

Fordham Law School

FLASH: The Fordham Law Archive of Scholarship and History

Faculty Scholarship

1996

Self-Defense, Domination, and the Social Contract

Benjamin C. Zipursky

Fordham University School of Law, bzipursky@law.fordham.edu

Follow this and additional works at: https://ir.lawnet.fordham.edu/faculty_scholarship



Part of the [Law Commons](#)

Recommended Citation

Benjamin C. Zipursky, *Self-Defense, Domination, and the Social Contract*, 57 U. Pitt. L. Rev. 579 (1996)
Available at: https://ir.lawnet.fordham.edu/faculty_scholarship/842

This Article is brought to you for free and open access by FLASH: The Fordham Law Archive of Scholarship and History. It has been accepted for inclusion in Faculty Scholarship by an authorized administrator of FLASH: The Fordham Law Archive of Scholarship and History. For more information, please contact tmelnick@law.fordham.edu.

SELF-DEFENSE, DOMINATION, AND THE SOCIAL CONTRACT

*Benjamin C. Zipursky**

TABLE OF CONTENTS

I.	Introduction	580
II.	Lack of Access to Genuine Alternatives as a Basis for the Self-Defense Justification	582
	A. Fletcher's Framework	582
	B. Fletcher's Argument for Imminence	584
	C. The Social Contract, Domination, and Domestic Violence	589
	D. The Social Contract, Self-Rule, and Dominance	593
III.	The Objectivity of Imminence	596
	A. Fletcher's Attack on the Model Penal Code	596
	B. Secondary Qualities in the Law: A Philosophical Digression	600
	C. The Secondary Qualities Model of Imminence	602
	D. The Relevance of a History of Domination to Imminence	605
IV.	A Modified Social Contract Model	605
	A. Extending the Social Contract Argument	606
	B. No-Access Cases and the Modified Social Contract	608
V.	Conclusion	613

* Associate Professor, Fordham University School of Law. J.D., 1991, New York University; Ph.D., 1987, University of Pittsburgh; B.A., 1982, Swarthmore College. I am grateful to Fordham University for a 1995 Summer Research grant supporting this work. I am also grateful to the University of Pittsburgh School of Law and the University of Pittsburgh Department of Philosophy for their support of the Symposium in Law and Philosophy, from which this set of articles arose; to Claire Finkelstein, who collaborated with me in organizing the symposium and contributed as a plenary speaker; to all of the participants, particularly our plenary speakers, Jane Cohen, George Fletcher, Arthur Ripstein, and Elizabeth Schneider; and to Kurt Baier for his encouragement in bringing together the Law and Philosophy faculties. I have benefitted from discussion with Marc Arkin, Martha Chamallas, Jane Cohen, Deborah Denno, Claire Finkelstein, James Fleming, Abner Greene, Tracy Higgins, Steven Jupiter, Maria Marcus, Linda McClain, Daniel Richman, and Anthony Sebok. My communication with Arthur Ripstein has been a particularly important influence, as the commonality between our articles makes clear.

I. INTRODUCTION

If a woman kills her severely abusive husband or partner and asserts a justification of self-defense, should the criminal law take notice of the abusive and dominating relationship in assessing the soundness of this defense? Recent scholarship presents a dilemma. The use of past domination evidence for self-defense as a *justification* is somewhat limited; one must avoid what might be called the "private retributivist" view that the victim was so evil that he deserved to be killed, which improperly permits the defendant to be the judge, jury, and executioner of her assailant.¹ On the other hand, it may also be problematic to rely heavily on self-defense as an *excuse*. Some feminist theorists have argued that we are promoting sexist stereotypes when we cast women in the role of pathetic victims who have done something egregious but should be excused because they are not genuinely capable of being responsible for their actions.² Thus, neither justification nor excuse seems adequate to accommodate battered women's cases.³

In what follows, I shall try to resolve this dilemma by developing a social contract theory of justification that explains why facts about domination are relevant to self-defense as a justification.⁴ In doing so, I hope to show that it is possible to avoid private retributivism in the

1. See, e.g., GEORGE P. FLETCHER, WITH JUSTICE FOR SOME: VICTIMS' RIGHTS IN CRIMINAL TRIALS (1995) (describing trend toward private retribution in domestic violence cases); George P. Fletcher, *Punishment and Self-Defense*, 8 LAW & PHIL. 201, 209 (1989) (desert irrelevant to harm the aggressor justifiably suffers); Susan Estrich, *Defending Women*, 88 MICH. L. REV. 1430, 1437-38 (1990) (reviewing CYNTHIA K. GILLESPIE, JUSTIFIABLE HOMICIDE: BATTERED WOMEN, SELF-DEFENSES AND THE LAW (1989)) (history-of-domination evidence in nonimminence cases is request "to abandon the limits on self-defense out of empathy for the circumstances of the defender and disgust for the acts of her abuser").

2. See Anne M. Coughlin, *Excusing Women*, 82 CAL. L. REV. 1 (1994); Deborah W. Denno, *Gender, Crime, and the Criminal Law Defenses*, 85 J. CRIM. L. & CRIMINOLOGY 80 (1994) (criticizing use of "battered women syndrome" insofar as it functions by pandering to jurors' gender stereotypes); Elizabeth M. Schneider, *Feminism and the False Dichotomy of Victimization and Agency*, 38 N.Y.L. SCH. L. REV. 387 (1993); see also Kathryn Abrams, *Sex Wars Redux: Agency and Coercion in Feminist Legal Theory*, 95 COLUM. L. REV. 304 (1995) (describing agency concerns in feminist theory).

3. Cf. Schneider, *supra* note 2 (examining victimization and agency themes in feminist theory); Elizabeth M. Schneider, *Particularity and Generality: Challenges of Feminist Theory and Practice in Work on Woman-Abuse*, 67 N.Y.U. L. REV. 520, 548-67 (1992) (describing tension between victimization and agency); Stephen J. Schulhofer, *The Feminist Challenge in Criminal Law*, 143 U. PA. L. REV. 2151, 2158-70 (1995) (describing lack of attention in criminal law to domestic violence).

4. I do not mean that to suggest that the resolution of the dilemma offered here is the only resolution. I believe it is a wide overstatement to suppose that excusing women generally involves stereotypes that undercut the notion of women as responsible agents.

theory of justification, to treat women as fully responsible for their actions, and to afford ample space for the notion of domination⁵ in the theory of self-defense and its application.

The catalyst for my discussion is Professor George P. Fletcher's characteristically incisive analysis of self-defense and domination in his article in this volume.⁶ Fletcher sharpens the dilemma I have described by arguing that domination is irrelevant to self-defense as a justification. His two principal contentions are: (1) *Irrelevance of Domination in Challenging the Imminence Requirement*: Information on the prevalence and nature of domination and abuse by men of women in society is irrelevant to determining whether the traditional imminence requirement of self-defense should be relaxed.⁷ (2) *Irrelevance of Individual Domination to Justifiability In Particular Cases*: Evidence that there was a history of domestic violence constituting a relation of domination between the defendant and the victim is irrelevant to the applicability of traditional self-defense to a particular defendant's case, assuming that self-defense is operating as a genuine justification, as opposed to a mere excuse.⁸

Part II argues that, from a social contract perspective, a sufficiently pervasive social problem of physical, psychological, sexual, and political domination of women would provide a reason to favor a self-defense justification that did not require imminence. Thus, the existence, nature, and extent of domination *is* relevant to whether there ought to be an imminence requirement, contra (1).

Building on a philosophical account of "imminence," part III argues that self-defense is not merely excusable, but indeed justifiable when the victim engages in conduct that would have led a reasonable person to believe that defensive force was immediately needed. Because past domination in a relationship renders it reasonable to perceive the victim's conduct in a different manner, such domination is relevant to the justifiability of resorting to self-defense, and (2) is also unpersuasive.

5. The terms "domination," "dominance," and "relations of domination" can be used in numerous ways. See *infra* text accompanying notes 32-48 for a discussion of the senses in which the terms are meant in this article.

6. See George P. Fletcher, *Domination in the Theory of Justification and Excuse*, 57 U. PITT. L. REV. 553 (1996).

7. See *id.* at 553-55, 568. Fletcher does not explicitly state this proposition. For a discussion of the appropriateness of attributing this view to him, see *infra* notes 17-22 and accompanying text.

8. See Fletcher, *supra* note 6, at 555, 570-71.

Concepts developed in part II and part III for purposes of responding to Fletcher are put to use more constructively in part IV. The social contract framework of part II combines with the analysis of reasonable belief in part III to provide a sketch of an alternative philosophical foundation for the justification of self-defense. The central idea of this account is that a theory of self-defense must harmonize two sorts of security interests that each of us has: the interest in remaining free from the aggression of potential assailants *and* the interest in remaining free from the aggression of purported self-defenders.

Finally, this article provides an occasion to address, in one particular context, the apparent conflict within political theory between liberal political philosophy and dominance theory in feminism, particularly that of Catherine MacKinnon.⁹ Fletcher, an exponent of liberal social contract theory in the spirit of John Locke¹⁰ and John Rawls,¹¹ argues that social contract theory precludes a relaxation of the imminence requirement in cases of women who have been severely abused, and in fact rejects any such relaxation as an illegitimate preference for women. Several feminist theorists, on the other hand, see the law's tolerance of pervasive physical and sexual domination by men of women as an emblem of true gender inequality in our society.¹² I shall argue in what follows that these apparently opposing ideologies can in fact be reconciled. Indeed, at least in the context of understanding self-defense, liberal social contract theory may provide a framework within which the nature of dominance and gender inequality can be articulated.

II. LACK OF ACCESS TO GENUINE ALTERNATIVES AS A BASIS FOR THE SELF-DEFENSE JUSTIFICATION

A. *Fletcher's Framework*

The centerpiece of Fletcher's article is his argument that the self-defense justification includes an objective imminence requirement. It is useful to begin by superimposing upon Fletcher's discussion a matrix of

9. CATHERINE A. MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE 215-34, 237-49 (1989). This article purports to address only one aspect of dominance theory, as introduced by MacKinnon and applied to domestic violence.

