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# “While Dangers Gather”: The Bush Preemption Doctrine, Battered Women, Imminence and Anticipatory Self-Defense

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# “WHILE DANGERS GATHER”: THE BUSH PREEMPTION DOCTRINE, BATTERED WOMEN, IMMINENCE, AND ANTICIPATORY SELF-DEFENSE

JANE CAMPBELL MORIARTY\*

## I.

### INTRODUCTION

Since the Bush Administration issued its controversial Preemption Doctrine, which claims to permit the United States to unilaterally and preemptively attack a putative enemy deemed to be a threat to national security,<sup>1</sup> I have been rethinking the concept of self-defense as it applies to battered women who kill their abusers. When President George W. Bush spoke about the peril of not taking action “while dangers gather,”<sup>2</sup> I thought about the thousands of battered women in the grip of domestic terrorists who must also make decisions about when and whether to use violence to save their own lives.

For many years, I have written about battered women who kill their abusers. During this time, I have witnessed a sea change in the way the public and the legal system think about battered women.<sup>3</sup> As the public has become cognizant of the frequency of domestic violence, the legal system has become more willing to intervene on behalf of battered women. Courts commonly admit expert testimony about battering and its effects when a battered woman is charged with murder after killing her abuser in a traditional self-defense posture (i.e., while he is attacking her).<sup>4</sup> The gradual move toward admitting expert testimony to explain the effects of abuse has been mostly positive and juries are often educated on matters about which they are misinformed or unaware.

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1. See THE NATIONAL SECURITY STRATEGY OF THE UNITED STATES OF AMERICA (Sept. 2002) [hereinafter SECURITY STRATEGY], available at <http://www.whitehouse.gov/nsc/nss.pdf> (discussed in detail *infra* Section II).

2. *Id.* at 15.

3. See JANE CAMPBELL MORIARTY, PSYCHOLOGICAL AND SCIENTIFIC EVIDENCE IN CRIMINAL TRIALS §§ 7:1–7:26 (1996 & Supp. 1997–2004) (discussing battered women, expert evidence, and the legal implications of women who kill their abusers).

4. *Id.* § 7:11 (analyzing case law); Janet Parrish, *Trend Analysis: Expert Testimony on Battering and Its Effects in Criminal Cases*, 11 WIS. WOMEN’S L.J. 75, 83–87 (1996) (summarizing statutory and case law).

Although many courts have permitted greater latitude in the admission of expert testimony about battering, unfortunate sequelae have developed in the jurisprudence surrounding battered women who kill.<sup>5</sup> Most courts admit both expert and factual testimony relevant to self-defense when a battered woman kills in a traditional self-defense posture.<sup>6</sup> However, many courts have been disinclined to admit such testimony when the killing does not fit precisely within a traditional self-defense posture—that is, when the killing occurs during a lull in the violence or when the killing occurs some time after the threat was made.<sup>7</sup> Many courts decide as a matter of law that a battered woman who kills has no right to introduce evidence relevant to self-defense if she does not kill her abuser at the exact moment the attack is occurring.<sup>8</sup> Focusing on the specific imminence of danger the batterer poses, these courts reason that unless she was in danger of losing her life at the precise moment of the killing, she has no legitimate claim to self-defense.<sup>9</sup>

This article posits that many courts have engaged in an overly rigid application of the imminence requirement in the law of self-defense by looking at a single moment—when the woman actually strikes the fatal blow—rather than looking at a broader spectrum of time and context in which the killing occurred. These courts decide whether self-defense is relevant by narrowly interpreting the issue of whether the killing was done when the woman was in “imminent” fear of death or bodily harm.<sup>10</sup>

In recognizing a parallel between self-defense in the spheres of domestic violence and international terrorism, this article considers how international law addresses the requirement of imminence in self-defense and whether that approach might be instructive for domestic criminal law. Drawing from international law precepts, this article delves into the question of whether some form of anticipatory self-defense (“ASD”) might be employed when a battered woman kills her abuser in a non-traditional self-defense posture. In answering that question, this article examines both the contours of ASD and the Bush Preemption Doctrine (“the Bush Doctrine”), analyzing points of commonality and dissimilarity between them.<sup>11</sup>

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5. As discussed *infra* Section IV.C, one troubling development is the use of the so-called “battered woman’s syndrome” (“BWS”) to explain women’s reactions to abuse. As developed *infra*, BWS is scientifically suspect, suggests that women who stay with battering partners are mentally ill, and fails to address many relevant issues, including the necessity of the killing.

6. See MORIARTY, *supra* note 3, § 7:11 (analyzing state cases).

7. *Id.* § 7:12 (discussing state cases disallowing expert testimony in those scenarios).

8. See discussion *infra* Section IV.A.

9. *Id.*

10. “Imminent” is often used interchangeably with “immediate,” although some courts still follow the more restrictive interpretation of imminence. See discussion *infra* Section IV.

11. Professor Mary Ellen O’Connell, writing for the American Society of International Law Task Force on Terrorism, distinguishes between the Bush Preemption Doctrine and the narrower doctrine of anticipatory self-defense. Mary Ellen O’Connell, *The Myth of Preemptive Self-Defense* 2 n.10 (Aug. 2002), at <http://www.asil.org/taskforce/oconnell.pdf> (noting that ASD is much

In international law, many have recognized that the longstanding doctrine of ASD is warranted in certain well-delineated circumstances that consider the timing and degree of the threat, as well as the necessity of attack.<sup>12</sup> For example, a country need not wait until the missile is in the air to react in self-defense. The legitimacy of the doctrine of ASD, however, is a carefully cabined construct available only in circumstances where its use prevents identifiable, specific, and known harm.<sup>13</sup>

By contrast, the Bush Doctrine, by placing no limits on timing, degree of threat, or necessity of attack, travels into uncharted waters beyond ASD. The Bush Doctrine claims to authorize preemptive attacks on terrorists and “rogue states” that support terrorism,<sup>14</sup> and provides that the United States is justified in making a unilateral decision about when, whom, and why to attack, without any reference to the nature, timing, or likelihood of the proposed threat.<sup>15</sup> I argue that the Bush Doctrine stretches the concept of ASD to the point of lawlessness and should not set a model for the domestic criminal law.<sup>16</sup>

Thus, distinguishing between ASD and the Bush Doctrine, this article discusses the legality of ASD in international law and suggests ways the concept can be applied to the domestic criminal law. I argue that the international law of self-defense and ASD provides a more rational perspective on the concept of temporality when addressing threats to national security than the domestic law does when considering threats to personal security.

In drawing the parallel between international and domestic law, I consider the concept of terrorism both in the home and as a threat to national security. “Domestic terrorists” are those who batter and terrorize their families, seeking to control and diminish lives by threats, physical harm, and the creation of uncertainty about how and when the potentially lethal harm will occur.<sup>17</sup> Like their domestic counterparts, terrorists who threaten national security create hypervigilant fear in their victims by controlling the timing and method of the attack. The victims do not know how or when the attack will occur or whether *this will be*

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narrower and better-recognized).

12. *Id.* at 8 (noting that the practice of nations, as well as general law and logic, permits some form of anticipatory or interceptive self-defense).

13. See also Martin L. Cook, *Ethical and Legal Dimensions of the Bush “Preemption” Strategy*, 27 HARV. J.L. & PUB. POL’Y 797, 809–10 (2004) (distinguishing between legitimate ASD and lawless preemption). The contours of ASD are discussed fully in Section II.A, *infra*.

14. See SECURITY STRATEGY, *supra* note 1, at 13–16.

15. *Id.* at 6. “While the United States will constantly strive to enlist the support of the international community, we will not hesitate to act alone, if necessary, to exercise our right of self-defense by acting preemptively against such terrorists, to prevent them from doing harm against our people and our country.” *Id.* (emphasis added).

16. *Accord*, Cook, *supra* note 13 at 810 (noting that the Security Strategy stretches ASD far beyond the conceptual bounds of legitimate anticipatory self-defense).

17. Professor Mechanic, writing about the psychological effects of domestic violence, discusses how the uncertainty about the nature and timing of attacks creates fear and dread in victims. See Mindy B. Mechanic, *Beyond PTSD: Mental Health Consequences of Violence Against Women*, 19 J. INTERPERSONAL VIOLENCE 1283, 1284 (2004).

*the time* it is lethal. Due to the unique nature of the threats posed by both types of terrorists, the concept of imminence as it relates to defense of self or state must be viewed in a flexible manner when determining whether the killing is legitimate. Therefore, ASD might be a useful doctrine for addressing both types of terrorism.

This article seeks a modest change: to encourage courts that rigidly view self-defense to take a more comprehensive view of the danger in domestic violence situations that would include evidence of the historical relationship between the decedent and accused and the nature of threats made. There are several states where a woman has been precluded from introducing evidence relevant to self-defense (including expert testimony on battering) where the court has determined that the harm was not sufficiently close in time to the killing. Rather than determining *as a matter of law* that a woman was not acting in self-defense because the threat was insufficiently imminent, those courts should allow the jury hear all the evidence. This change of perspective would permit courts to employ a more realistic, elastic view of imminence and would allow juries to decide if the woman's acts were legally justified.

This article concludes that a form of ASD, based on the principle of necessity and without the traditionally strict imminence requirement, should be available when a battered woman lethally strikes at her abuser in certain limited circumstances.<sup>18</sup> ASD should be available when: (1) there is prior history of serious physical abuse; (2) the abuser has made a statement of intention to commit a serious assault or killing; and (3) has taken any action in furtherance of the threat or is in the physical proximity of the woman at or shortly after the time he makes the lethal threat. As a corollary, the defendant should be permitted to introduce ample factual evidence about: (1) the relationship between herself and the decedent; and (2) why she did not seek help from the police or why she was unable to meaningfully leave the abusive situation. Finally, expert testimony

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18. Professor Joshua Dressler argues that the "reform movement," which seeks to absolve battered women who kill their abusers during a non-confrontational period, is animated by the "belief that battered women . . . are justified in killing their abusers, much as a person is justified in putting to death an insect or vermin" and because the abuser "deserves it." 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, 261, 269 (Stephen Shute & A.P. Simester eds., 2002). I argue in favor of the doctrines of both self-defense and necessity, which fall under the larger rubric of "justification," but I do not argue that these killings are justified in the same sense as one would be justified in killing vermin. Instead, I argue that the killing is justified because the victim is entitled to save her own life, which is the moral foundation for the legal concept of self-defense.

Professor Dressler and others have argued that commentators should be careful not to conflate excuse and justification in the law, and in principle, I do not disagree. However, while the focus of this article does not permit wading full-on into that Serbonian bog, it seems as though the concepts cannot be as brightly delineated as some would hope. See, e.g., *MODEL PENAL CODE AND COMMENTARIES*, art. 3, introductory comment at 2 (Official Draft and Revised Comments 1985) (suggesting there is only a "rough analytical distinction between excuse and justification as defenses").

on the nature of battering and its effects should be admissible. Of course, the prosecution should be permitted to introduce evidence to respond to the defendant's claim that the killing was a necessity.<sup>19</sup>

This article concludes that ASD must be cabined but allowed if we are to ensure the twin aims of security and justice. While we must be able to mold the law to encompass problems posed by unpredictable and lethal terrorists engaged in ruthless patterns of aggression, we must not seek to replace the law with lawless preemption, as does the Bush Doctrine. This article aims to find the middle ground between an overly rigid application of the self-defense doctrine and an overly flexible approach in which any type of perceived danger justifies preemptive action.<sup>20</sup>

In Section II of the article, I discuss terrorism, the international law of self-defense, and the Bush Doctrine. In Section III, I address the problems of intimate violence against women, while I review in Section IV the law of self-defense as applied to women who kill their abusers. In Section V, I analyze the intersection between international and domestic law, and conclude that some form of ASD should be available to women who kill their abusers.

