American University Journal of Gender, Social Policy & the Law

Volume 28 | Issue 1 Article 1

2019

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DEFENSELESS AGAINST RAPE: OUTDATED LAWS AND A PROPOSED LEGAL SOLUTION

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The authors wish to thank Amanda Pine for her research assistance and Bentley University for the research support.

I. INTRODUCTION: LEGAL LIMITS ON USE OF SELF-DEFENSE AGAINST RAPE LEAVE MANY WOMEN DEFENSELESS

Rape and the defense of rape using deadly force is that combination of legal elements which generates both passion and legal controversy. Today, few crimes engender more outrage and visceral disgust than rape. As the #MeToo movement[3] has so dramatically illustrated, current public reactions to rape stem, in part, from a modern awareness of the full impact of rape on victims.

The Centers for Disease Control (CDC) tells us that the injuries rape causes are often pervasive and span a wide spectrum of physical, psychological, and social injuries.[4] Physical injuries include pregnancy;[5] long-term physical injuries include chronic pain, gastrointestinal disorders, gynecological complications, migraines, sexually transmitted infections,[6] cervical cancer,[7] and genital injuries.[8] Rape also causes both immediate and chronic psychological injuries. Immediate psychological consequences include shock, denial, fear, confusion, anxiety, withdrawal, shame, guilt, nervousness, distrust of others, and symptoms of post-traumatic stress

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3. *See, e.g.*, Christina Pazzanese & Colleen Walsh, *The Women's Revolt: Why Now, and Where to*, THE HARVARD GAZETTE (Dec. 21, 2017), https://news.harvard.edu/gazette/story/2017/12/metoo-surge-could-change-society-in-pivotal-ways-harvard-analysts-say/.

4. *See generally Violence Prevention Sexual Violence: Consequences,* CENTERS FOR DISEASE CONTROL AND PREVENTION, http://medbox.iiab.me/modules/en-cdc/www.cdc.gov/violenceprevention/sexualviolence/consequences.html (last visited Sept. 29, 2019) (listing all consequences referenced in text and compiling primary sources to document each consequence); *see also Preventing Sexual Violence: What are the consequences?*, CENTERS FOR DISEASE CONTROL AND PREVENTION https://www.cdc.gov/violenceprevention/sexualviolence/fastfact.html?CDC_AA_refVal=https%3A%2F%2Fwww.cdc.gov%2Fviolenceprevention%2Fsexualviolence%2Fconsequences.html (last visited Sept. 29, 2019).

5. *See* Melissa Holmes et al., *Rape-related pregnancy: estimates and descriptive characteristics from a national sample of women*, AM J OBSTET GYNECOL (1996).

6. *See* Jewkes R. et al.,*World Report on Violence and Health*. WORLD HEALTH ORGANIZATION. (2002); *see also* Campbell J, et al., *Intimate partner violence and physical health consequences. Arch Intern Med.* (2002) *http://www.ncbi.nlm.nih.gov/pubmed/12020187*; *see also* Molly Paras et al. *Sexual abuse and lifetime diagnosis of somatic disorders: a systematic review and meta-analysis*, J AM MED ASSOC (2009); *see also* Judith McFarlane et al. *Intimate partner sexual assault against women: frequency, health consequences, and treatment outcomes*, OBSTET GYNECOL (2005).

7. Ann Coker, *Violence against women raises risk of cervical cancer*, J WOMENS HEALTH (2009).

8. Marilyn Sawyer Sommers, *Defining patterns of genital injury from sexual assault: A revie*, TRAUMA VIOLENCE ABUSE (2007).

disorder (PTSD).[9] Chronic psychological injuries include depression,[10] generalized anxiety,[11] attempted or completed suicide,[12] PTSD,[13] diminished interest/avoidance of sex,[14] low self-esteem, and self-blame.[15] A final type of injury common to rape victims is a set of negative social impacts. These injuries include strained relationships with family, friends, and intimate partners, less emotional support from friends and family, less frequent contact with friends and relatives, lower likelihood of marriage, and isolation or ostracism from family or community.[16]

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9. Nicole Yuan, et al. *The psychological consequences of sexual trauma*, NATIONAL ON-LINE RESOURCE CENTER ON VIOLENCE AGAINST WOMEN (2006), http://www.vawnet.org/applied-research-papers/print-document.php?doc_id=349; *see also* Goodman, et al. *Violence against women: physical and mental health effects. Part I: Research findings*, APPL. PREV. PSYCHOL. (1993); *see also* Campbell R, et al. *An ecological model of the impact of sexual assault on women's mental health*, TRAUMA VIOLENCE ABUSE (2009); *see also CDC Injury Center Violence Prevention Sexual Violence: Consequences,* http://medbox.iiab.me/modules/en-cdc/www.cdc.gov/violenceprevention/sexualviolence/consequences.html (stating that the relevant symptoms of PTSD include emotional detachment, sleep disturbances, flashbacks, and mental replay of assault).

10. *See* Laura Chen, et al. *Sexual abuse and lifetime diagnosis of psychiatric disorders: systematic review and meta-analysis*, MAYO CLIN PRO (2010); *see also* Kathleen Bastile & Sharon Smith, *Sexual violence victimization of women: Prevalence, characteristics, and the role of public health and prevention*, AM J LIFESTYLE MED (2011); *see also* Heather Littleton et al. *Impaired and incapacitated rape victims: assault characteristics and post-assault experiences* VIOLENCE VICT. (2009).

11. *See* Laura Chen, et al. *Sexual abuse and lifetime diagnosis of psychiatric disorders: systematic review and meta-analysis*, MAYO CLIN PRO (2010); *see also* Kathleen Bastile & Sharon Smith, *Sexual violence victimization of women: Prevalence, characteristics, and the role of public health and prevention*, AM J LIFESTYLE MED (2011); *see also* Heather Littleton et al. *Impaired and incapacitated rape victims: assault characteristics and post-assault experiences* VIOLENCE VICT. (2009).

12. *See* Jessica Tomasula et al. *The association between sexual assault and suicidal activity in a national sample*, SCHOOL PSYCHOLOGY QUARTERLY (2012).

13. *See* Heidi Zinzow, *The role of rape tactics in risk for posttraumatic stress disorder and major depression: results from a national sample of college women*, DEPRESSION AND ANXIETY, (2010).

14. *See* Terri Weaver, *Impact of rape on female sexuality: review of selected literature*, CLINICAL OBSTETRICS GYNECOLOGY (2009).

