

## TARGETED KILLING AND THE IMMINENCE REQUIREMENT

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[DRAFT]

*Perhaps the fundamental obstacle to justifying targeted killing is the imminence requirement. Because either the circumstances or the victims of targeted killing do not easily fit within the transnational war framework, the justification for targeted killings is often sought within the self-defense paradigm. And self-defense generally requires that the victim be posing an imminent threat at the time of the self-defense force. Typically, however, targeted killings occur while the target does not pose an imminent threat. As a result, if targeted killings are to be justified, the imminence requirement must be broadened or eliminated. This paper argues that the imminence requirement in self-defense should be substantially broadened if not eliminated. Despite the long heritage of the imminence requirement in the law of self-defense, the imminence requirement is an imperfect sorting mechanism for determining what instances of defensive force are permissible and what are not. Not only is the imminence requirement under-inclusive, as many have claimed in the spousal abuse context, it is also over-inclusive. As imperfectly translating the conditions for morally permissible defensive force, the imminence requirement obscures both the moral right of self-defense despite the absence of imminence and the absence of a moral right of self-defense despite the presence of imminence. Though inadequate as a dispositive criterion in a moral account of self-defense, the utility of the imminence requirement is as an evidentiary rule. A defensive killing in the absence of imminence is merely probative of the killing being morally impermissible; a defensive killing in the presence of imminence is merely probative of the killing being morally permissible. Over time, perhaps the imminence requirement, quite useful as an evidentiary rule, has assumed the weight of a moral requirement. But we should not confuse the evidentiary rule with the underlying moral principle. Even if we find that the evidentiary value of imminence to be indispensable in a law of self-defense, we should at least concede that some acts of defensive force, deemed unlawful for failure to satisfy an imminence requirement, are nonetheless morally permissible self-defense for which there is insufficient legal evidence. Targeted killings may well be such acts.*

## INTRODUCTION

Targeted killings (by one state of a citizen of another state physically located outside the state perpetrating the killing), whether by Predator drone or by more conventional means, are generally considered unlawful under the traditional laws of war. Among the arguments employed in defense of targeted killing is that the practice is justified by self-defense. That is, the individual targeted for killing is an aggressor against the state perpetrating the killing and that the killing is in self-defense of the state. Perhaps the principal difficulty with such a defense of targeted killings is the imminence requirement. Typically, the victim of the targeted killing is neither presently aggressing nor is manifesting any sign of imminent aggression or perhaps is not even temporally about to aggress. As a result, critics of targeted killings argue that because the imminence requirement is not satisfied targeted killings cannot be understood as permissible or justified self-defense. If targeted killings are to be understood as permissible or justified self-defense either targeted killings must be shown to somehow satisfy the imminence requirement or the validity of the imminence requirement must be placed in doubt.

This paper argues that the imminence requirement should either be modified or abandoned. If this argument is successful, the principal obstacle to justifying targeted killings under the law of self-defense might be circumvented. But whether targeted killings are ultimately permissible or justifiable under the law of self-defense or by some other means is beyond the scope of this paper. This paper only argues against the principal impediment to justifying targeted killings under self-defense—the imminence requirement.

While a number of commentators have criticized the imminence requirement, these criticisms have not been sufficient to alter the traditional and consensus view of the importance of the imminence requirement. This paper will attempt to advance some new arguments against and rebut some existing arguments in favor of the imminence requirement. The principal focus is to show why the imminence requirement is problematic, rather than to advance a preferable standard. However, I do tentatively join the number of scholars critical of the imminence requirement who argue for a necessity standard.<sup>1</sup> Rather than the imminence of the aggressor's threat triggering the right of self-defense, imminence should be one factor in a determination of whether the defensive force was necessary to neutralize the future aggression.

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<sup>1</sup> See, e.g., 2 PAUL ROBINSON, CRIMINAL LAW DEFENSES 78 (1984) ("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."); Larry Alexander, *A Unified Excuse of Preemptive Self-Protection*, 74 NOTRE DAME L. REV. 1475, 1494 (1999) ("It shall be a defense to any crime that the defendant committed it to avoid a harm to himself or others, and a 'person of reasonable firmness' in the defendant's situation would have committed the crime.").

## I. A PARABLE OF IMMINENCE

It is often said that our law of self-defense reflects and is guided by the use of force and violence in the western frontier. Imagine the archetypal scenario of self-defense that has been endlessly portrayed in television and film Westerns. The bad guy Gunslinger, who enjoys the reputation of being the fastest gun in the territory, is walking down a dusty street. He sees the good guy humble homesteading Sheepherder (or peace-loving sheriff) and calls him out. Sheepherder says, "I don't want any trouble." Gunslinger replies, "Well, you just might get some." Each have their hands at their sides poised above each holstered gun. Invariably, Sheepherder never makes the first move for his guns. He waits for Gunslinger to make the first move. Viewers of this archetypal scenario need not be criminal law scholars to realize that the good guy must never draw first; it is the bad guy that always draws first. In order to be the good guy, one must wait for the other to make the first move, the first sign of aggression. Only after the bad guy makes a move for his guns may the good guy reach for, draw, and fire his guns.

Our current law of self-defense incorporates the implicit messages of this Hollywood staple of the climactic scene in a Western. In order to be justified in self-defense against the wrongful force of an unlawful aggressor, one must wait until the unlawful aggression is imminent. And imminence is signaled by reaching for and drawing one's gun. Were the good guy to reach for, draw, and fire his gun first, he would not be the good guy. He would be the unlawful aggressor whose force would not be justified in self-defense. And this is true despite the good guy (and all the townspeople lining the street) knowing that the bad guy has the wrongful intent to kill him and will eventually draw and fire his gun thereby killing him. These are the immutable conventions of the scenario as well as our law of self-defense. So Sheepherder waits. Finally, after some cat and mouse dialogue in which Gunslinger taunts and toys with Sheepherder, Gunslinger reaches for his gun. The camera cuts to Sheepherder subsequently reaching for his gun. Gunslinger now has his gun in his hand, drawing it out of his holster, and raising it. Subsequently, we see Sheepherder do the same. Gunslinger starts to level the gun at Sheepherder. Next, Sheepherder begins to level his gun at Gunslinger.

At this point, the suspense is excruciating. Surely, Sheepherder will be killed. Gunslinger is always one step ahead. By the time that Sheepherder reaches for his gun, Gunslinger already has his in his hand; by the time that Sheepherder has his gun in hand, Gunslinger is already raising it to shoot etc. How will Sheepherder ever catch up and be able to shoot his gun first and kill Gunslinger and save the day?

The scenario calls to mind Zeno's paradox of the tortoise and the hare. Zeno challenged us to explain how the much faster hare could ever catch up with the much slower tortoise if the tortoise had a head start in a race. By the time the hare reaches the starting place of the tortoise, the tortoise has moved ahead, say five feet. And by the time the hare travels the five feet to reach the tortoise's previous position, the tortoise has again moved on ahead. Though the hare

gets closer and closer, Zeno claimed that, paradoxically, the faster hare could never overtake the slower tortoise.

But through the magic of the Hollywood ending, somehow Sheepherder does overcome Gunslinger's head start and Sheepherder fires his gun first and Gunslinger falls into a heap on the street. Not only does good triumph over evil, but good does so in a way that does not undermine, but only confirms, our prior view as to who is the good guy and who is the bad guy. Good not only triumphs over evil, but emerges from the confrontation with clean hands, untainted by the brush with evil.