## II.

### THE INTERNATIONAL LAW OF SELF-DEFENSE AND THE BUSH DOCTRINE OF PREEMPTION

This section discusses the international law of self-defense and the development of the concept of ASD, including how the United Nations Charter affects the current meaning of self-defense, and how ASD must be reasonably evaluated in the circumstances presented. Before drawing on ASD concepts for domestic violence law, I first contrast ASD in the international context with the Bush Doctrine and argue that the Bush Doctrine stretches ASD too far and is an inappropriate parallel for self-defense arguments in the domestic violence context.

#### *A. The International Law of Self-Defense*

Many nations have invoked the right of self-defense to attack an enemy prior to suffering an armed attack, alleging that they were acting lawfully

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19. This formulation for a domestic violence ASD loosely parallels the international law justification for ASD: the means to act, the intent to act, and that the planned attack is imminent and will be devastating. Cook, *supra* note 13, at 809–10. See also Mary Ellen O'Connell, *Lawful Self-Defense to Terrorism*, 63 U. PITT. L. REV. 889, 894 (2002) (stating that when there is a plan in the course of implementation, a target country would be justified in launching an interceptive attack).

20. Between the time this article was originally submitted for review in March 2004 and its publication date, other authors have published articles addressing the parallels between international law and domestic violence. See Kimberly Kessler Ferzan, *Defending Imminence: From Battered Women to Iraq*, 46 ARIZ. L. REV. 213 (2004); Shana Wallace, *Beyond Imminence: Evolving International Law and Battered Women's Right to Self-Defense*, 71 U. CHI. L. REV. 1749 (2004).

because an attack was imminent. Many international law scholars have maintained that if an attack is imminent, there is a right to engage in some form of ASD, although there is far from universal agreement on the issue.<sup>21</sup>

The Bush Doctrine, as articulated in the National Security Strategy of the United States (“Security Strategy”), claims to tap into the concept of ASD when it states “[f]or centuries, international law recognized that nations need not suffer an attack before they can lawfully take action to defend themselves against forces that present an imminent danger of attack.”<sup>22</sup> Whether such an historic right survived the enactment of the U.N. Charter and how expansively the Bush Administration is employing that concept are at the center of a sandstorm of controversy.<sup>23</sup>

### 1. *The Caroline Doctrine*

The origin of the right of ASD is often cited as “the *Caroline* Doctrine,” and refers to a nineteenth-century international dispute that occurred between the British in Canada and the Americans.<sup>24</sup> In 1837, a group of insurgents rebelled against British rule in Canada, set up headquarters on a small Canadian island on the Niagara River, and hired the *Caroline* to ferry men and material to the island. One night, the British found and seized the *Caroline* while she was docked overnight in New York. They towed her into the currents of the Niagara River, and destroyed her by fire, killing two people.<sup>25</sup>

The Americans objected to the British act of coming across the border to seize the *Caroline*. The British Ambassador in Washington wrote to the American Secretary of State to justify the British action, citing the piratical character of the *Caroline* and “the necessity of self-defence and self-

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21. See discussion *infra* Section II.C.

22. SECURITY STRATEGY, *supra* note 1, at 15. Noted international law scholar Ian Brownlie agrees with the claim that anticipatory self-defense has deep historical roots grounded in the right of both self-preservation and the doctrine of necessity. IAN BROWNLIE, INTERNATIONAL LAW AND THE USE OF FORCE BY STATES 257 (1963). Whether this “right of self-preservation,” which differs from the right of self-defense, survived the enactment of the U.N. Charter is a separate issue, however. See *id.* at 257–65.

23. See, e.g., BROWNLIE, *supra* note 22, at 264–65 (noting different opinions regarding whether enactment of Article 51 prohibited self-defense); Symposium, *Self-Defense in an Age of Terrorism*, 97 AM. SOC’Y INT’L L. PROC. 141 (2003) (setting forth various opinions as to whether the preemption element of Security Strategy comports with legal precedent and international law). See also Sean D. Murphy, *Assessing the Legality of Invading Iraq*, 92 GEO. L.J. 173, 179 (2004) (arguing that the U.S. justification for invading Iraq does not withstand close analysis).

24. See D.W. BOWETT, SELF-DEFENCE IN INTERNATIONAL LAW 188–89 (1958); Jack M. Beard, *America’s New War on Terror: The Case for Self-Defense Under International Law*, 25 HARV. J.L. & PUB. POL’Y 559, 585–86 (2002); Oscar Schachter, *The Right of States to Use Armed Force*, 82 MICH. L. REV. 1620, 1634–35 (1984). A detailed discussion of the *Caroline* incident may be found in Martin A. Rogoff & Edward Collins, Jr., *The Caroline Incident and the Development of International Law*, 16 BROOK. J. INT’L L. 493, 493–96 (1990).

25. Rogoff & Collins, *supra* note 24, at 495.

preservation.”<sup>26</sup>

Daniel Webster, who had become the Secretary of State, responded to the British claim in a letter setting forth the “circumstances and conditions under which the concept of self-defense could serve as a proper justification for the use of force by one nation against another.”<sup>27</sup> Webster admitted that there was a right of self-defense, but that the party seeking to invoke such a right must show:

[N]ecessity of self-defence, instant, overwhelming, leaving no choice of means, and no moment for deliberation. It will be for it to [show], also, that the local authorities of Canada, even supposing the necessity of the moment authorized them to enter the territories of the United States at all, did nothing unreasonable or excessive; since the act, justified by the necessity of self-defence, must be limited by that necessity, and kept clearly within it.<sup>28</sup>

Secretary Webster’s statement became known as the “*Caroline* Doctrine.” In the modern age, invocations of the *Caroline* Doctrine have been largely unsuccessful, including Germany’s invocation following World War II to justify its 1940 invasion of Norway<sup>29</sup> and the British claim when they took military action against Egypt in 1956.<sup>30</sup> When Israel bombed an Iraqi nuclear reactor in 1981, the U.N. Security Council condemned the attack, with several Council members stating that the attack did not meet the *Caroline* Doctrine’s requirement of necessity.<sup>31</sup> All fifteen members of the U.N. Security Council voted unanimously to condemn the attack as a “clear violation . . . of the norms of international conduct.”<sup>32</sup>

The United States has had limited success justifying preemptive force under the *Caroline* Doctrine. The Reagan Administration invoked the Doctrine when it attacked Libya following that country’s bombing of a Berlin discotheque in 1986, which killed an American soldier and injured scores of people.<sup>33</sup> The Administration relied on ASD, claiming it had clear evidence that Libya was planning more attacks. Several countries criticized the United States and supported a U.N. resolution condemning the attacks, although a few allies joined

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26. BROWNLIE, *supra* note 22, at 42.

27. See Rogoff & Collins, *supra* note 24, at 497 (citing BRITISH DOCUMENTS ON FOREIGN AFFAIRS: REPORTS AND PAPERS FROM THE FOREIGN OFFICE CONFIDENTIAL PRINT, PART I, SERIES C, NORTH AMERICA, 1837–1941, VOL. I, MCLEOD AND MAINE, 1837–1842 (K. Bourne, ed., 1986), Doc. 99 at 156 [hereinafter THE BRITISH DOCUMENTS ON FOREIGN AFFAIRS]).

28. *Id.* at 497–98 (quoting BRITISH DOCUMENTS ON FOREIGN AFFAIRS, *supra* note 27, at 159).

29. *Id.* at 504–05 (citing 1 TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL 206 (Nuremberg, International Military Tribunal, 1947)).

30. *Id.* at 507–08. The United Nations General Assembly requested the British to withdraw their forces by an overwhelming majority. *Id.*

31. John Yoo, *Using Force*, 71 U. CHI. L. REV. 729, 764–65 (2004).

32. Rogoff & Collins, *supra* note 24, at 509 (quoting 36 U.N. SCOR (2288th mtg.) at 33, U.N. Doc. S/PV.2288 (1981)).

33. Yoo, *supra* note 31, at 765–66.



the United States in opposing the resolution.<sup>34</sup>

After the bombing on the U.S. embassies in Kenya and Tanzania in 1998, the United States attacked terrorist training camps in Afghanistan as well as what was believed to be a chemical weapons factory in Sudan.<sup>35</sup> The Clinton Administration claimed the attacks were “intended to prevent and deter additional attacks by a clearly identified terrorist threat.”<sup>36</sup> The U.N. Security Council took no formal action.<sup>37</sup>

Although the *Caroline* Doctrine has been invoked frequently, its successful use has been limited. While many scholars seem to agree that it is a viable doctrine, there is often disagreement about the events in which it is used.

## 2. *The United Nations Charter and Article 51*

The twentieth century’s two World Wars ended with millions of deaths and innumerable atrocities visited upon nations and citizens. When the U.N. Charter was enacted in 1945, it was generally considered to have outlawed war as a viable solution to disputes.<sup>38</sup> Article 2, paragraph 4 of the U.N. Charter provides: “All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.”<sup>39</sup> This provision reflects the presumption that war does not properly serve as an appropriate means of resolving conflicts between nations.<sup>40</sup>

Two exceptions to the prohibition of force are expressly outlined in the U.N. Charter: “force used in self-defense when an armed attack occurs, and armed action authorized by the U.N. Security Council as an enforcement measure.”<sup>41</sup> Article 51 of the U.N. Charter recognizes an “inherent right of individual or collective self-defense if an armed attack occurs.”<sup>42</sup> However, this right of

34. *Id.* at 766–67. Commentators note that the attack was widely condemned. *See, e.g.*, Michael N. Schmitt, *U.S. Security Strategies: A Legal Assessment*, 27 HARV. J.L. & PUB. POL’Y 737, 746 (2004) (discussing the international rejection of the U.S. claim of self-defense); and W. Michael Reisman, *International Legal Response to Terrorism*, 22 HOUS. J. INT’L L. 3, 33–34 (1999) (discussing the widespread international disapproval).

35. Yoo, *supra* note 31, at 770.

36. *Id.* at 770–71 (citing William J. Clinton, *Letter to Congressional Leaders Reporting on Military Action against Terrorist Sites in Afghanistan and Sudan* (Aug 21, 1998), in 2 *Public Papers of the Presidents of the United States: William J. Clinton 1998* 1464 (GPO 2000)).

37. *See* Sean D. Murphy, *Self-Defense and the Israeli Wall Advisory Opinion: An Ipse Dixit from the ICJ?*, 99 AM. J. INT’L L. 62, 69–70 (2005) (noting that international reaction to the attack “suggested a measure of acceptance”).

38. *See* Schachter, *supra* note 24, at 1620. The Preamble to the U.N. Charter states its first objective is to “save succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow to mankind.”

39. U.N. CHARTER art. 2, para. 4.

40. *See* ROBERT E. OSGOOD & ROBERT W. TUCKER, *FORCE, ORDER, AND JUSTICE* 293 (1967).

41. Schachter, *supra* note 24, at 1620 (describing permissible force sanctioned by the U.N. Charter at the time of its adoption).

42. U.N. CHARTER art. 51.

self-defense is narrowly circumscribed as permissible only after an armed attack occurs or until the Security Council has taken measures necessary to maintain international peace and security.<sup>43</sup>

On October 7, 2001, the United States wrote to the U.N. Security Council and stated it had “initiated actions in the exercise of its inherent right of individual and collective self-defence following the armed attacks that were carried out against the United States on 11 September 2001.”<sup>44</sup> The U.N. Security Council not only condemned the terrorist attacks, but unanimously recognized the United States’ right of defense under the U.N. Charter.<sup>45</sup>

Since Al Qaeda had engaged in an “armed attack” against the United States on September 11, the right of self-defense against Al Qaeda was not a difficult question—the explicit language of provisions of Article 51 was met. Moreover, the unanimous approval by the U.N. Security Council legitimized the defensive attacks against the terrorists.<sup>46</sup> The more difficult issue currently posed is whether there is a right to engage in either an anticipatory or preemptive form of self-defense prior to an armed attack.