10. JOHN LOCKE, SECOND TREATISE OF GOVERNMENT 14-15 (C.B. Macpherson ed., Hackett 1980) (1690) (recognizing self-defense within social contract framework).

11. Fletcher, *supra* note 1, at 208-09 (discussing Rawlsian and Kantian principle that "each person is entitled to the maximum degree of freedom compatible with a like freedom in others").

12. GILLESPIE, *supra* note 1, at 48-49, 190-93; MACKINNON, *supra* note 9; Martha R. Mahoney, *Legal Images of Battered Women: Redefining the Issue of Separation*, 90 MICH. L. REV. 1 (1991).

four possible cases: objective imminence; putative imminence; objective "no-access" (to genuine alternatives); putative "no-access" (to genuine alternatives).

The objective imminence case is one in which the infliction of grievous bodily harm or death by the assailant would in fact have ensued had the defendant not immediately resorted to defensive aggression.¹³ The putative imminence case is one in which the defendant mistakenly, but reasonably, believed that the infliction of grievous bodily harm or death by the assailant would have ensued had the defendant not immediately resorted to defensive aggression. The objective "no-access" to genuine alternatives case is one in which the assailant would, in fact, have inflicted grievous bodily harm or death upon the defendant had she not resorted to defensive aggression, but this infliction of grievous harm was not imminent. The reason that such harm would have ensued is that, even though the attack was not imminent, the defendant's circumstances were such that she had no access to a genuine avenue of relief from the assailant's anticipated attacks. It is not realistically possible for the defendant in such cases to escape the assailant for any significant period of time, or to receive effective protection from the authorities.

The "no-access" case is typified by *State v. Norman*,¹⁴ which Fletcher discusses. Judy Norman experienced decades of serious physical and emotional abuse from her husband. She killed him while he slept, but he had stated that he would kill her when he awoke. He had tracked her down on every previous occasion on which she had tried to escape. Her efforts to have him institutionalized failed and caused her to be more severely abused. The authorities had permitted him to return home.

Norman does not fit the objective imminence requirement or the putative imminence requirement. Yet it may be said that Judy Norman, like those in objective imminence cases, had only two realistic choices: kill or be killed.¹⁵ This is so because Norman's alternatives of

13. This article follows Fletcher in taking for granted the other elements of self-defense: the unlawfulness of the original assailant's attack; necessity of level of force; proportionality or response; and intent of the defender. See Fletcher, *supra* note 6, at 556-63. This article does not directly focus on questions as to whether these elements must be *objectively* satisfied or may be *putatively* satisfied in order for there to be a justification—as opposed to an excuse. Although the views set forth below may have implications for those questions, the scope of this article is limited to imminence.

14. 378 S.E.2d 8 (N.C. 1989).

15. Following Fletcher, this article refrains from addressing the issue of how "no duty to

leaving and of going to the police were, as a practical matter, not something to which she had access; if she had left, he would have caught her and killed her; going to the police would have been extremely unlikely to cause him to be apprehended and extremely likely to aggravate his violence towards her.

The fourth possible category is the putative "no-access" to genuine alternatives. In this case, it is not true that genuine alternatives are unavailable, but the defendant—the person in Judy Norman's shoes—reasonably believes there are no genuine alternatives.¹⁶

Hence, we may see these defenses along two dimensions. The first dimension concerns the reason why the defendant needed to defend herself: why she could not wait, retreat, or avail herself of the authorities. In the traditional, imminence case, the need comes from the lack of time to avail oneself of these avenues. In the *Norman* type of case, the need comes from the lack of access to genuine alternatives: typically, because of the proven ability of the aggressor to stymie any retreat, and the proven inability of the authorities to effect protection. The second dimension concerns whether the asserted need to resort to force was objectively present (and reasonably believed to be present), or whether it was merely reasonably believed to be present. The former cases are "objective" cases, the latter merely "putative."

Fletcher's thesis may be restated in these terms. In order for self-defense to qualify as a justification, it must be in the "imminence" (rather than "no-access") region of the first dimension and it must be in the "objective" (rather than putative) region of the second dimension. Deviation on either dimension disqualifies the defense as a justification. One part of Fletcher's discussion addresses why only time-based, not access-based, defenses qualify as justifications. Another part concerns why only objective, not putative, cases qualify as justifications. I will take these up in turn.

B. Fletcher's Argument for Imminence

The nub of Fletcher's argument against permitting self-defense as a justification in a no-access case is as follows:

[In necessity cases], the imminence requirement expresses the limits of govern-

retreat" cases, even where there is truly imminence, can be reconciled with the theory that self-defense pertains to "kill-or-be-killed" dilemmas.

16. Fletcher's article in this issue does not in fact distinguish the third and fourth categories.

mental competence: when the danger to a protected interest is imminent and unavoidable, the legislature can no longer make reliable judgments about which of the conflicting interests should prevail. Similarly, when an attack against private individuals is imminent, the police are no longer in a position to intervene and exercise the state's function of securing public safety. The individual right to self-defense kicks in precisely because immediate action is necessary.¹⁷

According to Fletcher, because the government is incompetent to decide who shall bear the costs in a particular kind of situation, individuals are permitted to make that decision in that kind of situation.¹⁸ This governmental competence is lacking where the time frame is extremely short.¹⁹ Hence, the exception for objective imminence is warranted.²⁰ This is, according to Fletcher, a political-theoretical argument premised on notions of allocation of authority between the individual and the state.²¹ Whether there have been dominating relationships between men and women may seem relevant in discussing who morally "deserved" which result in some nonlegal sense, but it is irrelevant to the applicability of self-defense as a justification, which turns on allocation of authority concepts.²²

If Fletcher's argument for imminence is a competence argument, it is so only in an attenuated sense. As Fletcher himself recognizes in the quoted passage, the question in imminence cases is not whether the legislature is in a position to make the judgment in question, but whether the police are in a position to intervene. The point is therefore not that the decision-making role normally reserved for representative government must be given to the individual. It is that particular incapacitating actions, which only the police are normally permitted to take, are deemed permissible for an individual because there is too little time for the police to serve this incapacitating function.

Additionally, while it is arguably a "competence" notion—the conception of what the government is unable to do (in imminence situations)—that permits us to circumscribe imminence situations, the justificatory foundation of Fletcher's argument is a conception of the social contract, and not a competence notion standing alone: "Individuals do not cede a total monopoly of force to the state. They reserve the

17. Fletcher, *supra* note 6, at 570 (citing GEORGE P. FLETCHER, *RETHINKING CRIMINAL LAW* (1978)).

18. *Id.*

19. *Id.* at 570-71.

20. *Id.*

21. *Id.*

22. *Id.*

right when danger is imminent and otherwise unavoidable to secure their own safety against aggression."²³ Of course, this is not a description of some act of reserving rights that each individual has performed. Rather, Fletcher must be understood as suggesting that an individual would be reasonable to cede to the state the right to use force against individuals, but to reserve the right to use force in imminence situations. This is a normative conclusion resting upon social contract theory.

The most serious qualification of Fletcher's argument is that it shows only half of what it purports to show. What it shows is that *in cases where objective imminence exists, self-defense should be permitted*. However, that proposition (suitably qualified) has not been seriously in question. The more difficult proposition is that *in cases where objective imminence does not exist, self-defense should not be permitted*. Fletcher has said little explicitly in support of this latter proposition. In particular, our question in this section is whether, in no-access cases, self-defense ought to be deemed justifiable. If Fletcher is understood as answering, "No, imminence is required," then we must ask what in his position could support that view. Thoughtful commentators have proposed treating nonimminence cases as justifications,²⁴ and it seems plausible that if, in fact, the defendant needed to kill in order to avert death or grievous bodily harm inflicted by the assailant, then she had a right to kill, regardless of whether a "short time frame" or some other limitation was the reason for her need.²⁵

For the purposes of exploring Fletcher's view, it will be useful to employ the best developed social contract model: that of John Rawls.²⁶

23. *Id.* at 570.

24. *See, e.g.*, CHARLES P. EWING, BATTERED WOMEN WHO KILL: PSYCHOLOGICAL SELF-DEFENSE AS LEGAL JUSTIFICATION 77-85 (1987) (imminence of physical harm not necessary for justification); GILLESPIE, *supra* note 1, at 185-87 (imminence requirement should be relaxed); Richard A. Rosen, *On Self-Defense, Imminence, and Women Who Kill Their Batterers*, 71 N.C. L. REV. 371 (1993) (imminence should not be required in cases like *Norman*); *see also* Arthur Ripstein, *Self-Defense and Equal Protection*, 57 U. PITT. L. REV. 685 (1996); Anthony J. Sebok, *Does an Objective Theory of Self-Defense Demand Too Much?*, 57 U. PITT. L. REV. 725 (1996).

25. It is possible that Fletcher simply believes that there are no objective no-access cases in the real world, or that, as an empirical matter, the level of probability of grievous bodily harm in nonimminence cases is never high enough to warrant killing. *See* Sebok, *supra* note 24. Fletcher's description of *Norman* suggests, however, that he does not reject the objective no-access case as a possibility, but would still treat it as an excuse, rather than as a justification. *See* Fletcher, *supra* note 6, at 555-56, 570-71, 576-77. For a discussion of putative no-access cases, *see infra* part IV.

