselves trapped.”); Sebok, *supra* note 146, at 754 (arguing the denial of the battered woman's autonomy is sufficient to justify self-defense); Stark, *supra* note 15, at 1009 (offering a “coercive control” model of battering); Zipursky, *supra* note 177, at 611.

Not surprisingly, men who violently abuse their wives or partners often intentionally trap them or intentionally give them good reasons to believe that they have no genuine alternative paths of relief. They do this by threatening to find them and beat them if they try to escape (and by carrying through on these threats); they do this by circumventing legal authorities if those authorities are contacted, and then punishing the women more brutally for contacting the authorities, or simply by threatening to wait out any legal obstacles and carrying through on those threats.

Zipursky, *supra* note 177, at 611.

220. *But see* WALKER, *supra* note 15, at 51 (“Women who killed in self-defense recognized that something changed in the final incident and he was going to act out his threat this time.”).

221. No doubt this avenue is mired with issues. Some women do not leave, not because of fear of retaliation, but because social and economic factors make leaving more difficult. But these women would not be deemed “hostages” under the analysis above. *Accord* Schulhofer, *supra* note 15, at 130 (“But if the woman is mentally responsible, and if escape is possible in terms of the social and economic resources reasonably available, then—even though escape may indeed be difficult—the criminal law, unfortunately, has to come down forcefully in favor of the hard choice that minimizes violence and saves lives.”). Alafair Burke provides a clean contrast:

[Imagine a woman who leaves her husband, but because of religious convictions, behavioral problems with her children, and fear of losing custody of her children, she returns home.] She is not cognitively incapable of recognizing escape options; rather, she recognizes her escape options and makes what she decides is a rational decision not to pursue them. If she were subsequently threatened with imminent force by her husband, she would retain her rights to use self-defense, because her decision to return does not make her blameworthy for her husband's subsequent conduct. If she decides instead, however, to shoot her

Proponents of the “immediately necessary” standard simply assume that imminence is subsumed within “necessity.” Yet, as we have seen, we may legitimately question whether the “immediately necessary” standard fully captures the concept of self-defense. “Need” operates independently of the actions, intentions, and capabilities of the putative aggressor, yet there is reason to believe that these latter factors are morally relevant. The following section argues that there is more to self-defense than necessity and that it is in differentiating the two that imminence plays a role.

B. Imminence and Threats

The critical question is not *when* the defender needs to act but *what* kind of threat triggers the right to self-defense. Theorists who propose that we switch what “imminence” modifies—shifting focus from “imminent threats” to “immediately necessary”—ask the wrong question. The necessity of the defender’s action to preserve her life may have nothing to do with the current culpability or capabilities of the putative aggressor. But the need to act remains. Therefore, the true question that animates the debate over the imminence requirement is what type of threats trigger the right to self-defense. The correct question is not *when does the defender need to act* but *at what point is it fair to construe the putative aggressor as posing a threat?*

Recall that there are two senses of the word, “threat.”²²² One sense of the word threat is a forthcoming battery. But threats may also be far more inchoate. In the latter sense, the possession of nuclear weapons by North Korea is a threat to the United States and a sleeping husband is a threat to a battered woman. The concept of threat may be further extended—if two people are stuck in a cave with

husband in his sleep, she would not be able to demonstrate that her actions were necessary to defend her own safety, and would therefore not be entitled to claim self-defense.

Burke, *supra* note 16, at 296. In contrast, Rosen seems to grant too much to battered women. He argues that they have both the right to stay when escape is possible, and the right to strike preemptively. Rosen, *supra* note 99, at 396. The middle ground of a “no fair opportunity” claim also needs to be explored. Cf. Dressler, *supra* note 30, at 277–78.

The other interesting question under this approach is whether the hostage situation obtains only when the battered woman truly cannot escape or whether she is likewise justified (or excused) if she perceives that she cannot leave as a result of battered woman syndrome. While discussion of this issue is beyond the scope of this paper, I suspect that we may be willing to deem the woman who suffers from BWS justified for the following reason. If a kidnapper gives a hostage a drug that makes her perceive that she cannot leave and this keeps her captive, it seems plausible that the hostage is justified in killing her captor to escape. Indeed, the problem with the current question of individualizing the reasonable person standard is that it treats battered woman’s syndrome as if it were a merely *coincidental* aspect of the defendant’s psychological framework rather than the product of an intentional plan to dominate and control her.