15. *See* Kathleen Basile & Sharon Smith, *Sexual violence victimization of women: Prevalence, characteristics, and the role of public health and prevention*, AMERICAN JOURNAL OF LIFESTYLE MEDICINE (2011); *see also* Heather Littleton, *Impaired and incapacitated rape victims: assault characteristics and post-assault experiences*, VIOLENCE AND VICTIMS (2009).

16. *See* Jacqueline Golding et al. *Sexual assault history and social support: six general population studies,* JOURNAL OF TRAUMATIC STRESS (2002); *see also* Jewkes R,

Many, if not all, U.S. citizens would consider these injuries, particularly multiple ones, to be serious. Nonetheless, U.S. law recognizes neither such injuries nor the imminent threat of them, as "serious." Reasons for this apparent disconnect between public opinion and U.S. law include women historically being the most common victims of rape.[17] As a result, lawmakers, primarily men,[18] now perceive the act of rape as wrong, but still have difficulty understanding the full impact of rape on a victim.[19] The development of U.S. rape law has led to a variety of inappropriate evidentiary laws regarding rape.[20] Some of these laws have been updated to reflect a more modern view of rape and its impact on victims, but a number of rules remain outdated.[21] Many of the updates have been piecemeal, leading to a number of states now having bizarre internal inconsistences within their rape laws.[22] This paper focuses on one of these types of well-

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Sen P, Garcia-Moreno C. Sexual violence. In: Krug E, Dahlberg LL, Mercy JA, et al., editors. *World Report on Violence and Health*. GENEVA (SWITZERLAND): WORLD HEALTH ORGANIZATION. 2002; 213–239; Paras ML, Murad MH, Chen LP, Goranson EN, Sattler AL, Colbenson KM, Elamin MB, Seime RJ, Prokop LJ, Zirakzadeh A. Sexual abuse and lifetime diagnosis of somatic disorders: a systematic review and meta-analysis. *J Am Med Assoc;* 2009:*302(5)*, 550-561. doi: 10.1001/jama.2009.1091., *see Id. Sexual Violence: Consequences*, CTR. FOR DISEASE CONTROL AND PREVENTION, (*supra* note 4.Apr. 10, 2018).

17. *See* Kathryn Casteel et al., *What We Know About Victims of Sexual Assault in America*, FIVETHIRTYEIGHT (Jan. 2, 2018, 10:30 AM), https://projects.fivethirty eight.com/sexual-assault-victims/.

18. *See Women in State Legislatures 2019*, RUTGERS EAGLETON INSTITUTE OF POLITICS: CENTER FOR AMERICAN WOMEN AND POLITICS, https:// www.cawp.rutgers.edu/women-state-legislature-2019 (last visited Mar. 13, 2019). (stating that in 2019, only 28.8% of all state legislators were female).

19. *See., e.g.*, Melissa Burkley, *Describing Sexual Assault in a Language Men Can Understand*, THE SOCIAL THINKER (Nov. 21, 2017), https://www.psychologytoday.com/ us/blog/the-social-thinker/201711/describing-sexual-assault-in-language-men-can-understand.

20. These include requirements of corroboration, admissibility of an accuser's sexual history, and cautionary jury instructions due to excessive concerns about false accusations. *See, e.g.*, J. RALPH LINDGREN ET AL., THE LAW OF SEX DISCRIMINATION 394-405 (Wadsworth Cengage Learning, 4th ed.).

21. *See, e.g.*, Leslie Berkseth et al. *Rape and Sexual Assault*, 18(3) Geo. J. Gender & L. 743 (2017); Sydney Janzen, Amending Rape Shield Laws: Outdated Statutes Fail to Protect Victims on Social Media, 48 J. Marshall L. Rev. 1087 (2015) https://repository.jmls.edu/lawreview/vol48/iss4/5/. *See also* Clare McGlynn, *Rape Trials and Sexual History Evidence: Reforming the Law on Third-Party Evidence*, 81 J. CRIM. L. 367, XX (2017).

22. *See, e.g.*, Leslie Berkseth et al. *Rape and Sexual Assault*, 18(3) Geo. J. Gender & L. 743 (2017); Sydney Janzen, *Amending Rape Shield Laws: Outdated Statutes Fail*

intended, but malfunctioning, updated laws: enhanced laws of aggravated rape resulting in a prohibition of a rape victim's use of deadly force when defending herself.[23] The exclusion of deadly force from acceptable forms of self-defense against rape may be due in part to rape still not legally being considered a serious enough crime warranting such an extreme level of self-defense. Legislators in many states hesitant to expand the legal use of firearms is a potential explanation. Whatever the reason, it is a timely issue that demands attention.

This paper briefly examines the history of rape law to provide context on current U.S. rape law. It then examines how the act of rape is today construed in varying states both from a common law and statutory perspective. Next, the paper explains the well-established common law and statutory legal rules of self-defense and engages in a careful legislative analysis illustrating how current state rape laws inappropriately exclude the use of deadly-force as a defense to rape. The paper concludes with a proposal for a statutory correction to better align self-defense laws with the current understanding of the severity of injury that rape causes.

II. WHAT IS RAPE?

Today there is a common understanding that rape is a crime involving a form of unwanted sexual conduct and that the non-consenting person subjected to sex is the victim of this crime.[24] However, the view that rape encompassed all forms of non-consensual sex and saw the female—rather than her father or husband—as the victim, [25] was not always the case. An understanding of the original concept of rape is vital to unraveling how we

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to Protect Victims on Social Media, 48 J. Marshall L. Rev. 1087 (2015) https://repository.jmls.edu/lawreview/vol48/iss4/5/. *See also* Clare McGlynn, *Rape Trials and Sexual History Evidence: Reforming the Law on Third-Party Evidence*, 81 J. CRIM. L. 367, XX (2017).

23. *See* Casteel, *supra* note 17 (showing that the overwhelming majority of rape victims are women; framing the pronoun use in this article).

24. Since 2013, The FBI has defined rape as, "Penetration, no matter how slight, of the vagina or anus with any body part or object, or oral penetration by a sex organ of another person, without the consent of the victim." U.S. Department of Justice Federal Bureau of Investigation Criminal Justice Information Services Division https://ucr.fbi.gov/crime-in-the-u.s/2013/crime-in-the-u.s.-2013/violent-crime/rape

25. The authors recognize that the preferred description of modern rape victims is "survivors," rather than victims, to encourage a view of empowerment, rather than one of damaged individuals. However, in the context of criminal law, the person experiencing a crime is still more appropriately referred to as a "victim" and therefore this term will be used in this paper. Gwendolyn Wu, *'Survivor' Versus 'Victim': Why Choosing Your Words Carefully is Important*, HELLOFLO (Mar. 16, 2016).

have arrived at current rape laws.