#### B. *The Bush Preemption Doctrine*

On September 11, 2001, approximately three thousand people were killed by the terrorist attack, marking the deadliest foreign attack on U.S. soil since Pearl Harbor and the most lives lost to aggression in a single day since the Civil

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

*Id.*

43. Michael J. Glennon, *The Fog of Law: Self-Defense, Inherence, and Incoherence in Article 51 of the United Nations Charter*, 25 HARV. J.L. & PUB. POL’Y 539, 539–40 (2002); Thomas Graham, Jr., *National Self-Defense, International Law, and Weapons of Mass Destruction*, 4 CHI. J. INT’L L. 1, 3 (2003).

44. Beard, *supra* note 24, at 559–60 (quoting Letter from the Permanent Representative of the United States of America, to the United Nations, Addressed to the President of the Security Council (Oct. 7, 2001), U.N. SCOR, 56th Sess., at 1, U.N. Doc. S/2001/946 (2001)). See also JOHN F. MURPHY, *THE UNITED STATES AND THE RULE OF LAW IN INTERNATIONAL AFFAIRS* 167 (2004) (noting the Security Council referred to the inherent right of self-defense before commencement of combat in Afghanistan and did not condemn the use of force once begun).

45. Beard, *supra* note 24, at 565.

46. The distinction between unlawful acts of aggression by states and by terrorists raises important and complicated issues beyond the scope of this article. For further discussion on those subjects, see Sean D. Murphy, *Terrorism and the Concept of “Armed Attack” in Article 51 of the U.N. Charter*, 43 HARV. INT’L L.J. 41 (2002); Carsten Stahn, *Terrorist Acts as “Armed Attack”*: *The Right to Self-Defense, Article 51(1/2) of the UN Charter, and International Terrorism*, 27 THE FLETCHER F. WORLD AFF. 35 (2003).

War Battle of Antietam.<sup>47</sup> In 2002, President Bush introduced what some termed the Bush Doctrine,<sup>48</sup> which is central to the Bush Administration's national security policy.<sup>49</sup> The Bush Doctrine arose as part of the Administration's overarching strategy to respond to the continuing threat of terrorism following the attacks of September 11.<sup>50</sup> To understate the issue, the Bush Doctrine is controversial.<sup>51</sup>

The Bush Doctrine seems to have been first unveiled in a speech the President gave on June 1, 2002, at West Point Military Academy, where he stated "[i]f we wait for threats to fully materialize, we will have waited too long."<sup>52</sup> He continued:

We must take the battle to the enemy, disrupt his plans, and confront the worst threats before they emerge. In the world we have entered, the only path to safety is the path of action. And this nation will act . . . And our security will require all Americans to be forward-looking and resolute, to be ready for preemptive action when necessary to defend our liberty and to defend our lives.<sup>53</sup>

In the formal Security Strategy, published in September 2002, the Administration declared that it would "prevent our enemies from threatening us,

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47. Michael P. O'Connor & Celia M. Rumann, *Into the Fire: How to Avoid Getting Burned by the Same Mistakes Made Fighting Terrorism in Northern Ireland*, 24 CARDOZO L. REV. 1657 n.3 (2003) (noting that 3044 people were killed in the September 11 attacks and 2403 people were killed at Pearl Harbor). See also Mark Mueller & Mary Jo Patterson, *The Final, Terrible Toll from Trade Center: 2,749*, STAR-LEDGER (Newark, N.J.), Jan. 24, 2004, at 3 ("The total number of victims killed when the terrorists hijacked and crashed four jetliners is 2,973. At the Pentagon, 184 people died; in Shanksville, Pa., 40 died. Historians say 9/11 was one of the bloodiest days in American history, behind the 3,650 soldiers killed in the Civil War battle at Antietam, and more than the 2,403 killed at Pearl Harbor.").

48. See Trudy Rubin, *Dubious Doctrine of Preemption*, PHILA. INQUIRER, June 16, 2002, at C5 ("Call it a doctrine of preemption. Its core: The United States must strike at terrorists, or states that sponsor them, *before they hit us*" (emphasis in original)).

49. See SECURITY STRATEGY, *supra* note 1. See also Lee Feinstein & Anne-Marie Slaughter, *A Duty to Prevent*, FOREIGN AFF., Jan.–Feb. 2004, at 136 ("The Bush Administration has proclaimed a doctrine of unilateral preemption as a core part of its National Security Strategy.").

50. See Michael Hirsh, *Bush and the World*, FOREIGN AFF., Sept.–Oct. 2002, at 19–20 ("In the year since Bush first gave voice to his doctrine, it has become the animating concept of American foreign policy, transforming the entire focus of his administration. The Bush doctrine has been used to justify a new assertiveness abroad unprecedented since the early days of the Cold War—amounting nearly to the declaration of American hegemony—and it has redefined U.S. relationships around the world . . . The president keeps using the Bush doctrine to justify new calls to action.").

51. See, e.g., Michael J. Kelly, *Time Warp to 1945—Resurrection of the Reprisal and Anticipatory Self-Defense Doctrines in International Law*, 13 J. TRANSNAT'L L. & POL'Y 1, 31–35 (2003) (discussing the competing views of the Bush Doctrine as expressed by various commentators).

52. George W. Bush, Remarks at 2002 Graduation Exercise of the United States Military Academy at West Point (June 1, 2002), available at <http://www.whitehouse.gov/news/releases/2002/06/print/20020602-3.html>.

53. *Id.*

2005]

## WHILE DANGERS GATHER

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our allies, and our friends, with weapons of mass destruction.”<sup>54</sup> The goal of Section III of the Security Strategy is to “Strengthen Alliances to Defeat Global Terrorism and Work to Prevent Attacks Against Us and Our Friends.”<sup>55</sup> To achieve this goal, the Security Strategy provides that the United States will disrupt and destroy terrorist organizations and defend American interests abroad and at home, will not hesitate to act alone if necessary, and will “exercise our right of self-defense by acting preemptively against such terrorists, to prevent them from doing harm against our people and our country.”<sup>56</sup>

Section V of the Security Strategy also identifies what it terms “rogue states,” which share a number of disturbing attributes, such as brutalizing their own people, threatening neighbors, acquiring or attempting to acquire weapons, sponsoring terrorism, and rejecting basic human values.<sup>57</sup> Iraq was specifically mentioned as one of those rogue states.<sup>58</sup> The Security Strategy states that the United States must be prepared to stop both rogue states and “their terrorist clients” before such entities are able to either threaten or use weapons of mass destruction against the United States and its friends.<sup>59</sup>

To support the preemptive approach toward dealing with “terrorists and rogue states,” the Security Strategy appears to rely on the *Caroline* doctrine:

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

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

The United States will not use force in all cases to preempt emerging threats, nor should nations use preemption as a pretext for aggression. Yet in an age where the enemies of civilization openly and actively

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54. SECURITY STRATEGY, *supra* note 1, at 1.

55. *Id.* at 5.

56. *Id.* at 5–6. The willingness of the United States to act unilaterally has engendered considerable controversy. See, e.g., Karl M. Meessen, *Unilateral Recourse to Military Force Against Terrorist Attacks*, 28 YALE J. INT’L L. 341 (2003) (discussing how to limit the role of unilateralism in fighting society-induced, crossborder terrorism).

57. SECURITY STRATEGY, *supra* note 1, at 13–14.

58. *Id.*

59. *Id.* at 14.

seek the world's most destructive technologies, the United States cannot remain idle while dangers gather.<sup>60</sup>

Six months after the Security Strategy was published, the United States began military operations against Iraq on March 19, 2003, alleging that Saddam Hussein and his government posed a direct threat to the security of the United States.<sup>61</sup> Although the United States did not invoke the doctrine of preemptive self-defense when it chose to invade Iraq, the President did state that:

The people of the United States and our friends and allies will not live at the mercy of an outlaw regime that threatens the peace with weapons of mass murder. We will meet that threat now, with our Army, Air Force, Navy, Coast Guard and Marines, so that we do not have to meet it later with armies of fire fighters and police and doctors on the streets of our cities.<sup>62</sup>

The United Nations was not convinced about the attack on Iraq and, indeed, being assured it would receive a veto, the United States deliberately chose not to seek the approval of the Security Council.<sup>63</sup>

In November 2004, President Bush was reelected and immediately declared that he had earned political capital in the campaign and intended to spend it.<sup>64</sup> Whether this means he intends to continue to push for the Bush Doctrine remains to be seen, but given his views of the correctness of his beliefs,

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60. *Id.* at 15.

61. In his letter on March 18, 2003, President Bush told Congress that he had determined that further diplomatic and peaceful means would not protect national security from Iraq, nor would they lead to the enforcement of U.N. resolutions regarding Iraq. Furthermore, President Bush stated that the use of military force against Iraq was consistent with the United States continuing to take necessary action against any terrorists, nations, organizations, or persons who planned, authorized, committed, or aided the terrorist attacks of September 11, 2001. *See* Letter from President Bush to the Speaker of the House of Representatives and the President Pro Tempore of the Senate (Mar. 18, 2003), *available at* 2003 WL 7517290.

Notably, the Administration did not rely on the claim that it was acting according to principles of preemptive self-defense. *See* Murphy, *supra* note 23, at 175 (concluding that the United States did not use preemptive self-defense as justification for invading Iraq since the concept of preemptive self-defense has evolved). In fact, some believe such a claim would have most certainly failed. *See, e.g.,* Stahn, *supra* note 46, at 40 (discussing how invocation of a right of preemptive self-defense under international law would be exposed to serious criticism). *But see* John Yoo, *International Law and the War in Iraq*, 97 AM. J. INT'L L. 563, 571-74 (2003) (explaining how the United States could invoke anticipatory self-defense under international law to justify the invasion of Iraq).

62. George W. Bush, President Bush Addresses the Nation (Mar. 19, 2003) (transcript on file with author).

63. *See* Murphy, *supra* note 23, at 253 ("There is little doubt that, with the invasion of Iraq, the world's preeminent superpower deviated from the clear will of the majority of the Security Council.").

64. Richard W. Stevenson, *Confident Bush Outlines Ambitious Plan for Second Term*, N.Y. TIMES, Nov. 5, 2004, at A1. According to this article, "Mr. Bush restated a central campaign theme, that spreading freedom and democracy was the best long-term solution to fighting terrorism and its causes." *Id.*

it would seem unlikely he would retreat from such a vision.

*C. Historical and Contemporary Arguments about International Self-Defense*

The disagreement between the Bush Administration and the United Nations about whether a preemptive attack on Iraq was justified reflects the longstanding international disagreement about whether the specific language of Article 51 of the U.N. Charter outlaws the concept of ASD.<sup>65</sup> While traditional self-defense in response to an armed attack is wholly legitimate under historical doctrine and the actual language of Article 51, some preeminent scholars argue that ASD is not permitted by Article 51.<sup>66</sup>

However, it appears that many scholars *do* accept the legitimacy of ASD under Article 51.<sup>67</sup> A sensible argument can be made that some form of ASD must be recognized in the era of biological, nuclear, and chemical weapons.<sup>68</sup> The lethality, range, and unpredictability of modern weapons, as well as the use of unconventional weapons by terrorists, render it foolish to wait until attacked before striking those intending harm to the United States, as

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65. See, e.g., CHRISTINE GRAY, INTERNATIONAL LAW AND THE USE OF FORCE 84 (Malcolm Evans & Phoebe Okowa eds., 2000) (the legality of anticipatory self-defense has been much discussed since the creation of the U.N.). Compare Glennon, *supra* note 43, at 547–49 (although the Charter is not reflective of the reality of world practice, the language of Article 51 clearly requires an armed attack precede any attack claimed in self-defense), with Jane E. Stromseth, *Law and Force After Iraq: A Transitional Moment*, 97 AM. J. INT'L L. 628, 637–38 (2003) (anticipatory self-defense in response to an imminent armed attack reasonably falls within the U.N. Charter).

