

ARTICLES

SELF-DEFENSE WITHOUT IMMINENCE

Fritz Allhoff*

ABSTRACT

The doctrine of self-defense allows that otherwise criminal force can be justified so long as the actor reasonably believes its use necessary to protect against imminent and unlawful attack. Supposing that the force is necessary to dispel the attack, why the further requirement that the attack is imminent? The restriction precludes the use of force which, ex hypothesi, is the only way that the actor could defend himself. This Article surveys and critiques the rationale for the imminence requirement, arguing that it should be jettisoned in favor of a more expansive conception of self-defense. While the focus is on domestic law, the paper concludes by gesturing towards implications for international law as well, particularly with regards to preventive war (i.e., war against non-imminent threats).

I. IMMINENCE AND NECESSITY

Self-defense has long been taken to justify an otherwise illicit use of force. William Blackstone, characterizing the eighteenth-century common law of England, provided:

[I]f the party himself, or any of these his relations, be forcibly attacked in his person or property, it is lawful for him to repel force by force; and the breach of the peace, which happens, is chargeable upon him only who began the affray. For the law, in this case, respects the passions of the human mind; and . . . makes it lawful in him to do himself that immediate justice, to which he is prompted by nature, and which no prudential motives are strong enough to restrain. It considers that the future process of law is by no means an adequate remedy for injuries accompanied with force; since it is impossible to say, to

* Fritz Allhoff, J.D., Ph.D., is a Professor in the Department of Philosophy at Western Michigan University. He received his J.D., *magna cum laude*, from the University of Michigan Law School, then clerked for the Honorable Chief Justice Craig F. Stowers of the Alaska Supreme Court. Parts of this paper were written as a Fellow in the Center for Law and the Biosciences at Stanford Law School and as a Fulbright Specialist in the Faculty of Political Science at the University of Iceland; Dr. Allhoff thanks those institutions and the U.S. Department of State for generous support. He also thanks Sean Kermath and Kaleb TerBush for research assistance and the editorial staff at *American Criminal Law Review*—especially Rien Susca and Ryan Shymansky—for their assistance with manuscript preparation. © 2019, Fritz Allhoff.

what wanton lengths of rapine or cruelty outrages of this sort might be carried, unless it were permitted a man immediately to oppose one violence with another.¹

Interestingly, Blackstone hints at two reasons why we might find self-defense to mitigate criminal liability. The first is the exigency of human agency: we are simply not constituted to receive threats on our persons without responding in kind. While this might well be true, it hardly establishes that self-defense is justified, as opposed to merely excused.² Second, Blackstone finds it implausible that we should receive the assault, then seek redress in court. Here, he probably runs together civil and criminal liability. Wrongful death suits surely exist in tort, and the wronged party for the criminal action is the state, not the individual; the state can exact punishment even after a lethal assault. So, while Blackstone is certainly right that self-defense can be justified, more needs to be said as to *why*.

Scholars have been at work on this question since at least the thirteenth century. Thomas Aquinas invoked the doctrine of double effect, arguing that self-defense aims, not at the death of the attacker, but rather, at the safety of the attacked; this distinction is supposed to be morally determinative.³ The doctrine of double effect

1. WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 2 (Thomas P. Gallanis ed., 1st ed. 2016).

2. While an extended discussion takes us too far afield, criminal law provides for two broad categories of exculpation, justification and excuse. The principal difference between the two is that justification establishes that the act was not wrong, whereas excuse negates the actor's responsibility for a wrongful act. Similarly: "a justification claim . . . seeks to show that the act was *not wrongful*, an excuse . . . tries to show that the actor is not morally culpable for his wrongful conduct." Douglas Husak, *On the Supposed Priority of Justification to Excuse*, 24 L. & PHIL. 558 (2005) (emphasis added) (quoting JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 558 (8th ed. 2018)). Or else: "a justification shows that *prima facie* wrongful and unlawful conduct is *not wrongful or unlawful at all* . . . by contrast, an excuse does not take away our *prima facie* judgment that an act is wrongful and unlawful; rather, it shows that the actor was not culpable in his doing of an admittedly wrongful and unlawful act." Husak, *supra* note 2, at 200 n.36 (emphasis added) (quoting MICHAEL MOORE, PLACING BLAME: A THEORY OF THE CRIMINAL LAW 674 (1997)).

3. More verbosely:

Therefore this act [of self-defense], since one's intention is to save one's own life, is not unlawful, seeing that it is natural to everything to keep itself in 'being', as far as possible. And yet, though proceeding from a good intention, an act may be rendered unlawful, if it be out of proportion to the end. Wherefore if a man, in self-defense, uses more than necessary violence, it will be unlawful: whereas if he repels force with moderation his defense will be lawful, because according to the jurists, 'it is lawful to repel force by force, provided one does not exceed the limits of a blameless defense.' Nor is it necessary for salvation that a man omit the act of moderate self-defense in order to avoid killing the other man, since one is bound to take more care of one's own life than of another's. But as it is unlawful to take a man's life, except for the public authority acting for the common good . . . it is not lawful for a man to intend killing a man in self-defense, except for such as have public authority, who while intending to kill a man in self-defense, refer this to the public good, as in the case of a soldier fighting against the foe, and in the minister of the judge struggling with robbers, although even these sin if they be moved by private animosity.

THOMAS AQUINAS, SUMMA THEOLOGICA 2a2ae.64.7 (Fathers of the English Dominican Province trans., 1920) (1486).

continues to be influential in contemporary thought,⁴ but other candidate answers have emerged as well. Broadly, these can be divided into three camps: culpability accounts, rights-based accounts, and responsibility accounts.⁵ Culpability accounts trade on the fault of the aggressor insofar as he manifests malicious intentions.⁶ Rights-based accounts begin by assuming that people have a moral right against attack, but that this right can be forfeited through aggression; self-defense therefore can be justified insofar as it fails to violate a (forfeited) right.⁷ Responsibility accounts see aggressors as liable to defensive killing, a liability that they absorb through the creation of an unjust threat.⁸

Adjudicating among these competing accounts is unnecessary for present purposes since, in the majority of cases, their edicts converge. If an aggressor attacks an innocent third-party, then that party may—at least under certain conditions—be licensed in returning the force. *Why* this is the case can be debated, but *that* it is the case is uncontroversial. What I propose to do in this Article, then, is to consider archetypical cases, rather than ones floating at the margins; this is for expedience as much as for theoretical simplicity. I want to propose an emendation to the general theory of self-defense that resonates with any of its underlying moral justifications, and so an adjudication with regards to those need not concern us. Furthermore, I want to focus on the legal formulation, rather than on its underlying moral foundations.

And so let us begin by recognizing that the modern doctrine of self-defense allows that otherwise criminal force can be justified so long as the actor reasonably believes its use necessary to protect against imminent and unlawful attack. For example, Model Penal Code (MPC) section 3.04 states “[T]he 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.”⁹ Interestingly, the MPC dispatches with the reasonableness requirement of common law, but the dual requirements of necessity and imminence are certainly intimated by the language “immediately necessary.”¹⁰

4. See, e.g., Philippa Foot, *The Problem of Abortion and the Doctrine of Double Effect*, 5 OXFORD R. (1967); Warren Quinn, *Actions, Intentions, and Consequences: The Doctrine of Double Effect*, 18 PHIL. & PUB. AFF. 334, 334–51 (1989); SHELLY KAGAN, *THE LIMITS OF MORALITY* 128–82 (1991). For direct application to just war theory, see MICHAEL WALZER, *JUST AND UNJUST WARS* 151–59 (4th ed. 2006). For an extended critique of Walzer, see Frances Kamm, *Failures of Just War Theory: Terror, Harm, and Justice*, 114 ETHICS 650–92 (2004).

5. HELEN FROWE, *THE ETHICS OF WAR AND PEACE: AN INTRODUCTION* 12–27 (2nd ed. 2016).

6. *Id.*

7. Judith Jarvis Thomson, *Self-Defense*, 20.4 PHIL. & PUB. AFF. 283–310 (1991). For criticism, see DAVID RODIN, *WAR AND SELF-DEFENSE* 86 (2002).

8. Jeff McMahan, *The Basis of Moral Liability to Defensive Killing*, 15 PHIL. ISSUES 386–405 (2005).

9. MODEL PENAL CODE § 3.04.

10. MODEL PENAL CODE § 3.04, cmt. 2(c). There’s a wrinkle in the comments to § 3.04, to which we shall return below:

Nor does the draft limit the privilege of using defensive force to cases where the danger of unlawful violence is ‘imminent’, as many formulations of the rule now do. The actor must believe that his defensive action is immediately necessary and the unlawful force against which he defends

While some jurisdictions have followed the MPC approach,¹¹ most have been more restrictive, effectively codifying imminence and necessity as separate requirements.¹²

Consider Delaware:

In defending himself from injury, a person need not wait until he is struck by an impending blow; but if retreat is impossible [i.e., defense is necessary], and the danger is imminent, he may strike the first blow, using no more force than is reasonably necessary to repel the attack.¹³

Or Oregon:

The right of self-defense being founded on necessity, the party who would invoke it must avoid the attack . . . but where an assault precipitated without provocation is such as to indicate to a reasonable mind . . . that the danger to life or the infliction of great bodily harm is imminent, the party assailed is justified in killing the aggressor.¹⁴

must be force that he apprehends will be used on the present occasion, but he need not apprehend that it will be immediately used. There would, for example, be a privilege to use defensive force to prevent an assailant from going to summon reinforcements, given belief and reason to believe that it is necessary to disable him to prevent an attack by overwhelming numbers so long as the attack is apprehended on the 'present occasion.' The latter words are used in preference to 'imminent' or 'immediate' to introduce the necessary latitude for the attainment of a just result in cases of this kind.