The magical Hollywood ending supplies a twist on Zeno's paradox. Here the magical Hollywood ending depicts how the good tortoise (Sheepherder) gives the bad hare (Gunslinger) a head start and still beats the bad hare in the race. The magical Hollywood ending goes Zeno's paradox one better: how can the tortoise give the hare a head start and still beat the hare in the race?

The imminence requirement of our current law of self-defense shares much with the conventions of the magical Hollywood ending. The good guy must give the bad guy a head start. In order to prevail against a bad guy tortoise, the good guy must be a hare. In order to prevail against a bad guy hare, the good guy must be an even faster hare.

And the imminence requirement of our current law of self-defense is just as unrealistic as the magical Hollywood ending. Not all victims of aggression will be hares in tortoise clothing or faster hares in ordinary hare clothing. Not all humble, peaceful sheepherding homesteaders will be faster than the professional gunslinger. That is, not all victims of aggression will be able to employ force faster than their aggressor. Not all such victims will be able to overcome the head start that the law of imminence provides to the aggressor. Not all such victims will be able to overcome the handicap that the law of imminence imposes on the self-defender.

Consider the effect of the imminence requirement in either allowing or precluding effective self-defense force as a function of the comparative speed in the employment of force by the aggressor and self-defender:

- (i) self-defender is substantially slower than aggressor

*--NO RIGHT OF EFFECTIVE SELF-DEFENSE*

- (ii) self-defender is slightly slower than aggressor

*--NO RIGHT OF EFFECTIVE SELF-DEFENSE*

- (iii) self-defender is the same as aggressor

*--NO RIGHT OF EFFECTIVE SELF-DEFENSE*

- (iv) self-defender is slightly faster than aggressor

*--NO RIGHT OF EFFECTIVE SELF-DEFENSE<sup>2</sup>*

- (v) self-defender is substantially faster than aggressor<sup>3</sup>

*--RIGHT OF EFFECTIVE SELF-DEFENSE*

As we can see from the above categories, the imminence requirement only allows an effective right of self-defense when the self-defender is substantially faster than the aggressor and sufficiently so that the self-defender's speed can overcome the head start or advantage that the imminence requirement provides to the aggressor. But in all the other possible categories, four out of the five above, the self-defender lacks an effective right of self-defense. The imminence requirement bars an effective right of self-defense.

Moreover, even an effective right of self-defense in only one of the above five categories perhaps overstates the scope of an effective right of self-defense. Realistically, category (v) will represent significantly less than 20% of the cases. There are perhaps few aggressors who engage in unlawful aggression against victims who can employ force appreciably faster than their aggressor. Most aggressors will avoid such victims and instead select the comparatively more vulnerable victims depicted in categories (i)-(iv).

While the imminence requirement does not provide an effective right of self-defense to many victims of aggression, it should. While the imminence requirement seems to favor only the quick and the agile, it should not. The law of self-defense should protect not only those who

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<sup>2</sup> This assumes that despite the slight comparative advantage of speed in the employment of force that the self-defender enjoys, it is still not sufficient to overcome the head start that the imminence requirement provides to the slightly slower aggressor. As a result, there is no effective right of self-defense. But if the slight comparative advantage of speed did suffice to overcome the head start that the imminence requirement provides to the aggressor, then there would be an effective right of self-defense. The upshot is that where the self-defender's speed advantage is only slight, there would not clearly be an effective right of self-defense.

<sup>3</sup> That is, a self-defender who employs force substantially faster than the aggressor and that is sufficiently faster to overcome the head start or advantage that the imminence requirement grants to the unlawful aggressor.

may employ force faster than their aggressor, but less physically adept victims as well. The right of effective self-defense should not be a function of one's physical advantages. The fast as well as the slow should equally enjoy a right of effective self-defense. One's right to effective self-defense should not be a function of one's physical attributes. The law of self-defense should not be only for the hare but for the tortoise as well.

If anything, the law of self-defense, incorporating an imminence requirement, has it backwards. It favors the fleet afoot over the slow and cumbersome. Rather than enhancing the advantages already enjoyed by the physically blessed, the law of self-defense should be seeking to neutralize those advantages. Any bias in the law of self-defense should favor the less physically advantaged, not the more physically advantaged. But even if the law of self-defense fails to neutralize the physical advantages of the fleet over the slow, it should not further handicap the already less physically advantaged. And this applies regardless of the source of the aggression—gunslingers, strangers in dark alleys, countries pointing missiles at one another, or nimble, elusive terrorists.

## II. PRELIMINARY CONSIDERATIONS

What is the point of a law of self-defense granting a right of self-defense when that right only attaches after it is too late to effectively employ? And what is the point of requiring a self-defender to wait until the aggressor physically manifests or signals her imminent aggression by some action if such aggressor's force is temporally imminent, inevitable, and defensive force is necessary now?

Defenders of the imminence requirement answer these questions by making two central claims. First, the right to self-defense is not a right to effective self-defense. And second, imminence has important independent substantive and conceptual significance. Before we examine more closely the specific arguments on behalf of the imminence requirement, let us preliminarily test our commitment to these claims.

### A. *Right of Self-Defense v. Right of Effective Self-Defense*

To test our commitment to the first claim, suppose that the imminence requirement forced self-defenders to wait so long before using defensive force that it was *always* ineffective. By the time that self-defenders were permitted to prepare to employ force against their aggressors, the self-defenders were already battered or dead. As a result, aggressors *always* triumphed over their victims. The victims, of course, had a right of self-defense, but one that was *never* effective. Would we not reconsider the imminence requirement? If yes, then the right to self-defense at least somewhat entails a right to effective self-defense. If no, what then is the purpose of a right

of self-defense? The purpose would have to be something other than to protect victims from unlawful aggression.

This suggests that the law of self-defense attempts to strike a balance between protecting the rights of victims of possible aggression and protecting possible aggressors from unnecessary defensive force. Thus, a law of self-defense that overly protected aggressors at the expense of self-defenders would be just as wrong as a law of self-defense that overly protected self-defenders at the expense of aggressors. As a result, considerations of the effectiveness of the right of self-defense are relevant considerations in setting the parameters and contours of the law of self-defense. The law of self-defense does entail a right to, at least somewhat, effective self-defense.

That the right of self-defense includes a right to effective self-defense also finds support by considering why the law of self-defense does not require the more stringent trigger of present aggression. Rather than allowing self-defense force when aggression is merely imminent, we might require aggression to be actually present. Presumably we reject this standard because it would not allow self-defense force until it was too late to be effective. As a result, the right to effective self-defense is implicitly part of the very rationale for the imminence requirement. If affording an opportunity for effective self-defense was an irrelevant consideration in determining the standards and principles of justified self-defense, as some defenders of the imminence requirement maintain, then the very rationale for the imminence requirement is undermined.

This also suggests that our law of self-defense is not written in stone and may evolve as the times and technologies change. Over time, the tactics and weapons employed by aggressors has evolved from sticks and stones, and knives and guns, that are employed at close range and have a limited capacity to kill in great numbers, to nuclear missiles and weapons of mass destruction that may be employed from a great distance and have the capacity to kill millions. In addition, we now face the prospect of nimble, elusive non-state actors gaining access to the sort of advanced weapons which once only state actors could have employed and which these non-state actors can employ with greater surprise and camouflage. As a result, it is not surprising that the law of self-defense that was appropriate for aggression with guns and knives may not be appropriate for aggression with radiological dirty bombs.