A: Rape's Long and Sordid History

What constituted the "crime" or action of rape has changed considerably over time.[26] In Roman Antiquity, rape or "*raptus*," meant "[t]o carry away [a female] by force," and thus was defined as a type of theft.[27] At that time, rape did not include a sexual component.[28] The misdeed was not considered a wrong against a woman, but against the male "owning" her, or exclusively entitled to her services.[29] These services included, but were not limited to, her sexual services; in the case of fathers, the service included the value of his daughter's sexual services in a marriage negotiation. It was the male's responsibility to seek out a remedy, either through suit or force.[30]

Early Christianity offered little protection to women from rape because women were meant to be subjugated and chaste until marriage.[31] "Under the teachings of the early church, the sexuality of wives and daughters becomes the possession and product of their husbands and fathers."[32] This view further perpetuated the perspective that rape was a property crime against the husband or father.[33]

Emperor Constantine (272 AD-337 AD) made *raptus* a crime against the public, not the individual *male* "victim." *Raptus* was elevated to a "greater" wrong because it impacted the public good. As a result, it became punishable by death.[34] Two hundred years later Emperor Justinian abolished many of the previous laws concerning *raptus*, but still strongly enforced the death

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26. *See* Zoë Eckman, *An Oppressive Silence: The Evolution of the Raped Woman in Medieval France and England* (2011), http://www.medievalists.net/files/11020201.pdf (describing the change in rape laws and the understanding of rape in France and England).

27. *Id.* at 2 ("*Raptus* was not designated a public crime, but a private one between the abductor and the man who had legal power over the woman or property violently seized").

28. *Id.*

29. *See id.*

30. SUSAN BROWNMILLER, AGAINST OUR WILL: MEN, WOMEN AND RAPE 8-22 (1975).

31. Eckman, *supra* note 26, at 3.

32. Kim M. Phillips, *Written on the Body: Reading Rape from the Twelfth to Fifteenth Centuries, in* MEDIEVAL WOMEN AND LAW 142 (Noël James Menuge ed., 2000).

33. *Id.*

34. *Id.*

penalty and added a new penalty: confiscation of property.[35] The added penalty for rape and the continued use of the death penalty, indicates that these early rulers had an increasingly expanded awareness of the severity of rape.[36] Although women at this time were still not considered the victims of rape,[37] Justinian Law began to recognize a subset of women as crime victims in their own right.[38]

Justinian focused for the first time exclusively on the sexual aspects of rape. In so doing, he defined rape as "[a] sexual crime against only unmarried women, widows, or nuns."[39] Women without a father or husband to bring rape charges on their behalf or without anyone "owning" their sexual services were permitted to bring forth rape allegations for compensation and to punish the rapist. Girls and married women remained non-victims, even if the exact same sexual act was forced upon them. This inconsistency highlighted the notion that husbands could not be rapists because they could not steal what was already theirs.[40] Although a husband's absolute control over the wife was the status of married women in Roman antiquity, this rule against marital rape persisted in the United States—only beginning to evolve in 1976, when Nebraska became the first state to acknowledge marital rape as a crime.[41]

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35. *Id.* at 3.

36. This was particularly true when the rape was committed against a child and this perspective was carried into the U.S. and into modern times. Consider the following 1886 case: Is our thinking better today than it was 134 years ago? "But, however it may have been elsewhere, in Massachusetts the offence of unlawfully and carnally knowing and abusing a female child under the age of ten years is, and for more than two hundred years has been, known and designated as rape. In October, 1669, the ordinary form of rape being already punishable by existing laws, the following statute was passed: 'Forasmuch as carnal copulation with a woman childe, under the age of ten years, is a more heinous sin than with one of more years, as being more inhumane and unnatural in itself, and more perilous to the life and well-being of the childe: it is therefore ordered by this Court, and the authority thereof, that whosoever he be shall commit or have carnal copulation with any such childe under ten years old, and be legally convicted thereof, he shall be put to death.'" Commonwealth v. Roosnell, 8 N.E. 747, 750 (Mass. 1886) (citations omitted).

37. *See* Brownmiller, *supra* note 30, at 20.

38. Phillips, *supra* note 32, at XX.

39. *Id.* The phrase "unmarried women" here clearly excluded girls who were still part of their fathers' households since: a) "woman" was not a term used at that time for such females; and b) the law regarding such girls remained intact.

40. *Id.*

41. Joann M. Ross, *Making Marital Rape Visible: A History of American Legal and Social Movements Criminalizing Rape in Marriage* 19 (Dec. 2015) (unpublished Ph.D. dissertation, University of Nebraska) (on file with DigitalCommons@University of

As time progressed, governing bodies added odd limits on rape's definition because of a growing suspicion of victims' allegations offsetting the wrongful nature of the act of rape. One outrageous example of faulty science shifting the blame from rapists to the victims in thirteenth century England includes:

> judges would dismiss a charge of rape brought by a woman if she conceived as a result. This was because, according to the medieval concept of woman's sexual and physiological nature, she needed to secrete a certain seed to enable her to conceive, and this did not happen unless she was sexually satisfied. Pregnancy meant that she had enjoyed the rape and had no right to press charges.[42]

The idea that women enjoyed the act of being raped led to the creation of demeaning and disrespectful evidentiary rules in rape trials.[43] For example, although some women could now bring charges of rape on their own, a man needed to corroborate their claims.[44] This requirement was based on the notion that a woman caught in the act of adultery or unmarried sex would rather fabricate a rape allegation than admit voluntariness. The corroboration requirement discouraged women from pressing charges because, very few rapes are committed in front of witnesses. This makes it almost impossible for a victim to produce someone to corroborate her allegations.[45]

The corroboration element illustrates society's ongoing notions of the household roles of men and women, further contributing to illogical rape laws. Early United States rape laws grew from the colonial-era notion that normal sexual relations between a man and a woman involved force because a husband was entitled to sex, with or without his wife's consent.[46] Men were viewed as naturally aggressive and women naturally subservient or submissive in the act of sex.[47] Thus, the act of sex could involve violence without it being rape; moreover, "consensual" non-marital sex was also not

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Nebraska-Lincoln*)*.

42. SHULAMITH SHAHAR, THE FOURTH ESTATE: A HISTORY OF WOMEN IN THE MIDDLE AGES 17 (Cambridge 1983).

43. *Id.*

44. *Id.* at 15.

45. Aya Gruber, *Corroboration is Not Required*, THE HILL (Oct. 3, 2018, 11:00 AM), https://thehill.com/opinion/judiciary/409635-corroboration-is-not-required and cases cited and quoted therein.