²²². See *supra* text accompanying notes 89–91. My thanks again to Roger Clark for this invaluable insight.

limited oxygen, each poses a “threat” to the other simply because one individual’s survival is dependent on limiting the chances of the other’s.²²³

While our mere existence in some sense “threatens” others, those who wish to reject the *status quo* have never been regarded as self-defenders.²²⁴ After all, it seems that no one individual has a stronger claim to the right to life, existence, or thriving than another. Thus, the right to self-defense cannot be this broad.

Moreover, the formation of an intention is itself insufficient to constitute a threat sufficient to warrant self-defensive action.²²⁵ When an intention is first formed, the line between it, and wishes, desires, and hopes is notoriously vague. At the moment of formation, how does one distinguish a passing fancy from a formed intention?

Moreover, those harboring evil intentions have control over whether they will eventually execute those intentions.²²⁶ Intentions are often conditional, either internally or externally, on the occurrence of other events. For example, an intention to have sexual intercourse with V if she is over sixteen is an internally conditional intention. But the same man might also have the intention to have sexual intercourse with V—but if he were to find that she is under sixteen, he would change his mind—an externally conditional intention. Thus, simply because one has an intention to harm another does not mean that one will not change his mind.²²⁷

223. Cf. Kadish, *supra* note 50, at 890 n.32 (arguing that the Model Penal Code’s commentary incorrectly designates the mountaineer who, to save himself, cuts the rope on which his companion is dangling as a case of necessity but that the “dangling mountaineer is no bystander. He constitutes a threat, although an innocent one, so that the right to resist aggression suffices to justify cutting the rope). I take the classification of this case to be a difficult one, although I am inclined to agree with the Model Penal Code’s designation, and construe threats to be more in keeping with assaults and attacks. See UNIACKE, *supra* note 33, at 160–72 (arguing that our normative concept of threat closely resembles attacks and assaults).

224. Compare Walzer’s characterization of “preventive wars,” a type of war he rejects:

The sentinels stare into temporal as well as geographic distance as they watch the growth of their neighbor’s power. They will fear that growth as soon as it tips or seems likely to tip the balance [of power]. War is justified . . . by fear alone and not by anything other states actually do or any signs they give of their malign intentions. Prudent rulers assume malign intentions.

WALZER, *supra* note 156, at 77.

225. Cf. Jeff McMahan, *Preventive War*, in JUST WAR AND ACTUAL WAR (forthcoming) (manuscript at 17–18, on file with Author) (arguing that a culpable intention itself is sufficient to make the aggressor *liable*, and at that point, a fair distribution of risks allows the defender to act).

226. See Larry Alexander & Kimberly D. Kessler, *Mens Rea and Inchoate Crimes*, 87 J. CRIM. L. & CRIMINOLOGY 1138, 1173 (1997).

227. Now, it may seem that this claim about intentions collapses into the necessity calculation. If an aggressor will not follow through on her intentions, then the defender need not act. True enough. But an aggressor may decide to change her mind at any point, from

What we seek from our quest for “threats” is the concept of aggression.²²⁸ It is aggression that triggers the right to a defensive response. Indeed, while the adage “the best defense is a good offense” may be true, it is, by its own terms, offensive behavior, not defensive behavior. Self-defense is only understandable as a response to another’s aggressive conduct.