*B. Imminence Requirement Having Independent Substantive Significance v. Imminence as Evidentiary Requirement or Proxy*

To test our commitment to the second claim, suppose an actor believes that another poses a temporally imminent unlawful threat of aggression but there is no action by the aggressor signaling imminent aggression. The actor employs self-defense force anyway. Under an imminence requirement with such an action component, the defensive force would be unjustified. But suppose that the aggressor subsequently confesses that the self-defender was

correct: The aggressor was about to aggress after all. Would we still treat the defender's force as unjustified? If no, then what precisely is the independent substantive significance of the action component of the imminence requirement? If yes, why would we privilege the absence of an imperfect evidentiary signal over the ontological truth that the aggressor was about to aggress?<sup>4</sup>

This suggests that the action component of the imminence requirement may not have independent substantive significance but may merely be a proxy or evidentiary signal of something else. In most cases it may correspond well to the underlying principle or provide dispositive evidence, but it will not in all cases. It may well be the most important factor to consider but it is still but one factor among many to assess. In the unusual cases where the proxy conflicts with the principle or its evidentiary value conflicts with other evidence, the imminence requirement should not be dispositive.

If we answer these questions as I believe we should then much of the defense of the imminence requirement is questionable. If we analyze the two above situations as I believe we should then there is ample reason to either reconsider, or modify, or even reject the imminence requirement. Keeping our preliminary views on these two considerations in mind, let us examine more closely the specific defenses of the imminence requirement offered by defenders of the imminence requirement.

### III. DEFENSES OF THE IMMINENCE REQUIREMENT

The primary criticism of the imminence requirement is that it serves as a proxy or evidentiary requirement for the underlying principle that defensive force be necessary. Richard Rosen, in arguing against the traditionally narrow imminence requirement, maintains that a standard of necessity is the underlying principle and that imminence is only the proxy for that

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<sup>4</sup> Perhaps some might quibble that the aggressor's confession of aggression is not quite the same as ontological truth of aggression. Even so, the point can be made another way. Imagine we are watching footage of a security camera depicting an alternative scenario to the actual *Norman* case. See *infra* note \_\_\_ for a discussion of *Norman*. All the facts are the same except that at the precise time that the real Judy Norman did shoot her sleeping husband, the alternative Judy Norman decides not to shoot her sleeping husband because of the imminence requirement. One second later, her husband wakes up and shoots her with a gun he hid under his pillow. In this alternative scenario did her husband pose an imminent threat to alternative Judy Norman at precisely the time she decided not to shoot her husband? If yes, then it is possible for the actual husband to have posed an imminent threat to the actual Judy Norman at precisely the time she shot him. It is merely that she lacked evidence that he posed an imminent threat while he was sleeping. If the answer is no to the above question, then exactly when did the husband pose an imminent threat? Is it possible that he killed her without ever posing an imminent threat?



principle.<sup>5</sup> Self-defense that is employed when necessary, but not clearly against an imminent threat, should be understood as justified. The proxy should not be elevated over the principle. While imminence is convenient shorthand for when force is necessary and will translate the principle well in most cases, occasionally they will conflict. In such cases of conflict, satisfaction of the principle should control over non-satisfaction of the proxy. That is, in a situation where force is necessary, though not evidently employed against an imminent threat, the force should be eligible for justification.

Different defenders of the imminence requirement address this criticism differently. Joshua Dressler seems to accept the criticism but argues that utilization of the proxy or evidentiary device has greater efficacy in furthering the principle than direct application of the principle itself. Jens David Ohlin, George Fletcher, and Kim Ferzan resist the criticism and argue that the imminence requirement has independent substantive significance. Fletcher and Ohlin shelter the imminence requirement under a protective mantle of furthering important goals of political theory while Ferzan grounds the imminence requirement in the principles of criminal law theory. But despite the window-dressing, both arguments seem to devolve into arguments on behalf of the imminence requirement as an evidentiary device. Or so I will argue.

#### A. *Imminence Requirement More Efficacious than Underlying Principle*

Joshua Dressler views the imminence requirement as imposing a temporal limitation on the right of self-defense.<sup>6</sup> Dressler rejects an “inevitability” of future aggression standard because it is too speculative and involves too great a chance of error.<sup>7</sup> There is too great a chance that future aggression which seems inevitable will not actually occur. The “moral proposition” behind the imminence standard is that self-defense force should not be justified unless we are “very certain” that it is “necessary.”<sup>8</sup> Dressler maintains that that the imminence requirement “is the best way to enforce that moral proposition.”<sup>9</sup> While predictions of inevitable aggression in the distant future are too speculative, “when an attack is underway or imminent, the risk of factual error is reduced to virtually nil.”<sup>10</sup> Apparently, the prospect of the imminence requirement being under-inclusive—precluding genuine instances of self-defense—does not

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<sup>5</sup> Richard A. Rosen, *On Self-Defense, Imminence, and Women Who Kill Their Batterers*, 71 N.C. L. REV. 371 (1993).

<sup>6</sup> Joshua Dressler, *Battered Women Who Kill Their Sleeping Tormentors: Reflections on maintaining Respect for Human Life while Killing Moral Monsters*, in CRIMINAL LAW THEORY: DOCTRINES OF THE GENERAL PART 259, 260, 274 (Stephen Shute & A.P. Simester eds., 2002).

<sup>7</sup> *Id.* at 274-75.

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<sup>10</sup> See also Dressler, *supra* note \_\_, at 274 (“Once the temporal limitations are gone—once we move past imminent or ‘immediately necessary . . . on the present occasion’ threats—how well can one predict what human conduct is inevitable?”).

outweigh the harms of over-inclusiveness incurred by the more generous standard of when force is necessary.

But the imminence requirement does not, as Dressler maintains, assure that defensive force is necessary. Though most critics of the imminence requirement focus on its under-inclusiveness, the imminence requirement is also over-inclusive. Suppose an aggressor unlawfully puts a gun to my head and starts to pull the trigger. If any example satisfies the imminence requirement surely this does. One would be hard-pressed to imagine a more imminent threat. But there are innumerable reasons why defensive force may be unnecessary against even this most imminent of threats. For example: (i) the gun is a toy gun, (ii) prop gun, (iii) the gun is real but unloaded, (iv) the gun is real and loaded but not capable of firing, (v) the gun is real, loaded, and capable of firing, but jams when the aggressor pulls the trigger, and (vi) after the aggressor begins to pull the trigger, but before the aggressor pulls it sufficiently far to fire the gun, the aggressor has a change of heart and abandons his plan of killing me. In each of these examples, the threat is imminent, yet it is not necessary for me to use defensive force against the aggressor.

However, Dressler's point is not necessarily that the imminence requirement is a guarantor that defensive force will be necessary, but that it merely is the best means to assure that defensive force is necessary. But even this limited claim is questionable. As compared to the imminence requirement, would not a standard of actual, present aggression be preferable? If the goal, as Dressler claims, is to reduce instances of unnecessary defensive force, then a standard of requiring the defender to wait until not merely when action manifesting aggression is imminent but, rather, when aggression is actual and present would be that much better. It would avoid the over-inclusiveness of the imminence requirement. As a result, the stated rationale does not support the imminence requirement. Instead, it proves too much and supports a standard of actual, present force.