46. Sharon Block, *Rape in Early America: Perceptions and Realities*, H-NET (Apr. 2009), https://www.h-net.org/reviews/showrev.php?id=24349.

47. *See* Barbara Welter, *The Cult of True Womanhood: 1820-1860*, 18 AM. Q. 151, 158 (1966); Block, *supra* note 46, at 1.

considered rape because it likely involved force.[48] Rape was normal sexual behavior taken to the extreme; a woman's physical resistance to a sexual act did not necessarily mean a lack of willingness. Hence, some additional evidence beyond that of sexual activity and force, such as corroboration, was necessary to establish rape.[49]

Another cultural norm during the 1800s was the view that women should be chaste until married, virtuous, and avoiding any appearance of sexual impropriety.[50] This view led some U.S. courts to illogically conclude that if a woman accused a man of rape, the man's arousal was the result of the woman's actions; if the woman behaved properly, the rapist would not have been aroused.[51] The logic here, that if a woman had been virtuous there would have been nothing to arouse the man, led to another set of biased evidentiary rules allowing defense attorneys to introduce testimony of the victim's chastity, or lack thereof, to undermine credibility.[52]

B. The Slow Road to Women's Protection

The age at which a female could legally have sex in the 1700's was ten.[53] It was not until the temperance movement and the actions of the suffragettes that this "age of consent" was increased from ten to between fourteen and eighteen, depending on the state.[54] Even then, there were some who balked at this modest change. For example, a Kentucky legislator of the time stated, "I regard the twelve year old girl as being as capable of resisting the wiles of the seducer as any older woman."[55] That a legislator would compare the emotional maturity of a twelve-year-old girl to that of an eighteen-year-old young woman is astounding. It is even more astounding that a twelve-year-old *child* has the physical or emotional strength to assert her wish not to have sex in the face of a perpetrator. This is also a bizarre position to take because, on the one hand, women and children were still considered to be under the

48. Block, *supra* note 46, at 1.

49. *Id.*

50. *See* Welter, *supra* note 47, at 158.

51. Therefore, *her* behavior must have triggered his behavior and thus the "rape" must have been the woman's fault—i.e., the act was not rape because the woman's behavior initiated the sex. *See* Block, *supra* note 46, at 1

52. Lindgren, *supra* note 20, at 394.

53. Kyla Bishop, *A Reflection on the History of Sexual Assault Laws in the United States*, THE ARK. J. SOC. CHANGE AND PUB. SERV. (Apr. 15, 2018), https://ualr.edu/socialchange/2018/04/15/reflection-history-sexual-assault-laws-united-states/.

54. *Id.*

55. *Id.*

control of the man. Indeed, young unmarried women were unable to "consent" to sex without permission of their father, the ultimate decision maker in a young unmarried woman's marital future.[56] Married women had no right to refuse consent to their husbands.[57] Despite this, legislators gave young women and girls the responsibility of avoiding seducers. Thus, even as late as the early 1900s, U.S. law put the control of females' choices about when to have socially acceptable sex in the hands of their fathers and husbands, but inserted the responsibility of avoiding rape on the female.

Laws designed to protect, rather than blame women, slowly progressed and are still lacking blanket protections today. For example, in an offshoot of the civil rights movement of the 1960s and 1970s, states began to enact "rape-shield laws." [58] These rules were designed to "protect complainants from having their past sexual behavior and/or predispositions exposed in the courtroom unless defense counsel could point toward a compelling theory of admissibility." [59] With a purpose of encouraging more victims to press charges, rape shield laws removed the ability of a defendant to introduce a women's chastity or virtuosity as relevant evidence during a rape trial. Although it took a couple of decades, in 1994 the U.S. Supreme Court created Rule 412, now listing the victim's prior sexual conduct as inadmissible evidence.[60]

Yet, despite the name and the Supreme Court's support, rape shield law statutory exceptions, such as allowing evidence of the victim's sexual history when the defendant "point[s] toward a compelling theory of admissibility" serve as workarounds to inadmissibility.[61] Additional exceptions include using evidence of the victim's past consensual sexual activity with the defendant to prove consent, or that the victim had a vengeful motive to bring a false claim.[62] Moreover, federal law also contains exceptions, such as use of prior sexual acts to prove that another attacker was responsible for the alleged rape, or using evidence of the victim's prior sexual activity if exclusion of such evidence denies a defendant the Sixth Amendment right to confront witnesses.[63] Thus, the shield meant to protect women, now

56. Brownmiller, *supra* note 30, at 19-20.

57. Phillips, *supra* note 32, at XX.

58. COLIN MILLER, EVIDENCE: RAPE SHIELD RULE (CALI eLangdell Press 2012).

59. *Id.*

60. Fed. R. Evid. 412.

61. Miller, *supra* note 58.

62. Rudolph Alexander, Jr. and Jacquelyn Monroe, *Exceptions to Rape Shield Laws*, FREE INQUIRY IN CREATIVE SOCIOLOGY (November 2004).

63. Fed. R. Evid. 412(b).

provides for several loopholes. With a good defense lawyer, jurors could use the victim's prior sexual conduct to conclude that the woman was either lying or unreliable. It was not so long ago that a woman was expected to be chaste and virtuous.[64]

C. Statutory Implications for Seriousness of Rape Injuries

In the face of rape law's history, it should be no surprise that many of today's rape laws contain vestiges of obsolete attitudes about women and sex. For example, at common law, rape required force.[65] Early statutes retained this requirement, and some still do, though most add other evidence of a lack of consent as an alternative.[66] This modification to the "proof of force" standard occurred because, over time, society and legislators realized that the old "force plus corroboration" rule translated to proof of non-consensual sex, the key element distinguishing rape from "mere" forcible sex.[67]

As a result of enlightenment that physical force was but one way to prove lack of consent, states developed the idea that forcible rape is a worse crime than rape without consent, but no physical force.[68] Today, state statutes typically break rape down either by degree or various names, depending on the severity of any additional forms of assault.[69] Unfortunately, these

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(1) *Criminal Cases*. The court may admit the following evidence in a criminal case:

(A) evidence of specific instances of a victim's sexual behavior, if offered to prove that someone other than the defendant was the source of semen, injury, or other physical evidence;

(B) evidence of specific instances of a victim's sexual behavior with respect to the person accused of the sexual misconduct, if offered by the defendant to prove consent or if offered by the prosecutor; and

(C) evidence whose exclusion would violate the defendant's constitutional rights."