26. JOHN RAWLS, A THEORY OF JUSTICE 17-21, 136-42 (1971) (describing original position and veil of ignorance); JOHN RAWLS, POLITICAL LIBERALISM 22-28 (1993) (explaining place of original position and veil of ignorance in the theory of political liberalism). Like Rawls, I intend to

Briefly, on an adaptation of a Rawlsian view, whether a given aspect of the basic structure of society is just can be related to the following hypothetical question: what sort of structure would be chosen by a rational person selecting a basic structure for society without knowing his or her wealth, occupation, religion, ideology, race, gender, abilities, disabilities, and so on? This hypothetical choice situation is referred to as "the original position." Rawls uses the term "veil of ignorance" as a metaphor for the hypothetical inability to know whom one will be and how one will be situated in the society selected. Hence, the form of a Rawlsian question is: would this aspect of the structure of society be selected by a rational person in the original position, from behind the veil of ignorance? It is worth emphasizing that questions of hypothetical consent within the social contract framework are only expository devices. The real questions are whether the aspects of our social structure under examination are consistent with (or perhaps even demanded by) the bundle of rights that one may reasonably insist upon as a floor of rights for all persons in society.²⁷

Applied to the question at hand, Fletcher's view can be formulated as follows: a person in the original position would not rationally reserve the right to use force in objective no-access cases.²⁸ But why not? By

use the social contract framework as an expository device for playing out notions of what sorts of concerns one can reasonably and impartially insist upon safeguarding, even as one recognizes the importance and inevitability of existing within a highly developed cooperative social scheme. Cf. DAVID GAUTHIER, *MORALS BY AGREEMENT* (1986) (describing social contract theory of morality and rationality that does not depend on concept of original position or veil of ignorance); T.M. Scanlon, *Contractualism and Utilitarianism*, in *UTILITARIANISM AND BEYOND* 103 (Amartya K. Sen & Bernard Williams eds., 1982) (offering constructivist social contract theory that does not depend on concept of original position or veil of ignorance). Note that, while the principles of justice are for *reasonable* people, the thought experiment of the original position involves *rational* decisionmakers, according to RAWLS, *POLITICAL LIBERALISM*, *supra* at 72ff. Correspondingly, while this article considers *rational* decisions from the original position, it is with an eye towards evaluating an acceptable system for *reasonable* persons. This is not to say that the reasonable is reducible to rational.

27. Other scholars have utilized, in a rather general way, social contract theory and distributive rights theory to elucidate the nature of the self-defense justification. See, e.g., Sanford H. Kadish, *Respect For Life and Regard For Rights in the Criminal Law*, 64 CAL. L. REV. 871, 897 (1976) (self-defense right based on what a person "may claim as his due equally with all other persons"); Phillip Montague, *Self-Defense and Choosing Between Lives*, 40 PHIL. STUD. 207 (1981); SUZANNE UNIACKE, *PERMISSIBLE KILLING: THE SELF-DEFENSE JUSTIFICATION OF HOMICIDE* (1994) (noncontractarian rights-based account of self-defense).

28. It is a sensitive question whether the Rawlsian framework is appropriately applied to individual questions of substantive law theory—in this case, of substantive criminal law theory. Compare Susan M. Okin, *Political Liberalism, Justice, and Gender*, 105 ETHICS 23 (Oct. 1994) (Rawlsian framework appropriately applied to questions about family structure) with S.A. Lloyd, *Situating a Feminist Criticism of John Rawls's Political Liberalism*, 28 LOY. L.A. L. REV. 1319

definition, an objective no-access case is one in which the defendant's own death at the hand of her assailant would have occurred had she not resorted to self-defense.²⁹ Why would a rational person cede the right to prevent this from happening?

The most straightforward concern lies in the potentiality for abuse that would inhere in a rule permitting objective no-access self-defense. The abuse is at two levels.³⁰ At the level of the citizen, we might see persons who take life unnecessarily because they wrongly believe they are entitled to do so under a no-access defense. And at the level of courts, we might see slippage, a tendency to treat putative no-access cases as objective no-access cases, and a tendency to spread no-access themes across various parts of the criminal law. This would mean that more lives would be taken than necessary or desirable. And, from the point of view of the social contractor *ex ante*, knowing about the likelihood that his/her legal rule would be diluted in application, it would mean that each of us would be less secure in bodily safety to the extent that others would feel freer to use force against us. In other words, men who merely seem like Mr. Norman, but are not like him, have much less security than they would in a world without an objective no-access justification. The fear would be particularly acute if having objective no-access cases as justifications led courts to make putative no-access cases justifications or excuses.³¹ In short, the argument would proceed, an objective no-access justification would, in practice, lead to less personal security rather than greater personal security. It therefore would not be rational to accept such a justification from the original position.

Ultimately, I do not want to accept or reject this conclusion. I want to point out what kind of argument we are dealing with now, and what kinds of considerations ought to be raised in order to evaluate its soundness. The argument is about the effects that certain rules would have on the security interests of persons located in various places in

(1995) (Rawlsian framework inappropriately applied to questions about family structure).

I do not mean to suggest that the application of the Rawlsian framework to questions about the structure of self-defense would in fact fall within Rawls's own theory. Rawls's framework is used here merely as a device for presenting a view of self-defense that is intended to stand or fall on its own.

29. See *supra* text accompanying notes 13-16.

30. See Maria L. Marcus, *Conjugal Violence: The Law of Force and the Force of Law*, 69 CAL. L. REV. 1657, 1709-10 (1981) (recognizing hazards of permitting self-defense in nonimminence cases).

31. But see *infra* part IV.B (constructing an argument for a putative no-access defense, but building in safeguards).

society, and whether a rational person contemplating those effects *ex ante* in decisions about how much power to cede to the state would select or reject the objective no-access justification. But if this is what the argument is about, then relations of domination may indeed be relevant, as we shall see.

C. *The Social Contract, Domination, and Domestic Violence*

I begin by noting three different respects in which one might use the phrase, "relations of domination." First, it might be used simply to summarize a history of abuse in a relationship, in which a man repeatedly physically harms his wife or partner, and she does not do the same to him and is unable to do so because she is physically weaker. While psychological harm may be (and perhaps invariably is) involved, I mean this first sense of "domination" to be thinner.

Second, "relations of domination" might be used to evoke a psychological profile of a relationship. Lenore Walker's description of "learned helplessness" in relationships of physical and emotional abuse is the best known theoretical rendition of this concept.³² Jane Cohen has suggested that battering relationships are microcosms of tyrannies.³³ And a great deal of literature addresses the need to educate juries as to the nature and depth of the psychological dynamic between a physically abusive man and a woman whom he has attacked.³⁴ His consuming and acted-out desire to control her physically, sexually, and emotionally, and her precarious existence at the mercy of his whim, are characteristic of this form of domination.³⁵ Although I intend this usage of the term to connote a psychological aspect, I do not mean that the only respect in which domination occurs in this situation is psychological.

There is a third respect in which men and women may be said to stand in a relation of domination in this society. In this sense, to comment on domination in society is not to point to any particular relationship, but to suggest that the entire social structure of society incorpo-

32. LENORE E. WALKER, *TERRIFYING LOVE: WHY BATTERED WOMEN KILL AND HOW SOCIETY RESPONDS* (1987).

33. Jane M. Cohen, *Regimes of Private Tyranny*, 57 U. PITT. L. REV. 757 (1996).

34. See, e.g., Elizabeth M. Schneider, *Describing and Changing: Women's Self-Defense Work and the Problem of Expert Testimony on Battering*, 9 WOMEN'S RTS. L. REP. 195 (1986); Robert F. Schopp et al., *Battered Women's Syndrome, Expert Testimony, and the Distinction Between Justification and Excuse*, 1994 U. ILL. L. REV. 45, 52-53; Beth I.Z. Boland, *Battered Women Who Act Under Duress*, 28 NEW ENG. L. REV. 603, 614-16 (1994).

35. WALKER, *supra* note 32.

rates an assumption of the subordinate status of women. It is often suggested that sexual domination of women by men is an emblem and a means of pervasive domination. Professor MacKinnon has most forcefully articulated a view of this kind, and has taken pains to emphasize that dominance as a form of inequality is not easily reducible to formal inequality in treatment.³⁶

Assessing "relations of domination" in all three of these senses is necessary for resolving the issue Fletcher's paper presents: whether a rational person would reserve the right to use force in objective no-access situations. Let us begin with pure physical domination through beating, raping, stabbing, shooting, burning, and numerous other forms of inflicting physical injury. Defense lawyers in the field, and those who work in shelters for women victimized by domestic violence, undoubtedly recognize this absolutely straightforward sense of domination to be extremely forceful and daunting, whatever one might ultimately add with regard to domination in the second and third senses. These episodes often do end in the man's murder of the woman. And when they do not end in murder, they often end in grievous bodily harm, hospitalization, broken bones, and severe beatings. A woman's home is a common place for her to be seriously injured or killed, and her husband or partner is a common assailant. Arguably, a woman's security against such injuries is enhanced if she is permitted to use force to prevent them from happening in a wide range of cases: first, because in a certain number of occasions, she may actually use the force and avert loss of life or grievous injury, and second, because even if the force is not used, well-informed assailants will no longer be able to rely on the likelihood that their law-abiding wives or partners will feel compelled to refrain from using deadly force.³⁷

A similar argument applies with regard to the possibility of more

36. See MACKINNON, *supra* note 9, at 215-34.

37. The extent to which cases of battered women killing men occurs in confrontational settings is a matter of dispute. Compare Holly Maguigan, *Battered Women and Self-Defense: Myths and Misconceptions in Current Reform Proposals*, 140 U. PA. L. REV. 379, 397 (1991) (most battered women kill in confrontational settings) with EWING, *supra* note 24, at 48 (the bulk of killings seem to take place outside direct confrontations). As a logical matter, even if there were no nonconfrontational killings, the component of the social contract argument in the paragraph above would still be sound.