The need for aggression, and not just evil intentions, is justified on both deontological and consequentialist grounds. As Michael Walzer argues, “[w]hen we stipulate threatening acts, we are looking not only for indications of intent, but also for rights of response. To characterize certain acts as threats is to characterize them in a moral way, and in a way that makes a military response morally comprehensible.”²²⁹ Conversely, David Luban maintains that from a rule-consequentialist perspective, preventive war (war before an imminent attack) is unpalatable as it makes war “too ordinary”:

Instead of making the trigger for war the threat of an imminent attack—the adversary’s unmistakable signal that he has crossed the line from diplomacy to force—preventive war doctrines make the trigger a set of policy-choices not much different in kind from those that states always make—for example, decisions about what weapons programs to pursue, what alliances to form, where to station troops.²³⁰

Aggression is also morally relevant for domestic criminal law. Theorists who adopt a forfeiture approach to self-defense claim that the actor loses her right to life when she poses an unjust threat.²³¹ Moreover, some scholars claim that self-defense is justifiable only when it is intended to repel a present threat.²³² Thus, the moral assessment of both the aggressor’s and the defender’s rights hinges on some notion of aggression.

Our understanding of aggression contains several elements, one of which is *action*.²³³ The imminence requirement is best understood as the *actus reus* of

two seconds after she forms the intention to two seconds after she has pointed a gun at the defender. That is, even imminent threats present the problem that the aggressor may change her mind thus eliminating the need to act. The issue addressed above, however, is whether an intention is itself sufficient to trigger the right to self-defense.

228. Cf. Arthur Ripstein, *Self-Defense and Equal Protection*, 57 U. PITT. L. REV. 685, 694 (1996) (defining threats as conduct that is reasonably taken to be life-threatening).

229. WALZER, *supra* note 156, at 79.

230. Luban, *supra* note 147, at 21.

231. See generally DRESSLER, *supra* note 27, § 18.04[B][2], at 234.

232. E.g., UNIACKE, *supra* note 33, at 162 (“I act *in self-defence* . . . in resisting, repelling, or warding off an *actual* threat.”); see also Russell Christopher, *Self-Defense and Objectivity: A Reply to Judith Jarvis Thomson*, 1 BUFF. CRIM. L. REV. 537 (1998) (demonstrating the importance of motivation to a theory of self-defense).

233. The term “aggression” is loaded to the extent that it implies culpable and voluntary action. See UNIACKE, *supra* note 33, at 160–64 (noting this difficulty). There is a debate within the literature as to whether justifiable self-defense should cover the killing of innocents, and even if so, whether one unifying theory can plausibly account for the killing of both culpable and innocent aggressors. Cf. Judith Jarvis Thomson, *Self-Defense*, 20 PHIL. & PUB. AFF. 283, 302 (1991) (“what makes it permissible for you to kill [innocent and

aggression. This view of imminence is congruent with the criminal law's approach to incomplete attempts. The common law's *actus reus* formulation requires that the defendant be in dangerous proximity to completing her crime.²³⁴ In contrast, the Model Penal Code's substantial step formulation focuses on whether there is sufficient evidence to corroborate a clear criminal intent earlier in the process.²³⁵ Whatever the standard, our understanding of an "attempt" is informed by the

culpable aggressors] is the fact that they will otherwise violate your rights that they not kill you"); with Larry Alexander, *Self-Defense, Justification, and Excuse*, 23 PHIL. & PUB. AFF. 53, 61 (1993) (criticizing Thomson and arguing that self-defense should be sensitive to numbers, moral fault, fair allocation of risks, and nonappropriation of others); McMahan, *supra* note 204, at 252 (arguing against a unified theory); Michael Otsuka, *Killing the Innocent in Self-Defense*, 23 PHIL. & PUB. AFF. 74, 76 (1994) (arguing that innocent threats are morally equivalent to innocent bystanders and thus may not be killed in self-defense).

There are compelling arguments on both sides. There seem to be strong cases for allowing self-defense against innocent and involuntary aggression. See generally ROBERT NOZICK, *ANARCHY, STATE, AND UTOPIA* 34–35 (1974) (arguing that it is permissible to disintegrate a falling man who will otherwise fall on you and kill you); UNIACKE, *supra* note 33, at 157 ("Although the aggressor's culpability and his danger to others obviously strengthen the justification of self-preference, neither of these grounds of discrimination is necessary to the positive right of self-defense."); Kadish, *supra* note 50, at 884 ("[T]he whole concept of forfeiture by wrongdoing collapses in the case of a threat to life by one who acts without blame—the legally insane attacker, for example, or a very small child. For, as I pointed out earlier, it likely is the law with us, and certainly is the law in many Continental systems, that the person attacked may kill such an attacker to the same extent he may kill a culpable aggressor.").