11. *See, e.g.*, ARIZ. REV. STAT. ANN. § 13-404 (West 2017); DEL. CODE ANN. tit. 11, § 464 (West 2017); HAW. REV. STAT. ANN. § 703-304 (LexisNexis 2017); NEB. REV. STAT. ANN. § 28-1409 (LexisNexis 2017); N.J. STAT. ANN. § 2C:3-4 (West 2017); 18 PA. STAT. AND CONS. STAT. ANN. § 505 (West 2017); TEX. PENAL CODE ANN. § 9.31 (West 2017).

12. *See, e.g.*, ALA. CODE § 13A-3-23 (2017); ALASKA STAT. § 11.81.330 (2017); ARK. CODE ANN. § 5-2-607 (West 2017); COLO. REV. STAT. § 18-1-704 (2017); CONN. GEN. STAT. ANN. § 53A-19 (West 2017); FLA. STAT. ANN. § 776.012 (West 2017); GA. CODE ANN. § 16-3-21 (West 2017), HAW. REV. STAT. ANN. § 703-304 (LexisNexis 2017); IDAHO CODE ANN. § 19-202A (West 2017); 720 ILL. COMP. STAT. ANN. 5/7-1 (West 2017); IND. CODE ANN. § 35-41-3-2 (West 2017); IOWA CODE ANN. § 704.3 (West 2017); KAN. STAT. ANN. § 21-5222 (West 2017); KY. REV. STAT. ANN. § 503.050 (West 2017); ME. REV. STAT. tit. 17-A, § 108 (2017); MICH. COMP. LAWS ANN. § 780.972 (West 2017); MISS. CODE ANN. § 97-3-15 (West 2017); MO. ANN. STAT. § 563.031 (West 2017); MONT. CODE ANN. § 45-3-102 (West 2017); N.H. REV. STAT. ANN. § 627:4 (West 2017); N.M. STAT. ANN. § 30-2-7 (West 2017); N.Y. PENAL LAW § 35.15 (McKinney 2017); N.C. GEN. STAT. ANN. § 14-51.3 (West 2017); N.D. CENT. CODE ANN. § 12.1-05-07.1 (West 2017); OKLA. STAT. ANN. tit. 21, § 1289.25 (West 2017); OR. REV. STAT. ANN. § 161.209 (West 2017); S.C. CODE ANN. § 16-11-440 (West 2017); S.D. CODIFIED LAWS § 22-16-35 (2017); TENN. CODE ANN. § 39-11-611 (West 2017); UTAH CODE ANN. § 76-2-402 (West 2017); WASH. REV. CODE ANN. § 9A.16.110 (West 2017); W. VA. CODE ANN. § 55-7-22 (LexisNexis 2017); WIS. STAT. ANN. § 939.48 (West 2017); WYO. STAT. ANN. § 6-2-602 (West 2017). For Maryland, see *State v. Faulkner*, 483 A.2d 759, 761 (Md. 1984) ("The accused must have had reasonable grounds to believe himself [or herself] in apparent imminent or immediate danger of death or serious bodily harm from his [or her] assailant or potential assailant."). For Virginia, see *Commonwealth v. Sands*, 553 S.E.2d 733, 736 (Va. 2001) ("In the context of a self-defense plea . . . 'There must be . . . some act menacing present peril . . . [and] [t]he act . . . must be of such a character as to afford a reasonable ground for believing there is a design . . . to do some serious bodily harm, and imminent danger of carrying such design into immediate execution.'").

13. DEL. CODE ANN. tit. 11, § 464 (West 2014).

14. OR. REV. STAT. ANN. § 161.209 (West 2014).

Or Illinois:

A person is justified in the use of force against another when and to the extent that he reasonably believes that such conduct is necessary to defend himself or another against such other's imminent use of unlawful force. However, he is justified in the use of force which is intended or likely to cause death or great bodily harm only if he reasonably believes that such force is necessary to prevent imminent death or great bodily harm to himself or another, or the commission of a forcible felony.¹⁵

But why require both imminence *and* necessity?

In principle, there are two different ways to separate the requirements. First, we could allow self-defense against imminent attacks, even when not necessary. And, in fact, sometimes we do. Second, we could allow self-defense against non-imminent attacks, so long as the force is necessary to dispel them. This scenario will form the principal investigation in the Article; in particular, I think necessity should defeat the requirement of imminence, which is a position only adopted by a handful of jurisdictions.¹⁶ On this view, necessity is a sufficient condition to license self-defense, though not a necessary one. Let us start with the second claim, which is counterintuitively the easier to defend, or at least more readily grounded in the common law.

II. SELF-DEFENSE WITHOUT NECESSITY

While the target of this Article is self-defense without imminence, self-defense without necessity is worth a detour because it makes a case for the view that I will argue against, at least in part, namely that necessity and imminence travel together. It turns out that they can be usefully separated, though only some of the time; as previously mentioned, necessity is sufficient for self-defense, but not necessary. In other words, self-defense can sometimes be justified even without necessity. As this seems a strange claim to make, let us start by considering the alternative position.

Consider *State v. Abbott*.¹⁷ Abbott was neighbors with Michael and Mary Scarano, and a dispute ensued about the paving of a common driveway.¹⁸ The Scaranos' son, Nicholas, visited his parents and confronted Abbott.¹⁹ A fist fight followed, and, while Abbott landed the first punch, the court held that Nicholas may have been the aggressor.²⁰ After Nicholas was knocked to the ground,

15. 720 ILL. COMP. STAT. ANN. 5/7-1 (West 2014).

16. See, e.g., CAL. PENAL CODE § 197 (West 2017); MASS. GEN. LAWS ANN. ch. 278, § 8A (West 2017); MINN. STAT. ANN. § 609.06 (West 2017); NEV. REV. STAT. ANN. § 200.200 (West 2017); OHIO REV. CODE ANN. § 2901.05 (West 2017); 11 R.I. GEN. LAWS ANN. § 11-8-8 (West 2017); VT. STAT. ANN. tit. 13, § 2305 (LexisNexis 2017).

17. *State v. Abbott*, 174 A.2d 881 (N.J. 1961).

18. *Id.* at 882.

19. *Id.*

20. *Id.* at 882–83.

Michael approached Abbott with a hatchet, and Mary allegedly followed with a large carving knife.²¹ The details are thereafter contested, but the result was that all three Scaranos were hit by Michael's hatchet. Abbott claims that they were injured in a struggle for the weapon, whereas the Scaranos claim that Abbott disarmed Michael and then attacked them.²² Abbott was indicted for assault and battery against each of the three Scaranos; he was acquitted with regards to Michael and Mary, but convicted with regards to Nicholas.²³

On appeal, Abbott complained about the jury instructions with regards to retreat, and the New Jersey Supreme Court ended up reversing his conviction. The issue was whether Abbott could appeal to self-defense in justifying his use of force had he been able to retreat from the conflict. Or, to use our language, whether he could use force to dispel an imminent attack, even if such force was not necessary to dispel the attack in light of his ability to retreat.

The English common law espoused a strict duty to retreat, providing that self-defense could only be used after every opportunity to flee had been exhausted.²⁴ However, American courts moved away from this principle late in the nineteenth century. In an influential Ohio decision, the court held that the law,

out of tenderness for human life and the frailties of human nature, will not permit the taking of it to repel a mere trespass, or even to save life, where the assault is provoked; but a true man, who is without fault, is not obliged to fly from an assailant, who, by violence or surprise, maliciously seeks to take his life or do him enormous bodily harm.²⁵

Still, some scholars continued to defend the retreat requirement. For example, in a widely-cited law review article, Joseph Beale argued that despite the “apparent cowardice” of fleeing, an honorable man “would regret ten times more . . . the thought that he had the blood of a fellow-being on his hands. It is undoubtedly distasteful to retreat; but it is ten times more distasteful to kill.”²⁶ However, Beale's view did not carry the day and, despite some hold out states on the east coast, the “true man” rule had replaced the duty to retreat by the early twentieth century.²⁷

More recently however, there has been some pushback, and even Ohio—the progenitor of the rule—has now rejected it.²⁸ Tennessee has swung in the opposite direction; it long required retreat, but then adopted the “true man” rule by

21. *Id.* at 883.