I am nevertheless sympathetic with Maguigan's contention that more battered woman self-defense cases than is normally recognized are in fact standard self-defense cases. Note that Fletcher wants to remove the label of "justification" even from many of these "standard" cases by branding them as "subjectivist" and attacking the viability of putative self-defense as a justification. See Fletcher, *supra* note 6, at 567-71.

pervasive physical and psychological forms of domination. What is at stake, in this regard, is not only physical security, but, as Jane Cohen has pointed out, liberty of thought, speech, movement, and sexuality. Physical domination is an instrument for the elimination of these forms of liberty, and for the elimination of psychological independence and well-being. And one particularly important enhancement of the physical domination is the elimination of the dominated woman's access to outside help.³⁸ If use of deadly force in no-access situations were permitted, then it would arguably be the case that: (1) she would increase her ability to avert death or injury in the sort of "no-access" case that does frequently arise in these scenarios; (2) to the extent that her sense of lack of liberty and helplessness were based on her actual condition, she might experience a greater sense of liberty because, if access has truly been cut off, she will still have the right to defend herself; and (3) the assailant could no longer count on being able to rape and terrorize her by cutting off access and engaging in brutal conduct without facing the risk of defensive homicide (a risk that would presumably increase substantially if such defensive homicide were legal). Perhaps this fact would diminish the terrorizing conduct and the cutting off of access. With regard to both forms of domination I have considered, it might also be added that society might change so that access for women to alternative paths of relief were more available than it now is. If the cost to society of no-access scenarios were women killing men without criminal liability, the state might be more motivated to provide alternative avenues of relief. This provision of access would arguably enhance women's security.

Finally, some feminists have argued that the forms of psychological and physical domination described above are both pervasive and fundamental, and that they form a backdrop for the power relations between men and women in society more generally; this backdrop permits the dominance of men over women to be replicated in many fora that do not involve obvious physical or sexual abuse, but nevertheless incorporate a form of female subordination.³⁹ Bluntly, an argument might be phrased as follows: where women depend on domestic relationships with men and such relationships are fraught with domination, women in every forum are expected to be, and in some sense are, at the mercy of men. If women are permitted to defend themselves in such

38. Mahoney, *supra* note 12, at 80-82.

39. See MACKINNON, *supra* note 9, at 215-34.

relationships, dominance in that forum may be diminished, and that may affect more generally the degree to which women feel themselves at the mercy of men (and men feel that women are at their mercy).

These are not intended as arguments that there should be a no-access justification or as plans to change society; they are intended to suggest respects in which such a rule would arguably increase a woman's security against deprivations of physical and emotional well-being and liberty. To rephrase, they are intended to suggest that, for those who, after the veil of ignorance is lifted, turn out to be women, they may less frequently find themselves in relations of physical and psychological domination, and if they do, they might be somewhat less badly off, less insecure, and more free than in a society that rejects the no-access rule.

Even assuming all of these conjectures to be true—a very strong assumption—at least three large questions would remain. First, how else would such a society change women's lives, and would the sum total changes be beneficial for women, all considered? For example, it is possible that children would come to believe that matricide was permissible under a "no-access" rationale, and that matricide would therefore become more prevalent, as Fletcher's remarks on the *Menendez* case suggest.⁴⁰ Husbands would conceivably have no-access arguments against their wives, as might a woman's male or female partner. Perhaps women are more disinclined than men to avail themselves of violence even if they have the right to do so. And women who choose to respond with an attempt at lethal force might find that, by raising the level of force involved, they end up only accelerating their own deaths. More generally, it is possible that the rule in question would end up permitting more violence and condoning greater state deference to privately violent actors, and one might argue that such rules—particularly when they pertain to domestic settings—tend to favor men over women in actual practice.⁴¹

Second, how would such a society affect men's lives? For some, it would diminish security, particularly those who are on the "dominating" end of the domination, but also those who would suffer as a result of *Menendez* extensions and other extensions of the law. But men may be victims of some forms of dominance and pervasive fear as well, and

40. See Fletcher, *supra* note 6, at 571-76.

41. Cf. Estrich, *supra* note 1, at 1437-38 (questioning who will benefit from relaxation of imminence standard).

for these men, security and psychological well-being might be increased.

The third question, within the contractarian framework, is which society it would be rational to select from behind the veil of ignorance, given all of the ways it might alter security, power, and freedom in men's and women's lives, and given the nearly equal probability of turning out to be a man or a woman. I do not have an answer to this question, but I hope the above comments have suggested that the best answer is sensitive to the extent of domestic violence in society, to the pervasiveness of physical and psychological domination in relationships between men and women, and to the nature of that domination.⁴² If Fletcher is right to suggest that the question of whether to require imminence is really a question of contractarian political theory, then he is wrong to suggest that relations of domination should be ignored in answering that question.

D. The Social Contract, Self-Rule, and Dominance

A contractarian framework may also help us to interpret theses about relations of domination in the third sense I mentioned above: the respect in which the very structure of our society is asserted to embody men's dominance over women, even if a superficial appearance of equality of treatment under the law exists.⁴³

Let us suppose that, in the original position, a person behind the veil of ignorance would choose a law that included an objective no-access defense. Additionally, imagine that person in the original position may wear what I shall call "gender-lenses," which permit him or her to see through the veil of ignorance to his or her gender. It seems plausible that the rules it would be rational to select, wearing gender-lenses, might well differ depending on whether one was a man or a woman. And I think this may be true in the domestic violence context. While men and women could each gain and suffer somewhat by a no-access rule, it is at least plausible, on an anecdotal basis, that a no-

42. Additionally, the answer should be sensitive to the possibility of legal changes independent of alterations in the law of self-defense, such as, for example, enhanced stalking laws and greater availability and enforcement of temporary restraining orders.

43. For an illuminating discussion of the possibility of using Rawlsian theory to articulate feminist positions, see SUSAN M. OKIN, *JUSTICE, GENDER, AND THE FAMILY* 101, *passim* (1989) and Okin, *supra* note 28. Others are less optimistic about the compatibility of Rawlsian theory and feminist theory. See Linda Hirshman, *Is the Original Position Inherently Male Superior?*, 94 COLUM. L. REV. 1860, 1861-62 (1994) (criticizing Rawls's theory for failing "to confront honestly the problem of gender").

access rule would likely enhance women's security and liberty.⁴⁴ And I think that Fletcher's comments on why the no-access rule would diminish security are particularly forceful if one excludes the effects on women in domestic violence situations. In short, it is plausible that a person wearing gender-lenses and seeing that he was a man would reject the no-access justification; but a person seeing that she was a woman would accept a no-access justification. Recall that, by hypothesis, a man or woman not wearing gender-lenses would accept a no-access justification.

Now in a trivial sense, the laws of such a system are unjust *simpliciter*, and *a fortiori* unjust for each member of society. But there is an important sense in which a man (*qua* man) lacks standing to complain of this injustice, because what makes it unjust is that it cannot ask for the rational allegiance of any but those who know they are men.⁴⁵ But it can ask for his rational allegiance, and so he is in no position to complain. The fiction of consent, as constructed through the concept of rational allegiance, permits the contractarian to import the concept of autonomy, in the sense that if one is living under rules that one would rationally have chosen, one is self-governing, and therefore autonomous. In this sense, the fact that the rules are unjust is consistent with a man's being self-governing and autonomous.

By contrast, such a system coerces a woman, but it cannot ask for her rational allegiance (at least with regard to the law in question⁴⁶). To this degree, social contract theory's fiction that citizens "consent" to be bound by the law (to which they would rationally give allegiance) does not apply to her. The state's conduct as to her is therefore coercion without consent; it is not, even in the highly abstract contractarian sense, an aspect of her self-governance. And the existence of the state ruling her is not even consistent with her autonomy, let alone an aspect of it.

The picture becomes more striking when we combine the implications of the model as applied to each gender. To a certain extent, as suggested above, contractarianism equates the ruler with those who would rationally assent to a scheme of rules, because the foundation of

44. See Rosen, *supra* note 24, at 392-98 (battered women often unable to escape abusive partners who threaten future harm or death); EWING; *supra* note 24; Mahoney, *supra* note 12, at 53-71.

45. This is not to deny that a man of some particular race or religion, for example, might have "standing" to complain of the injustice in question.

46. The illegitimacy of one part of the law with respect to a category of persons does not entail that all laws are illegitimate with regard to that category of persons.

authority for contractarianism is hypothetical mutual rational consent. To the extent that men could rationally consent to a system, I have said they are rulers of that system. But if the system is one that a person could not rationally consent to except if he knew he was a man, I have argued, then that person is not a ruler of that system. Hence, although women are ruled by the system, and coerced to accede to the system, they are not rulers of it. Because it is in fact one and the same system, the theoretical implication is that men are rulers of a system to which women are unjustly coerced to accede. In this sense, men are the rulers and women are the ruled. This might appropriately be dubbed a form of dominance in a part of our legal and political system.

Note that this sense of dominance is not reducible to a lack of formal equality between men and women in the formulation of the law: the law in question is facially gender-neutral.⁴⁷ Nor is it equivalent to a utilitarian judgment that, all told, the current society fails to optimize women's well-being, or that the law culpably fails to correct actual imbalances between men and women. Nor is it equivalent to a claim about the historical origins of the system, about the existence of intentional discrimination, or about the current distribution of power between men and women in government office. The law itself, in light of our social context, constitutes a form of dominance by men of women, and a form of gender inequality, according to this thesis.

Conversely, on this view, the adoption of a no-access justification would not be a preference for women. It would apply equally to men and women. Although men with gender-lenses would not choose it from behind a veil of ignorance, persons ignorant of their gender would choose it. In both of these senses, it would be gender-neutral. And it follows that it would preserve autonomy for all; all would be self-ruling. As a matter of our political structure and principles, equality not only permits the no-access rule; it may well require it, the argument would go.⁴⁸

To review, Fletcher appears to be committed to the following: (a)

47. See MACKINNON, *supra* note 9, at 230-34 (lack of parity in treatment under the explicit law, and lack of facial gender-neutrality do not exhaust notion of gender inequality).

48. It should be clear that Fletcher could use this very same framework to express his concern that the law of self-defense not be altered in order to address current, as opposed to structural social problems, or in order to cater to the plight of women who have been abused and then kill their abusers. If a woman sees no-access defenses as enhancing security only when she is wearing gender-lenses, and if our current system would be selected by all those truly behind a veil of ignorance (with no gender-lenses), then the no-access justification would indeed reflect an illegitimate preference for women.

the imminence requirement is based principally in concerns of competence; (b) under social contract theory, we would not reserve the right to kill in any but imminence cases; (c) considerations of relations of domination are irrelevant to whether attenuated imminence of no-access justifications should be permitted; and (d) the use of no-access defense would reflect an illegitimate preference for women.