For example, enemy soldiers rarely choose to fight in our ordinary sense of choice. They may be the products of drafts or indoctrinations. They may be young or mistaken. These soldiers can hardly be thought to have exercised a choice to kill in any meaningful sense. Additionally, even those who generally reject the right to abortion allow it in instances of "self-defense," yet the threat posed by a fetus is innocent and involuntary. See Nancy Davis, *Abortion and Self-Defense*, 13 PHIL. & PUB. AFF. 175 (1984) (demonstrating the problems with this conception of abortion as self-defense). Nancy Davis has argued that self-defense against innocents is best viewed as an agent-relative permission. *Id.* at 192. Thus, third parties do not have a duty to aid one innocent over the other. *Id.* at 194–96. From her theory it also follows that the number of innocent aggressors would be morally relevant because one can only give one's own life so much weight.

Conversely, we might query what makes a culpable aggressor "culpable?" Larry Alexander and I have argued that one has not committed a culpable act until one has unleashed a risk of harm over which she no longer has control, and thus we should not punish for incomplete attempts. See Alexander & Kessler, *supra* note 227, at 1168–74. How then do we distinguish between the innocent and the culpable aggressor? My co-author has taken a first pass at this problem. See Alexander, *supra* note 28, at 1501.

His malicious intent disables him from protesting the preemptive use of force against him, once the threshold probability—whatever it is—that he will choose to harm and that harm will result from his choice is reached So although his intention plus the danger that he will act as he now intends do not make him a culpable actor, they do deprive him of moral standing to object to preemptive force.

Alexander, *supra* note 28, at 1501.

234. E.g., *New York v. Rizzo*, 158 N.E. 888 (N.Y. 1927)

235. MODEL PENAL CODE § 5.01.

progress and movement of the defendant from his starting point toward his goal. The imminence standard in self-defense and the *actus reus* standards for attempt both use the language of time and distance to account for a substantive requirement of action.

In contrast to attempts, however, the *actus reus* of aggression serves a different role. For example, the purpose of the Model Penal Code's test is to corroborate criminal intent to ensure the prediction is accurate. Under such a view, however, the action is not independently important. The common law's test places the criminal threshold close to completion to respect the defendant's ability to renounce. The possibility of renunciation in self-defense, however, is subsumed within the necessity calculation.

For self-defense, however, the action serves a different purpose. The aggressor's action "starts it." We can only understand defense by comparison with offense. The aggressor's action signifies the breach of the community rules and the lack of equal respect for the defender.²³⁶ It is this action that makes self-defense understandable.²³⁷

When the right to self-defense is broadened to any person that might potentially inflict harm, we blur the distinction between offense and defense. Two nations may have great disdain for each other and accumulate significant weaponry *in case* these weapons must be used. But once inchoate threats are sufficient to justify self-defense, then both nations are authorized to attack the other.²³⁸ We then have no ability to distinguish self-defensive conduct from aggressive conduct.

236. Cf. WALZER, *supra* note 156, at 79 ("When we stipulate threatening acts, we are looking not only for indications of intent, but also for rights of response. To characterize certain acts as threats is to characterize them in a moral way, and in a way that makes a military response morally comprehensible.")

237. Cf. UNIACKE, *supra* note 33, at 159.

Although "immediate threat" is more accurate than 'aggressor' in referring to someone against whom force is used in self-defence, the common use of "aggressor" in this context signifies something deeper than the assumption that most persons against whom force is used in self-defence are aggressors properly so called. There is an important conceptual link between aggression and the conditions of immediate threat relevant to the use of force in self-defence. Aggression is essentially *offensive* conduct: it initiates harm or conflict In contrast the essential feature of force used in self-defence is, of course, that it is *defensive*: it resists, repels, or wards off a threat.

Id.