22. *Id.*

23. *Id.*

24. SANFORD H. KADISH ET AL., *CRIMINAL LAW AND ITS PROCESSES: CASES AND MATERIALS* 863 (9th ed. 2012).

25. *Erwin v. State*, 29 Ohio St. 186, 199–200 (1876).

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

27. RICHARD MAXWELL BROWN, *NO DUTY TO RETREAT* 4–30. (1991). *See also* KADISH ET AL., *supra* note 24, at 865.

28. *State v. Robbins*, 388 N.E.2d 755, 758–59 (Ohio 1979).

legislation in 1989.²⁹ Overall, there has been a tendency to require retreat when possible, though some half dozen states take a weaker stance, allowing the possibility of retreat to be considered a factor in judging the appropriateness of self-defense.³⁰ The minority of states that do not require retreat have done so, not under the aegis of “true man,” explicitly rejecting the idea that the law should not require what looks like cowardice. Rather, they have argued that the rule of retreat can confuse a jury because of the difficulty in establishing whether the defendant knew he could safely retreat.³¹

“Stand your ground” laws have provided another way in which self-defense can be justified against imminent attacks, despite a lack of necessity. A Florida case, *State v. Smiley*, pre-dates the state’s stand-your-ground-law. Smiley, a taxi driver, drove an intoxicated man home from a bar. After reaching the destination, an argument ensued and the man advanced on Smiley with a knife. While still seated in the taxi—and with the ability to drive away—Smiley shot the advancing man dead. Smiley was convicted of murder because, at the time, Florida law required retreat.³² Shortly thereafter, the legislature passed a statute providing that:

A person who is not engaged in an unlawful activity and who is attacked in any . . . place where he or she has a right to be has no duty to retreat and has the right to stand his or her ground and meet force with force, including deadly force if he or she reasonably believes it is necessary to do so to prevent death or great bodily harm to himself or herself or another or to prevent the commission of a forcible felony.³³

Under this statute, Smiley would have been acquitted, as George Zimmerman ultimately was in the controversial Trayvon Martin case. Many jurisdictions have now effected similar legislation, either by explicitly abrogating the duty to retreat,³⁴

29. TENN. CODE ANN. § 39-11-611 (West 2011). The comments indicate:

The test [for justified self-defense] is threefold: the defendant must reasonably believe he is threatened with imminent loss of life or serious bodily injury; the danger creating the belief must be real or honestly believed to be real at the time of the action; and the belief must be founded on reasonable grounds. Under this section, there is no duty to retreat, which changes Tennessee law.

See also *State v. Clark*, No. W2005-01020-CCA-R3-CD, 2006 WL 2191255, at *1 (Tenn. Crim. App. Aug. 2, 2006).

30. KADISH ET AL., *supra* note 24, at 865. See also *State v. James*, 867 So. 2d 414, 416–17 (Fla. Dist. Ct. App. 2003); *Commonwealth v. Pasteur*, 850 N.E.2d 1118, 1128 (Mass. App. Ct. 2006); *State v. Hall*, 764 N.W.2d 837, 846 (Minn. 2009).

31. KADISH ET AL., *supra* note 24, at 865–66. See also *Culverson v. State*, 797 P.2d 238, 240 (Nev. 1990) j (“[I]t is often quite difficult for a jury to determine whether a person should reasonably believe that he may retreat from a violent attack in complete safety. Thus, a rule which requires a non-aggressor to retreat may confuse the jury and lead to inconsistent verdicts. We believe that a simpler rule will lead to more just verdicts.”).

32. *State v. Smiley*, 927 So. 2d 1000, 1003 (Fla. Dist. Ct. App. 2006).

33. FLA. STAT. § 776.013(3) (2014).

34. See, e.g., ALA. CODE § 13A-3-23 (2018); ALASKA STAT. § 11.81.335 (2018); ARIZ. REV. STAT. ANN. § 13-405 (West 2018); FLA. STAT. ANN. § 776.012 (West 2018); GA. CODE ANN. § 16-3-21.1 (West 2018); IDAHO

or else by not explicitly codifying such a duty.³⁵

But, with the exception of Vermont,³⁶ every remaining jurisdiction abrogates the duty to retreat from within one's domicile,³⁷ and some of those even extend this abrogation to vehicles.³⁸ In other words, even if the defendant is able to flee his home—or vehicle, depending on the jurisdiction—to escape the attack, he is under no legal duty to do so; he may respond to the threat of deadly force with deadly force. This so-called “Castle Doctrine” (cf., “a man’s home is his castle”) was powerfully articulated by Judge Cardozo:

It is not now and never has been the law that a man assailed in his own dwelling is bound to retreat. If assailed there, he may stand his ground and resist the attack. He is under no duty to take to the fields and the highways, a fugitive from his own home . . . Flight is for sanctuary and shelter, and shelter, if not sanctuary, is in the home. That there is, in such a situation, no duty to retreat is, we think, the settled law in the United States as in England.³⁹

CODE ANN. § 18-4009 (West 2018); IND. CODE ANN. § 35-41-3-2 (West 2018); IOWA CODE ANN. § 704.1 (West 2018); KAN. STAT. ANN. § 21-5230 (West 2018); KY. REV. STAT. ANN. § 503.050 (West 2018); MICH. COMP. LAWS ANN. § 780.972 (West 2018); MISS. CODE ANN. § 97-3-15 (West 2018); MO. REV. STAT. § 563.031 (2018); MONT. CODE ANN. § 45-3-110 (West 2018); NEV. REV. STAT. ANN. § 200.120 (West 2018); N.H. REV. STAT. ANN. § 627:4 (West 2018); N.C. GEN. STAT. § 14-51.3 (2018); OKLA. STAT. tit. 21, § 1289.25 (2018); 18 PA. STAT. AND CONS. STAT. ANN. § 505 (West 2018); S.C. CODE ANN. § 16-11-440 (West 2018); S.D. CODIFIED LAWS § 22-18-4 (2018); TENN. CODE ANN. § 39-11-611 (West 2018); TEX. PENAL CODE ANN. § 9.31 (West 2018); UTAH CODE ANN. § 76-2-402 (West 2018); W. VA. CODE § 55-7-22 (2018); WYO. STAT. ANN. § 6-2-602 (West 2018).

35. *See, e.g.*, 720 ILL. COMP. STAT. ANN. 5/7-1 (West 2018); N.M. STAT. ANN. § 30-2-7 (West 2018); OR. REV. STAT. ANN. § 161.209 (West 2018); WASH. REV. CODE ANN. § 9A.16.110 (West 2018). For Virginia, see *Foot v. Commonwealth*, 396 S.E.2d 851, 856 (Va. Ct. App. 1990) (“[Defendant], being without fault, did not have a duty to retreat. He was entitled to stand his ground . . .”).

36. *See State v. Albano*, 102 A. 333, 335 (Vt. 1917) (“[I]f the party assaulted has other means of avoiding the assault that are available, and that appear to him at the time as sufficient, and are in fact available, then he cannot use force in his self-defense.”).

37. *See, e.g.*, ARK. CODE ANN. § 5-2-607 (West 2018); CAL. PENAL CODE § 198.5 (West 2018); COLO. REV. STAT. § 18-1-704.5 (2018); CONN. GEN. STAT. § 53a-19 (2018); DEL. CODE ANN. tit. 11, § 464 (West 2018); HAW. REV. STAT. ANN. § 703-304 (LexisNexis 2018); ME. REV. STAT. tit. 17-A, § 108 (2018); MASS. GEN. LAWS ANN. ch. 278, § 8A (West 2018); MINN. STAT. ANN. § 609.06 (West 2018); NEB. REV. STAT. ANN. § 28-1409 (LexisNexis 2018); N.J. STAT. ANN. § 2C:3-4 (West 2018); N.Y. PENAL LAW § 35.15 (McKinney 2018); 11 R.I. GEN. LAWS § 11-8-8 (West 2018). *See also Crawford v. State*, 190 A.2d 538, 541 (Md. 1963) (“There is also a generally accepted rule, which we think is correct, that a man faced with the danger of an attack upon his dwelling need not retreat from his home to escape the danger, but instead may stand his ground and, if necessary to repel the attack, may kill the attacker.”).

38. *See, e.g.*, N.D. CENT. CODE § 12.1-05-07.1 (2018); OHIO REV. CODE ANN. § 2901.05 (West 2018); WIS. STAT. ANN. § 939.48 (West 2018).

39. *People v. Tomlins*, 107 N.E. 496, 498 (N.Y. 1914). *See also Beard v. United States*, 158 U.S. 550, 564 (1895) (holding that “[t]he defendant was where he had the right to be [i.e., in his own home], when the deceased advanced upon him in a threatening manner, and with a deadly weapon; and if the accused did not provoke the assault, and had at the time reasonable grounds to believe, and in good faith believed, that the deceased intended to take his life, or do him great bodily harm, he was not obliged to retreat, nor to consider whether he could safely retreat, but was entitled to stand his ground, and meet any attack made upon him with a deadly weapon, in such way and with such force as, under all the circumstances, he, at the moment, honestly believed, and had reasonable grounds to believe, were necessary to save his own life, or to protect himself from great bodily injury.”).