I have taken issue with each of these contentions, arguing that: (a') competence concerns explain, at most, why imminence renders self-defense permissible, not why the absence of imminence renders self-defense impermissible. (b') it is possible that, in light of the enhancement of physical, sexual, and psychological security that a no-access rule would provide, a person entering the social contract would rationally reserve the right to use lethal force in a no-access case, even absent the imminence requirement, and thus social contract theory does not clearly imply the necessity of the "imminence" requirement; (c') we cannot know whether "imminence" should be required under social contract theory without knowing a great deal about the prevalence and nature of men's physical and psychological domination of women; and (d') if it is the case that social contract theory would require a no-access defense, because it would provide an enhancement of women's security that a person would rationally select in light of the possibility of being a woman, then it would be correct to conclude that living under a system that forbids self-defense in no-access situations is a form of political dominance of women, and that the rejection of a no-access defense would be a form of gender inequality.

III. THE OBJECTIVITY OF IMMINENCE

A. *Fletcher's Attack on the Model Penal Code*

Recall that Fletcher discusses two ways cases can deviate from the objective imminence case: perhaps lack of access, rather than imminence, is the basis of the defense, or perhaps there is not objective imminence, but merely putative imminence. We now turn to putative imminence cases.

One of Professor Fletcher's major contributions to the theory of criminal law has been the articulation of the conceptual distinction between excuse and justification.⁴⁹ What motivates this distinction is

49. GEORGE P. FLETCHER, *RETHINKING CRIMINAL LAW* §§ 10.1-10.5 (1978); GEORGE P. FLETCHER, *A CRIME OF SELF-DEFENSE: BERNHARD GOETZ AND THE LAW ON TRIAL* 18-38 (1988); FLETCHER, *supra* note 1; George P. Fletcher, *The Right and the Reasonable*, 98 HARV. L. REV.

Fletcher's insistence that the law must not lose sight of the concept of right; as the concept of right fades, we lurch toward moral chaos. The important concept of diminished blameworthiness has unfortunately been permitted to cloud the concept of right, on Fletcher's account, and it must be reined in to keep right clear. Thus, it is important to distinguish excuses, which involve wrong action that is not blameworthy, from genuine justifications,⁵⁰ which involve action to which one has a right.⁵¹

The Model Penal Code's treatment of self-defense is an important example of this unfortunate clouding of bases of exoneration, according to Fletcher. It essentially treats a case of reasonable belief that there is an imminent threat (need for immediate force) as a basis for a self-defense justification.⁵² This means that even if the imminence was not objective, but reasonably believed to exist, a justification exists, on Fletcher's interpretation. Yet in such a case, the action is not right. By hypothesis, there was not really a need for immediate force, as the grievous harm to be inflicted was not really imminent. Fletcher agrees that the defendant, if her belief was reasonable, should be excused because she was blameless. But he insists that this is not a justification.⁵³ The conclusion he reaches is that facts about domination, because they

949, 954-55 (1985) (attacking American law's willingness to treat "putative self-defense" as a justification); see also H.L.A. HART, PUNISHMENT AND RESPONSIBILITY 13-14 (1968) (distinguishing justification and excuse).

50. For a helpful discussion of the distinction between justifications and excuses, see Joshua Dressler, *Justifications and Excuses: A Brief Review of the Concepts and the Literature*, 33^o WAYNE L. REV. 1155 (1987).

51. There is, arguably, a tension in Fletcher's own views as to whether justifiable action is action that one has a *right to engage in*, on the one hand, or action that is *right*, on the other. On the former view, *permissibility* is the key concept; on the latter, *commendability* is central. Insofar as this article comments upon Fletcher as social contract theorist, the former notion of justification is more apt.

52. MODEL PENAL CODE § 3.04(1) (1985) (force justifiable when actor believes that such force is "immediately necessary"); *id.* § 3.09(2) (recklessly or negligently formed belief no defense in prosecution for reckless or negligent homicide, respectively).

Fletcher has chosen the Model Penal Code to illustrate the position he is targeting. While the choice is understandable because of the clarity of the Model Penal Code's structure, the Model Penal Code does not actually use the term "imminence" or the term "imminent" in setting forth the features of self-defense. It uses the phrase "immediately necessary" instead. *Id.* at § 3.04(1). It is not obvious that the two terms are synonymous or the two concepts are the same. To the degree possible, I will follow Fletcher's discussion.

53. Fletcher, *supra* note 6; cf. JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 193, *passim* (2d ed. 1995) (describing debate over whether putative self-defense cases are justifications or excuses).

are relevant only to the reasonableness of her belief, are not relevant to self-defense as a justification (i.e., (2), above).⁵⁴

The concept of reasonable belief involves (a) the reasonableness of the belief, and (b) the fact that the defendant had the belief. The crucial question under the Model Penal Code ("MPC") concerns (b): whether the defendant had the belief. The central moral idea is that *if* she believed an attack was imminent (immediate force was needed), it is not wrong for her to have resorted to self-defense.⁵⁵ This idea is then qualified: if there is something defective about the defendant's formation of that belief, the belief will not necessarily form a basis of complete justification. Indeed, the MPC converts the justification into a lowering of the crime to negligent homicide or reckless homicide in the case of a negligently or recklessly formed belief about the need for immediate force (or about the existence of other elements).⁵⁶ This is the MPC's interpretation of the rule in most jurisdictions that full exoneration requires not only that there be a belief in the existence of an imminent threat, but also that this belief be reasonable. Note that this reasonableness (or the nonnegligently formed belief) requirement clearly occurs as a limitation, and not as the core of self-defense. The core is the idea that the defendant actually had the belief. If one accepts Fletcher's argument that the defendant's subjective state of mind goes to blameworthiness and therefore to excuse, but not to justifiability, then his critique of the treatment of imminence (immediacy) under the Model Penal Code is correct.

54. The argument in this part will accept *arguendo* the premise that information on past forms of domination and abuse would be relevant, if at all, only to the reasonableness of the belief as to the imminence of the threat. Fletcher himself does not explicitly state this premise, and there is no reason to believe he would accept it, as is. Past domination could be relevant to the sincerity of the defendant's belief, which is a necessary, but not a sufficient condition, under Fletcher's view. It could also be relevant to questions such as the possibility of retreat, and even as one of the many exceptions to the exclusion of similar acts evidence (e.g., *modus operandi*), to whether the abusive conduct she claims occurred on the occasion in question did in fact occur, and to what the result would likely have been (i.e., if a certain style of attack had previously led to grievous bodily harm, say, serious stab wounds or bullet wounds, that would arguably be *modus operandi* evidence as to the existence of such an attack and the probable result of such an attack in the present). Nevertheless, it is clear that the majority of courts admitting evidence on past conduct admit it on the question of the reasonableness of believing a threat was imminent, and that in light of its prejudicial force (regarding the illicit similar acts), such a centrally permissible avenue is probably essential in many cases. For the purposes of this article, it will be assumed that "reasonableness" of belief is a crucial evidentiary basis of admitting past domination evidence, and ask whether reasonableness of belief goes to the existence of a justification.

55. See MODEL PENAL CODE § 3.04(1) ("the use of force upon . . . another is justifiable when the actor believes that such force is immediately necessary").

56. *Id.* § 3.09(2).

Perhaps, however, the Model Penal Code put the cart before the horse. I shall argue that a crucial question in self-defense justifications ought to be whether the original assailant engaged in conduct that would have led a reasonable person to believe that he would cause her death or grievous bodily harm if defensive force were not immediately used. If so (and if the elements of self-defense other than imminence are present), the objective conditions of a self-defense justification are met.⁵⁷

There is one further requirement. I have no reason to reject Fletcher's contention that the availability of this defense ought to be conditioned on the defendant acting under the right of self-defense.⁵⁸ She will not prevail in a case where she maliciously killed someone who she later learned was about to kill her. The fortuity of external facts that would support a right to self-defense does not suffice to undergird the justification. These ideas are encapsulated by the requirement that she must actually have believed that the threat was imminent. Note that this requirement comes as an afterthought or a qualification, not as the core of the defense. The core of the defense is that the conduct presented to the defendant would have made a reasonable person believe that there was an imminent threat.

As will be illustrated below, the move I am making here is not unfamiliar in the law: facts about what it is reasonable to believe under certain circumstances may, as Kent Greenawalt has pointed out, be *objective* facts.⁵⁹ And legal norms may be made to turn, in some cases, on such objective facts. Hence, it does not follow, from Fletcher's contention that justification must be based on right, and right must be based on objective facts, that the concept of reasonable belief is incapable of grounding the self-defense justification. Fletcher rightly condemns the Model Penal Code on this basis, but it remains to be seen whether a

57. There are affinities between my view and that expressed by Kent Greenawalt, in response to Fletcher, in Kent Greenawalt, *The Perplexing Borders of Justification and Excuse*, 84 COLUM. L. REV. 1897 (1984). Greenawalt argues, in effect, that epistemic justifiability creates a basis for moral permissibility in some cases. *See id.* at 1903. My view differs from Greenawalt's in several respects. At a minimum, on my view, but not Greenawalt's: (1) epistemic justifiability does not create permissibility; (2) secondary legal qualities are pivotal; and (3) the victim must have engaged in imminently threatening conduct. In part IV, *infra*, I add that the victim must have engaged in conduct that he knew or one should have known was imminently threatening, also not included by Greenawalt. A thorough comparison of my view with Greenawalt's would go beyond the scope of this article.

58. *See* Fletcher, *supra* note 6 (defendant must have been intending to defend against attack).