66. See, e.g., YORAM DINSTEIN, WAR, AGGRESSION AND SELF-DEFENCE 168 (3d. ed. 2001) (“There is not the slightest indication in Article 51 that the occurrence of an armed attack represents only one set of circumstances (among others) in which self-defence may be exercised . . . Not only does Article 51 fail to intimate that preventive war is allowable, but the critical tasks assigned to the Security Council are restricted to the exclusive setting of counter-force employed in response to an armed attack.”); Michael J. Glennon, *Self-Defense in an Age of Terrorism*, 97 AM. SOC'Y INT'L L. PROC. 150, 151 (noting that many prominent scholars support the view that anticipatory self-defense is not permitted under Article 51); GRAY, *supra* note 65, at 86–87 (discussing the views of those who interpret Article 51 narrowly).

67. See, e.g., BOWETT, *supra* note 24, at 191 (“It is not believed . . . that Art. 51 restricts the traditional right of self-defence so as to exclude action taken against an imminent danger but before ‘an armed attack occurs’ . . . [S]uch a restriction is both unnecessary and inconsistent with [other Articles.]”); Graham, *supra* note 43, at 4 (noting that anticipatory self-defense is not always unlawful, but rather depends on the seriousness of the threat and whether preemptive action is both necessary and the only way to avoid the threat) (citing OPPENHEIM’S INTERNATIONAL LAW 418 (Robert Jennings & Arthur Watts eds., Longman 9th ed., 1992); Stromseth, *supra* note 65, at 637–38 (arguing that anticipatory self-defense falls within the right of self-defense under the United Nations Charter). See also Schachter, *supra* note 24, at 1634–35 (arguing that preemptive force should not be freely allowed, but recognizing that “there may well be situations in which the imminence of an attack is so clear and the danger so great that defensive action is essential for self-preservation”).

68. See OSGOOD & TUCKER, *supra* note 40, at 296 (“A restrictive view of the Charter’s provisions, in limiting the right to exercise force in self-defense to the sole contingency of a prior armed attack, is vulnerable to the criticism that, if adhered to, it might well result in defeating the essential purpose of this right.”).

Professor Miriam Sapiro cogently recognizes.<sup>69</sup>

Noted international law scholars Thomas Franck and Michael Glennon both believe that ASD is required by modern weaponry, despite the restrictive terms of Article 51.<sup>70</sup> Professor Karl Meessen concurs when evaluating threats made by terrorists: “Terrorists choose the time for attack as it pleases them. How could one expect the state victim of such an attack to postpone its response until the aircraft are on their way next time?”<sup>71</sup> The cumbersome way the United Nations has dealt with international conflict in the past and the lethality posed by terrorists and other aggressors require the practical evaluation that ASD must be considered lawful in those circumstances where self-preservation requires it.

Nonetheless, even if one assumes a limited form of ASD is generally accepted, the Bush Doctrine seems to conflate ASD with the far more controversial concept of preemptive or preventive self-defense.<sup>72</sup> The former is a response to a specific, known, and extant threat; the latter is an affirmative act meant to preclude even the *creation* of a specific and knowable threat before it is made. The language of the Security Strategy—“in an age where the enemies of civilization openly and actively seek the world’s most destructive technologies, the United States cannot remain idle while dangers gather”<sup>73</sup>—suggests a broad-ranging power to attack any designated enemy, anywhere, that poses a potential threat.<sup>74</sup> The Security Strategy is a policy that is untethered from traditional historical concepts of self-defense, one that moves away from any timely evaluation of a threat into a new world, where the mere possibility of a threat will bring about preemptive action. While one may hope that the exercise of the Bush Doctrine may be less extreme than some of its language portends, there can be no doubt that the Bush Doctrine goes beyond the reasonable strictures of ASD.

Article 51 makes a clear, broad line in the sand that there should be no attacks unless one receives an armed attack, but the ‘realpolitik’ use of the doctrine

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69. See, e.g., Miriam Sapiro, *Iraq: The Shifting Sands of Preemptive Self-Defense*, 97 AM. J. INT’L L. 599, 602 (2003) (“Today it is more likely to be foolish, if not suicidal, for a state that believed its fundamental security interests were at risk to wait until the first attack.”).

70. Thomas M. Franck, *What Happens Now? The United Nations After Iraq*, 97 AM. J. INT’L L. 607, 619 (2003); Glennon, *supra* note 43, at 549–53.

71. See Meessen, *supra* note 56, at 351.

72. See Franck, *supra* note 70, at 619 (characterizing the Security Strategy as “exponentially expanding the range of permissible preemption”); Sapiro, *supra* note 69, at 599 (describing the new approach and noting that “[r]ather than trying to preempt specific, imminent threats, the goal is to prevent more generalized threats from materializing”); O’Connell, *supra* note 11, at 2 (distinguishing between preemption and ASD and stating that “[p]reemptive self-defense . . . is clearly unlawful under international law”). But see, e.g., Graham, *supra* note 43, at 1 (noting the definitional lines separating preemptive attack, preventive war, and anticipatory self-defense are unclear and legitimacy of any attack is circumstance-dependent).

73. SECURITY STRATEGY, *supra* note 1, at 15.

74. Professor Franck also addresses the implications of the U.S. announcement in the Security Strategy document that it may engage in unilateral decisionmaking—clearly an important point, but beyond the scope of this article. See Franck, *supra* note 70, at 619–20.

has been much less clear.<sup>75</sup> In this postmodern age, the United States cannot wait until a nuclear weapon is launched, an airplane has flown into its target, or a pandemic is released. It is perhaps equally frightening, however, for countries to unilaterally and preemptively decide when, whom, and why to attack—what Professor Franck terms a “model that makes global security wholly dependent on the supreme power and discretion of the United States and frees the sole superpower from all restraints of international law and the encumbrances of institutionalized multilateral diplomacy.”<sup>76</sup>

The Bush Doctrine is different in kind from the historical concept of ASD rooted in the *Caroline* Doctrine, which requires necessity, immediacy, and to a lesser degree, proportionality, in the face of a potentially devastating attack. If the concept formulated in the *Caroline* Doctrine has survived the enactment of the U.N. Charter, a state seeking to prevail under the *Caroline* formulation of ASD must show that the danger was indeed imminent and that the force employed was both proportionate and necessary.<sup>77</sup> “It is a well established rule of customary international law that even when a state is lawfully engaged in the exercise of its inherent right of self-defense, its use of force must be limited to that force necessary to defend against the attack and must be proportionate.”<sup>78</sup>

However, even though the international law of ASD has a temporal requirement, that conception of time is far more flexible than in the domestic criminal law.<sup>79</sup> Those who favor ASD in international law do not restrict the doctrine to the moment when the missile is in the air.<sup>80</sup> Even among those who urge a narrow reading of Article 51, the concept of immediacy has a more elastic view: “Immediacy signifies that there must not be an undue time-lag between the armed attack and the exercise of self-defence. However, this condition is construed ‘broadly.’”<sup>81</sup>

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75. See Glennon, *supra* note 43, at 546, 549 (arguing that Article 51’s language is explicit but noting that the Article is “grounded upon premises that neither accurately describe nor realistically prescribe state behavior”).

76. Franck, *supra* note 70, at 608.

77. See BROWNLIE, *supra* note 22, at 261–64 (discussing the proportionality requirement); Sapiro, *supra* note 69, at 600 (discussing proportionality, imminence, and necessity). Accord, Meessen, *supra* note 56, at 349 (arguing that “the principles of necessity and proportionality give guidance to the evolution of operative rules on self-defense against society-induced terrorist attacks”). Professor Glennon, however, quite accurately notes that compliance with a strict test of proportionality is nearly impossible: “[w]aging war is bound to be disproportionate if the provocation is an isolated armed attack.” Glennon, *supra* note 43, at 550–51. Authors Osgood and Tucker note that it is not clear whether proportionality “limits acts taken in self-defense to repelling the immediate danger or permits action directed to removing the danger,” but argues that the latter interpretation is not unreasonable. OSGOOD AND TUCKER, *supra* note 40, at 300.

78. Beard, *supra* note 24, at 583.

79. The rigid temporal approach of many states is developed more fully in Section IV, *infra*.

80. See Sapiro, *supra* note 69, at 602.

81. See DINSTEIN, *supra* note 66, at 184. Dinstein does not believe ASD is legitimate and posits that an armed attack is required before a strike. He allows, however, that the *interception* of a strike is permissible. *Id.* at 169–72.



Thus, there is an argument that when survival is alleged to be at stake, we must evaluate the temporal situation with some degree of flexibility, so as not to ignore the modern-day realities.<sup>82</sup> The concept of an imminent threat must adapt to the capabilities of the enemy and a rational understanding of the dangers posed. Thus, the *Caroline* formulation of the timing of ASD —“instant, overwhelming, leaving no choice of means, and no moment for deliberation”—must be understood in light of the modern era, in an age of biological weapons, yellowcake uranium, and shoulder-fired missiles.

This article posits that the elastic concept of imminence incorporated into a legitimate use of ASD should be incorporated into the domestic criminal law, so that courts do not ignore the realities of domestic violence situations that render the traditional framework of self-defense inappropriate and inadequate. The “middle ground” of ASD, which considers the danger of the threat, the timing of the threat, and the necessity to take action, form a more workable triad of considerations that would enrich the domestic criminal law, as is more fully explained in Section IV.

This article argues that the Bush Doctrine is not the proper model to follow, as it wholly disregards any notion of necessary temporal connection between the threat and the preventive attack, simply claiming it cannot be idle “while dangers gather.” This far-too-vague temporal reference does not fit within any legal recognition of self-defense, qualifying as neither anticipatory nor interceptive self-defense. It vests total decisionmaking in a unilateral superpower to decide both the degree and timing of the threat and challenges the viability of U.N. decisionmaking and influence. Moreover, it can lead to an international slippery slope in which aggressive action by any state can be self-labeled preemptively justified.<sup>83</sup> The doctrine incorporates neither necessity nor any mention of proportionality. Rather, it simply claims to permit the United States to unilaterally decide that it is appropriate to attack a “rogue state” (which is in and of itself a unilateral designation) because the United States believes that the state is harboring or helping terrorists.<sup>84</sup> The Bush Doctrine, as stated, is too dangerous for a hoped-for increasingly civilized world. Perhaps it will be applied less wantonly, but the willingness to invade Iraq in the given circumstances suggests otherwise. Professor Franck is convincing in his argument that the Bush Doctrine does not seek to stretch the law so much as it does to repeal the law altogether<sup>85</sup>—leaving us perhaps with the concept of “might

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82. Meessen, *supra* note 56, at 349, 351.

83. See Murphy, *supra* note 23, at 176 (welcoming U.S. decision not to rely upon a theory of preemptive self-defense in attacking Iraq because it could have “invited an unraveling of norms” by setting an overly lenient standard for the use of force, but going on to find that the legal argument of the United States for invading Iraq is faulty).

84. As Professor O’Connell reasons, to permit “preemptive self-defense at the sole discretion of a state is fundamentally at odds with the Charter’s design” . . . and would both defeat Article 2, § 4 and “the very purposes of the UN.” O’Connell, *supra* note 11, at 13.

85. See Franck, *supra* note 70, at 608 (commenting that the U.S. effort to stretch international

makes right.” The Bush Doctrine does not embrace the elastic concept this article favors, but rather disaggregates the concept of danger and temporality altogether.

Terrorism, of course, is unpredictable in terms of place, timing, and methodology; it is a deliberate strategy that seeks to create and does create anxiety and chronic fear in its victims. Stopping terrorism requires the availability of ASD to respond to known threats. Similarly, as discussed in Section IV, domestic batterers intend and do create anxiety and fear in their victims. ASD should likewise be recognized as an available defense to respond to known threats in an abusive relationship. The unpredictability and lethality of both international and domestic violence terrorism dictate that the concept of imminence be interpreted broadly, but, again, it cannot be disengaged wholly from the threat itself. The “middle ground” of ASD, which considers the danger of the threat, the timing of the threat, and the necessity to take action, forms a more workable triad of considerations that would enrich the domestic criminal law, as is more fully explained in Section IV.