Therefore, the castle doctrine allows for self-defense without the requirement of necessity because, even though the person at home may be able to flee, he is not required to.

So we have now seen four arguments under which self-defense may be justified despite the absence of necessity: (1) true man doctrine; (2) jury confusion; (3) stand your ground legislation; and (4) castle doctrine. Admittedly, the true man doctrine is on the wane, but while courts have become less sympathetic to it, legislatures have effectively enshrined it through stand your ground legislation. Even the castle doctrine draws on the same general principle; Cardozo's language with regards to the castle doctrine explicitly incorporates similar language ("stand his ground"). In this regard, jury confusion stands apart as being a *sui generis* rationale, even if only a small number of courts have espoused it. The castle doctrine, though, is near-universal across jurisdictions and invocation of it alone would have been adequate to make the point that imminence and necessity can come apart.

Before moving on, let me reflect on one potential objection. Here a critic could just say that, while the law does not require necessity for self-defense, it *should*. The true man doctrine, stand your ground legislation, and the castle doctrine all discharge the obligation to retreat, though it remains unanswered whether someone who can retreat has a moral—if not legal—obligation to. We can easily imagine arguments on both sides of this question and from both consequentialist and deontological camps. The legal arguments against necessity are certainly meant to track moral considerations, though, so I would just propose that a *prima facie* moral case is on offer.

More importantly, the answer simply does not matter for present purposes. Again, the target of this Article is that self-defense can be justified without imminence, though the point of this section has been to make plausible the claim that it can also be justified without necessity; we need not press too hard on the legal doctrine to establish this plausibility. The goal has been to start to put pressure on the link between necessity and imminence, showing that they can be decoupled. Once we see that self-defense—the wording of the MPC notwithstanding—does not require necessity, we can be more open to the claim that it should not require imminence, either.

III. IMMINENCE REDUX

Before seeing why self-defense might be justified without imminence, let us try to build up the imminence requirement in greater detail, making it as strong as it can be. The obvious thing to say is that, if the threatened force is not imminent, then there is no reason for that force to be returned *now*. Events might change, or alternatives realized such that the returned force would be gratuitous. By restricting the use of force as against imminent threats—at least so goes the argument—we institute an important check against gratuitous force, and thus cut down on its

incidence. This point has made a scattered appearance in the case law and can be usefully elucidated by looking at it.

In *State v. Schroeder*, the defendant committed an assault while incarcerated.⁴⁰ At the time of the assault, he was confined in a cell with three other prisoners one of whom, Riggs, was the ultimate victim.⁴¹ Riggs had a reputation for inflicting sex and violence on the other prisoners, and Schroeder was undeniably afraid of him.⁴² Schroeder lost \$3,000 gambling with Riggs, a debt that he could not pay.⁴³ Furthermore, Schroeder and others testified that Riggs forced them to gamble, despite their attempts to desist.⁴⁴ Riggs threatened to sell Schroeder's gambling debt to other prisoners, a debt they could forcibly exact through sodomy.⁴⁵

Schroeder asked to be transferred to another a cell, a request that was apparently ignored.⁴⁶ On the night of the assault, Riggs indicated he might claim some of his debt that night while Schroeder was asleep.⁴⁷ Scared to sleep, Schroeder lay awake and, some hours later, stabbed Riggs in the back of the neck with a table knife, then struck him several times in the face with an ashtray.⁴⁸

At trial for assault, Schroeder requested an instruction of self-defense. The court denied the request, and the Nebraska Supreme Court affirmed. They held:

[T]here was no evidence to sustain a finding that the defendant could believe an assault was imminent except the threat the Riggs had made before he went to bed . . . There is a very real danger in a rule which would legalize preventive assaults involving the use of deadly force where there has been nothing more than threats.⁴⁹

In other words, the fact that Riggs had merely threatened Schroeder was insufficient to justify a claim of imminence, according the majority. However, part of the debate turned on what the relevant time slices were, a point made in the dissent:

The defendant could not be expected to remain awake all night, every night, waiting for the attack that Riggs had threatened to make. The defendant's evidence here was such that the jury could have found the defendant was justified in believing the use of force was necessary to protect himself against an attack by Riggs "on the present occasion."⁵⁰

40. *State v. Schroeder*, 261 N.W.2d 759, 760 (Neb. 1978).

41. *Id.*

42. *Id.*

43. *Id.*

44. *Id.*

45. *Id.*

46. *Id.*

47. *Id.*

48. *Id.*

49. *Id.* at 761.

50. *Id.* at 762. See MODEL PENAL CODE § 3.04.

Put differently, the majority drew a distinction made at one time, that might have been realized at a later time; the temporal distinction between these two was enough to abrogate any claim to imminence. The dissent was more charitable, seeing the whole “occasion”—i.e., the temporally delimited segment starting with the threat and ending with its prospective realization—as less divisible. It is hard to see why this would be the better interpretation, particularly given that Schroeder could have reported the threat to the warden in the meantime; there is no evidence that he did.⁵¹ While I agree that Schroeder should not have to lay awake waiting for Riggs’ attack, the story should properly hang on necessity, not imminence, an idea to which we return below.

Ha v. State presents similar issues.⁵² Ha, an immigrant from Vietnam, found employment on an Alaskan fishing boat.⁵³ After work, he shared drinks with other Vietnamese immigrants, including Buu.⁵⁴ After drinks, they returned to the boat, and Buu started to assault Ha, first verbally, then physically.⁵⁵ They were eventually separated; Buu left the boat temporarily, then returned with a hammer.⁵⁶ Ha was able to escape to a neighboring boat and ensconced himself in the boat’s cabin.⁵⁷ Buu allegedly yelled into the cabin that he would kill Ha, then left.⁵⁸ Ha was unable to sleep that night, then retrieved a rifle, loaded it, and kept it by his side for safety.⁵⁹ The next morning, Ha went looking for Buu.⁶⁰ He found him returning from the grocery store, and shot him in the back.⁶¹ Buu was hit by seven of thirteen shots and died immediately.⁶²

Ha requested a self-defense instruction on the basis that Buu came from a family renowned for violence and that Ha reasonably feared Buu would make good on his death threat.⁶³ Furthermore, Ha denied that he should have gone to the police, contending that his “cultural background and his poor command of English” would render such an attempt useless.⁶⁴ The trial court denied the request and Ha was convicted of second-degree murder; he got mitigation from first-degree murder for heat of passion.⁶⁵ The self-defense claim, failed, though, because “[I]nvincible’ harm is not the same as ‘imminent’ harm. Even though Ha may have reasonably

51. Of course, his previous request for transfer was not granted; this might undermine Schroeder’s confidence that a new request would work, but it hardly excuses his from making one regardless.

52. *Ha v. State*, 892 P.2d 184 (Alaska Ct. App. 1995).

53. *Id.* at 186.

54. *Id.*

55. *Id.*

56. *Id.*

57. *Id.*

58. *Id.*

59. *Id.* at 187.

60. *Id.*

61. *Id.*

62. *Id.*

63. *Id.*

64. *Id.* at 195.

65. *Id.*

feared that Buu (or one of Buu's relatives) would someday kill him, a reasonable fear of future harm does not authorize a person to hunt down and kill an enemy."⁶⁶

Interestingly, the Alaska statute did not explicitly require imminence for self-defense. Rather, it stated that "a person is justified in using nondeadly force upon another when and to the extent the person reasonably believes it is necessary for self-defense against what the person reasonably believes to be the use of unlawful force by the other."⁶⁷ However, the court read an imminence requirement into this provision by looking at the definition of "force," which appears elsewhere in the code: "'force' means any bodily impact, restraint, or confinement or the *threat of imminent bodily impact*, restraint, or confinement."⁶⁸ In other words, Ha could exercise self-defense against Buu only if Buu wielded unlawful force against him. Insofar as the force Buu wielded was threatened rather than actualized, the threat would have to be imminent to count as force against which Ha could respond. It was not, and so his defense failed.

Finally, consider *State v. Norman*.⁶⁹ *Norman* is a hugely influential case, but also incorporates factors beyond those we need to consider for present purposes. The defendant killed her husband while he slept, then was denied a self-defense instruction at trial.⁷⁰ The North Carolina Supreme Court agreed that she should not receive the instruction.⁷¹ At issue was, among other things, whether it was reasonable for Norman to believe that force was warranted. She had been violently abused for many years, both physically and verbally.⁷² The physical abuse was especially horrific, including burning, dousing with hot coffee, and forced prostitution at a local truck stop.⁷³ It worsened, and her husband threatened to kill her.⁷⁴ Police came, but she refused to file a complaint against her husband for fear of retaliation.⁷⁵ He beat and burned her regardless, refused her food, and forced her to sleep on the floor.⁷⁶ In the middle of the night, she took their grandchild to a neighbor's house, returned with a pistol, and shot her husband in the head, three times.⁷⁷

66. *Id.* at 191.