64. *See* Welter, supra note 47, at 158.

65. *See* Commonwealth v. Roosnell, 8 N.E. 747, 749 (Mass. 1886).

66. MASS. GEN. LAWS ANN. Ch. 265, § 22 (West 2019).

67. RAPE AND SEXUAL ASSAULT IN THE LEGAL SYSTEM Presented to the National Research Council of the National Academies Panel on Measuring Rape and Sexual Assault in the Bureau of Justice Statistics Household Surveys Committee on National Statistics June 5, 2012 By Carol E. Tracy, Terry L. Fromson, Women's Law Project Jennifer Gentile Long, Charlene Whitman, Aequitas1 https://www.womenslaw project.org/wp-content/uploads/2016/04/Rape-and-Sexual-Assault-in-the-Legal-System-FINAL.pdf

68. *Compare* LSA-R.S. 14:42.1 (2015) (In Louisiana, use of force may be prosecuted as second-degree rape), *with* LSA-R.S. 14:43 (2015) (lack of consent may be prosecuted as third-degree rape).

69. *Id.*

evolutions in perspectives on the role of force in rape have led to definitions of the various types of rape that, when read together, imply that rape itself is not a "serious bodily injury."[70]

1. Massachusetts as Exemplar

In Massachusetts, the crime of rape is broken down by degrees of force.[71] For "basic" rape, the Massachusetts criminal code requires that the perpetrator "[h]as sexual intercourse. . . with a person and compels such person to submit by force and against his will, or compels such person to submit by threat of bodily injury[.]" [72]

The statutory definition of second degree of rape, sometimes referred to as "aggravated rape," begins with the same requirements as those of "basic" rape—with additional injury requirements to meet. For "aggravated rape," the perpetrator "[h]as sexual intercourse . . . with a person and compels such person to submit by force and against his will, or compels such person to submit by threat of bodily injury *and* . . . such sexual intercourse . . . *results in or is committed with* acts resulting in serious bodily injury."[73]

Neither section requires corroboration and both acknowledge that actual force is not necessary if evidence of a "threat of bodily injury" exists.[74] These elements reflect a much more progressive view of rape than the early common law rules requiring corroboration and evidence of physical harm or

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70. Carol Tracey, et al. *Rape and Sexual Assault in the Legal System*, https://www.womenslawproject.org/wp-content/uploads/2016/04/Rape-and-Sexual-Assault-in-the-Legal-System-FINAL.pdf (June 5, 2012).

71. MASS. GEN. LAWS ANN. ch. 265, § 22 (West 2019).

72. *Id.* § 22 (b) ("Whoever has sexual intercourse or unnatural sexual intercourse with a person and compels such person to submit by force and against his will, or compels such person to submit by threat of bodily injury, shall be punished by imprisonment in the state prison for not more than twenty years; and whoever commits a second or subsequent such offense shall be punished by imprisonment in the state prison for life or for any term of years").

73. *Id.* § 22 (a) (emphasis added) ("Whoever has sexual intercourse or unnatural sexual intercourse with a person, and compels such person to submit by force and against his will, or compels such person to submit by threat of bodily injury and if either such sexual intercourse or unnatural sexual intercourse results in or is committed with acts resulting in serious bodily injury, or is committed by a joint enterprise, or is committed during the commission or attempted commission of an offense defined in section fifteen A, fifteen B, seventeen, nineteen or twenty-six of this chapter, section fourteen, fifteen, sixteen, seventeen or eighteen of chapter two hundred and sixty-six or section ten of chapter two hundred and sixty-nine shall be punished by imprisonment in the state prison for life or for any term of years.") Note the substantially more severe punishment for this type of rape.

74. *Compare* § 22 (a), *with* § 22 (b).

"force."[75] The statute also properly acknowledges that additional injuries to the victim increase the penalty for the perpetrator. However, by labeling these additional injuries as ones of "serious bodily injury," the statute implies that the act of rape alone is, by comparison, *not* a "serious bodily injury."[76] Had the definition of aggravated rape included two additional words, this situation would have been avoided:

> [A person committing the crime of aggravated rape] has sexual intercourse . . . with a person and compels such person to submit by force and against his will, or compels such person to submit by threat of bodily injury . . . .and such sexual intercourse results in or is committed with acts resulting in *a second* serious bodily injury.[77]

This addition would have changed the meaning of both rape definitions by: a) including the underlying rape as itself a "serious bodily injury;" and b) clarifying that it is the infliction of *additional* serious bodily injuries that increases the severity of the crime and its punishment. The statute's wording could constitute an oversight if the legislature drafted both statutory sections at different times, with potentially different agendas; these amendments however, were part of an overhaul of the statute in 1980, linking rape with eleven different crimes.[78] This statutory overhaul resulted in a definition that, while increasing the penalty for rape if committed with other crimes, also seems to purposefully exclude rape as a "serious bodily injury."[79]

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75. Gruber, *supra* note 45; Block, *supra* note 46, at 1-2.

76. Gruber, *supra* note 45; Block, *supra* note 46, at 1-2.

77. MASS. GEN. LAWS ANN. ch. 265, § 22 (West 2019) (emphasis added) ("Whoever has sexual intercourse or unnatural sexual intercourse with a person, and compels such person to submit by force and against his will, or compels such person to submit by threat of bodily injury and if either such sexual intercourse or unnatural sexual intercourse results in or is committed with acts resulting in serious bodily injury, or is committed by a joint enterprise, or is committed during the commission or attempted commission of an offense defined in section fifteen A, fifteen B, seventeen, nineteen or twenty-six of this chapter, section fourteen, fifteen, sixteen, seventeen or eighteen of chapter two hundred and sixty-six or section ten of chapter two hundred and sixty-nine shall be punished by imprisonment in the state prison for life or for any term of years"). Note the substantially more severe punishment for this type of rape.