### III.

#### INTIMATE VIOLENCE AGAINST WOMEN<sup>86</sup>

To understand the need for ASD to be available to women who kill their abusers, it is important to understand the astounding level of domestic violence in this country. According to the Bureau of Justice statistics in 1994, approximately five million women were the victims of violent crimes (murder, rape, assault, etc.); three million of those women were victimized by people they knew, and nine hundred thousand of those were victimized by “intimates.”<sup>87</sup> For homicides in which the relationship was known, thirty-one percent of women were killed by an intimate (approximately fourteen hundred deaths).<sup>88</sup>

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law to justify the invasion of Iraq demonstrates a principle from the Peloponnesian War: “[T]he strong do what they can and the weak suffer what they must.” (citing THUCYDIDES, *THE PELOPONNESIAN WAR: THE COMPLETE WRITINGS OF THUCYDIDES* 331 (Richard Crawley trans., 1934)).

86. “Women” are discussed as abuse victims in this article, although it is clear that men are also domestic abuse victims. See Linda Kelly, *Disabusing the Definition of Domestic Violence: How Women Batter Men and the Role of the Feminist State*, 30 FLA. ST. U. L. REV. 791 (2003). However, the statistical data suggests that women suffer far more serious injuries and death than do men from domestic abuse. While thirty-one percent of female homicide victims are killed by intimates, only four percent of men are. Moreover, while nine hundred thousand women per year are victimized by intimates, one hundred and sixty-six thousand men are. DIANE CRAVEN, BUREAU OF JUSTICE STATISTICS, DEP’T OF JUSTICE, *SEX DIFFERENCES IN VIOLENT VICTIMIZATION* 4 (1994), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/sdvv.pdf> [hereinafter *SEX DIFFERENCES*].

87. See CRAVEN, *supra* note 86 at 1 (reporting that females were five times more likely to be victims of intimate violence). Accord ELIZABETH M. SCHNEIDER, *BATTERED WOMEN AND FEMINIST LAWMAKING* 25 (2000) (noting women are more likely to be injured or killed by an intimate partner).

88. See JAMES ALAN FOX, BUREAU OF JUSTICE STATISTICS, DEP’T OF JUSTICE, *HOMICIDE TRENDS IN THE UNITED STATES*, available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/htius.pdf>

Moreover, female murder victims are substantially more likely than male murder victims to be killed by an intimate, and since 1995, of all female murder victims, the proportion of those murdered by an intimate has been increasing.<sup>89</sup> The leading cause of injury to women between the ages of fifteen and forty-four remains domestic violence.<sup>90</sup>

The Department of Justice, members of the Supreme Court, and Congress have all recognized the extent of domestic violence against women.<sup>91</sup> In sum, the overall picture is clear: American families are dangerous and violent places for millions of women.<sup>92</sup>

The last few decades have witnessed a dramatic change in police willingness to intervene in domestic violence and prosecutorial willingness to move forward with those cases. A majority of states now have mandatory arrest and “no-drop” prosecution rules.<sup>93</sup> Despite such official efforts, the government has not been able to stop such violence, as is clear from the Department of Justice and Bureau of Justice statistics on domestic violence.<sup>94</sup> And even when domestic violence aggressors are arrested and prosecuted, the results are often discouraging. According to one anecdotal review of 140 domestic violence cases from 1995 in eleven different jurisdictions, ninety-five cases did not result in a final disposition of plea, acquittal, or guilty verdict.<sup>95</sup> The remaining defendants faced the following justice:

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[hereinafter HOMICIDE TRENDS].

89. *Id.*

90. Judith A. Smith, *Battered Non-Wives and Unequal Protection-Order Coverage: A Call for Reform*, 23 YALE L. & POL’Y REV. 93, 94 (2005) (citing 140 Cong. Rec. 27,281 (1994)). This cause of injury is more than the combined totals of car accidents, mugging, and rapes. *Id.*

91. See *United States v. Morrison*, 529 U.S. 598, 631–33 (2000) (Souter, J., dissenting) (collecting Congressional statistics about domestic violence and noting that “battering is the single largest cause of injury to women in the United States”); HOMICIDE TRENDS, *supra* note 88; SEX DIFFERENCES, *supra* note 86. See also *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 888 (1992) (noting, among other statistics, that “[s]tudies reveal that family violence occurs in two million families in the United States. This figure, however, is a conservative one that substantially understates (because battering is usually not reported until it reaches life-threatening proportions) the actual number of families affected by domestic violence”).

92. Erica Beecher-Monas, *Domestic Violence: Competing Conceptions of Equality in the Law of Evidence*, 47 LOY. L. REV. 81, 129 (2001).

93. See Wayne A. Logan, *Criminal Law Sanctuaries*, 38 HARV. C.R.-C.L. L. REV. 321, 373 (2003) (most U.S. jurisdictions have some form of a mandatory arrest policy for domestic violence calls, and a majority of prosecutor’s offices have “no-drop” policies which require the prosecution to go forward regardless of the victim’s wishes); Cheryl Hanna, *The Paradox of Hope: Crime and Punishment of Domestic Violence*, 39 WM. & MARY L. REV. 1505, 1518–20 (1998) (writing that most jurisdictions have policies that require or encourage police to make arrests in response to domestic violence calls, but noting that even with more rigorous prosecutions, most cases still end with arrest).

94. See SEX DIFFERENCES, *supra* note 86. See also Logan, *supra* note 93, at 346 (noting that “despite the increasing *de jure* recognition of family violence and the government’s increased readiness to intervene, use of criminal sanctions has demonstrably failed to stem the tide of domestic harms”).

95. Hanna, *supra* note 93, at 1523.

Cases were dismissed even in jurisdictions with avowed no-drop policies. Only sixteen of the forty-four defendants who were convicted or pled no contest served any time; the vast majority received probation or a suspended sentence, including one man who sent his wife to the hospital with a broken nose and a broken rib. He received six months' probation. A man who slapped his wife in the face and tried to stab her with a kitchen knife received one year, the longest sentence given on this day. The court found that two prior felony drug convictions, not the severity of the crime, justified the length of the sentence.<sup>96</sup>

Moreover, there are some data that mandatory arrest policies may not only fail to deter domestic violence, but may actually increase the likelihood of future violence.<sup>97</sup> The "no-drop" prosecution research also yields "uncertainty as to whether the approach exercises a general or specific deterrent influence on domestic abuse."<sup>98</sup> Moreover, the effects of domestic violence services have not been found to be related to lower rates of men killing their partners—although, ironically, these programs, designed to protect women from murder, appeared to have a stronger role in reducing the killing of husbands by wives.<sup>99</sup> Certainly, the population of battered women is not convinced of the efficacy of police intervention. According to current research, "more than 73% of the women who were physically assaulted by an intimate did not report the incident to the police. The leading reason was their belief that the police could not help."<sup>100</sup>

Rather than call the police, some women employ a "self-help" approach and leave a violent home.<sup>101</sup> Unfortunately, the danger may not end with the exit and, indeed, the likelihood of harm may substantially increase. As Professor Elizabeth Schneider states, "[w]e know that women's assertion of independence, most dramatically in the act of separation, exacerbates the lethality of male violence, and that women who leave their abusers are at a greater risk of being seriously injured or killed."<sup>102</sup> According to the Bureau of Justice statistics, women separated from their spouses had a violent victimization rate of 128 per one

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96. *Id.* at 1524 (citations omitted).

97. Logan, *supra* note 93, at 375 (citing various social science research studies).

98. *Id.*

99. Laura Dugan, Richard Rosenfeld, & Daniel S. Nagin, *Exposure Reduction or Retaliation? The Effects of Domestic Violence Resources on Intimate Partner Homicide*, 37 L. & SOC'Y REV. 169, 173 (2003).

100. *Id.* at 194. Moreover, government statistics support the drop in intimate violence against men. HOMICIDE TRENDS, *supra* note 88.

101. Dugan, Rosenfeld, & Nagin, *supra* note 99, at 194 (citation omitted).

102. SCHNEIDER, *supra* note 87, at 115. See also Martha Mahoney, *Legal Images of Battered Women: Redefining the Issue of Separation*, 90 MICH. L. REV. 1, 5–6 (1991) (describing "separation assault" as an attack that may be precipitated by the moment of separation or attempted separation, when the batterer's quest for control often becomes acutely violent and potentially lethal); Richard A. Rosen, *On Self-Defense, Imminence, and Women Who Kill Their Batterers*, 71 N.C. L. REV. 371, 395 (1993) (noting the recent development of evidence in professional literature supporting the contention that a battered woman who attempts to leave or get help places her life at risk).

thousand (approximately thirteen percent).<sup>103</sup> The Justice Department report notes, however, that the victimization rate of women who separate from their batterers is dramatically elevated in comparison to all other women and is six *times* the rate of married women.<sup>104</sup> Thus, in response to the frequently asked question about why a woman does not leave the abusive situation, the real answer might be that she was trying to stay alive.

For women in an abusive relationship, there is little positive news to report about successful ways to avoid the harm.

#### IV.

##### WHEN BATTERED WOMEN KILL: SELF-DEFENSE, IMMINENCE, AND NECESSITY

Many battered women who kill their abusers are charged with murder and many of these women are convicted. These trials have produced difficult questions about the application and limitation of the traditional self-defense doctrine and the role that gender plays in the creation and application of law.<sup>105</sup>

Self-defense is justified when the actor uses a “reasonable amount of force against [her] adversary when [she] reasonably believes (a) that [she] is in immediate<sup>106</sup> danger of unlawful bodily harm from [her] adversary and (b) that the use of such force is necessary to avoid this danger.”<sup>107</sup> Self-defense is morally justified under the law: the killer was a victim who did not start the fight and killed to preserve her own life.<sup>108</sup> The issues at play in self-defense in homicide generally are: whether there was reasonable belief that force was necessary to guard against death, serious bodily harm, rape, or kidnapping; whether the force used was proportionate; and whether the killing was sufficiently close enough in time to the danger.<sup>109</sup> All of these factors raise difficult and unique concerns in the situation of a battered woman who kills her abuser. However, self-defense is sometimes disallowed as a matter of law, primarily because the self-defense doctrine is applied quite rigidly<sup>110</sup> or

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103. SEX DIFFERENCES, *supra* note 86, at 1.

104. *Id.* at 4.

105. See SCHNEIDER, *supra* note 87, at 112.

106. Several jurisdictions, however, use “imminent” rather than “immediate,” although many seem to treat the terms interchangeably. Indeed, the two terms are often interchangeable in normal parlance.

107. WAYNE R. LAFAVE, CRIMINAL LAW § 10.4, at 539 (4th ed. 2003).

108. CAROLINE A. FORELL & DONNA M. MATTHEWS, A LAW OF HER OWN: THE REASONABLE WOMAN AS A MEASURE OF MAN 200 (2000). The moral legitimacy of self-defense is long-established. See, e.g., DINSTEIN, *supra* note 66, at 160 (“[t]he legal notion of self-defence has its roots in interpersonal relations, and has been sanctified in domestic legal systems since time immemorial”); Alafair S. Burke, *Rational Actors, Self-Defense, and Duress: Making Sense, Not Syndromes, Out of Battered Women*, 81 N.C. L. Rev. 211, 276 (2002) (arguing that essence of self-defense is to avoid punishing actors whose conduct was impelled by self-preservation).

109. LAFAVE, *supra* note 107, §§ 10.4 (a)–(d).

110. See, e.g., *Commonwealth v. Grove*, 526 A.2d 369, 373, 375 (Pa. Super. 1987) (disallowing the defendant to claim self-defense when she shot her husband while he slept, despite a twenty-

the statutory language provides a specific temporal limitation.<sup>111</sup>

Concerned about temporal rigidity in the law of self-defense, the authors of the Model Penal Code (“MPC”) revised the MPC’s language for self-defense as follows: “[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.”<sup>112</sup> In the Commentary to the MPC, the authors explain that self-defense is not limited to cases where unlawful violence is imminent or immediate. Rather, 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 used immediately.”<sup>113</sup> Evaluating the person’s belief “on the present occasion,” as opposed to whether the unlawful force was immediate or imminent, recognizes that the temporal factor must have some flexibility to attain a just result.<sup>114</sup> Many states, however, have remained true to

two-year history of abuse since the danger was not “imminent” while he slept); *Lane v. State*, 957 S.W.2d 584, 586–87 (Tex. Crim. App. 1997). See discussion *infra* Section IV.A.