Would Dressler wish to support a standard of actual, present force? No, presumably not. It would be under-inclusive; it would bar genuine instances of self-defense. It would bar situations where defensive force was necessary even in the absence of the actual presence of the aggressor's force. But if that is a sufficient reason to reject the actual presence of force standard, then the under-inclusiveness of the imminence standard is a sufficient reason to reject the imminence requirement. But if under-inclusiveness is not a sufficient reason to reject the imminence standard, then it is also not a sufficient reason to reject the actual presence of force standard. And if under-inclusiveness is insufficient to reject either standard, then what basis supports the imminence standard?

Once we deviate from a standard of actual presence of force and allow self-defense force to be employed prior to the actual presence of an aggressor's force, how do we establish how long prior to actual force defensive force may be employed? The law's answer of imminence leaves unanswered the question of why not near imminence, almost imminence, or pre-

imminence? And if a rationale is still lacking, then why not substantially pre-imminent? And so on and so on. Once we deviate from a requirement of actual presence of force, there seems little principled reason to support one temporal time period rather than another as *the* time the right of self-defense attaches.

Dressler applies his understanding of the imminence requirement to the *Norman* case—one of the more infamous cases rejecting a claim of self-defense because imminence was lacking. After twenty years of horrific and nightmarish physical abuse by her husband, Judy Norman shot and killed her husband while he was sleeping. Dressler and other defenders of the imminence requirement hold up this case as a paradigmatic example of force used against a non-imminent threat. As Dressler puts it, “[t]here is simply no basis for suggesting that J.T. Norman, as he slept in bed, *in reality* represented an imminent threat to Judy Norman.”<sup>11</sup> Though it was not highly probable that he would have imminently killed her, it was possible. Apart from Judy killing him, there was nothing to prevent the husband from waking up and killing her. If it is possible that he would have killed her, and hardly wildly implausible given his twenty-year history of horrific physical abuse, it is not irrational to claim that he did pose an imminent threat at the very time that she killed him. For the very reason that she did kill him, we will never know whether he would have imminently killed her and whether he posed an imminent threat. So, if it is possible and not implausible and not irrational, could it not be reasonable to suppose that he did pose an imminent threat?

### B. *Imminence as a Right to Respond to Aggression*

Kim Ferzan rejects the criticism that imminence is merely a proxy for the more fundamental and underlying principle of necessity. And she rejects the claim that the focus of self-defense should be on what is necessary or immediately necessary for the self-defender. Such a focus, Ferzan argues, collapses the distinction between the defenses of self-defense and necessity. And it improperly treats all self-preferential force as self-defensive force. While “[a]ll self-defense cases are instances of self-preference . . . not all self-preferential actions constitute self-defense.”<sup>12</sup> The difficulty with the focus on when defensive force is necessary is that it “operates independently of the intentions, capabilities, or actions of a putative aggressor.”<sup>13</sup> Disregarding those aspects and focusing exclusively on the necessity of defensive force conflates self-defense with the general defense of necessity. But unlike necessity, self-defense limits the class of persons against whom force may be employed to unlawful aggressors. And unlike necessity, “self-defense is an action against a threat.”<sup>14</sup> Under Ferzan’s account,

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<sup>11</sup> *Id.* at 267.

<sup>12</sup> Kimberly Kessler Ferzan, *Defending Imminence: From Battered Women to Iraq*, 46 ARIZ. L. REV. 213, 248 (2004).

<sup>13</sup> *Id.* at 250.

<sup>14</sup> *Id.* at 252 (emphasis omitted).

“[t]he critical question is not *when* the defender needs to act but *what* kind of threat triggers the right to self-defense.”<sup>15</sup>

According to Ferzan, the independent substantive significance of the imminence requirement is that it specifies the type of threat or aggression that triggers a right of self-defense. And the type of threat or aggression that triggers a right of self-defense involves action. “The imminence requirement is best understood as the *actus reus* of aggression.”<sup>16</sup> Ferzan arrives at this view by comparing the imminence requirement with the *actus reus* of attempt. Under the common law of attempt, the *actus reus* assures that the defendant’s conduct is sufficiently proximate to completing the crime; the defendant has crossed the line from lawful preparation to unlawful attempt. Similarly, “the aggressor’s action signifies the breach of the community rules”; “the aggressor’s action ‘starts it.’”<sup>17</sup> In international law terms, the action component of the imminence requirement serves as the aggressor’s “unmistakable signal that he has crossed the line from diplomacy to force.”<sup>18</sup> Ferzan concludes that “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.”<sup>19</sup>

But the attempt analogy that Ferzan relies on to bolster the independent substantive significance of the action component of the imminence requirement also cuts the other way. Under some views of attempts, the *actus reus* has no independent substantive significance.<sup>20</sup> It only plays an evidentiary role in establishing the defendant’s *mens rea*. In corroborating the defendant’s *mens rea*, it serves as a proxy for the defendant’s *mens rea*. As an evidentiary device or proxy, it has no independent substantive significance.

### C. *Imminence as a Requirement of Political Theory*

George Fletcher and Jens David Ohlin view the imminence requirement as a matter of political theory rather than moral theory.<sup>21</sup> It is only when aggression is imminent that the state

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<sup>15</sup> *Id.* at 255.

<sup>16</sup> *Id.* at 257-58.

<sup>17</sup> *Id.* at 259.

<sup>18</sup> *Id.* at 257 (quoting David J. Luban, *Preventive War*, available at <http://papers.ssrn.com/abstract=469862>, at 21).

<sup>19</sup> Ferzan, *supra* note \_\_, at 262.

<sup>20</sup> See, e.g., GLANVILLE WILLIAMS, *CRIMINAL LAW: THE GENERAL PART* 631 (2d ed. 1961) (“[John L.] Austin put forward the interesting view that in attempt the party is really punished for his intention, the act being required as evidence of a *firm* intention. There is much to be said for this.”).

<sup>21</sup> George Fletcher, *Domination in the Theory of Justification and Excuse*, 57 U. PITT. L. REV. 553, 570-71 (1996); see also GEORGE P. FLETCHER & JENS DAVID OHLIN, *DEFENDING HUMANITY: WHEN FORCE IS JUSTIFIED AND WHY* 155-76 (2008).

cannot intervene and secure the safety of the victim. According to Fletcher, only “when the danger . . . is imminent and unavoidable” may a private citizen may exercise defensive force against aggression.<sup>22</sup> And “[p]recisely because the issue is political rather than moral, the [imminence] requirement must be both objective and public. There must be a signal to the community . . . .”<sup>23</sup> Fletcher further explains that the “‘imminent attack’ must actually occur in the real world. The attack signals to the community that the defensive response is not a form of aggression but a legitimate response in the name of self-protection.”<sup>24</sup> In the sphere of international relations, Fletcher & Ohlin similarly argue that “the use of defensive force should be based on public evidence—evidence that the world can see.”<sup>25</sup> The imminent attack “must be based on publicly observable facts;” it must be “manifested in publicly observable facts.”<sup>26</sup> Fletcher & Ohlin conclude that “[t]he appeal of imminence is precisely that it provides a nearly foolproof standard for distinguishing between the aggressor and the defender.”<sup>27</sup>

#### *D. Ferzan, Fletcher, and Ohlin’s Evidentiary View of the Imminence Requirement*

Ferzan, Fletcher, and Ohlin argue for the independent substantive significance of the imminence requirement. It is neither merely a proxy for the underlying principle of necessary force nor is it merely an evidentiary requirement. But their arguments seem to collapse into arguments for imminence as an evidentiary requirement. This is particularly true with respect to each scholar’s argument for an action component, a physical manifestation of aggression.