67. ALASKA STAT. § 11.81.330 (2014).

68. ALASKA STAT. § 11.81.900 (2014) (emphasis added).

69. *State v. Norman*, 378 S.E.2d 8 (N.C. 1989). For a more extensive exposition of the facts, see *State v. Norman*, 366 S.E.2d 586, 587–89 (N.C. Ct. App. 1989).

70. *Norman*, 378 S.E.2d at 9.

71. *Id.*

72. *Id.* at 9–11.

73. *Id.* at 10–11.

74. *Id.* at 10.

75. *Id.*

76. *Id.*

77. *Id.* at 11.

Much of the case involved so-called “battered woman syndrome” (BWS) and the reasonable person standard.⁷⁸ In North Carolina, an instruction for self-defense required that “the evidence, viewed in the light most favorable to the defendant, tends to show that at the time of the killing it appeared to the defendant and she believed it to be necessary to kill the decedent to save herself from imminent death or great bodily harm.”⁷⁹ The court continued “[t]hat belief must be reasonable, however, in that the circumstances as they appeared to the defendant would create such a belief in the mind of a person of ordinary firmness.”⁸⁰ In other words, the reasonable person standard is supposed to be objective,⁸¹ and so Norman’s well-grounded fear of her husband would not necessarily be exculpatory.

The court found that it was not. Norman testified that she thought her husband would resume the abuse as soon as he awakened.⁸² Furthermore, expert testimony indicated that Norman thought her life was doomed and that her death at the hands of her husband was inevitable.⁸³ But even if this were true, the court said, it did nothing to “establish a fear—reasonable or otherwise—of *imminent death or great*

78. A useful overview of BWS is as follows:

Violent behavior directed at the woman occurs in three distinct and repetitive stages that vary both in duration and intensity depending on the individuals involved.

Phase one of the battering cycle is referred to as the “tension-building stage,” during which the battering male engages in minor battering incidents and verbal abuse while the woman, beset by fear and tension, attempts to be as placating and passive as possible in order to stave off more serious violence.

Phase two of the battering cycle is the “acute battering incident.” At some point during phase one, the tension between the battered woman and the batterer becomes intolerable and more serious violence inevitable. The triggering event that initiates phase two is most often an internal or external event in the life of the battering male, but provocation for more severe violence is sometimes provided by the woman who can no longer tolerate or control her phase-one anger and anxiety.

Phase three of the battering cycle is characterized by extreme contrition and loving behavior on the part of the battering male. During this period the man will often mix his pleas for forgiveness and protestations of devotion with promises to seek professional help, to stop drinking, and to refrain from further violence. For some couples, this period of relative calm may last as long as several months, but in a battering relationship the affection and contrition of the man will eventually fade and phase one of the cycle will start anew.

The cyclical nature of battering behavior helps explain why more women simply do not leave their abusers. The loving behavior demonstrated by the batterer during phase three reinforces whatever hopes these women might have for their mate’s reform and keeps them bound to the relationship.

State v. Kelly, 478 A.2d 364, 371–72 (N.J. 1984) (internal citations omitted). For extended discussion, see LENORE E. WALKER, *THE BATTERED WOMAN*, 55–70 (1979). For the legal upshot, see CYNTHIA GILLESPIE, *JUSTIFIABLE HOMICIDE: BATTERED WOMEN, SELF-DEFENSE, AND THE LAW* (1989). For a critical reply, see Stephen Morse, *The “New Syndrome Excuse” Syndrome*, 14 CRIM. JUST. ETHICS 3, 3–15 (1995).

79. *Norman*, 378 S.E.2d at 12.

80. *Id.*

81. *See, e.g.,* People v. Goetz, 497 N.E.2d 41, 41 (N.Y. 1986).

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

83. *Id.*

bodily harm at the time of the [husband's] killing."⁸⁴ Her husband was asleep when she shot him, and

all of the evidence tended to show that the defendant had ample time and opportunity to resort to other means of preventing further abuse . . . There was no action underway [such that] . . . the jury could have found that the defendant had reasonable grounds to believe . . . that a felonious assault was imminent.⁸⁵

Courts have wrestled with BWS, particularly insofar as how it fixes the reasonable person standard. That standard is ostensibly objective, but courts have granted some accommodation. In *People v. Goetz*, for example, the defendant, a middle-aged white man, shot four black youths on a New York subway; they had approached him asking for money.⁸⁶ Two were shot in the back, one after Goetz had paused to survey the damage.⁸⁷ The New York self-defense statute required reasonable belief, and the court interpreted this as requiring an objective standard.⁸⁸ But the objective standard they promulgated looked at least somewhat subjective;

[W]e have frequently noted that a determination of reasonableness must be based on the "circumstances" facing a defendant or his "situation" . . . [T]he defendant's circumstances encompass any prior experience he had which could provide a reasonable basis for a belief that another person's intentions were to injure or to rob him or that the use of deadly force was necessary under the circumstances.⁸⁹

Goetz had previously been mugged, and, violence on the subways was not uncommon. Because of his previous experience, the setting, and his fears, he argued that self-defense was justified. The jury agreed, acquitting him on all charges except for possession of an unlicensed handgun.⁹⁰

This issue translates directly over to the BWS context where courts try to decide whether the battered woman gets to present her experiences of abuse in formulating what would be reasonable in her situation, or whether the jury should not countenance such subjective experiences. Despite the skepticism in *Norman*, courts have since become more sympathetic to such evidence.⁹¹ In *People v. Humphrey*, the California Supreme Court held that "defendant's perspective" mattered, and

84. *Id.* at 14 (emphasis in original).

85. *Id.* at 13 (emphasis omitted).

86. *Goetz*, 497 N.E.2d at 44. For extended treatment, see GEORGE FLETCHER, A CRIME OF SELF-DEFENSE: BERNHARD GOETZ AND THE LAW ON TRIAL (1990). See also LILIAN RUBIN, QUIET RAGE: BERNIE GOETZ IN A TIME OF MADNESS (1988).

87. *Goetz*, 497 N.E.2d at 43.

88. *Id.* at 51.

89. *Id.* at 52.

90. *Id.* at 44–45.

91. For more discussion, see KADISH ET AL., *supra* note 24, at 841–42.

that such a perspective could be effected by BWS; the court also, though, made clear that this was still supposed to be an objective standard.⁹² Missouri has moved further toward a subjective standard, noting that the jury must “weigh the evidence in light of how an otherwise reasonable person who is suffering from battered spouse syndrome would have perceived and reacted in view of the prolonged history of physical abuse.”⁹³ North Dakota goes even further, directing juries to “assume the physical *and psychological* properties [of the defendant] . . . and then decide whether or not the particular circumstances . . . were sufficient to create . . . reasonable belief . . . that the use of force was necessary. . . .”⁹⁴

While it is important to map out this terrain, it can also obfuscate the relationship between imminence and self-defense. Whether BWS subjectivizes the standard or not, the law uncontroversially upholds the imminence requirement. What matters is whether it is reasonable to believe that an attack is imminent, and BWS either does or does not move the referent of that standard. Norman shot her husband while he slept, and the court determined that she lacked a reasonable belief of an imminent attack. The *Humphrey* court would have been more forgiving, and Missouri and North Dakota courts more forgiving still. But reasonable belief of imminent attack does not go away in any of these standards; all that changes is the metric by which we determine whether reasonable belief is met.

So, in *Schroeder*, *Ha*, and *Norman*, the defendants all lose their claims of self-defense. The obvious way to analyze the failures is in terms of imminence. Riggs threatened Schroeder, but the threat was for action at some time in the future; in fact, insofar as Riggs was sleeping, it was impossible that Schroeder at risk when he stabbed Riggs. Same thing with Buu: even if his family had a reputation for violence and Buu would have eventually made good on his threat, Ha need not have shot Buu in the back. Rather, he could have pursued police intervention, he could have fled, or he could have sought security. Norman is the hardest case because her psychology was affected by longstanding and brutal abuse. Nevertheless, her husband was asleep and so the court was not sympathetic to her claim because she was not in imminent danger. And even the more liberal courts would have still required at least a subjective belief of imminent threat. Maybe BWS could help ground this belief, or maybe not, but the standard is clear. Or at least so it seems; in the next section, I will propose a different analysis.

IV. DISPOSING OF IMMINENCE

One of the principal moves in this section is to argue that the aforementioned cases are critically ambiguous as to why self-defense fails. To be sure, they say that self-defense fails because the imminence requirement is not met. But those cases can also be analyzed such that the necessity requirement is not met. In this

92. *People v. Humphrey*, 921 P.2d 1, 8 (Cal. 1996).

93. *State v. Edwards*, 60 S.W.3d 602, 615 (Mo. Ct. App. 2001).