Even when evidence of self-defense is allowed, the jury may disagree with the claim of self-defense and conclude that the defendant was not justified in using deadly force. See *People v. Beasley*, 622 N.E.2d 1236, 1238–44 (Ill. App. Ct. 1993) (holding there was sufficient evidence to support jury’s finding that defendant’s belief in the need for deadly force was unreasonable because the decedent had been sleeping when he was shot, despite horrific abuse and several threats by the decedent to kill the defendant on the night of the shooting).

111. Many self-defense statutes speak of imminent harm. See, e.g., ALA. CODE § 13A-3-23 (1975); ARK. CODE ANN. § 5-2-607 (Michie 2003); COLO. REV. STAT. ANN. § 18-1-704 (West 2004); IDAHO CODE § 19-202A (Michie 2004); KY. REV. STAT. ANN. § 503.050 (Michie 1985); LA. REV. STAT. ANN. § 14:20 (West 2005); ME. REV. STAT. ANN. tit. 17-A, § 108 (West 1983); MO. ANN. STAT. § 563.031 (West 1999); N.D. CENT. CODE § 12.1-05-03 (1997); OR. REV. STAT. § 161.209 (2003); TENN. CODE ANN. § 39-11-611 (2003); WASH. REV. CODE ANN. § 9A.16.050 (West 2000); WIS. STAT. ANN. § 939.48 (West 2003–04).

A few courts using the imminent harm language interpret it liberally. See, e.g., *State v. Janes*, 850 P.2d 495, 506 (Wash. 1993) (noting the distinction between imminent and immediate and stating “[t]hat the triggering behavior and the abusive episode are divided by time does not necessarily negate the reasonableness of the defendant’s perception of imminent harm”).

Other statutes use the word immediate. See, e.g., ARIZ. REV. STAT. ANN. § 13-404 (Michie 2001); DEL. CODE ANN. tit. 11, § 464 (2001); HAW. REV. STAT. ANN. § 703-304 (Michie 1993); N.J. STAT. ANN. § 2C:3-4 (West 2004); 18 PA. CONS. STAT. ANN. § 505 (West 1998); TEX. CODE ANN. § 9.32 (Vernon 2003).

112. MODEL PENAL CODE AND COMMENTARIES § 3.04 (1) (Official Draft and Revised Comments 1962). Section § 3.04 (1) describes the defense as follows:

Subject to the provisions of this Section and of Section 3.09, the use of force upon or toward another person is justifiable when the actor believes that such force is immediately necessary for the purpose of protecting himself against the use of unlawful force by such other person on the present occasion.

Section 3.04 (2) (b) limits the defense as follows:

The use of deadly force is not justifiable under this Section unless the actor believes that such force is necessary to protect himself against death, serious bodily injury, kidnapping or sexual intercourse compelled by force or threat; nor is it justifiable . . .

113. *Id.* § 3.04 cmt. 2 (c).

114. *Id.* § 3.04 cmt. 2 (d). Although imminent and immediate are thought to be conceptually

their original requirement of a strict temporal relation between the decedent's threats or actions and the defendant's lethal response.<sup>115</sup>

A. "Imminence" and Battered Women

In the case of battered women who kill their abusers, the paramount question is often how "sufficiently close in time" the killing was to the danger that triggered the killing.<sup>116</sup> The majority of women who kill their abusers do so while they are being attacked, in what is known as traditional self-defense.<sup>117</sup> In cases that fit within the traditional model, courts usually permit expert testimony about domestic violence and battering, often to explain why the woman believed she was in danger of losing her life at the time of the attack. In addition, expert testimony is introduced to help the jury understand why the woman may have chosen not to leave, even though that is not generally an element of self-defense.<sup>118</sup>

However, there is a percentage of cases falling outside the traditional self-defense posture where there is a delay between the threat by the abuser and the killing of that abuser. In those cases, courts generally have disallowed both expert testimony about the effects of battering and percipient witness testimony about past abuse, often on grounds of irrelevance to the issue of self-defense.

In *Commonwealth v. Grove*, for example, where the wife killed the husband while he was drunk and asleep, the Supreme Court of Pennsylvania held it was not error for the trial court to exclude evidence of both the 22-year history of prior abuse and any evidence of the decedent's reputation for violence.<sup>119</sup> The Court reasoned that while such evidence might be a factor in determining whether the defendant's fear was genuine, in this case, the defendant could not have been in fear of imminent death or bodily harm because her abuser was

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synonymous, states vary in their understanding of each term. The MPC sought to provide some flexibility in this temporal restriction in adapting the phrase "on the present occasion."

115. See, e.g., *supra* note 111. Even states that have adopted the MPC formulation have continued to impose a strict temporal requirement. See, e.g., *Grove*, 526 A.2d at 375 (rejecting the broader MPC interpretation as inconsistent with common law).

116. For an excellent discussion of the history of imminence and its implications in self-defense, see V.F. Nourse, *Self-Defense and Subjectivity*, 68 U. CHI. L. REV. 1235 (2001). Professor Nourse argues that the concept of "imminence" in the context of self-defense is not as objective as many would claim. *Id.* at 1237-38.

117. See Holly Maguigan, *Battered Women and Self-Defense: Myths and Misconceptions in Current Reform Proposals*, 140 U. PA. L. REV. 379, 384-85 (1991). Accord Nourse, *supra* note 116, at 1253-54.

118. For a fuller discussion of the use and limitation of such expert testimony and the various approaches utilized by courts, see MORIARTY, *supra* note 3, §§ 7:10-7:11. Most people question why the woman did not leave her abusive mate—but as a comparison to self-defense when used by men, Professor Nourse aptly remarks, "[w]e do not ask of the man in the barroom brawl that he leave the bar before the occurrence of an anticipated fight, but we do ask the battered woman threatened with a gun why she did not leave the relationship." Nourse, *supra* note 116, at 1238.

119. 526 A.2d 369, 372 (Pa. Super. 1987).

sleeping when she killed him.<sup>120</sup> “[T]he fact remains that whatever danger he presented was not *imminent on the present occasion* as he lay sleeping.”<sup>121</sup> Any danger to the defendant, the court declared, ended when the husband went to sleep.<sup>122</sup>

In *Lane v. State*, the decedent was married to the defendant for thirty years, during which time he drank and abused her repeatedly.<sup>123</sup> After the defendant moved out of their home to stay with their daughter, she talked with the decedent late one night, during which conversation he calmly told her that he was going to kill her and that he would “slit her open like a wild animal and pull her guts out.”<sup>124</sup> He also threatened to kill their daughter. This was the first time he had made such threats.<sup>125</sup> After pacing the floor all night, the defendant went to her husband’s house and shot him.<sup>126</sup> The Texas Court of Criminal Appeals held that there was no issue of self-defense since there was “nothing more than verbal threats,” which were insufficient to justify the use of force.<sup>127</sup> These threats, supposedly nothing more than verbal, included telling the defendant that he would find her wherever she went and shoot her in the head “like JFK” while she was driving.<sup>128</sup> In addition, the decedent had recently told friends that he wanted to hire killers to murder his wife.<sup>129</sup>

Nevertheless, the court upheld the trial court’s decisions to deny an instruction on self-defense and to exclude expert testimony on battering and its effects. “There is no evidence,” the majority wrote, “that [the decedent] took any physical actions against [the defendant] that would have warranted her in believing that deadly force was immediately necessary to protect herself.”<sup>130</sup> The court emphasized that the threats were made nearly five hours before the killing and the defendant had to drive to her abuser’s house to kill him.<sup>131</sup> To reach this conclusion, however, the court had to disaggregate the decedent’s past history of substantial physical abuse from his more current threats of murder, thereby ignoring the reality and likelihood of his intent to carry out his threats. *Lane* provides a classic example of how some courts view the concept of immediacy in self-defense as if looking through a microscope at the moment the trigger is pulled.

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120. *Id.* at 373.

121. *Id.* (emphasis in original).

122. *Id.* at 375.

123. 957 S.W.2d 584, 585 (Tex. Crim. App. 1997).

124. *Id.* at 585–86.

125. *Id.*

126. *Id.* at 586.

127. *Id.*

128. *Id.* at 588–89 (James, J., dissenting).

129. *Id.*

130. *Id.* at 586.

131. *Id.*



In *State v. Head*, the trial court and intermediate appellate court agreed that the defendant had not proffered sufficient evidence *in camera* to entitle her to present her self-defense claim, which would have included evidence that the defendant had intimidated he would kill her, and then seconds later lunged at her before she grabbed a gun and shot him in the chest.<sup>132</sup> The defendant was not allowed to introduce evidence that the decedent had abused her in the past; nor could she introduce evidence that she knew he had acted violently toward others.<sup>133</sup> Fortunately, the Supreme Court of Wisconsin disagreed, holding that she did have sufficient evidence to allege a self-defense or imperfect self-defense claim.<sup>134</sup>

In *State v. Norman*, the Supreme Court of North Carolina disallowed expert testimony in a non-traditional self-defense case based on the reasoning that “[h]omicidal self-help would then become a lawful solution, and perhaps the easiest and most effective solution.”<sup>135</sup> Many courts find this argument persuasive and also exclude evidence to support a self-defense claim in cases involving battered women when there is any delay between the threat to the defendant and the subsequent killing of the abuser.<sup>136</sup>

It is concededly true that the temporary incapacity of some of the decedents in these cases makes it a harder question of whether the defendants were reasonably in fear of imminent danger; arguably, not even bin Laden poses a danger at the moment he is asleep. Yet, in evaluating the danger of someone carrying out a threat to kill, an intended victim cannot reasonably assume the danger has permanently ceased simply because the terrorist is momentarily incapacitated. Moreover, courts often fail to find imminent harm even when the decedent was not temporarily incapacitated. As Professor Nourse explains in her twenty-year retrospective study of battered women cases, many traditional self-defense cases still concluded that “there was no imminent threat

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132. 648 N.W.2d 413, 418–19, 421 (Wis. 2002).

133. *Id.* at 419.

134. *Id.* at 439. The Court also held that the defendant should have been able to introduce evidence of the victim’s prior acts of violence as probative to her state of mind. *Id.* at 440.

135. 378 S.E.2d 8, 15 (N.C. 1989) (disallowing expert testimony about battering since the case was not one of self-defense). The court stated:

The term “imminent,” as used to describe such perceived threats of death or great bodily harm as will justify a homicide by reason of perfect self-defense, has been defined as “immediate danger, such as must be instantly met, such as cannot be guarded against by calling for the assistance of others or the protection of law . . . . The evidence tended to show that no harm was “imminent” or about to happen to the defendant when she shot her husband. The uncontroverted evidence was that her husband had been asleep for some time [when she killed him].

*Id.* at 13 (citations omitted). For a detailed discussion of the horrific facts of this case, see MORIARTY, *supra* note 3, §§ 7:22–7:25.

136. See, e.g., *State v. Stewart*, 763 P.2d 572, 579 (Kan. 1988). See also *State v. Reid*, 747 P.2d 560 (Ariz. 1987) (daughter killing her abusive father); *Commonwealth v. Grove*, 526 A.2d 369 (Pa. Super. 1987) (no imminent threat when decedent was killed while sleeping). See generally MORIARTY, *supra* note 3, §§ 7:20–7:25; Nourse, *supra* note 116, at 1252–54; Parrish, *supra* note 4, at 83–87.

because the victim was unarmed, was not in a physical position to pose a threat, or was turning away or had gone.”<sup>137</sup>

But whether sleeping, turned away, or physically distant, the threat of a domestic violence terrorist does not disappear after he has made the threat. There is a more sensible approach than to watch the clock for objective evidence of an imminent threat. Rather, the more reasoned view is to consider the situation with a view toward the totality of the circumstances: Did the decedent make lethal threats? Were there prior incidents of physical abuse? How serious were they? Did the decedent tell other people of his intent to harm the defendant? Did the decedent have access to a weapon? Was the decedent intoxicated by drugs or alcohol at the time he threatened to kill the defendant? By considering these factors, the factfinder is in a much better position to evaluate whether the killing was rational and necessary.