238. See also Luban, *supra* note 147, at 24–25 (citing THOMAS C. SCHELLING, THE STRATEGY OF CONFLICT 232 (1980)).

In Thomas Schelling's imagery, it is always possible that I will have to shoot my rival in self-defense to stop him from shooting me in self-defense. The doctrine of preventive war makes shooting a legitimate option for both of us, and by legitimizing it unravels whatever precarious equilibrium a broadly-asserted norm against first force establishes.

Id.

Hence, international lawyers are quite correct in noting that the absence of imminence causes significant line-drawing problems. Without the standard of aggression to mediate self-defense, it seems that both India and Pakistan may attack each other. Indeed, during the Cold War, could the Soviet Union have struck the United States *in self-defense*? Jettisoning imminence in the name of necessity leaves the international community without a standard for the type of conduct sufficient to warrant defensive force.

It is the aggressor's actions, and not the defender's need, that grounds the right to self-defense. These questions are too often confused. For example, consider Robert Schopp's hypothetical where two hikers are engaged in a ten-day hike across the desert.²³⁹ Throughout the race, one hiker, *Y*, has consistently attempted to sabotage (and to kill) the other, *X*. Both hikers are almost out of water and need to replenish their canteens at the next water hole. *Y* passes *X*, whose ankle is sprained, and, holding a box of rat poison, *Y* vows to poison the water hole after filling his own canteen. Schopp asks whether *X* may kill *Y* now, while *X* has the chance.

Schopp argues that "[t]he central question involves the appropriate relationship between the necessity and imminence requirements."²⁴⁰ I disagree. There is no doubt that *X* needs to act now. The question is whether *Y*'s behavior qualifies as aggression. Schopp himself justifies the right to self-defense by noting "any culpable criminal conduct infringes on the victim's concrete interests and violates her sphere of self-determination as well as her standing in the public jurisdiction. The aggressor imputes an unjustified imbalance of standing by culpably violating the victim's protected domain."²⁴¹

Notice Schopp's emphasis on *infringing, violating, and imputing*. These verbs require action on the part of *Y*, mere evil intentions are not sufficient. Hence, the real question here, under Schopp's own analysis, is whether *Y*'s actions have risen to the level of violating *X*'s sovereignty.

In this case, *X* may act. *Y*'s behavior is of the sort that we understand to be aggressive. That is, *Y*'s intentions, *Y*'s communication of these intentions, *Y*'s recent attempts at killing *X*, and *Y*'s present ability to cause *X* harm in the future lead to our conclusion that *Y* is *aggressing* against *X*.²⁴²

239. ROBERT F. SCHOPP, JUSTIFICATION DEFENSES AND JUST CONVICTIONS 100 (1998).

240. *Id.* at 101.

241. *Id.* at 83.

242. *Y*'s actions are the sort that would be regarded as intrinsic to a crime, as opposed to an extrinsic act. *Cf.* FED. R. EVID. 404(b). In contrast, consider the following indictment of Saddam Hussein:

The real evidence we require is in plain view. Does Saddam, who has twice invaded his neighbours, who has the unique distinction of having been the first state to annex another member state of the UN, who has acknowledged seeking nuclear weapons, developing biological weapons and using chemical weapons in an unprovoked war of aggression against his own citizens, who has violated his ceasefire commitments, shot repeatedly and continuously at coalition forces enforcing the no-fly

Notice that in making this assessment, *X*'s need to act is irrelevant. If *X* knew that he would reach the water hole before *Y* then *X* need not stop *Y*. Yet, this does not mean that *Y* is not *aggressing* against *X* or that *X*'s behavior would not be intelligible as self-defensive. Rather, in such a case, *X* may not act against *Y* because necessity simply imposes a limitation on the right to self-defense.

Schopp's hypothetical does demonstrate that the imminence requirement is sometimes too restrictive. Importantly, however, this act requirement does not simply corroborate the presence of an evil intention but rather signals the end of peaceful resolution and an initiation of an assault on sovereignty. Exactly how far the aggressor must have come may be difficult to characterize. As Michael Walzer notes, "the idea of being under a threat focuses on what we had best simply call *the present*."²⁴³

Additionally, even in those instances of sufficient aggression, the imminence requirement—in its role as poor proxy for necessity—may limit when the defender may employ force against aggression. At that point, the debate is about need and not about threats.