94. *State v. Leidholm*, 334 N.W.2d 811, 818 (N.D. 1983) (emphasis added).

regard, the failure of self-defense is over-determined. So I want to make plausible the claim that self-defense could found, not just in imminence, but also in necessity. The proposal is revisionary since it is often explicitly at odds with the reasoning that the courts supply. However, that reasoning often appears outcome-oriented (i.e., constructed so as to deny the defense) and so alternative reasoning that reaches the same outcome may still be valuable.

This alternative reasoning therefore calls into question the preference of imminence-based, as opposed to necessity-based, defeaters for self-defense. Actually, more than that, it risks making imminence-based defeaters completely superfluous. This would truly be my preference, though the aforementioned reasoning does not get there: at best, it establishes that there are two ways to defeat self-defense, without giving the superiority of one over the other. In practice, fact patterns are often going to treat these two defeaters closely, which is just to say that they often travel together. Lack of imminence often means lack of necessity. But does this go the other way? Can we have necessity without imminence? In the second part of this section, I will argue yes, and that self-defense should be justified in these cases. That then puts pressure on the imminence requirement, making the strongest case for its wholesale abrogation in favor of necessity.

In *Schroeder*, the court specifically invoked imminence in denying the defendant's claim to self-defense, noting that "there was no evidence to sustain a finding that the defendant could believe an assault was imminent except the threat that Riggs had made before he went to bed."⁹⁵ While this is true, they could have reached the same conclusion by saying nothing about imminence, but rather, by focusing on necessity. Riggs makes the threat on Schroeder and retires for the night. Schroeder then attacks Riggs while he sleeps. Why? Why not seek interventions from the warden? Either Schroeder could be placed in protective custody, or Riggs could be detained. There are simply alternatives to Schroeder's attack, which is to say that the attack was not necessary.

Schroeder disagrees, and bases his disagreement on the fact that he had previously requested a transfer, a request that the prison administration had apparently disregarded. As his defense goes, intervention was not a live option. Two things in reply. First, maybe he is right, but it is very unlikely that he would know that for sure; certainly the onus is on him to at least *ask*, an onus that he failed to discharge. Second, if he is right, then it is not obvious to me that his claim should fail. Rather, the driving intuition is that the attack was not necessary because other possibilities existed. If the defense could indeed foreclose these possibilities—which, at trial, it did not—then perhaps he should win.

The court, though, tied imminence to a public policy argument, holding that, absent imminence, "[t]here is a very real danger in a rule which would legalize preventive assaults involving the use of deadly force where there has been nothing

95. *Schroeder*, 261 N.W.2d at 761.

more than threats.”⁹⁶ Indeed this is true, but the lack of imminence in Schroeder’s case is adventitious since he also lacked necessity. In other words, the court is worried about authorizing Schroeder’s preventive assault against Riggs, but it could deny that assault either by appealing to imminence—which it did—or else by appealing to necessity. Imminence plays, well, no necessary role in the explanation. The BWS analysis is useful here, too, because maybe Schroeder can argue that he is incapacitated by fear, and maybe the court therefore affords him consideration under a somewhat subjectivized reasonable person standard. But he still loses if he cannot show necessity; imminence is just a distracting proxy.

The same conflation happens in *Ha*. Here, the court provides that “[e]ven though Ha may have reasonably feared that Buu (or one of Buu’s relatives) *would someday* kill him, a reasonable fear of *future harm* does not authorize a person to hunt down and kill an enemy.”⁹⁷ Again the language trades on temporal considerations, implicating imminence. However, recall that Ha shot Buu in the back, and that Ha never contacted the police to report the threat. Ha argued that there were obstacles to contacting the police, both in regards to culture and in regards to language. Maybe, but these obstacles hardly obviate his responsibility to at least try. So the threat was not imminent, but nor was Ha’s response to it necessary. Again, we have, at best, a tie between imminence and necessity.

As I said above, *Norman* is the hardest case. Schroeder and Ha could have contacted authorities, but they did not. Schroeder was at least locked inside a cell with Riggs, his would-be attacker, but Ha could have easily fled. Norman is not constrained physically; in fact, she took her grandchild to the neighbor’s house after her husband fell asleep and before she came back to kill him. So, in some sense, she could have left. Her restriction is psychological where, even if there was a doorway leading out of the house, she felt that there was no escape from an abusive relationship. It is hard—if not impossible—to situate ourselves within her mind.

The easy way out is to impose an objective standard such that the confines of her mind are irrelevant. As courts have been increasingly sympathetic to BWS, though, this out is on the wane. Once the standard becomes subjectivized, we cannot discount either her fear that an attack is imminent—even if her husband is asleep—nor that she (even reasonably) thinks that firing the gun is necessary to ensure her safety. But say that the standard stays at least semi-objective, and that she cannot convince the jury that she was justified in shooting her husband. Surely the obstacle will as much be the intuition—whether misguided or not—that she could have left as that the husband was asleep. The former goes to necessity, which is a principal problem for her claim. And so again we could defeat her claim by appeal to necessity as well as by appeal to imminence; imminence can be jettisoned without losing our ability to deny her claim. I am not sure her claim should be denied but, regardless, imminence need not play any central role in the adjudication.

96. *Id.*

97. *Ha*, 892 P.2d at 191 (emphases added).

A problem in these three cases is that necessity and imminence travel so closely together. There are two ways that, in principle, they can be separated. In part II, we considered cases where imminence was present, but not necessity, seeing that self-defense is still sometimes allowed, though probably not uncontroversially. What we have not seen, though, are cases where we have necessity, but not imminence. These cases are critical for testing out intuitions and for querying the centrality of imminence for a theory of self-defense. But, in practice, cases simply do not exist. So the exercise is going to be hypothetical, but in developing these hypotheticals, we will be able to gain a greater grasp on the underlying issues.

Let us therefore consider some imagined cases:

Errant Wanderer. Albert enjoys remote hiking, as far from civilization as possible. He never takes his phone with him, not tells anyone where in particular he is going. Unfortunately for Albert, his nemesis Bertha tracks him on one of these expeditions. Bertha has long wanted to kill Albert, a fact of which Albert is aware. Bertha surprises Albert along the path, though has absent-mindedly left her pistol at home. Fortunately for Bertha, there is a nearby pit into which she can push Albert. The pit is shallow enough that Albert will not be hurt in the fall, yet deep enough that Albert will not be able to escape. Rather, Albert will be stuck in the pit until his demise from exposure, some two days hence. Albert, however, has a pistol and can shoot Bertha before being pushed into the pit.

Is Albert justified in shooting Bertha? The construction of the case is meant to separate imminence from necessity, querying the appropriateness of self-defense when necessary to protect against a non-imminent threat. As my intuitions go, self-defense could be justified, so long it really is necessary. The case can be resisted in various ways pertaining to necessity. Maybe Albert can actually escape? Maybe someone will find him before he dies? These possibilities are meant to be excluded by stipulation, but they linger. We can make the cases even more abstract, trying to shore up the necessity intuition even more strongly.

Space Walk. Carl and Denise are working together at the space station, where they develop a hostile and toxic relationship. Each vows to kill the other at the next opportunity, vows of which they are both aware. Carl has to make repairs on an exterior panel, and heads out, tethered to the station. Denise proposes to seize the opportunity, disconnecting Carl's tether and ensuring that he will drift out to space. Carl's suit has two days' worth of life support, but he will thereafter die. Carl, however, has a pistol and can shoot Denise before being untethered.

Again, is Carl justified in shooting Denise? Here, there is absolutely no possibility of salvation; Carl would be adrift in outer space. In *Errant Wanderer*, it is hard to set the possibility of escape or intervention completely aside, but, in *Space Walk*, the stipulations are harder to resist. My intuitions are certainly that Albert and Carl can exercise self-defense, despite the threats being non-imminent. What

drives them is that self-defense is necessary to save their own life; the temporal element of the threat simply gains no purchase.

One way to resist this line of reasoning would be to say that the threat *is* imminent. What is not imminent is death, but perhaps that need not affect how we consider the nature of the threat. In other words, the threat is now, but will not be fully realized until later. Or else, not only is the threat now, but its realization is also now—the threat simply is an inexorable death. This is not implausible, though is not my preferred interpretation. For example, consider the Delaware statute mentioned above: “In defending himself from injury, a person need not wait until he is struck.” Rather, if “the danger is imminent, he may strike the first blow, using no more force than is reasonably necessary to repel the attack.”⁹⁸ So what constitutes the danger? Is it being pushed into the pit or is it dying of exposure? Certainly, one leads to the other, but we need to be specific in terms of understanding the application of the statute. I would say the danger is of the death, not of initiating the causal sequence, but others may reasonably disagree.

While statutes like Delaware’s raise interpretive issues, others are less ambiguous. For example, Illinois’s allows for self-defense when “necessary to prevent imminent death or great bodily harm.”⁹⁹ In neither of the above cases is Albert or Carl at risk of imminent death or great bodily harm. Rather, they are at risk of being relegated to death in a few days, but certainly the imminence language of this statute could not be satisfied in either of our hypothetical cases. But what we need is not just to separate imminence and necessity, but also to construe of imminence in a particular way. And that way is one in which the threat or the danger is of death, not of being subject to death. The difference is subtle, but important.