What Fletcher & Ohlin cleverly couch as a requirement of political theory might be better understood as an evidentiary requirement. According to Fletcher & Ohlin, the imminence of the attack must be objective, public, and provide a signal to the community. Imminence is thus not a moral requirement or substantive principle of justified self-defense, but rather an evidentiary rule or requirement. Imminence of attack is serving as an objective manifestation of aggression. It suggests that there may well be genuine instances of justified self-defense for which there is not sufficient publicly observable facts that manifest the justifiability of the self-defense. (Just as there are factually guilty offenders for which there is insufficient legal evidence to sustain a conviction.) Utilizing imminence as an evidentiary requirement allows a determination of which party in a conflict is the aggressor and which is the victim/self-defender.

Similarly, Ferzan’s argument for the action component of the imminence requirement seems to only serve an evidentiary function in establishing that the recipient of the defensive

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<sup>22</sup> Fletcher, *supra* note \_\_, at 570.

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

<sup>24</sup> *Id.* at 571.

<sup>25</sup> FLETCHER & OHLIN, *supra* note \_\_, at 161.

<sup>26</sup> *Id.* at 167.

<sup>27</sup> *Id.* at 169.

force is an aggressor posing a threat that makes defensive force necessary. As Ferzan herself puts it, the action component is a “signal”<sup>28</sup> “signifying”<sup>29</sup> future aggression. It “signals the end of peaceful resolution and an initiation of an assault on sovereignty.”<sup>30</sup> And what is the purpose of this signaling? It allows us to “distinguish self-defensive conduct from aggressive conduct.”<sup>31</sup>

*E. Why Imminence as Merely an Evidentiary Requirement is Problematic*

Critics of the imminence requirement have argued that it is merely a proxy for or evidence establishing a deeper principle—the necessity of defensive force. And if imminence is merely a proxy or an evidentiary requirement, in a case of defensive force that fails to satisfy the proxy but does satisfy the principle, these critics argue that self-defense should be justified. The underlying substantive principle should trump the evidentiary requirement when the two conflict. Ferzan explicitly acknowledges the premise of this criticism—that substantive principle should trump mere proxy or evidentiary requirement. (But she disagrees that the imminence requirement is a mere proxy. To avoid the critics of the imminence requirement, she attempts to independently ground the imminence requirement as a substantive principle.)

Unlike Ferzan, Fletcher & Ohlin do not expressly acknowledge that imminence as a mere proxy or evidentiary requirement is problematic. But Fletcher & Ohlin implicitly acknowledge this by attempting to ground the importance of the imminence requirement in political theory. Outside the context of the imminence requirement, Fletcher has warned of the dangers of conflating substantive principles and evidentiary requirements. Fletcher distinguishes substantive rules from procedural and evidentiary rules as follows: “the rules of procedure [and evidence] do not bear on the morality of acting.”<sup>32</sup> As an example, “[w]hether evidence of prior spousal abuse is admissible against O.J. Simpson has nothing to do with the morality of killing his wife.” Similarly, whether a victim of future aggression uses force under conditions where there is an objective manifestation of an imminent aggression has nothing to do with the morality of whether the self-defender employed force when necessary to do so.

Other scholars also warn of the inherent problems in mixing evidentiary requirements and substantive principles. Consider Doug Husak’s admonition to keep substantive principles free from the infection of evidentiary issues:

[Because of concern for social protection and utilitarian reasoning],  
conclusions about what justice demands in a particular case are often

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<sup>28</sup> See *supra* note \_\_\_\_.

<sup>29</sup> See *supra* note \_\_\_\_.

<sup>30</sup> Ferzan, *supra* note \_\_\_, at 261.

<sup>31</sup> *Id.* at 259.

<sup>32</sup> GEORGE FLETCHER, BASIC CONCEPTS OF CRIMINAL LAW 13 (1998).

infected with practical problems of obtaining reliable evidence. . . . If theorists are to be taken seriously in construing these principles as requirements of justice, it is crucial that questions about evidence be placed to one side, at least temporarily. . . . Theorists who specify the scope and application of the fundamental principles of criminal liability should . . . resist the tendency to compromise their answers by practical difficulties of obtaining reliable evidence. . . . The scope and application of the fundamental principles of liability will differ if criminal theory is not infected by evidentiary questions. It is hardly surprising that the just outcome of a case may conflict with what is most efficient or practical. . . . Intellectual clarity is best served by divorcing questions of justice and evidence altogether. . . . [Conflating principle and evidence] should be recognized for what it is—an unfortunate and regrettable *retreat* from what criminal theory demands as a matter of justice. Worries about evidence should not be reflected in the content of the fundamental principles of criminal liability, as long as they are to be construed as requirements of justice.<sup>33</sup>

Replacing what should be substantive principles with evidentiary rules obscures what should be the underlying moral principles. Failure to satisfy the evidentiary requirement will tend to be confused with failing to satisfy the underlying substantive principle.

*F. Imminence as Evidentiary Requirement Analogous to the Widely Condemned Resistance Requirement in Rape Law*

A comparison with the effort to abolish the resistance requirement in rape law might be helpful. Traditionally, in order to secure a conviction for rape, the victim had to prove that s/he resisted. Though not a formal element of the offense of rape, resistance on the part of the victim was considered as the preferred means to prove the formal elements of force and non-consent. Resistance was considered an objective manifestation of, and more reliable evidence of, the victim's non-consent. But recent efforts in rape reform have persuaded many jurisdictions to abolish this evidentiary requirement because it endangered victims' lives. Rape victims should not be forced to subject themselves to additional risk of harm to improve the criminal law's ability to sort out which cases of intercourse are consensual and which are not. While the presence of resistance may dispositively establish non-consent, the absence of resistance does not dispositively establish consent.

Similarly, victims facing aggression should not have to wait until the aggression is imminent, if doing so would endanger them, in order to aid the criminal law's sorting mechanism

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<sup>33</sup> DOUGLAS N. HUSAK, *PHILOSOPHY OF CRIMINAL LAW* 58-60 (1987).

differentiating aggressors from self-defenders. And similarly, while the presence of objective manifestations of imminence may dispositively establish imminence, the absence of such objective manifestations should not be dispositive in barring justified self-defense.

#### *G. Arbitrariness of the Action Component*

Regardless of whether the imminence requirement is merely a proxy/evidentiary requirement or has independent substantive significance, Ferzan, Fletcher, and Ohlin fail to explain why only action manifesting aggression can serve the function of supplying the requisite signal to the relevant community so as to easily determine who is aggressor and who is defender. Could not stated intentions of unlawful aggression also supply this signal? Or evidence obtained after the defensive force demonstrating the aggressor's planned aggression? Or perhaps even the aggressor's confession that but for the self-defender's force the aggression would have commenced? That action is only one of among many means to supply this signal suggests that it has no independent substantive importance but is merely an evidentiary device.

True, the action component of the imminence requirement works well in providing a clear signal in most cases. But that which provides a bright-line rule is not necessarily the best rule. What should we do when the cleanest rule to distinguish self-defender from aggressor in most cases unduly limits a self-defender's right to self-defense in some cases? When the factual contexts are too varied and too ambiguous and reality is too messy to be neatly compartmentalized, the better rule may be the duller, more ambiguous rule.

#### IV. PROBLEM WITH A PURELY TEMPORAL IMMINENCE REQUIREMENT

Defenders of the imminence requirement maintain that "[t]he appeal of imminence is precisely that it provides a nearly foolproof standard for distinguishing between the aggressor and the defender."<sup>34</sup> But this is far from clear. And it is not even clear what precisely the imminence requirement requires. While some formulations refer to imminence in purely temporal terms, others additionally or alternatively add an action component, a physical manifestation of aggression.