59. *See* Greenawalt, *supra* note 57, at 1915-18.

different sort of reasonableness-based self-defense justification could be constructed.⁶⁰

B. Secondary Qualities in the Law: A Philosophical Digression

It is difficult to get clear on how it is that facts about what it is reasonable to believe can constitute objective features of a situation. In this law and philosophy symposium, a metaphysical analogy may be appropriate and helpful. John Locke famously distinguished between primary and secondary qualities of physical objects.⁶¹ The paradigm of a primary quality is shape or mass;⁶² the paradigm of a secondary quality is color.⁶³ What is special about secondary qualities is that they are defined essentially by reference to normal perceivers. Redness is that which would produce in a normal perceiver the idea of redness.

This is a gross oversimplification of Locke's views, but that does not matter for the moment. I want simply to note that many attributes on the basis of which laws regulate may be characterized as secondary attributes in the Lockean sense. To take a particularly clear example, the tort of wrongful disclosure of private facts depends on what a "private fact" is. The *Restatement (Second) of Torts* defines a private fact roughly as that which would cause a reasonable person to be highly offended if it were disclosed.⁶⁴ Thus, to define whether the wrongdoing

60. It may be objected that I have misconceived the basis of Fletcher's reason for treating putative imminence cases as excusable, rather than as justifiable: perhaps the problem is that defendant's belief (that harm will ensue) lacks truth, not that objectivity is unavailable.

The objection only holds up if the untrue belief in question is relevant to the justifiability of the act. The point of the discussion of secondary qualities, which follows, is that justifiability does not turn on whether harm will, in fact, occur, but on whether the conduct presented an imminent threat—i.e., one that would reasonably have been perceived as requiring immediate force.

61. 1 JOHN LOCKE, AN ESSAY CONCERNING HUMAN UNDERSTANDING 169-71, bk. II, ch. VIII, §§ 7-9 (Alexander Campbell Fraser ed., Dover 1959) (distinguishing ideas of primary qualities and ideas of secondary qualities). Locke himself argued that primary qualities are real and secondary qualities are not. Subsequent philosophers have used Locke's distinction to point out the difference between terms that are intrinsically defined in relation to human response (secondary property predicates) and those which are intrinsically defined independently (primary property predicates). It is a matter of contention among philosophers whether the referents of secondary property predicates so defined ought to count as "real," but it is a far less contentious position to assert that their referents are "objective" in the sense described in the text. See John McDowell, *Values and Secondary Properties*, in MORALITY AND OBJECTIVITY 110 (Ted Honderich ed., 1985) (explaining respects in which secondary qualities may be objective).

62. LOCKE, *supra* note 61, at 169-70, bk. II, ch. VIII, § 9.

63. *Id.* at 170-71, bk. II, ch. VIII, § 10.

64. RESTATEMENT (SECOND) OF TORTS § 652D (1977) (liability for publication of matters "of a kind that (a) would be highly offensive to a reasonable person, and (b) is not of legitimate concern to the public").

has occurred—and even before we reach the question of injury—we must look at the factual statement and determine whether it disclosed a private fact, and we answer this question by determining whether it possesses the propensity to offend seriously a reasonable person. Similarly, in the law of defamation, it is common to define “defamatory” as that which would lower the plaintiff’s standing in the eyes of (at least a substantial minority of) “respectable” persons.⁶⁵ Of course, liability in defamation law turns on whether the statement was defamatory. To this extent, it turns on a *secondary quality* of the statement.

The same sorts of classifications can be found in the law of criminal procedure. Most notably, whether reasonable suspicion exists is considered an objective fact. But what constitutes this fact is whether it would have been reasonable to suspect criminal wrongdoing under the circumstances.⁶⁶ Whether a Fourth Amendment right to privacy existed is an objective fact. What constitutes that fact, in the first instance, depends upon whether a reasonable person would expect a certain area to be free from intrusion.⁶⁷ Whether a government actor has acted within the sphere of qualified immunity is an objective fact.⁶⁸ What constitutes that fact is a matter of whether one could reasonably have believed that the action in question did not violate anyone’s legal and constitutional rights.⁶⁹

Interestingly, in the qualified immunity context, it is not relevant whether the government actor did in fact hold the belief in question, but there has been a great deal of dispute over that question.⁷⁰ The same holds with regard to reasonable suspicion. In the Fourth Amendment context, it is often relevant whether people do expect the area in question to remain free from intrusion, but it is not always relevant. For example, it is no answer in a *Bivens* action that the homeowners knew the police were constantly wrongfully breaking into houses.⁷¹ In all of these areas, the legal norms turn, in the first instance, on whether

65. *Id.* § 559 cmt. e.

66. *Terry v. Ohio*, 392 U.S. 1, 20-22 (1968) (reasonable suspicion under the circumstances).

67. *Katz v. United States*, 389 U.S. 347, 360-62 (1967) (Harlan, J., concurring).

68. *Harlow v. Fitzgerald*, 457 U.S. 800, 818-19 (1982).

69. *Id.*

70. *Id.*; see also *Anderson v. Creighton*, 483 U.S. 635, 643 (1987).

71. *Bivens v. Six Unknown Named Agents*, 403 U.S. 388, 392 (1971); see Anthony Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 403 (1974) (arguing that Fourth Amendment must not be interpreted so that government can bootstrap from regular violation of privacy interests into absence of privacy right).

the circumstance or conduct in question are *such as would reasonably be perceived a certain way*. In this sense, the law of private facts, defamatory statements, reasonable suspicion, qualified immunity, and Fourth Amendment invasion of privacy turns on what might be called "secondary legal qualities." It looks to qualities that are defined by reference to the responses of reasonable persons. Of course, there is some sense in which virtually all legal classifications depend, in part, for their content, on human perceptions. But what is peculiar about those I have outlined is that the law itself defines them in terms of responses of reasonable persons.

While Locke may have puzzled over whether secondary qualities were really part of the ultimate structure of the universe, we need not be so ambitious in our thinking about legal secondary qualities. They are, in principle, capable of at least two sorts of objectivity.⁷² First, their presence or absence does not depend on any particular person's or group of persons' actual subjective state; it is a public matter. Second, and closely related, there is no principled obstacle to such facts being determinable by a variety of different individuals. For example, while different people may take offense at different things, we roughly expect everyone to know that someone's preferred sort of sexual stimulation is a private matter: it would cause a reasonable person to be offended if widely disseminated without consent.

But legal secondary qualities, while they must be objective in these respects, may also be highly particularized. For example, in the qualified immunity context, the question is whether a reasonable officer would have (or could have) taken the action to be within the bounds of the law *under the circumstances*.⁷³ In libel law, the question is whether a given utterance would have been understood, under the circumstances, to lower the esteem of the plaintiff in the minds of respectable or right-thinking persons. And, of course, in criminal procedure, reasonable suspicion is reasonable suspicion under the circumstances.

C. *The Secondary Qualities Model of Imminence*

The secondary qualities account presents an appropriate middle ground in characterizing the law of self-defense. What gives a person

72. See McDowell, *supra* note 61, at 112.

73. *Anderson*, 483 U.S. at 641.

the right to resort to defensive aggression is not the fact that a given harm *will* in fact ensue. Consider the following example:⁷⁴

The Unloaded Magnum

V puts a .44 Magnum to a shopkeeper's head in the middle of a hold-up, and says, when the money has been taken, "Now I'm going to blow your brains out." The shopkeeper reaches under the cash register for a gun and kills the robber. The police learn that the Magnum was unloaded.

Self-defense is clearly justified, even though the gun was not loaded. This is a justification, not merely an excuse. It is not the case that some attribute of the shopkeeper rendered his action blameless, despite its being wrong. Rather, the action itself is not wrong; it is morally permissible. That is because the shopkeeper was, in fact, faced with an imminent threat of death or grievous bodily harm through X's aggression. What it means to be faced with an imminent threat is to be presented with conduct that, under the circumstances, would lead a reasonable person to believe that immediate defensive force would be needed to avoid death or grievous bodily harm. Having someone put a .44 Magnum between one's eyes and say "Now, I'm going to blow your brains out," would lead a reasonable person to believe that defensive force would be needed to avoid death or grievous bodily harm.

On the other hand, this account does not make justifiability turn principally on the existence of the reasonable beliefs of the defendant. Consider the following example:

The Unlucky Twin

D is about to go home when a police officer stops her and shows her a photograph of an escaped murderer whom some neighbors reported seeing in the vicinity of her apartment building. The escaped convict is known to break into women's apartments and strangle them when they enter. D waits for an hour or so and then gets tired and goes in. She rings the doorbell first, thinking her boyfriend may be home. Then she enters, whereupon she sees a stranger who looks exactly like the mur-

74. This is a variation of an example that Arthur Ripstein suggested to me in conversation.

derer. He walks towards her, smiling, and she shoots and kills him. In fact, he was not the murderer, but rather D's boyfriend's college roommate, visiting for a couple of days, unbeknownst to D. Unluckily, he is the identical twin of the murderer.

This should be an excuse case, not a justification case. D should be exonerated for the murder of the unlucky twin because she reasonably believed that immediate defensive force was needed to avoid death or grievous bodily harm from the person she shot. Yet the twin had not engaged in threatening conduct. Nothing he did (then or in the past) would lead a reasonable person to believe that she was in imminent danger. D's belief was reasonable, but not because of any threat presented by the twin. Because the twin in fact presented no threat, the killing was not justified. The act, taken by itself, was wrong. But because the actual belief held by D was reasonable, D is blameless for her conduct.

"Imminent threateningness of conduct" may be both objective and particularistic, like other legal secondary qualities. Consider the following example:

The Last Bowl of Oatmeal

V and D are mobsters. V drives D to a cabin in the woods, tells him to sit in a chair at a table, and gives him a hot bowl of oatmeal to eat. For twenty years, D has accompanied V to this cabin with other persons who were similarly given a bowl of oatmeal to eat. In every case, V pulled out a gun and killed the person while he ate the oatmeal. On several occasions, V did this to his former partners. This was a murder ritual for V. D shoots and kills V before he completes the oatmeal.