Interestingly, the MPC actually supports a view like this one even if the case law has not. Recall the principal language of § 3.04: “[t]he 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.” The MPC does not explicitly use ‘imminence’, but rather talks of what is “immediately necessary.” It is easy to read the ‘immediately’ modifier as having to do with imminence, but this word was actually chosen quite self-consciously to reject any commitment to imminence. As the commentary reveals:

Nor does the draft limit the privilege of using defensive force to cases where the danger of unlawful violence is ‘imminent’, as many formulations of the rule now do. The actor must believe that his defensive action is immediately necessary and the unlawful force against which he defends must be force that he apprehends will be used on the present occasion, but he need not apprehend that it will be immediately used. There would, for example, be a privilege to use defensive force to prevent an assailant from going to summon

98. DEL. CODE ANN. tit. 11, § 464 (West 2018).

99. 720 ILL. COMP. STAT. ANN. 5/7-1 (West 2018).

reinforcements, given belief and reason to believe that it is necessary to disable him to prevent an attack by overwhelming numbers so long as the attack is apprehended on the 'present occasion.' The latter words are used in preference to 'imminent' or 'immediate' to introduce the necessary latitude for the attainment of a just result in cases of this kind.¹⁰⁰

This is pretty groundbreaking stuff buried in commentary, and there has been little jurisdictional uptake. But to build off the example intimated here, suppose Bertha threatens to go get friends to attack Albert. Standardly, we would think that self-defense is off the table; Albert should not shoot Bertha, but should rather flee, seek police protection, or whatever. But this is just to say that self-defense is not necessary to disarm the threat. What if it were? Suppose Albert is locked in a cell, completely vulnerable to future attack. There is nobody to call, and flight is impossible. He has a pistol with only one bullet, inadequate to rebuff the score of attackers that Bertha will summon. However, he can shoot Bertha and prevent the future attack. Would he be justified? I agree with the MPC's framers that the answer is yes, again despite the fact that jurisdictions have been unsympathetic.

If cases like this are meant to marshal our intuitions in favor of necessity, and against imminence, there is still the question as to why necessity drives the issue. As suggested above, it is a distracting feature of self-defense that the two tend to travel together; this precludes us from seeing that they are—at least in principle—separable. So why does imminence not matter? Well, it does, but the upshot is that imminence is a proxy for necessity. Imminence therefore matters—at least in practice—because it helps us see when self-defense is necessary. As threats become more temporally distant, it is less likely that the necessity requirement will be met because there will be more opportunities for intervention against those threats. But the key result is that these two can come apart and, when they do, imminence yields to necessity; the dual requirement simply does not make sense.

One difficult objection to this view is inspired by Kimberly Kessler Ferzan.¹⁰¹ She argues that the imminence requirement should be preserved because necessity, taken by itself, ignores the intentions, capabilities, and actions of the putative aggressor against whom self-defense would be deployed.¹⁰² Her example, which she credits to Larry Alexander, goes like this:

Assume that A is a friend of B. 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?¹⁰³

100. MODEL PENAL CODE, §3.04 commentary.

101. Kimberly Kessler Ferzan, *Defending Imminence: From Battered Women to Iraq*, 46 ARIZ. L. REV. 213, 213–62 (2004).

102. *Id.* at 250.

103. *Id.*

She answers negatively because, while B killing A is necessary to preserve A's life, A has not yet aggressed, had not yet made any movement toward planning the aggression, does not yet intend to aggress—because he does not yet know about the affair—and so on. By putting imminence back into the doctrine, we are much closer to ensuring that these desiderata are met.

There are a few things to say in reply, though it is a wonderful challenge. First, in the cases we considered above—*Abbott* and *Buu*—the would-be aggressor *did* manifest an intention to harm the accused. And so, we can distinguish those cases from hers, such that she need not object to my analysis therein. But surely that is only a partial reply: even if self-defense is allowed there, what of the case she proposes? I could agree with her that intentions matter, but ultimately think that would be giving too much back on my preferred account by loading in another substantive consideration. Rather, my move would generally be to simply deny that necessity is likely to be satisfied in the sorts of cases she envisions. To the extent that A will find out about B's affair down the road, it is hard to see why it would be necessary for B to shoot A now. B could flee, including to another state. B could seek a restraining order or police protection. And any of these possibilities undermines necessity.

But then she could just counter that I am denying the hypothetical: what if it *really were necessary* for B to kill A now, lest A kill B later? And even if A still has no idea about the affair, or how the eventual knowledge thereof would lead to a threat on B's life? Aside from trying to cabin the practical implications of these sorts of hypotheticals, my inclination is to accept the consequences and maintain, against her intuitions, that B would be justified in killing A now. Why? Because otherwise B is assuredly dead at A's hands; it is just implausible to think that B must sit around and wait for death. If the pushback is that he actually has other options, then that just goes to undermining necessity. If the pushback is that he really must sit around and wait for death, then I simply disagree.¹⁰⁴

To my mind, the best defense for maintaining imminence is not theoretical, but practical. Yes, we care about necessity, and we want to make sure that self-defense is only employed in its service. As for non-imminent threats that might be suggestive of necessity, they will often be a philosophical fiction. And so, the law emphasizes imminence, not as a *sui generis* consideration, but rather as a stopgap measure against an overzealous appeal to necessity. This sort of story makes sense so far as it goes, but what of the genuine cases where necessity can be satisfied

104. *But see* Regina v. Dudley and Stephens, 14 Q.B.D. 273, 287 (1884) (“To preserve one’s life is generally speaking a duty, but it may be the plainest and the highest duty to sacrifice it. War is full of instances in which it is a man’s duty not to live, but to die. The duty, in case of shipwreck, of a captain to his crew, of the crew to the passengers, of soldiers to women and children . . . [T]hese duties impose on men the moral necessity, not of preservation, but of the sacrifice of their lives for others, from which in no country, least of all, it is to be hoped, in England, will men ever shrink . . .”). Suffice it to say that I disagree with this analysis as well, but make that argument elsewhere. See Fritz Allhoff, *Homicide on the High Seas: Regina v. Dudley and Stephens* (unpublished).

against a non-imminent threat? Surely, we should not say that the defender must wait for a certain, but future, death.

V. PREVENTIVE WAR

Before concluding, let me remark on an important consequence of this approach—and probably a controversial one—namely as applies to preventive war. Just war theorists draw a distinction between preemptive war and preventive war.¹⁰⁵ Preemptive war is against imminent threats, whereas preventative war is against non-imminent threats. For the former, consider the Six Day War. Here, Egypt mobilized forces on the Israeli border, and Israel launched a surprise attack on the Egyptian airfields, arguing that an attack was imminent and that it should hardly wait idly in the meantime.¹⁰⁶ Some traditional thinkers, like Francisco de Vitoria, have argued against the permissibility of preemptive war, maintaining that, as aggression has yet to happen, the would-be aggressor is not liable to attack.¹⁰⁷ The contemporary consensus, though, has been more favorable.¹⁰⁸

Far less popular is preventive war. For example, consider the Japanese attack on the United States at Pearl Harbor. Here, the United States posed no immediate threat to Japan but may have become a threat at some time in the future.¹⁰⁹ The obvious problem with Japanese aggression is that, maybe, the threat posed by the United States would never have materialized. And so, as any threat becomes more temporally distant, the case for force is weakened because any range of interventions might be sufficient to diffuse the threat. The distinction between preemptive war and preventive war is, in this regard, not dichotomous, but rather one of degree as relates to the retreat of imminence. However, despite the absence of non-imminent threats, the so-called Bush Doctrine affirms the right to preventive war:

[A]s 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 . . . 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. We must adapt the concept of imminent threat to the capabilities and objectives of today's adversaries.¹¹⁰

105. BRIAN OREND, *THE MORALITY OF WAR* 74–83 (2006).

106. For more detail, see MICHAEL B. OREN, *SIX DAYS OF WAR: JUNE 1967 AND THE MAKING OF THE MODERN MIDDLE EAST* (2003).

107. FRANCISCO DE VITORIA, *POLITICAL WRITINGS* (Anthony Pageden & Jeremy Lawrance eds., 1st ed.1991).

108. See, e.g., WALZER, *supra* note 4, at 80–85.

109. WALTER LORD, *DAY OF INFAMY: THE CLASSIC ACCOUNT OF THE BOMBING OF PEARL HARBOR* (1957).

110. GEORGE W. BUSH, *THE NATIONAL SECURITY STRATEGY OF THE UNITED STATES OF AMERICA* (2002).

Somewhat disingenuously, the Bush Doctrine promises to “adapt the concept of imminence,” rather than to dispose of it. In preventive engagement, *ex hypothesi*, there is no imminent threat; changing the referent of the word hardly fixes this.