Far too often, however, we have focused on the question of the defender's needs and not the aggressor's actions. The defender may need to act prior to the acquisition of weapons. The defender may need to act before the aggressor harbors any intent to harm her. But we must remain cognizant of the fact that the need to act operates independently of the aggressor's actions.²⁴⁴ Necessity is a *limitation* on the defender's right; it does not ground it.²⁴⁵ Defenders who wish to act against threats that are not imminent must not only point to the need to act but must also make the case that there has been aggression.

zones imposed by the UN in 1991, really stand in the same position vis-à-vis other countries? States are judged by their intentions and their capabilities. There is ample evidence of Saddam's intentions; must we wait on his capabilities?

Bobbitt, *supra* note 92.

In justifying the attack on Iraq, Bobbitt does not point to a current intention against the United States or any *present* action. Rather, the argument is that his prior bad acts are sufficient to justify preemptive force. But then the justification is not based on Hussein's current *aggression*.

243. WALZER, *supra* note 156, at 81.

244. Cf. Tziporah Kasachkoff, *Killing in Self-Defense: An Unquestionable or Problematic Defense?*, 17 LAW & PHIL. 509, 526 (1998).

The [Indifference Argument] thus takes the fact of the attacker's moral innocence to make the fact of his attack irrelevant. But once we make the fact of the attack irrelevant, we open the door for justifying not only killing in self-defense when we are attacked by an innocent attacker, but killing for reasons of self-preservation when we haven't been attacked at all.

Id.

245. UNIACKE, *supra* note 33, at 156 ("The conditions of necessary and proportionate force—and according to some, lack of intention to kill—are moral limits of the right of self-defence: they cannot *ground* a positive right of self-defence.").

The war against Iraq was not a justifiable act of self-defense. When the United States went to war, Iraq had not *aggressed* against the United States. The United States acted against a vicious ruler, who aggressed against his own citizens and neighbors, who had no love for the United States, who either possessed or sought to develop weapons of mass destruction, and who defied the United Nations. Hussein was undoubtedly a “threat to the peace” under Article 39 of the UN Charter. The United States’ actions might have been deemed “law enforcement,” if it had had the authority of law. The United States’ actions were certainly self-preferential. But in the absence of any aggression from Hussein, the United States’ actions were not in self-defense.

The problem posed by both battered women and the war against Iraq is that once aggressive conduct has begun, there may be no stopping it. The shift from inchoate threat to harm occurs without the ability to intervene at any stage in between. But the right to self-defense is not *the right to act as early as is necessary to defend oneself effectively*. The right to self-defense is the right to respond to aggression.

Prevention cannot be justified as self-defensive. As has been shown, the imminence requirement is more than a proxy for necessity. Rather it is conceptually related to the concepts of aggression and defensive conduct. Without aggression, there is no self-defense, only self-preference.

The compelling need to aid battered women has made the self-defense argument too easy. In this context, the integrity of self-defense has been undermined by the jettisoning of imminence. But, in the end, it would be error to export this bastardized view of self-defense to international law. Rather, self-defense is worth conceptually preserving. And, for self-defense, we cannot supplant imminence with necessity.

V. CONCLUSION

In both domestic and international law, the traditional imminence requirement in self-defense doctrine is being challenged. The emergence of terrorism and weapons of mass destruction led the United States to act when it believed it needed to do so, despite the absence of an imminent Iraqi threat. Domestically, battered women claim that they must kill their abusers while they are sleeping, arguing they are unable to defend themselves effectively in confrontational settings. These challenges rest on the moral claim that one should have a right to act in self-defense when necessary. Many criminal law scholars agree with this claim, contending that the imminence requirement should not preclude defensive action as imminence’s *raison d’etre* is to establish necessity. However, the “immediately necessary” standard proposed by criminal law theorists conflates self-defense and self-preference. Self-defense is uniquely justified by the fact that the defender is responding to aggression. Imminence, far from simply establishing necessity, is conceptually tied to self-defense by staking out the type of threats that constitute aggression. We cannot simply discard imminence in the name of necessity.