Pursuant to international law, ASD may be legitimately invoked if a targeted country has been victimized by prior attacks and learns more attacks are planned.<sup>138</sup> When a prior aggressor threatens to commit future violence, international law treats that threat as real. So should domestic criminal law.

We would think it foolhardy if the U.S. Department of Defense evaluated the threat of a terrorist attack on any given day in 2005 based only on the immediate circumstances of that given day, much less hour or minute. Rather, there is a lucid understanding in the international terrorism context that the determination of legitimate self-defense must be made through a rational evaluation of the totality of the circumstances, which may include a more elastic consideration of the time period to judge the threat. Similarly, in the domestic violence context, we should not separate the moment of killing from context and past behavior to determine whether the threat was “imminent” or “immediate” and whether the use of force was appropriate.

Perhaps if our society was honestly able to make a serious dent in the level of domestic violence, I would not argue in favor of ASD, but it seems unjust to preclude such a defense when fourteen hundred women are killed by intimates on a yearly basis.

#### *B. Traditional Self-Defense Doctrine Does Not Consider Intimate Relationships*

Another problem in self-defense jurisprudence for battered women relates to the fact that the law of self-defense arises from longstanding principles governing behavior between those involved in aggression, but developed apart from the relationship between spouses. Prior to the nineteenth century, a husband, in

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137. Nourse, *supra* note 116, at 1256 (citations omitted). Professors Burke and Rosen are likewise compelling in their arguments that imminence or immediacy only serve as a “proxy for the more general standard of necessity.” Burke, *supra* note 108, at 277 (citing Rosen, *supra* note 102, at 380).

138. O’Connell, *supra* note 11, at 9 (reasoning that ASD is permissible when there is “clear and convincing evidence that the enemy is preparing to attack again”).

his role as master of the household, was permitted to corporeally punish his wife provided he did not inflict any permanent damage.<sup>139</sup> Although beating one's wife became illegal in the nineteenth century, the law rarely intervened in cases where such beatings occurred.<sup>140</sup> It was not until the 1970s that the law began to recognize the role of self-defense when women struck back and killed their abusers.<sup>141</sup>

However, in addition to the imminence requirement, several other aspects of the traditional self-defense doctrine are a difficult fit for battered women. As many commentators have argued, the law of self-defense is a male construct, defined by how men reasonably respond to other men's violence.<sup>142</sup> Rather than recognize and respect the fact that domestic violence is different, and often less avoidable, than other types of violence, the law often simply metes out unjust and overly harsh results for those whose self-defense does not fit precisely within the traditional, male-based canon. As the Supreme Court of North Dakota cautioned:

if the particular facts of a defendant's case do not fit well with a claim of self-defense, the defendant perhaps should consider abandoning any such claim because the law of self-defense will not be judicially orchestrated to accommodate a theory that the existence of battered woman syndrome in an abusive relationship operates in and of itself to justify or excuse a homicide.<sup>143</sup>

Yet, the law needs to recognize that batterers are different than others who make threats. Not only do batterers share a home with the victim—unlike most people involved in disputes—but they operate much the way terrorists do by instilling fear that an attack is forthcoming, and thus, creating anxiety and fear in their victims. The uncertainty about precisely when or how the attack is coming creates dread, hypervigilance, and fear in the victim.<sup>144</sup> Indeed, hypervigilant awareness of danger is one of the signposts of a person suffering from post-traumatic stress disorder, whether as a result of being a victim of terrorism or battering.<sup>145</sup> The sustained trauma created by an abusive relationship differs

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139. SCHNEIDER, *supra* note 87, at 13. *See also*, Smith, *supra* note 90.

140. *Id.*

141. *Id.* at 20.

142. FORELL & MATTHEWS, *supra* note 108, at 197 (“The basic terms [of self-defense] are skewed so that women who kill their batterers rarely fit the male-defined standard of a justifiable killing.”). *See also* Beecher-Monas, *supra* note 92, at 103–04 (noting that the decedent's past acts and threats of violence are traditionally admissible in cases involving only men, but such details are often left out in women's cases); Nourse, *supra* note 116, at 1286 (“When the gun is pointed at the male defendant in the bar, there is an imminent confrontation; when it is pointed at [a battered woman], who was stalked by an ex-boyfriend, there is a question about whether the threat was imminent and serious.”).

143. *State v. Leidholm*, 334 N.W.2d 811, 820 n.8 (N.D. 1983).

144. *See* Mechanic, *supra* note 17, at 1284 (discussing interpersonal violence against women and addressing the subsequent behaviors arising out of such trauma).

145. *See* DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS § 309.81 (American

from one-time confrontations in which self-defense is used, and, therefore, the concepts of imminence or immediacy have different meanings for the victims of persistent terror as opposed to victims of other types of violence.

A related problem is the courts' perception of a woman's role in domestic violence situations. As is clear from Professor Nourse's study, while many courts may state that they are evaluating imminence, they are often actually asking, "Why didn't she leave?"<sup>146</sup> Thus, even though leaving is often not relevant to self-defense—no one asks the person in a bar fight who defended himself why he did not leave earlier—both juries and judges often need to have these issues explained by experts. When juries are instructed that leaving may pose a greater danger than staying, they can begin to see the woman as a rational actor who might have been trying to save her own life.

Without such information from the experts, courts, juries, and commentators may be questioning whether the defendant really was a victim and whether she actually invited the abuse by not leaving. In *State v. Hundley*, the Supreme Court of Kansas states that "[t]he mystery, as in all battered wife cases, is why she remained after the beatings."<sup>147</sup> Yet, the often accurate, and indeed *rational*, answer is that she was afraid he would track her down and likely kill her.<sup>148</sup> As Professor Rosen asked in regard to the *Norman* case, "[a]s for Ms. Norman, her husband had told her explicitly that he would maim her or kill her if she tried to alter the situation, and can one honestly maintain that she was unreasonable in believing him?"<sup>149</sup>

One of the most striking problems for victims of domestic violence is that there may be no truly viable solution for many victims and, therefore, the decision to stay with the abuser may be rational. As discussed in Section III, victims are afraid to stay, to leave, to prosecute, and not to prosecute for various

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Psychiatric Ass'n ed., 4th ed. 1994); Beecher-Monas, *supra* note 92, at 134 (discussing Post-Traumatic Stress Disorder ("PTSD") victims as tending to respond to perceived events in an exaggerated manner because of compromised sensory perception); Edgar Garcia-Rill & Erica Beecher-Monas, *Gatekeeping Stress: The Science and Admissibility of Post-Traumatic Stress Disorder*, 24 U. ARK. LITTLE ROCK L. REV. 9, 10 (2003) (noting that PTSD may result from exposure to trauma, including combat, domestic violence, disasters, etc.). PTSD became prevalent in rescue workers and volunteers subsequent to the September 11 attacks in New York City. See, e.g., Samantha Marshall, *Virtual Tour, Real Cure: 9/11 Post-Traumatic Therapy Breaks Ground*, CRAIN'S N.Y. BUS., Dec. 1-7, 2003, at 3 (reporting that psychiatrists screened 6500 workers and volunteers from the disaster and noting that about twenty percent continued to have problems two years later).

146. See Nourse, *supra* note 116, at 1282.

147. 693 P.2d 475, 478 (Kan. 1985). In *Hundley*, the Supreme Court of Kansas reversed the conviction because the trial court instructed the jury on self-defense and used the term "immediate" to describe the harm; the Supreme Court said the trial court should have used the term "imminent." *Id.* at 480.

148. See, e.g., *State v. Cramer*, 841 P.2d 1111, 1112 (Kan. Ct. App. 1993) (recognizing that although the defendant sued for divorce and obtained a restraining order against her husband, he "continued to beat and threaten her").

149. Rosen, *supra* note 102, at 395.

reasons.<sup>150</sup> The battered woman's attempts to leave may precipitate increased violence, the law does not provide adequate protection, she often has economic and sociological reasons for staying, and the batterer may threaten suicide.<sup>151</sup> Moreover, many of the women love the abuser and wish for a successful marriage or bond without the abuse. The bonds between spouses are compelling—particularly when there are children—and the desire for the relationship to work out may overcome the potential but unguaranteed benefits of trying to get help or get away.<sup>152</sup> In reality, victims of domestic violence who kill their abusers are like kidnapping victims who kill their kidnappers. However, because the woman is a spouse or partner of the abuser, the law treats her like an equal participant in a bar fight.

Thus, at the end of the day, we are faced with an epidemic of domestic abuse in situations from which women are often rationally afraid or unable to flee, for which prosecution and restraining orders are ineffective, and which appear hopeless. Unfortunately, the choice is often to kill or be killed, yet the traditional self-defense doctrine is inadequate for the facts of a domestic violence case. When domestic abuse victims strike back and kill their abusers, they are generally prosecuted for murder. Once a battered woman gets to court, she is again abused by a system of law that looks at self-defense under a microscope, rather than through the wide-angle lens it deserves. She may be convicted of murder or manslaughter and spend years, if not a lifetime, in jail. Certainly, that cannot be justice.

### C. *Battered Woman's Syndrome and Its Limitations*

Courts and legislatures have attempted to mitigate the harshness of traditional self-defense doctrine when it is applied to battered women, primarily by embracing the Battered Woman's Syndrome ("BWS").<sup>153</sup> From the 1970s onward, courts began to admit BWS evidence in traditional self-defense cases involving battered women who killed their abusers. The experts attempted to explain the behaviors of battered women to educate the jury about how battered women perceived threats, why they often stayed with an abuser, and how their response to threats often seemed to be disproportionate to the objective degree of the threat.<sup>154</sup> Yet, since the syndrome was first admitted, it has caused no small

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150. See *supra* Section III.

151. See Burke, *supra* note 108, at 268–72.

152. See *id.* at 273 (noting that love for the abuser and a belief that he can change can contribute to a rational decision to stay in an abusive relationship); Sally Engle Merry, *Wife Battering and the Ambiguities of Rights*, in IDENTITIES, POLITICS, AND RIGHTS 271, 300 (Austin Sarat and Thomas R. Kearns eds., 1995) (discussing how women in her study want to believe men's promises that they will change and that the violent partner is also someone they love and depend on for sex and economic support.).

153. See MORIARTY, *supra* note 3, § 7:11 (discussing case law) and § 7:16 (considering statutory recognition).

154. See LENORE WALKER, THE BATTERED WOMAN SYNDROME (1984); LENORE WALKER,

degree of controversy. Over the last two decades, many scholars have extensively critiqued the methodology and conclusions of BWS.<sup>155</sup> Moreover, BWS raises the implication that the woman who killed was not acting rationally, but suffered from a mental illness. In a recent case from Missouri, the court stated that “[a] battered woman is a terror-stricken person whose mental state is distorted.”<sup>156</sup> This description suggests that mental distortion caused her to overreact with lethality. She could not, according to the court’s language, be evaluated as a reasonable battered woman because a reasonable battered woman was “something of an oxymoron.”<sup>157</sup> She was either a reasonable person or a battered woman, but, obviously, could not be both.<sup>158</sup>

Finally, a woman may still be left without a defense if the prosecution introduces evidence that she does not “fit” the syndrome’s requirements.<sup>159</sup> This “failure to fit within the syndrome” is troubling, since the “syndrome” itself is not based on science.<sup>160</sup> For example, corroborating evidence in one case established that the wife was beaten from the beginning of her marriage through the end, sometimes requiring hospitalization.<sup>161</sup> In one episode, the husband attempted to hang her from a nail in the wall, puncturing her back and leaving a scar running up to her shoulder.<sup>162</sup> Nevertheless, the prosecution introduced evidence that she had fought with another woman at a wedding and had kicked a

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THE BATTERED WOMAN (1979). For further discussion of the use and limitations of BWS, see MORIARTY, *supra* note 3, §§ 7:1–7:26 (1997–2003 Supp.) (discussing battered women, expert evidence, and the legal implications of women who kill their abusers).