And it is not just the Bush administration that pushed back on the concept of imminence. President Obama, attempting to justify drone attacks on Anwar al-Awlaki, an American terrorist in Yemen, posited the following legal theory¹¹¹:

By its nature, therefore, the threat posed by al-Qa’ida and its associated forces demands a broader concept of imminence in judging when a person continually planning terror attacks presents an imminent threat, making the use of force appropriate. In this context, imminence must incorporate considerations of the relevant window of opportunity, the possibility of reducing collateral damage to civilians, and the likelihood of heading off future disastrous attacks on Americans.¹¹²

Again, this sort of language completely eviscerates the content of ‘imminence’. Whether there is a “relevant window of opportunity” obviously has nothing to do with whether the attack is imminent, but rather with whether preventive force could be, at best, necessary. Same with the reduction of collateral damage.

The focus on imminence is opportunistic because of its status under international law. In 1837, the British—responding to United States support of Canadian rebels—seized a ship, the *Caroline*, set it in fire, and sent it over Niagara Falls. Secretary of State Daniel Webster condemned the British, saying their actions could not be construed as in self-defense. He promulgated the so-called “Caroline test”, under which self-defense must be shown, not only to be proportional, but also that the “necessity of self-defense [was] instant, overwhelming, leaving no choice of means, and no moment for deliberation.”¹¹³ More recently, Article 51 of the United Nations Charter has been interpreted so as to restrict the use of force against imminent attacks.¹¹⁴ One commentator reads this admittedly vague

111. Al-Awlaki’s father unsuccessfully sought relief on his son’s behalf. *Al-Aulaqi v. Obama*, 727 F. Supp. 2d 1, 1 (D.D.C. 2010). The following year, Al-Awlaki was killed by a drone strike. Jennifer Griffin, *Two U.S.-Born Terrorists Killed in CIA-Led Drone Strike*, FOX NEWS (Sept. 30, 2011), <http://www.foxnews.com/politics/2011/09/30/us-born-terror-boss-anwar-al-awlaki-killed/>.

112. U.S. DEP’T OF JUSTICE, *LAWFULNESS OF A LETHAL OPERATION DIRECTED AGAINST A U.S. CITIZEN WHO IS A SENIOR OPERATIONAL LEADER OF AL-QA’IDA OR AN ASSOCIATED FORCE* (2013). For discussion, see Josef L. Kunz, *Individual and Collective Self-Defense in Article 51 of the Charter of the United Nations*, 41 AM. J. INT’L L. 872, 872–79 (1947). For more on the distinctive nature of terrorism, see Fritz Allhoff, *The War on Terror and the Ethics of Exceptionalism*, 8 J. MIL. ETHICS 265, 265–88 (2009). See also Lionel K. McPherson, *Is Terrorism Distinctively Wrong?*, 117 ETHICS 524, 524–46 (2007).

113. Letter from Daniel Webster to Henry Stephen Fox (April 24, 1841), in *THE PAPERS OF DANIEL WEBSTER: DIPLOMATIC PAPERS*, COL. 1, 1841–43 at 62 (K.E. Shewmaker ed., 1983). See also John C. Yoo, *Force Rules: UN Reform and Intervention*, 6 CHI. J. INT’L L. 641, 641–61 (2006).

114. The text is as follows:

Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken the measures necessary to maintain international peace and security. Measures taken by members in exercise of this right of self-defense shall be immediately reported to the

language as saying that states may protect their citizens when they “are in imminent peril of death or grave injury.”¹¹⁵ Similarly:

[T]here is a well-established right to use limited force for the protection of one’s own nationals from an imminent threat of injury or death . . . The right, flowing from the right of self-defense, is limited to such use of force as is necessary and appropriate to protect threatened nationals from injury.¹¹⁶

So we can see why various administrations might want to weaken the requirements of “imminence,” but we can also wonder why not just give up on it altogether, at least philosophically, if not legally. The Caroline test presents imminence as a feature of necessity, which is somewhat different from most approaches in criminal law where the two are presented as complementary requirements. Nevertheless, the argument from earlier sections applies here as well, namely insofar as we can wholly separate imminence from necessity. In these cases, can self-defense still be justified?

Before answering that, it is worth reflecting on how we extend from the individual context (e.g., A shoots B) to the collective one (e.g., nation A attacks nation B, or else nation A defends itself against individual B). Is this a straightforward extension? Or does something get in the way? This question is central to thinking about war. Michael Walzer famously defends parity between the two contexts: “[e]very reference to aggression as the international equivalent of armed robbery or murder, and every comparison of home and country or of personal liberty and political independence, relies upon what is called the *domestic analogy*.”¹¹⁷ Evaluating this analogy takes us too far afield, but it at least has some intuitive plausibility.¹¹⁸ And if it does, we might be able to take our account of self-defense from domestic law and map it, at least roughly, onto the international context.

So what effects would that have for preventive war? As I have argued, imminence is simply not important with regards to self-defense, or at least not important

Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.

For further discussion, see *Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.)*, Judgment, 1986 I.C.J. 14 (June 27). See also Anthony Clark Arend, *International Law and the Preemptive Use of Military Force*, 26 WASH. Q. 89 (2003); Yoo, *supra* note 113, at 641–61.

115. Oscar Schachter, *The Lawful Resort to Unilateral Use of Force*, 10 YALE J. INT’L L. 271, 271–93 (1985). See also Mark B. Baker, *Terrorism and the Inherent Right of Self-Defense (A Call to Amend Article 51 of the United Nations Charter)*, 10 HOUS. J. INT’L L. 25, 38 (1987).

116. John F. Murphy, *State Self-Help and Problems of Public International Law*, in LEGAL ASPECTS OF INTERNATIONAL TERRORISM 553, 557 (Alona E. Evans & John F. Murphy eds., 1978).

117. WALZER, *supra* note 4, at 58. See also Noam Zohar, *Innocence and Complex Threats: Upholding the War Ethics and the Condemnation of Terrorism*, 114 ETHICS 734, 734–51 (2004); Jeff McMahan, *Collectivist Defenses of the Moral Equality of Combatants*, 6 J. MIL. ETHICS 50, 50–59 (2007); Christopher Kutz, *The Difference Uniforms Make: Collective Violence in Criminal Law and War*, 33 PHIL. & PUB. AFF. 33.2 (2005): 148–180.

118. For more discussion, see FROWE, *supra* note 5, at 29–39.

for any other reason than that it often serves as a proxy for necessity.¹¹⁹ So imagine a case not altogether unlike the al-Awlaki or, to set that one aside, something structurally similar:

Terrorist Training Camp. One country receives confirmed information that another country hosts a terrorist training camp. It is in an isolated part of the mountains, and largely out of the host country's governance. The trainees are young, and will not become operationalized for a decade. However, they will soon leave the camp and infiltrate American society, becoming sleeper agents until the time of their lethal attacks some years hence. The camp disbands tomorrow, yet a drone can take it out tonight.

It is easy to resist the hypothetical. Maybe the terrorists' resolve will weaken in the coming years. Maybe geopolitics will change, thus abrogating the ideological tension between the two cultures. Maybe diplomacy will intervene. Maybe law enforcement will intervene. And so on. But just suppose none of that is true.¹²⁰ The options are, quite literally, destroy the camp now or else suffer fatalities in the future. As in domestic cases, my intuitions track necessity, not imminence. The civilian deaths are non-imminent but, as the case is constructed, attacking the terrorist training camp is necessary to prevent them.

CONCLUSION

Self-defense traditionally requires both necessity and imminence. The purpose of this paper has been to, first, show that these two requirements are separable; they often travel together, but sometimes they take different paths. And so, section II explored how self-defense can be justified without necessity, the easier of the two showings. Sections III-IV, though, took on the harder project of showing that self-defense can be justified without imminence, a showing at odds with most approaches.

That argument proceeded in two stages. The first was to show that most judicial language was critically ambiguous between whether self-defense claims failed because of an absence of imminence—what, ostensibly—those opinions hold, or else because of an absence of necessity. I argued that appeals to necessity could as appropriately defeat claims as appeals to imminence, and so the focus on imminence was, at best, superfluous. But then I created some hypotheticals in which necessity and imminence actually separate, and tried to marshal intuitions in favor of self-defense against non-imminent threats. The last section explored how self-defense without imminence, previously countenanced in domestic contexts, could

119. For disagreement, consider Ferzan, *supra* note 101 at 262, who contends that 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.”

120. For more discussion of some of the methodological issues herein, see FRITZ ALLHOFF, *TERRORISM, TICKING TIME-BOMBS, AND TORTURE* 87–111 (2012).

be extended to international contexts as well, particularly as pertains to preventive war.

The principal ambition of this Article was to release self-defense from the requirement of imminence. Imminence serves as a proxy for necessity but does not portend a *sui generis* metric by which we should assess claims of self-defense. This account therefore broadens the scope of self-defense, allowing for more expansive applications. The point, of course, is not to encourage unjustified violence, but rather to delimit the scope of justified violence, a delimiting more broadly than has generally been enshrined in our criminal law.