D is justified in killing V, not merely excused. While giving someone a bowl of oatmeal is not, generally speaking, conduct that would lead a reasonable person to believe imminent force was necessary, it is such conduct under the circumstances of this case (where "circumstances" include past conduct of V). It is not simply D's beliefs that warrant exoneration, it is the objective facts of the situation. V has engaged in life-threatening conduct toward D; that is why D believes there is an imminent threat to his life. We analyze this conduct as life-threatening by pointing out that it would lead a reasonable person, under the circumstances, to believe that immediate defensive force was needed to avoid death or grievous bodily harm.

D. The Relevance of a History of Domination to Imminence

This account suggests that Fletcher is mistaken to say that the only justification cases are ones in which the harm would in fact ensue imminently. If "putative imminence" cases are defined as those in which the harm would not in fact ensue, despite the defendant's reasonable belief that it would, then Fletcher is wrong to say that no putative imminence case can be a justification (although many putative imminence cases will not be justifications). For there are many cases in which the conduct was imminently threatening, in which harm does not in fact ensue (and would not have). These cases, I have argued, ought to be treated as justifications, for the trigger of the exoneration is the objective threat of the victim's attack on the defendant, and not some feature of the defendant's own state of mind. Of course, we could also structure this point by saying that the class of objective imminence cases is broader than Fletcher thinks, and includes many cases that he would have categorized as "putative" imminence cases.

In light of this analysis, it should be clear that past circumstances of domination in a relationship are relevant to the determination of whether a defendant's action was justified. The question is whether the victim engaged in conduct that, under the circumstances, would have led a reasonable person to believe that defensive force was immediately necessary in order to avoid death or grievous bodily harm. In order to know this, we need to know the circumstances. The question is not simply whether she reasonably believed it; that is relevant principally to excuse, and whether she in fact believed it is a necessary second step of the justification. The question is whether the conduct was such that a reasonable person would believe it under the circumstances. And in order to know this, we need to know the relevant circumstances. In many cases of women asserting self-defense in connection with the killing of a husband or partner, the relevant circumstances will include a pattern of physical and psychological abuse in the past. This history forms a backdrop of circumstances such that, in the mind of a reasonable person aware of these circumstances, the assailant's present conduct leads to a belief that the victim needs to use immediate defensive aggression in order to avert death or grievous bodily injury.

IV. A MODIFIED SOCIAL CONTRACT MODEL

Parts II and III were intended to respond directly to Fletcher. Each was intended to apply independently of what the other offered. And each was intended to work largely within a framework Fletcher

himself had offered. I believe these parts show that domination *is* relevant to whether there ought to be a no-access defense, and whether, even within a standard model, a defendant has justifiably resorted to self-defense.

The final part of this article is intended to be constructive and suggestive. Parts II and III stand on their own, but in part IV, I hope to combine a social contract account and a secondary qualities account to synthesize the beginnings of an alternative philosophical foundation for the law of self-defense.

A. *Extending the Social Contract Argument*

The argument in part III, like the argument in part II, can be phrased within a social contract framework.⁷⁵ On this account, one reserves the right to act aggressively where the assailant has engaged in threatening conduct. What triggers the right is not the existence of conditions rendering self-defense necessary, but the existence of threatening actions. Arguably, a person in the original position would want to reserve for herself the right to use force when the threatening conduct is engaged in, because this is something that she is better at knowing about than the future-oriented question of whether death or bodily harm *will* ensue (e.g., she can tell whether a gun is pointed at her head, but she cannot tell whether it is loaded). She would rationally decide to reserve a right that permits response to perceivable threats, rather than indeterminate outcomes.

It will be objected, however, that this version of a social contract argument proves too much. Wouldn't the party in the original position want to minimize the gap between when she believed there was an imminent threat and when she was permitted to use force? And if so, wouldn't the person in the original position simply select a rule permitting her to use force if she sincerely believed there was an imminent threat? If this is so then the distinction between self-defense as an excuse and self-defense as a justification has vanished, and, moreover, even defendants with unreasonable beliefs would be permitted to engage in lethal self-defense.⁷⁶

This objection is myopic. The party in the original position needs

75. Of course, part II assumed *arguendo* that "objective" cases and not "putative" cases qualified as justifications, and merely addressed whether imminence was required. See discussion *supra* part II.

76. Fletcher's concern over the *Menendez* case suggests this objection. See Fletcher, *supra* note 6, at 571-76.

to look beyond the effects of the rule for her as potential victim of the original assailant, to the effects of the rule for her as potential victim of the purported self-defender. A world in which an innocent person can be killed as a matter of right because of another person's unreasonable fantasy of an imminent threat to life lacks a fundamental kind of security. Whether I will be killed as a matter of right by another person is something over which I have very little control, in such a world. This is, ultimately, a large part of Fletcher's motivation.⁷⁷

The secondary quality model recognizes that one would wish, as a potential victim of an original assailant, to have one's rights turn on epistemically available features of the world (objective appearances), so that one may better patrol one's own security while acting within one's rights. Similarly, as a potential victim of the purported self-defender, one wishes to have a higher level of control over when one's life will become fair game for others. The secondary model view constructed above attempts to accommodate this second aspect of personal security by requiring that the right be triggered by the victim's own threatening conduct. If it is his own conduct that triggers in others a right of defensive aggression, then he controls when others are permitted to use aggression against him.

These considerations can be satisfied by a rule that the right of self-defense is triggered only when the victim engages in conduct that he knows or that one should know is imminently threatening.⁷⁸ This requirement would ensure that the potential victim of the purported self-defender has ample control over his vulnerability to legal attacks by others, and therefore has ample security against others' attacks.⁷⁹

77. See *id.* at 567 (rejecting Greenawalt's view, in part, because "[r]easonable mistakes in self-defense cases are about actions that are harmful to innocent people").

78. Note that this account leaves open the possibility that it is justifiable to kill a psychotic aggressor, for the aggressor has engaged in conduct that one should have known was imminently threatening. Arguably, the fact that he cannot be faulted for not knowing that his conduct was imminently threatening (if that is the case), or for not refraining from his conduct, does not undercut the contention that his conduct has triggered a right in the one he attacks.

The "psychotic aggressor" problem, and "innocent aggressor" problems more generally, merit a thorough treatment; my point here is only that the implications of my view for such problems are not obvious. See George P. Fletcher, *Proportionality and the Psychotic Aggressor: A Vignette in Comparative Criminal Theory*, 8 *ISR. L. REV.* 367 (1973); Michael Otsuka, *Killing the Innocent in Self-Defense*, 23 *PHIL. & PUB. AFF.* 74 (1994); Judith J. Thomson, *Self-Defense*, 20 *PHIL. & PUB. AFF.* 283 (1991); David Wasserman, *Justifying Self-Defense*, 16 *PHIL. & PUB. AFF.* 356 (1987).

79. This requirement appears to diminish the epistemic accessibility of the trigger of self-defense to potential victims of the original assailant (defendants asserting self-defense). It is not, now, enough that there is imminently threatening conduct—the conduct must have been such that

Ultimately, I think Fletcher is concerned about the personal control and security each of us loses by living in a society that permits the right to use lethal force against any one of us to be triggered by an individual defendant's subjective state of mind—a Model Penal Code society, rather than a Fletcheresque one. But the solution, I have suggested, is not to objectivize the trigger of the justification to such a great degree that it becomes epistemically inaccessible to the defendant. The solution is to articulate the conditions for self-defense in such a way that each of us is, to as great a degree possible, capable of controlling when the right to self-defense against himself or herself has been triggered. As the above considerations have also suggested, one should try simultaneously to articulate the conditions so that they will be epistemically accessible to each of us insofar as we may be potential victims of original assailants. In satisfying these desiderata, we harmonize a desirable degree of personal security against purported self-defenders with a desirable degree of security against original assailants.⁸⁰

B. No-Access Cases and the Modified Social Contract

The secondary quality model of imminence suggests the a priori plausibility of a no-access defense that diverges from the purely objective form of no-access justification offered in part II. It may, in fact,

the victim knew or should have known of its imminent threateningness. The latter fact appears to go to the mens rea of the original assailant, and therefore appears to be epistemically less accessible to the defendant.

This objection is only partially well-taken. The right to self-defense will be triggered by imminently threatening conduct so long as the original assailant *should have known* that his or her conduct was imminently threatening, and whether it is the sort of conduct that the original assailant should have known was imminently threatening will largely be a public and objective matter, not a matter of the original assailant's state of mind. To the extent that a gap is now left—where the victim did not know and cannot be faulted for not knowing that he was engaging in imminently threatening conduct (Unlucky Twin 2: Unlucky Twin who displays a rope to D as she enters her apartment, because he is in the process of repairing something)—that gap is roughly the same as the gap in which we were already forced to place the Unlucky Twin case. The defendant's act is not justifiable, but it is excusable. The upshot is that the victim is justified in using defensive self-aggression against the defendant; the Unlucky Twin and Unlucky Twin 2 are each justified in fighting back. This expresses the point that the Unlucky Twin and the Unlucky Twin 2 have a right not to be killed by D, and D is violating that right, albeit excusably.

80. Of course, my comments in part II about the relevance of information about society will have to apply to this version of the social contract argument just as much as to the version of part II: whether this would in fact be the desirable accommodation of our security interests is a question to which we will give better answers as our information about the various kinds of experiences people have and the pervasiveness of certain kinds of security concerns increases. The relevance of empirically enriched accounts does not preclude offering and arguing for models based on a priori concepts of security, but counsels against insulating such models from empirical information.

support self-defense as a justification in a subset of the fourth category of my matrix: putative no-access. To review, self-defense would be justified, according to the part II no-access justification, only if in fact death or grievous bodily harm at the hands of the aggressor was inevitable, due to the absence of genuine alternative paths of relief. The question was whether, from behind a veil of ignorance, the value of such a rule in enhancing the physical and psychological security of women would warrant the loss of security each person would suffer by virtue of increased vulnerability to purported self-defenders.