78. *See id.*

79. The statutory intent here is a bit unclear. According to the editor's note for the statute:

"The 1980 amendment rewrote this section, dividing it into subdivision (a), dealing with rape involving threat or infliction of bodily injury, and subsection (b), relating to rape without such threat or imposition of bodily injury, and adding a paragraph to both subsections with respect to increased penalties for repeat offenders." MASS. GEN. LAWS ANN. ch. 265, § 22 (West 2019). While it is true that the change in statute increased the penalties for repeat offenders, and also created a requirement that the statistics of rape

Court decisions provide some confusing precedents for this subsequent statutory distinction. For example, in *Commonwealth v. McCan*, the court defined rape as follows: "Rape is carnal knowledge of any woman above the age of consent against her will; its essence is the felonious and *violent* penetration of the person of the female by the defendant."[80]

This was reiterated virtually verbatim almost forty-six years later in 1977 in *Commonwealth v. Gallant*, defining rape as: "[c]arnal knowledge of any

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convictions and charges be tracked and filed with the clerk of the House of Representatives, the quoted material incorrectly characterizes the new statute . . . The editor summarized the change as being one between intending to commit bodily injury, during the course of rape, a § 22(b) violation and one where there was actual bodily injury committed, a §22 (a) violation. *Id.* But this is not the case! A violation for aggravated rape does not require simple bodily injury, it requires "serious bodily injury." *Id.* Does that mean that if a rape is committed with bodily injury but not serious bodily injury a person can only be convicted of rape and not aggravated rape? The answer appears to be yes. In 2003, the Massachusetts Supreme Court re-iterates the current standard, arguing: "The essence of the crime of rape, whether aggravated or un-aggravated, is sexual intercourse with another compelled by force and against the victim's will or compelled by threat of bodily injury." Commonwealth v. McCourt, 781 N.E.2d 808, 815 (Mass. 2003) (quoting Commonwealth v. Sherry, 437 N.E.2d 224 (1982)). Does the court recognize this dichotomy, between the pre-1980 statute and the post 1980 statute? One would hope so, but the current cases seem to have the court either focusing on the pure statutory elements of the rape itself as stated in the statute, avoiding entirely the conflict in the two sections or they tend to justify the legislature's actions rather than chastising them for the error. For example, the often-cited case of Commonwealth vs. Lopez, in discussing section 22(b) rape, attempts to define the statute thusly: "As to the first element, there has been very little disagreement. Sexual intercourse is defined as penetration of the victim, regardless of degree. The second element has proven to be more complicated. We have construed the element, "by force and against his will," as truly encompassing two separate elements each of which must independently be satisfied. *See generally* Commonwealth v. Caracciola, 569 N.E.2d 774, 777-78 (1991) (stating elements of "force" and "against his will" not superfluous, but instead must be read together). Therefore, the Commonwealth must demonstrate beyond a reasonable doubt that the defendant committed sexual intercourse (1) by means of physical force." Commonwealth v. Lopez, 745 N.E.2d 961, 965 (Mass. 2001) (citations omitted). During the Lopez trial, there was expert testimony from a doctor who cited that the injuries sustained by the victim were excessive and more than would normally be expected: "The physician opined that there had been 'excessive force and trauma to the [vaginal] area 'based on his observation that there was "a lot of swelling" in her external vaginal area and her hymen had been torn and was 'still oozing' The doctor noted that in his experience, it was "fairly rare" to see that much swelling and trauma." *Id.* at 963. Despite this testimony, the Court in Lopez, seemed to want to ignore that a gap exists between the two sections saying, basically that all rape is accompanied by force, instead of noting the actual distinction of the two sections which is that 22(b) rape merely requires the threat of force and that 22(a) requires serious bodily injury. *Id.* at 965-66.

80. Commonwealth v. McCan, 178 N.E. 633, 634 (Mass. 1931) (emphasis added).

woman against her will . . . its essence is the felonious and *violent* penetration of the person of the female by the defendant."[81] The court's language clearly refers to rape as "violent penetration" against a person's will.[82] Moreover, even as late as 2003, courts stated that: "rape is 'a crime involving not simply sex but *violence* and domination calculated to humiliate, injure and degrade.'"[83] Why did these courts feel the need to specify that rape had to be a *violent* penetration against a person's will? Why is not any penetration of another against their will an act of rape? One might hope that the use of the adjective "violent" indicates an awareness by the courts that such a penetration is, by its very nature, violent, and therefore presumably a serious injury. However, both Black's Law Dictionary and The Oxford American Dictionary define "violent" as: "1. Of or relating to or characterized by strong physical *force*. 2. Resulting from extreme or intense *force*."[84] "Using or involving physical *force* intended to hurt, damage or kill someone or something." [85]

Therefore, the legislature carried over the word "violent," from an era when the victim needed to provide proof of force, and not just a threat of force or lack of consent, for rape. Indeed, in *Commonwealth v. MacDougall*, the court explicitly equated the terms "force" and "violence" as synonyms: "the jury were required to find that the intercourse was accomplished either by *actual physical force or by threat of violence* which put the victim in fear of hear [sic] life or safety." [86]

Importantly, if "violent" in the statute merely indicated force, early court decisions' inclusion of the word did not transform rape into being a form of "serious bodily injury." Instead, when the modern 1980 statute replaced the courts' earlier term of "violence" with "force," it merely incorporates an updated legal synonym. This drafting creates a situation where a rape committed through the use of force is not considered serious bodily injury, unless combined with other *more* serious injuries. This analysis is confirmed by *Commonwealth v. McCourt*, a 2003 Massachusetts Supreme Judicial Court decision in which the court stated:

> The legislature's clear purpose in creating the offense of aggravated rape

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81. Commonwealth v. Gallant, 369 N.E.2d. 707, 711 (Mass. 1977) (emphasis added).

82. *Id.*

83. Commonwealth v. McCourt, 781 N.E.2d 808, 815 (Mass. 2003) (quoting Commonwealth v. McCourt, 767 N.E.2d 1067) (emphasis added).

84. *Violent*, BLACK'S LAW DICTIONARY (8th ed. 2004) (emphasis added).

85. *Violence*, THE OXFORD AMERICAN COLLEGE DICTIONARY (2002) (emphasis added).

86. Commonwealth v. MacDougall, 319 N.E.2d 739, 740 (Mass. App. Ct. 1974)).

> was to protect victims of violent sex offenders, by punishing more severely perpetrators (i) who inflict *serious bodily injury on a victim, in addition to the bodily harm from the act of rape itself*. . . . The critical point is not whether the aggravating acts served to compel a victim's submission, but *whether the rape victim sustained serious bodily injuries, or was subjected to other felonious conduct, during the same criminal episode*. The legislature . . . intended that *rapists who inflict serious bodily injury or commit other crimes against their victims*, will be dealt with severely.[87]

This language clearly distinguishes between the "bodily harm of rape" and "serious bodily injury." There are two possible explanations: first, in an attempt to quickly enact a more modern statute, taking into account more aggravating factors such as rape by means of assault and battery with a deadly weapon, it inadvertently stuck in the word "serious" ahead of the words "bodily injury" for emphasis. If it is not a drafting error, then the second explanation remains: neither the courts nor the legislature considered rape itself to be a serious injury.