If understood as a purely temporal relation between the time when possibly aggressive force will actually be applied and the time when force may first be used in self-defense against that possibly aggressive force, the imminence requirement fails to work properly. Consider the following example. Suppose that A poses a threat of force to SD and will use force at a time, T10, against SD unless SD employs defensive force that neutralizes A's threat. Let us further say that the period of imminence is five units of time. (By not specifying precisely how long or

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<sup>34</sup> FLETCHER & OHLIN, *supra* note \_\_\_, at 169.



short the units of time, five units of time is consistent with anyone's conception of how long or short the period of time expressed by the concept of imminence.) As a result, A poses an imminent threat to SD at T5 and any force employed by SD against A from T5 to T10 would satisfy the imminence requirement. Suppose that SD employs force against A at T6. SD would thereby seemingly satisfy the imminence requirement.

But at what point in time did SD pose an imminent threat to A? In general, imminence is understood as the period of time prior to the employment of possibly aggressive force that one may use defensive force against that aggressive force and still be eligible for a self-defense justification. Specifically, we have arbitrarily defined that period of time to be five units of time. As a result, if SD employs force against A at T6, then it was imminent that SD would use force against A at T1. (Just as A posed an imminent threat to SD at T5 because he would have used force against SD at T10 unless stopped by SD.) Between A and SD, the party who first posed an imminent threat was SD—SD posing an imminent threat at T1 occurs prior to A posing an imminent threat at T5. In any such confrontation between two parties, the first party that actually uses force will necessarily be the first party that imminently would use force. Because some self-defenders will be the first party to actually apply force, some self-defenders will be the first party to pose an imminent threat and thus paradoxically will be understood as the aggressor.

Rather than neatly sorting aggressor and defender, the imminence requirement seems to get it backward. Because the party we intuitively find to be the self-defender (SD) is the first party (between A and SD) to actually use force, the self-defender is the first party to pose an imminent threat and is thus the aggressor after all. Starting at T1, SD poses an imminent threat to A; A does not pose an imminent threat to SD until T5.

By treating the first party to actually use force as the aggressor, this purely temporal understanding of the imminence requirement defeats the very purpose of an imminence standard. As opposed to an actual force standard, a standard of imminence is designed to afford a self-defender an opportunity to actually use force first and prevent the use of aggressive force. If the purely temporal version treats the first party to actually apply force as the aggressor, what is the point of an imminence standard? It produces the same results as an actual force standard.

Although the imminence requirement is most simply understood as a temporal relation, formulations of the imminence requirement commonly include an additional component—some action or some physical manifestation of the impending attack or aggression. How this possible additional component is understood is not entirely clear. And the legitimacy of this additional component is also unclear. But it would avoid the problem above.<sup>35</sup>

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<sup>35</sup> Suppose that A commences some action in furtherance of the impending attack or physically manifests his attack at T5 and will carry out the attack at T10. Only after T5 does SD physically manifest his use of force that he will carry out at T9. So rather than the first party that actually uses force being the first party that poses an imminent threat and is thus the aggressor,

## V. PROBLEMS WITH AN IMMINENCE REQUIREMENT WITH TEMPORAL AND ACTION COMPONENTS

An imminence requirement containing both temporal and action components presumably requires the satisfaction of both components. In order for a possible aggressor to be understood as posing an imminent threat, the possible aggressor's aggression would have to be both temporally imminent and physically manifested by some action or conduct. In order for a self-defender to be eligible to use justified self-defense force against an aggressor, the aggressor must have satisfied both components. If either component is not satisfied, the possible aggressor is not an imminent aggressor and self-defense force is not eligible for justification. Self-defense force would be eligible for justification in neither of the following two examples. First, suppose A manifests future aggression but the future aggression is not yet temporally imminent. A does not yet pose a fully imminent threat and force by SD would not satisfy the imminence requirement. Second, suppose A's future aggression is temporally imminent but A has not yet manifested this future aggression by some act or conduct. In neither case does A pose a fully imminent threat and in neither case would force by SD satisfy the imminence requirement.

As a result, under an imminence requirement containing both temporal and action components, the first party whose force is both temporally imminent and manifested by some action is the aggressor. The imminence requirement thus differentiates between aggressor and self-defender by determining which is the first party to satisfy both components. The first party to satisfy both components is the aggressor.

But this understanding of the imminence requirement, with both temporal and action components, also incurs difficulties.

### A. *Arbitrariness*

A conception of the imminence requirement as composed of both temporal and action components leads to arbitrary results. Consider two variations on a situation involving two actors who each have reason to use force against the other.

(i) A and SD are walking toward each other across a large field. Each is wary that the other might pose an unlawful threat of aggression. Because A has an old gun that takes longer to operate and sometimes jams, A decides that he better get the jump on SD and be the first to use force. At TO, A takes out his gun and begins to raise it toward SD. If not neutralized, A will

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imminence is measured by the physical manifestation of the attack. Whoever is the first party to both pose a temporally imminent threat and manifest that threat by some act is the first to pose an imminent threat and is thus the aggressor. Under this construction of the imminence requirement, A would be the aggressor and SD the self-defender. As a result, this alternative understanding of the imminence requirement avoids the problem above and does properly sort, in this case, which party should be the aggressor and which party should be the self-defender.

shoot at SD at T5. (Again, let us assume that temporal imminence is five units of time.) Thus, A poses an imminent threat—both temporally and physically—to SD at T0. At T1, SD takes out his gun and shoots A at T4. SD would seem to be the self-defender and A the aggressor because A was the first to pose an imminent threat and SD only shot at A while A posed an imminent threat (both temporally and physically).

(ii) A gets a new gun that is lightning quick to operate and never jams. A and SD are again walking toward each other across a large field. A now realizes that A need not make the first move. At T1, SD takes out his gun and raises it to shoot at A. If not neutralized, SD will shoot at A at T4. At T2, A takes out his gun and shoots at SD at T3. Because SD would shoot at A at T4 if not neutralized and SD manifested that aggression at T1, starting at T1 SD posed an imminent threat to A. A did not pose an imminent threat to SD until T2. Thus, SD was the first between the two parties to pose an imminent threat. As a result, A would be the self-defender and SD the aggressor.

In comparing cases (i) and (ii), A is the aggressor in (i) and the defender in (ii); SD the defender in (i) and the aggressor in (ii). A is the aggressor in (i) because he was the first to manifest aggression; A was the defender in (ii) because he was not the first to manifest aggression. But SD's conduct was the same in both cases. How can we explain why SD varies as defender and aggressor for the very same conduct? Because which party is identified as aggressor or defender depends exclusively on which party has the faster gun. In (i) when SD has the faster gun he can afford to wait longer before manifesting aggression thereby inducing A to become the first to pose an imminent threat. But in (ii), when A has the faster gun, he can afford to wait longer before manifesting aggression thereby inducing SD to become the first to pose an imminent threat.

But which party has the faster gun or weapon or which party can employ force more quickly is hardly a principled basis for determining which party should be the unlawful aggressor and which party should be the lawful self-defender. While the inclusion of the action component in the imminence requirement avoids the problem above besetting an exclusively temporal construction of the imminence requirement, inclusion of an action component produces arbitrary results.