155. See, e.g., Beecher-Monas, *supra* note 92, at 114–24 (criticizing the syndrome research and suggesting that such evidence be replaced in the courtroom by expert testimony about PTSD, for which she alleges there is much greater scientific support); Burke, *supra* note 108, at 253–65 (criticizing BWS on various grounds and arguing against its use); David L. Faigman, *The Battered Woman Syndrome and Self-Defense: A Legal and Empirical Dissent*, 72 VA. L. REV. 619 (1986) (questioning the validity of BWS research and arguing against its admission at trial); David L. Faigman & Amy J. Wright, *The Battered Woman Syndrome in the Age of Science*, 39 ARIZ. L. REV. 67, 104–14 (1997) (critiquing the methodologies and conclusions of BWS).

156. *State v. Edwards*, 60 S.W.3d 602, 615 (Mo. Ct. App. 2001) (citing *State v. Hundley*, 693 P.2d 475, 479 (Kan. 1985)).

157. *Id.* at 614. Professor Dressler likewise notes the problem that BWS causes by “pathologizing” battered women. See Dressler, *supra* note 18, at 268.

158. In 2001, the Supreme Court of Indiana reaffirmed that the legislature intended evidence of BWS as a defense to murder must be presented by way of an insanity plea. See *Marley v. State*, 747 N.E.2d 1123 (Ind. 2001). Recently, prosecutors have begun to call on their colleagues to halt the admission of BWS testimony. See Sandra R. Sylvester, *Calling Prosecutors to Arms*, THE PROSECUTOR, Sept./Oct. 2003, at 8 (2003) (grouping BWS into the category of “bogus expert testimony” and asking “[h]ave we not been plagued with enough anecdotal testimony in battered women cases?”).

159. See *Todd v. State*, No. 05-95-00994-CR, 1998 WL 196187, at \*2 (Tex. App. Apr. 24, 1998) (summarizing evidence introduced at trial, including prosecution witness testimony that defendant had a “bossy streak” to rebut her claim that she was afraid of her husband).

160. See, e.g., Beecher-Monas’s critiques of BWS, *supra* note 155.

161. *State v. Cramer*, 841 P.2d 1111, 1112 (Kan. Ct. App. 1993).

162. *Id.*

fellow with steel-toed boots when he was vomiting in the bathroom.<sup>163</sup> The Kansas Court of Appeals held that the admission of such evidence was proper and laid the foundation for the State's expert to testify that the defendant did not fit the syndrome.<sup>164</sup> Yet, there was ample evidence, in addition to the years of abuse, that on the evening of the husband's death, he was drunk, had threatened and attempted to grab her before she shot him.<sup>165</sup> Nevertheless, after hearing the State's expert, the jury was convinced that she was wrong in killing him and convicted her of involuntary manslaughter.

Moreover, BWS has only been admissible evidence in cases where self-defense is available as a matter of law. In many jurisdictions, as outlined in the beginning of this section, if the court decides that the killing was not sufficiently close in time to the decedent's threatening behavior, neither evidence of abuse nor expert testimony is admissible.

#### D. Doctrine of Necessity and Its Limitations

Given the variety of problems associated with BWS, scholars have continued to look for other ways to help battered women who kill get justice. One way to remedy the injustice problem, many scholars argue, is to replace the concept of imminence with the defense of necessity.<sup>166</sup> Professor Richard Rosen argues that using the necessity rule rather than an imminence rule "imports no new norms into the law of self-defense; it merely changes the locus of decision making."<sup>167</sup> Thus, instead of a judge deciding that the use of force in response to a threat of non-imminent harm can never be necessary, the doctrine of necessity permits the jury to weigh the evidence and make its own decision about whether the killing was indeed justified.<sup>168</sup>

Elsewhere, I have written that courts could expand the jury's role to permit them to hear more evidence about the relationship between the man and the woman, allowing the jury to decide if the killing was legitimate self-defense.<sup>169</sup> I suggested that courts need to consider these killings on the basis of a "totality of the circumstances approach"<sup>170</sup>—what I characterize here as looking through a wide-angle lens, rather than a microscope. I am not suggesting that temporality

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163. *Id.* at 1113.

164. *Id.* at 1114.

165. *Id.* at 1112–13.

166. See, e.g., Beecher-Monas, *supra* note 92, at 104–05 (advocating that an instruction on necessity should supplement or replace imminence requirement since temporal limitations may skew self-defense doctrine); Burke, *supra* note 108, at 279–80 (arguing that imminence requirement is an imperfect proxy to measure whether force was necessary because it presumes that use of force during nonconfrontational situation is never necessary—therefore standard should be reasonable belief that use of force was necessary).

167. Rosen, *supra* note 102, at 404.

168. *Id.*

169. See MORIARTY, *supra* note 3, § 7:13.

170. *Id.*

has no role in deciding whether a battered woman should be convicted of murder or manslaughter; I am only suggesting that courts permit the jury to evaluate the danger the woman believed she was in by permitting it to hear all evidence relevant to the woman's claim that she was in fear of losing her own life at the time of the killing—just as would be relevant in international laws involving ASD.<sup>171</sup>

Under the MPC approach,<sup>172</sup> Professor Dressler notes a battered woman should be able to rely on self-defense “when the need appears urgent, although not imminent.”<sup>173</sup> When a batterer states he is going to get a gun and turns away, he may be justifiably stabbed in the back as he turns to leave.<sup>174</sup> Dressler does not believe, however, that the MPC language would apply to a woman who kills while the batterer is “asleep, watching television, or [is] otherwise in a passive condition at the time of the incident.”<sup>175</sup>

Rather than focusing on the specific temporality, this interpretation of the MPC draws a bright line between a decedent who was actively engaged in carrying out any part of his threat and one who was passive at the moment. This is a sensible approach in many respects, not least of which is its moral appeal—who wants to authorize the shooting of a sleeping man? Yet, the approach creates a new set of problems about where to draw this bright line. For example, when the batterer says “when I wake up, I'll kill you,” may the woman shoot him when he opens his eyes? When he gets off the bed? When he walks toward the room in which he keeps his gun? This bright line active/passive distinction is one more way in which the temporal rigidity of imminence governs the legality of the lethal action. The better approach is to relax the imminence requirement and let the jury hear all the evidence when there is a history of serious abuse, coupled with a current threat to commit serious bodily harm, and either an action taken in furtherance of the threat or the defendant's close physical proximity to the woman at or around the time he makes the threat.

Under the ASD framework suggested at the outset, the woman might be justified (or unjustified) in the killing of an active/passive abuser, but it would be the jury's decision after hearing all the relevant evidence to decide whether the threat posed was “sufficiently close in time” to justify her actions. This ASD framework, however, would be permissible only as set forth in the preceding paragraph.

These limiting factors that my framework uses help guide the law toward the middle ground of ASD and away from lawless preemption by providing

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171. See, e.g., O'Connell, *supra* note 11, at 9 (noting victims may use force to prevent the aggressor from attacking again).

172. See *supra* note 112.

173. Dressler, *supra* note 18, at 274.

174. *Id.* at 273–74.

175. *Id.* at 274. Professor Dressler argues in favor of the doctrine of excuse, rather than justification. Under his construction, the jury would evaluate whether the woman had “no-fair-opportunity” to act otherwise on the day in question, a form of the duress defense. *Id.* at 276–81.



guidance about when the defense would be available. Moreover, by tethering the defense to a current lethal threat, this framework serves to relax the temporal requirement, but not abolish it.

## V.

### CONCLUSION: THE INTERSECTION OF INTERNATIONAL AND DOMESTIC SELF-DEFENSE LAWS

The heart of this article is whether it should be legal to permit an individual to rely on a theory of ASD as a defense to assault or murder of a domestic violence perpetrator. To answer that, I look at international law to see whether it permits such a defense and whether that law provides some assistance in sorting out the answer on the domestic front.

In making these comparisons, we cannot lose sight of the fact that while nearly three thousand people were killed in the terrorist attack of September 11, 2001, roughly fourteen hundred women are murdered by intimates every year, and nine hundred thousand are victimized by abuse. We should not minimize the danger that these domestic violence terrorists cause. And when women testify, "I thought this time he'd kill me," perhaps we owe them the dignity to be heard in court and not precluded from raising a self-defense claim.

There is an historical connection between international and domestic law concerning aggression and self-defense and both laws' genesis is in our common moral and philosophical groundings.<sup>176</sup> The right of self-defense is recognized not only for countries but for individuals as well. While the international and domestic law cannot, and indeed should not, be an exact overlap in the contours of self-defense, it seems as though there are important points of commonality that should guide both laws—namely, that the law must not give private or world citizens the Hobson's choice of deciding between death or legal sanction when survival is at stake.

In the international law context, the better argument is that *some limited form* of ASD must be considered justified, particularly in a world in which terrorists have made statements of intention and are taking steps toward completing future attacks. Any decision about the actual likelihood and timeliness of the danger cannot be made without considering the background relationship of the parties, as we continue to do with Al Qaeda. This same principle should inform the domestic law. A statement of intent to cause lethal harm, coupled with a past history of serious violence, should at least permit the jury to decide whether the subsequent killing was in self-defense. I suggest no new defense; I merely suggest that we stop permitting judges to decide as a matter of law that the killing

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176. DINSTEIN, *supra* note 66, at 160; George P. Fletcher, *Domination in the Theory of Justification and Excuse*, 57 U. PITT. L. REV. 553, 556–58 (1996) (briefly addressing the connection between preemptive self-defense in the international and domestic law, noting that imminence plays a critical role in the legitimacy of both types of law).

could not have been self-defense. It is for the jury to decide, after hearing the evidence, whether the woman was motivated by the need to save her own life or by an improper motive.

In the case of the battered woman, the right to self-defense should at least be available for argument when there is a history, a statement of intention, and either some step in furtherance of the planned assault/killing or the defendant's proximity to the batterer at the time of the threat.<sup>177</sup> If we use the "wide-angle lens" to judge the scenario, the evidence of the danger is apparent and the concept of imminence can be rationally decided; if we judge it by looking at one moment, without considering the prior incidents and the statement of intention, the danger is not as apparent. The latter approach is not rational, since it divorces the one moment in time from the totality of the relationship's circumstances. If we can consider the time element "in a different light"<sup>178</sup> when evaluating international dangers, certainly we should be able to use that same light in domestic abuse.

This distinction between responding to a known threat and a potential, not-yet-materialized threat is the demarcation line between permissible and prohibited action; it is the line between ASD and unlawful preemption. Although the domestic law continues to focus with rigid precision on the temporal limitation of self-defense, we should continue to push for a more rational interpretation of danger in the case of the battered woman who strikes back to save her own life.

We have not stemmed domestic violence in this country and our efforts, while perhaps noble-minded, are not sufficiently successful. While we should make every effort to prosecute those who kill based on retribution and revenge, we should make every effort to assure that women who kill due to a rational belief they will be killed are supported by the legal system. To effectuate a just and secure result for battered women who kill, the law needs to consider the possibility of anticipatory self-defense.

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177. This standard would parallel the law of conspiracy and attempt where no overt act is required. For example, 21 U.S.C. § 846 (2000), which applies to attempt and conspiracy in drug crimes, provides: "Any person who attempts or conspires to commit any offense defined in this subchapter shall be subject to the same penalties as those prescribed for the offense, the commission of which was the object of the attempt or conspiracy." The Supreme Court has held that this statute, however, like common law conspiracy, requires no overt act. *United States v. Shabani*, 513 U.S. 10, 15 (1994).

178. Meessen, *supra* note 56, at 351.