Why does this matter? The 1980 Massachusetts law makes clear that the level of force used in an aggravated rape is of a level putting a victim, either actually or potentially, in fear of death.[88] This fear of death allows a rape victim to use deadly force against the perpetrator. By contrast, a "basic" rape— the threat of mere "bodily injury does not trigger a right to use deadly force in self-defense.[89] This situation is problematic because it means that rape victims can only use deadly force in self-defense if their rapist does more than "just" rape them. Regardless of the reason for the wording of the statute, ambiguity exists as to the limits of deadly force as self-defense against rape. Massachusetts is not alone in this regard.

2. Other States and the Uniform Code of Military Justice also Characterize Rape as an Injury Something less than "Serious"

Maryland, Kentucky and New Jersey statutes and the Uniform Code of Military Justice also employ the same type of dichotomy and avoidance of the recognition of rape's serious physical and psychological harm.

Maryland divides rape into first and second degree offenses.[90] Rape in the first degree carries a more serious sentence, requiring that the perpetrator:

> (1)(i) engage in vaginal intercourse with another by force, or the threat of force, without the consent of the other; . . . *and*

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87. *McCourt*, 781 N.E.2d at 815-6 (emphasis added).

88. MASS. GEN. LAWS ANN. ch. 265, § 22 (West 2019).

89. *Id.*

90. *See* MD. CODE ANN., CRIM. LAW § 3-303 (LexisNexis 2018); *Id.* § 3-304.

> (2)(i) employ or display a dangerous weapon, or a physical object that the victim reasonably believes is a dangerous weapon;
> (ii) suffocate, strangle, disfigure, or inflict *serious physical injury* on the victim or another in the course of committing the crime;
> (iii) threaten, or place the victim in fear, that the victim, or an individual known to the victim, imminently will be subject to death, suffocation, strangulation, disfigurement, *serious physical injury*, or kidnapping (emphasis added);[91]

Rape in the first degree requires the existence of a victim in fear that she will be killed or face *serious physical injury.*[92] In contrast, rape in the second degree requires "only" forceful or a threat of a forceful vaginal intercourse or sex act.[93] Again, by implication, rape in the second degree is not a "serious physical injury."

Kentucky also minimizes the type of force for rape offenses. "*Rape in the first degree"* presents three factual situations in which an accused is deemed guilty. Subsection (1)(a) prohibits sexual intercourse with another person by forcible compulsion, defined in KRS 510.010(2). The essential element under subsection (1)(a) is the use of force. Force is not restricted to physical force but includes a threat that "overcomes earnest resistance and places the victim in *fear of immediate death*[.]"[94] Forcible compulsion is defined as physical force or threat of physical force, express or implied, placing a person in *fear of immediate death.* [95] Because first degree rape involves the victim fearing immediate death, i.e., serious bodily injury, then second degree rape, by implication, "only" puts the victim in fear of some lesser injury.

In New Jersey, the statutory term for rape is sexual assault. The New Jersey statute is divided into three degrees of culpability, each of which determine the penalty. As in Massachusetts, the New Jersey statute lists aggravated sexual assault as a fist degree felony, carrying a potential penalty of life imprisonment: [96]

> An actor is guilty of aggravated sexual assault if he commits an act of sexual penetration with another person . . . [if] [t]he actor uses physical force or coercion *and severe personal injury is sustained by the*

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91. *Id.* § 3-303.

92. *Id.* (emphasis added).

93. *Id.* § 3-304 (a) ("A person may not engage in vaginal intercourse or a sexual act with another: (1) by force, or the threat of force, without the consent of the other").

94. KY. REV. STAT. ANN. § 510.040 (West 2018) (emphasis added).

95. *Id.* § 510.010.

96. N.J. STAT. ANN. § 2C:43-7 (West 2004).

victim; . . .Aggravated sexual assault is a crime of the first degree.[97]

By contrast, here is how the act of sexual assault is dealt with if there are no aggravating factors: "[a]n actor is guilty of sexual assault if he commits an act of sexual penetration with another person [if] … [t]he actor uses physical force or coercion, *but the victim does not sustain severe personal injury*[.]"[98]

Note that, as in Massachusetts, by the exclusion of two words, "*a second,*" before the phrase "severe personal injury," the New Jersey statute defines by exclusion the injury sustained in a "basic" rape as something less than "severe."

Even our military, operating under the Uniform Code of Military Justice (UCMJ), utilizes a three-tiered system for rape charges. The UCMJ outlines the powers of the varying tribunals and courts and promulgates rules of conduct applicable to all areas of military life.[99]

Upon first blush, the UCMJ seems to allow for the use of deadly force in the defense of rape. The UCMJ defines rape as: (1) an unlawful sexual act upon another by force; or (2) causing or likely to cause death or grievous bodily injury.[100] This statute in isolation, would allow a rape victim to defend herself with deadly force because of the obvious fear of deadly force used against them during the act.[101] Therefore, were that the extent of UCMJ rape's coverage, this would be the end of the analysis. Unfortunately, as with the other outdated statutes, the act of rape is categorized in the UCMJ as a lesser offense of sexual assault; the perpetrator must place the victim in fear,

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97. *Id.* § 2C:14-2(a).

98. *Id.* § 2C:14-2(c) (emphasis added).

99. UNIFORM CODE OF MILITARY JUSTICE, MANUAL FOR COURTS-MARTIAL UNITED STATES I-1 (2019). "Military law consists of the statutes governing the military establishment and regulations issued thereunder, the constitutional powers of the President and regulations issued thereunder, and the inherent authority of military commanders. Military law includes jurisdiction exercised by courts-martial and the jurisdiction exercised by commanders with respect to non-judicial punishment. The purpose of military law is to promote justice, to assist in maintaining good order and discipline in the armed forces, to promote efficiency and effectiveness in the military establishment, and thereby to strengthen the national security of the United States." *Id.*

100. *Id.* at IV-85 (rape being defined as: "(a) *By unlawful force* (i) That the accused committed a sexual act upon another person; and (ii) That the accused did so with unlawful force. (b) *By force causing or likely to cause death or grievous bodily harm*").

101. *Id.* at II-129. R.C.M.916(e)(1)(e) ("It is a defense to a homicide, assault involving deadly force, or battery involving deadly force that the accused: (A) Apprehended, on reasonable grounds, that death or grievous bodily harm was about to be inflicted wrongfully on the accused; and (B) Believed that the force the accused used was necessary for protection against death or grievous bodily harm").

and then by virtue of that fear, commit a sexual act on them.[102] Therefore, the UCMJ's definition of "rape" is equivalent to "aggravated rape" or "first degree rape" under state laws; the UCMJ's definition of "sexual assault" is equivalent to "simple rape" or "second degree rape" under state laws. The result of this confusing statutory terminology is that an individual, carrying out acts commonly defined as rape, escapes a harsher penalty by being charged with "sexual assault" instead. This statutory dichotomy perpetuates the notion that one can be "raped" without grievous bodily injury, and removes a victim's right to use deadly force in defense.