## *B. Over-Inclusiveness*

In addition to arbitrariness, the addition of the action component is both over-inclusive and under-inclusive. Too see that it is over-inclusive consider the following hypothetical. At T0, A physically manifests posing a threat to kill SD at T5. As a result, SD's use of force from T0 to T5 would satisfy the imminence requirement. SD uses force against A at T3. But had SD not used force against A at T3, A would have changed his mind and not used force after all. As compared to a standard of waiting until A actually uses force against SD, the imminence

requirement is over-inclusive in allowing SD's force to be eligible to be justified as self-defense despite it not being necessary.

*C. Under-Inclusiveness*

Inclusion of an action component is also under-inclusive. Suppose that A will kill SD at T5. And, at T0, SD knows this. Under a purely temporal understanding of the imminence requirement, A poses an imminent threat at T0. Force used by SD from T0 to T5 would satisfy this temporal understanding of the imminence requirement. But A does not physically manifest his aggression until T4. As a result, under the action component of the imminence requirement A does not become an imminent threat until T4. Although SD knows that A will kill SD at T5 unless stopped and that, temporally speaking, A poses an imminent threat at T0, SD must wait to employ defensive force until A physically manifests this aggression at T4. With both the temporal and physical components of the imminence requirement satisfied, SD's force can now satisfy the imminence requirement. But after all the time SD has waited until the imminence requirement is satisfied, SD now lacks sufficient time to employ force against A. SD starts to employ his defensive force but it is too late. It is now T5 and A has killed SD. The action component of the imminence requirement is under-inclusive. What our intuitions suggest the law of self-defense should allow is SD's right to use both effective and justified self-defense. But what the imminence requirement grants is only one or the other—effective but non-justified self-defense (earlier than T4) or ineffective but justified self-defense (from T4 to T5).

*D. Action Component Distorts the Balance of Interests Between Aggressor and Self-Defender*

In some situations, the action component shortens the time period under which the temporal component of the imminence requirement alone would allow self-defense. But if the temporal component of the imminence requirement is meant to strike a balance between the interests of defender and (potential) aggressor, then the action component distorts this balance. The purpose of the imminence requirement is to give the defender sufficient time to mount a defense against aggression while not allowing defensive force at so early a point in time that it is not truly necessary. If required to wait until the actual presence of aggression, self-defense force would be too late. If allowed to use defensive force prior to imminence, the defensive force might be unnecessary. The imminence requirement thereby is claimed to reflect a careful balance between the defender's interest in protection from aggression and the potential aggressor's interest in not being the victim of unnecessary defensive force. But the action component upsets this balance by restricting the defender's ability to employ effective force despite the presence of temporal imminence of aggression. As merely an evidentiary device to

aid the state (or international community) determine who is the defender and who is the aggressor, it restricts and distorts the scope of the right to self-defense.

And not only does it distort the right of self-defense, it does so asymmetrically. It only distorts the right of self-defense in favor of the (potential) aggressor. It does not expand the right of self-defense; it only restricts it.

And this asymmetrical distortion of the right of self-defense is entirely within the control and whim of the aggressor. By manifesting her aggression at or prior to the temporal imminence period, the self-defender enjoys a temporally maximal right of self-defense. But by opting to manifest her aggression subsequent to the temporal imminence period, the aggressor shrinks the self-defender's right down to a temporally minimal right of self-defense. And by opting to wait to manifest her aggression until just prior to the actual aggression, the aggressor can further shrink the right to self-defense thereby virtually eliminating a self-defender's right to effective self-defense.

Why should the law of self-defense allow the aggressor to determine whether the self-defender enjoys a temporally maximal or minimal right of self-defense?

And why should the self-defender bear the brunt of the law's difficulty in determining which party is aggressor and which party is self-defender? Why is not the aggressor's interests diminished in the name of divining which party is aggressor and which is defender? Should not the burden at least be borne equally?

The action component only furthers the handicap already imposed on the self-defender by the temporal component. A self-defender is only allowed to employ effective justified self-defense if the self-defender can employ force appreciably faster than the aggressor. The head start supplied to the aggressor and the handicap imposed on the self-defender is only exacerbated by the action component. It affords the aggressor an even bigger head start and imposes on the self-defender an even greater handicap. Not only must a self-defender wait until an aggressor poses a temporally imminent threat, but also the self-defender must further wait until the aggressor's temporally imminent threat manifests itself in some physical action.

This section demonstrated the problem where an aggressor first satisfies the temporal component and then subsequently satisfies the action component, especially when the action component is satisfied just before the aggressor would actually use force. In the next three sections, problems arise when the aggressor does the converse—when the aggressor first satisfies the action component and then subsequently satisfies the temporal component.

E. *A Minor Paradox: Imminence v. Post-Imminence*

In addition to being arbitrary, over-inclusive, and under-inclusive, and restricting and distorting the right of self-defense, an imminence requirement including an action component incurs a minor paradox. Consider the following example. A will aggress against SD at T10 unless neutralized. Thus, at T5 A's threat is temporally imminent. A physically manifests his threat by some action at T0. Thus A's threat becomes fully imminent at the point when both components are satisfied—at T5. The unchallenged assumption is that SD may employ defensive force when the aggressor poses a fully (temporally and physically) imminent threat; specifically, at T5. At the point when an aggressor's threat is imminent, the self-defender is eligible to use justified force. But this assumption is false.

Paradoxically, if the self-defender uses force at the time when the aggressor poses an imminent threat, the self-defender will become the first to pose an imminent threat and thus will become the aggressor. For example, if SD applies force at T5—the time when the aggressor's force became imminent—SD would necessarily have had to physically manifest such force prior to T4. Presumably, one cannot apply force without first manifesting that force by some physical act. For example, if SD was to shoot A at T5, SD would necessarily have to take preparatory steps prior to T5—raising the gun, pointing the gun, pulling the trigger etc. As a result, if SD actually did what the imminence requirement seemingly allows, SD would become the first party to physically manifest aggression. Thus, SD would become the aggressor and A the defender. Despite A posing an imminent threat at T5, curiously SD must wait until *after* T5 to apply force. Despite A posing an imminent threat at T5, SD must not actually apply force at T5.

Inherent in the concept of the imminence requirement seems to be a waiting period after the point of imminence. But what do we say of the time period between when aggression is imminent and when a self-defender may actually apply defensive force? It would seem that a defender has the right to apply force in the abstract at the point of imminence but if this right is exercised it cancels or negates the right. The use of defensive force, at the precise point in which aggression is imminent, converts justified self-defense into unlawful aggression. The self-defender becomes the aggressor. But as long as the self-defender does not exercise this right, the self-defender may be said to have the right to use force when aggression is imminent. Is the imminence requirement really a “nearly foolproof method” for distinguishing aggressor from defender?

As a technical matter, the paradox may easily be solved. Rather than stating that defensive force is eligible for justification when used against an aggressor's fully imminent threat, the rule may be changed to subsequent to imminence. That is, defensive force is not permissible at the point of imminence but, rather, subsequent to imminence. Thus, applying this new rule to the above hypothetical situation, A becomes an imminent threat at T5 and SD may permissibly apply force subsequent to the point of imminence—T6 and thereafter.

But even if altering the standard from imminence to *post*-imminence easily resolves the problem, it is unclear what moral reason explains why defensive force may not be used when an aggressor poses an imminent threat. The solution is ad hoc and lacks a satisfactory moral rationale. Moreover, a standard of post-imminence does not necessarily resolve the problem as the next section will demonstrate.