The secondary quality model suggests we ask a different question. Just as it is difficult to know which imminent threats will in fact materialize, so it is difficult to know whether *the menace of inevitable death or grievous bodily harm* perceived by someone like Judy Norman will in fact materialize. It is desirable, insofar as each of us considers his or her vulnerability to potential assailants, for our rights to turn on what we reasonably believe. From that perspective (and not necessarily more generally), it would be desirable to base the right to self-defense on a reasonable belief in the absence of genuine alternatives, even absent imminence. But the sacrifice in security against purported self-defenders might be very great, if such a right were unqualified. Part IV.A suggests a compromise. What triggers the right to self-defense (in nonimminence situations) would be conduct that the victim knows, or should know, would lead a reasonable person to believe that, because of the absence of genuine alternatives, and because of the impending violence of the assailant, if she does not resort to defensive aggression, she will inevitably suffer death or grievous bodily harm by the assailant. Such conduct might be described as *conduct presenting a "menace of inevitable death or grievous bodily harm."* I am proposing that the menacing character of the victim's conduct in a no-access case is a secondary legal quality, just as the imminent threateningness of the victim's conduct was a secondary legal quality in the imminence case.

The model can therefore be more simply described. From the original position, we each would reserve the right to kill in self-defense if confronted by conduct presenting a menace of inevitable death or grievous bodily harm. But this reservation is qualified: it must be the case that the victim knew or should have known his conduct presented such a menace. In this manner, we each retain control over when we render ourselves vulnerable to the defensive attacks of others. With this caveat, however, we each remain able to defend ourselves when others'

conduct is reasonably perceived as presenting a "kill-or-be-killed" choice.

As with the social contract arguments in part II and part IV.A, the model suggested here ultimately must be assessed from a point of view that is empirically richer than what has been presented here. There also may be practical reasons pertaining to political acceptability, and ease of implementation, that affect what form of no-access defense, if any, ought to be incorporated in the law, and how. It is nevertheless worth remarking that, despite the fact that the "objective no-access" and the "putative no-access" defenses might well have fairly similar consequences, from a broader perspective, the structural differences between them are illuminating and suggest the appeal of the "putative no-access defense."

From a defense perspective, the principal advantage of the "putative no-access" view is that the court (or jury) does not have to decide what would, in fact, have happened. This is particularly important because lawyers, judges, and jurors may be hesitant to reach and state the conclusion that *the system would in fact have failed and fleeing would in fact have failed and murder was in fact the only genuine option*, even if the evidence might warrant that conclusion from a purely empirical point of view. Such conclusions conflict not only with ordinary empirical beliefs about options,⁸¹ but also with a sort of faith, or trust, that society understandably inculcates in its citizens. It is (and ought to be) an article of faith in a civilized society that private violence is *not* the only way or the best way to remain safe. The objective no-access defense in part II has the unfortunate implication that courts and jurors would have to doubt this article of faith. "Imminence"—because it depends on relatively sharp and nonhuman temporal limitations—seems to provide a discrete and undisturbing exception to this rule. Lack of access to genuine alternatives, by contrast, depends on contingent human failings or manipulations, not on sharp temporal limitations. It is therefore a less discrete and more disturbing intrusion into our article of faith. It is particularly disturbing when courts are essentially asked to announce to the public that going to the police would have been the wrong choice for the defendant.

The putative no-access model sketched in this part is, for this reason, pragmatically and rhetorically more palatable. One may believe that there were, in fact, genuine alternatives, but nevertheless believe

81. See Sebok, *supra* note 24, at 746-51.

that the defendant reasonably perceived the assailant as presenting a menace of inevitable death or grievous bodily harm. More importantly, one may at least refrain from committing to the position that going to the authorities or fleeing *would in fact have failed*. The court and the jury need to decide whether a reasonable person under the circumstances would have believed she was confronted with menacing conduct from which there was no escape other than defensive aggression, and whether the victim knew or should have known he was engaging in such conduct.

Yet this part's model ("putative") of the no-access defense is also harder on the defendant in some ways, for the defense is grounded on the fact that the victim presented conduct that *he knew or should have known would lead the defendant to believe that death or grievous bodily harm was inevitable, due to the absence of alternative paths of relief*. Note that this condition effectively requires that the victim knew (or should have known) his conduct was menacing *and* knew (or should have known) that the defendant would reasonably view herself as essentially trapped. We can now see why "imminence" is such a salient form of the self-defense justification: time limitations are generally public; the assailant and the attacked are mutually aware of the limitation that time causes. And we can also see why kidnapping cases are the clearest form of nonimminence, no-access cases. The assailant is intentionally trapping the attacked, and *a fortiori* believes that he is engaging in conduct that would cause the defendant to believe herself to be trapped.

Not surprisingly, men who violently abuse their wives or partners often *intentionally* trap them or intentionally give them good reasons to believe that they have no genuine alternative paths of relief.⁸² They do this by threatening to find them and beat them if they try to escape (and by carrying through on these threats); they do this by circumventing legal authorities if those authorities are contacted, and then punishing the women more brutally for contacting the authorities, or simply by threatening to wait out any legal obstacles and carrying through on those threats. Martha Mahoney has aptly labelled this conduct "separation assault": the aggressor (usually, the man), through violence and threats of violence, intentionally cuts off the routes by which the woman may separate from him.⁸³ He traps her.

82. See EWING, *supra* note 24, at 7-21; GILLESPIE, *supra* note 1; Mahoney, *supra* note 12; Schneider, *supra* note 3.

83. Mahoney, *supra* note 12, at 6.

The putative no-access model clarifies why separation assault is relevant to the justifiability of self-defense, just as imminence scenarios are paradigmatic of self-defense, and kidnapping cases often present the most tenable examples of the possibility of justifiable self-defense absent imminence. In each case, we can infer *not only that the defendant reasonably believed she had no other choices*, but also that the assailant presented his threatening or menacing conduct in a situation that *he knew would cause the defendant reasonably to perceive a lack of alternatives to death or grievous bodily harm*. This matters not because the assailant therefore deserved it, or because he commands less sympathy or respect—although each of these contentions merits its own discussion. It matters because the assailant has knowingly crossed a line that adequately delimits for a reasonable person the scope of his or her vulnerability to others' defensive aggression, in light of his or her simultaneous desire to be permitted to use defensive aggression when confronted with a kill-or-be-killed choice.

Obviously, the accounts offered in parts IV.A and IV.B are rough and incomplete. They are not intended, at this stage, to constitute a concrete proposal for law reform. There are delicate questions concerning whether the objective account of part II may, all considered, be preferable to the putative account, from the original position; whether the accounts might somehow be combined; and whether, after thorough reflection of likely consequences, the current framework is, in fact, more justifiable. On the doctrinal front, considerations such as proportionality and differential rules of retreat would have to be addressed. Similarly, there remain difficult questions about how the defense would be formulated for courts and juries, how it would be announced in legislation to the public, and how to stave off serious problems of abusability in all of these fora. The account would also have to address the rights of third parties, the rights of an original assailant to fight back, the effect of mistake of fact doctrine on this defense, and the status of genuine attackers who lack *mens rea*. These questions would take me far beyond the scope of this article. It is important to acknowledge that Fletcher *has* provided answers to most of these questions—has provided the components of a complete view of self-defense. Yet parts IV.A and IV.B are motivated by the worry that Fletcher's theory may not provide sufficient space for the very matters that concern him: evenhandedness rather than divisiveness, public justification rather than private retribution, and fundamental fairness rather than

political expediency. In that spirit, the social contract model of parts IV.A and IV.B attempts to make a fresh start.

V. CONCLUSION

Contrary to the thrust of Fletcher's paper, men's domination of women *is* relevant to whether self-defense may figure as a justification. It is relevant to whether the law should offer a broader right of self-defense than it currently does. The contours of the right—if Fletcher's invocation of social contract theory is to be accepted—depend upon the scope of the right it would be rational for each of us to reserve when we cede our right to use force against others to the state. But how much of a right to self-defense it would be rational to reserve, and in what context, is sensitive to the kinds of situations one is likely to confront in real life.

Social contract theory requires that each of us must impartially consider the possibility of being physically and psychologically abused by others, and the extent to which another person (or, perhaps, society through a series of persons and institutions) is likely to use violent force or threats and menaces thereof, to render us trapped, unfree, and perpetually subordinate. In short, each of us must consider the possibility of being a person who is dominated in this way, and the nature and magnitude of our interest in remaining free from such domination. Arguably, a broader right of self-defense—for example, a right to kill where there is no genuine alternative to being killed—would somewhat reduce the pervasiveness of such domination both in particular cases and in general. If that is even arguably so, then the nature and extent of domination in our current society is clearly relevant to deciding what the proper contours of self-defense are. The reduction of domination—if it is a great enough problem—might be a reason in light of which each of us would reasonably forego a certain degree of security against purported self-defenders. I have not argued that domination is pervasive and structural as suggested; I have merely argued that we need to know whether it is in order to decide what form of self-defense justification is just.

Relations of domination are also relevant to determining whether a defendant was justified in using lethal force in a particular case. A history of domination may render it reasonable for a person in defendant's circumstances to perceive the assailant as engaging in conduct that requires immediate defensive aggression. But, I have argued, that is what it means for conduct to be imminently threatening, and self-defense as

a justification turns on the imminent threateningness of the conduct. A history of domination may therefore support the reasonableness of believing that there was conduct presenting an imminent threat, which in turn justifies defensive aggression.

Beyond these rather modest substantive claims, I have suggested that certain tensions within legal theory are sometimes more apparent than real. We need not always choose between liberal political theory and a jurisprudence of structural dominance. Not only are they compatible; social contract theory can serve as a medium for the expression of one form of dominance theory. Similarly, we need not choose between treating woman as responsible and making room for the defenses of battered women. Relations of domination can generate the basis for a claim of right, not merely a plea for excuses.⁸⁴

84. J.L. AUSTIN, *A Plea for Excuses*, in *PHILOSOPHICAL PAPERS* 123 (1961).