*F. Indeterminacy of Which Party is Aggressor and Self-Defender*

The solution of a standard of post-imminence as to when defensive force is permissible is also problematic. Suppose the same facts obtain in the above hypothetical except that SD applies force at T6. Because A became a fully imminent threat at T5, SD's use of force at T6 would seemingly satisfy the new requisite standard of post-imminence. But, as noted above, if SD applies force at T6, SD must necessarily prepare to use force prior to T6. Suppose that SD prepares to use force at T5 such that SD's preparations would satisfy the action component. By satisfying the action component at T5 (and satisfying the temporal component at T1), SD poses a fully imminent threat to A at T5. But A, by satisfying the action component at T0 and the temporal component at T5, also poses a fully imminent threat to SD at T5. If each becomes a fully imminent threat to the other at the same time—T5—which party is the aggressor and which party is the self-defender?

The imminence requirement with an action component purports to supply a nearly foolproof means of distinguishing between aggressor and self-defender. The test is which party is the first to pose a fully imminent threat. The first party to do so is the aggressor. But here, which party is the aggressor and which party is the self-defender is indeterminate. Each becomes a fully imminent threat at the same time. And each does so despite each party using force at different times (SD at T6, and A at T10), each party manifesting their force at different times (SD at T5 and A at T0), and each party's force being temporally imminent at different times (SD at T1 and A at T5). The imminence requirement, containing both temporal and action components, fails to determine which party is the aggressor and which party is the self-defender.

*G. A Further Puzzle: Why a Defender May Neither Use nor Even Prepare to Use Force until Post-Imminence*

The problems raised in the two previous sections can easily be technically resolved. The problem raised by a defender applying force at the point when an aggressor's force is imminent can be resolved by a standard of *post*-imminence. A defender may not apply force until subsequent to the point of the aggressor's threat being imminent. And the problem of a defender physically manifesting his force at the point of imminence could similarly be easily resolved by a standard of *post post*-imminence. Not only may a defender not apply force at the point of the

aggressor posing an imminent threat, but also a defender may not even prepare to apply force until after the aggressor has become a fully imminent threat. Thus in the example above, despite A posing a fully imminent threat at T5, SD may not apply force at T5. SD must wait until after T5. And SD must not even use force at T6 and prepare to use force at T5. SD must wait until after the point of imminence to even prepare to use force. SD must wait until T6 to prepare to use force and then may only apply force starting at T7, despite that A poses a fully imminent threat at T5. Only in this way may SD avoid being determined to be the aggressor and be eligible to use justified defensive force.

While such an extended waiting period after the point of imminence technically resolves the problems, left unexplained is why? Why must a defender wait until after the point of imminence to even prepare to use force? What moral reason explains why a self-defender must wait for so long past the point of imminence?

Consider the following hypothetical. Suppose that at T1, A readies his gun to shoot at and kill SD at T10. SD sees A do this and realizes that he must be prepared to use force against A. At T3, SD readies his gun to shoot at and neutralize SD. Because A will kill SD at T10 unless stopped and A has already satisfied the action component at T1, A becomes a temporally and fully imminent threat to aggress against SD at T5. Thus after T5, SD should be eligible to use force against A. If SD is to prevent A's aggression and save his own life, SD must shoot at and neutralize A prior to T10. Thus, in order for SD's force to be both justified and effective it must be employed after T5 and prior to T10. SD waits as long as he can and finally shoots A at T9 thereby neutralizing him. This is just in time because otherwise A would have killed SD at T10.

Intuitively, SD's force should be eligible to be justified in self-defense. A manifested his aggression first. A became an imminent threat at T5 and SD did not shoot at A until after T5. Moreover, he even waited until the last moment and shot at A at T9.

But surprisingly, under the imminence requirement, SD is the aggressor and A is the self-defender. According to the imminence requirement, the first party to satisfy both the action and temporal components is the first to pose an imminent threat. By shooting at A at T9, SD became a temporally imminent threat at T4. And because SD satisfied the action component at T3, SD posed a fully imminent threat at T4. A did not pose a fully imminent threat to SD until T5. Because SD posed an imminent threat to A at T4 which is prior to A posing a fully imminent threat to SD until T5, SD is the aggressor and A the self-defender.

How can we explain *why* SD is the aggressor? True, as a technical matter, SD is the aggressor because SD was the first to pose a fully imminent threat. But intuitively it seems that A should be the aggressor because (i) A was the first to manifest force, (ii) SD waited to use until after A's force was fully imminent, and (iii) SD waited even longer until it was just prior to A's use of force.



To understand this, it might be helpful to see how SD could have avoided becoming the aggressor. Consider a variation on the above hypothetical, involving A and SD2. All the facts are the same except that SD2 does not manifest his force at T3. Instead, SD2 manifests his force at T6. Thus SD2 did not pose a fully imminent threat until T6 which was after A's fully imminent threat at T5. Because A at T5 was the first to pose a fully imminent threat, A is the aggressor and SD2 is the self-defender.

Is there a morally relevant difference between SD who the imminence requirement determines is an aggressor and SD2 who the imminence requirement determines is a self-defender? In each case, A is still the first to manifest force and in each case SD/SD2 does not employ force until after A poses a fully imminent threat. Intuitively, we might think that SD/SD2 should be the self-defender and A the aggressor in both cases. Why is it impermissible for SD to make preparations outside the imminence period as to force that will only be actually employed inside the imminence period?

While it is understandable for the imminence requirement to obligate SD to wait until A's threat becomes fully imminent before using force, why must SD also wait to *prepare* to use force until after A's threat becomes fully imminent? Moreover, why must SD so wait to even prepare to use force when A has already manifested force first?

When an aggressor has already manifested aggression and a self-defender waits to actually apply defensive force until after the aggressor's threat is fully imminent, why would the imminence requirement bar a self-defender from preparing to use that defensive force? Requiring a self-defender to wait to use force until an aggressor poses a fully imminent threat would seem to provide adequate protection to the aggressor. What purpose of the imminence requirement is advanced by also requiring a self-defender to wait before even preparing to use force? While not providing any further protection to the aggressor from unnecessary defensive force, it does restrict a self-defender's ability to employ effective self-defense. By requiring a self-defender to wait to even prepare to use force, the self-defender may not have sufficient time to effectively employ defensive force. And again, regardless of the significance of the paradox or puzzle, the effect is to shorten the period in which SD can employ effective self-defense. By further handicapping the self-defender without further protecting the aggressor, the imminence requirement is irrational.

## CONCLUSION

The imminence requirement for justified self-defense is problematic and should be modified or abandoned. As a proxy or evidentiary requirement, it unduly distorts and restricts an actor's moral right to effective self-defense when necessary. Though defended as crucial for differentiating between unlawful aggressors and lawful defenders, the imminence requirement fails to properly distinguish them. Understood in purely temporal terms, the imminence

requirement reverses our intuitions and classifies aggressors as defenders and defenders as aggressors. Understood as containing both temporal and action components, the imminence requirement is arbitrary, over-inclusive, under-inclusive, and distorts the balance of interests—between aggressor and defender—that it is designed to maintain. Close analysis of the interrelation between the temporal and action components reveals a number of puzzles. In some situations, despite facing an imminent threat, a defender either using force or even merely preparing to use force at the point of imminence would be paradoxically deemed the aggressor by the imminence requirement. While these puzzles may be technically resolved by adopting a post-imminence standard, a moral rationale for such an extended waiting period subsequent to the point of imminence is still lacking.