So, where does all of this now leave us in terms of defense against rape? To answer this question, it is vital to first understand the well-established rules of the degree of force legally permitted as self-defense in varying circumstances.

III. INTERFACE OF SELF-DEFENSE LAW AND RAPE

The self-defense doctrine follows two distinct standards: non-deadly force and deadly force.[103] The attacker's level of force determines the difference between the two. Both situations in which an attacker using force that is either: (1) likely to cause bodily harm or (2) likely to result in the victim suffering *serious* bodily harm have different standards.

A. Common Law Self-Defense

The Restatement of Torts Second (Restatement) provides two rules on the use of self-defense at common law. The first rule describes circumstances in which no threat of death or serious bodily harm exists. The second rule describes circumstances in which the threat of death or serious bodily harm does exist. Under the Restatement, if someone attacks another without deadly force, then the victim can use reasonable force[104] against the

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102. *Id.* at IV-84 (""*By threatening or placing that other person in fear.* (i) That the accused committed a sexual act upon another person; and (ii) That the accused did so by threatening or placing that other person in fear").

103. As summarized in the official Massachusetts jury instructions on self-defense, "Deadly force and non-deadly force involve two different standards. The right to use non-deadly force arises at a 'somewhat lower level of danger' than the right to use deadly force. *Commonwealth v. Pike*, 428 Mass. at 395, 701 N.E.2d at 955. For that reason, the standards for self-defense using deadly force and non-deadly force 'are mutually exclusive.' *Commonwealth v. Walker*, 443 Mass. 213, 820 N.E.2d 195 (2005)." Instructions on: SELF-DEFENSE; DEFENSE OF ANOTHER; DEFENSE OF PROPERTY, Instruction 9.260 (2009 Edition) https://www.mass.gov/files/documents/2016/08/xm/9260-defenses-self-defense.pdf

104. The common law defense also states that it is not necessary that the victim flee or retreat from the aggressor. Her remaining to defend herself even when a situation

aggressor.[105] If the attacker uses deadly force, or force causing serious bodily harm, or "ravishment," the victim may use deadly force to defend herself.[106] There is no common law requirement of flight. One might conclude that the inclusion of "ravishment" confers to a rape victim the right of using deadly force against an attacker.

The Restatement certainly allows for the use of deadly force when the victim is in reasonable fear of death or serious bodily harm. This rule is analogous to the various aggravated rape statutes previously examined,[107] requiring that rape include the infliction of serious bodily injury. Therefore, under the Restatement, deadly force would certainly be allowed in a situation of today's statutory aggravated rape. However, the Restatement § 65's inclusion of the phrase "*ravishment,*" in contrast to modern statutes, seems to allow the use of deadly force in self-defense for all rapes.[108] Ravishment is used as an alternative to serious bodily injury, implying that, while "ravishment" is not itself "serious bodily harm," it separately qualifies for the use of deadly force in self-defense.

The Oxford American Dictionary defines ravishment as "1. a*rchaic* Seize

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presents itself for escape does not diminish her self-defense privilege.

105. Restatement (Second) of Torts § 63 (Am. Law Inst. 1965).

"Self-Defense by Force Not Threatening Death or Serious Bodily Harm

(1)(1) an actor is privileged to use reasonable force, not intended or likely to cause death or serious bodily harm, to defend herself against unprivileged harmful or offensive contact or other bodily harm which she reasonably believes that another is about to inflict intentionally upon her.

(2)Self-Defense is privileged under the conditions stated in Subsection (1), although the actor correctly or reasonably believes that she can avoid the necessity of so defending herself.

(a)By retreating or otherwise giving up a right or privilege, or

(b) By complying with a command with which the actor is under no duty to comply or which the other is not privileged to enforce by the means threatened." *Id.*

106. *Id.* § 65.

"Self-Defense by Force Threatening Death or Serious Bodily Harm

(1)Subject to the statement in Subsection (3), an actor is privileged to defend herself against another by force intended or likely to cause death or serious bodily harm, when she reasonably believes that

(a)The other is about to inflict upon her an intentional contact or other bodily harm, and that

(b) She is thereby put *in peril of death or serious bodily harm or ravishment*, which can safely be prevented only by the immediate use of such force." *Id.* (emphasis added).

107. See *supra*, Section II C.1. and Section II.C.2., and statutes cited therein at notes 71-74, 77-79, 88-100.

108. *Id.* (emphasis added).

and carry off by force to have sexual intercourse against her will." [109] Thus, the Restatement indicates that it should be permissible to use deadly force to defend against rape. However, the *legal* definition of ravishment makes this less clear. Black's Law dictionary defines ravishment as a synonym for rape,[110] but defines rape as: "[t]he unlawful and carnal knowledge of a woman by a man forcibly and against her will."[111] Further, it states that rape is committed by force *or* by threat of imminent death.[112] Black's use of the disjunctive "or" indicates that ravishment/rape does not always create a threat of imminent death. Once again, without a threat of imminent death, the victim would be unable use deadly force to defend against a rape. It is unclear whether the Restatement's separate inclusion of "ravishment" in its self-defense discussion indicates that deadly force is a legally permissible self-defense against any ravishment, with or without the threat of imminent death. One can persuasively argue for this interpretation. After all, why else would the Restatement separate "ravishment" from the general condition of fear of seriously bodily injury or death? Otherwise, its use of the term ravishment would be redundant. This position, however, is far from clear in the Restatement, leaving little guidance to legislators attempting to codify common law rape laws.[113]

B. Statutory Self-Defense

Self-defense is commonly articulated in jury instructions to help jurors determine whether someone asserting self-defense meets the legal definition. Many states have statutorily adopted the Model Jury Instructions into their legal systems.[114] The Model Jury Instructions on self-defense, as adopted in the Commonwealth of Massachusetts, present self-defense in the context of deadly force as: "[d]eadly force is force that is intended or likely to cause death or great bodily harm."[115] In order to defend oneself with a dangerous weapon likely causing serious injury or death, the person using the weapon

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109. *Ravish*, OXFORD LEARNER'S DICTIONARIES, https://www.oxfordlearners dictionaries.com/us/definition/english/ravish (last visited Mar. 13, 2019).

110. *Ravishment*, BLACK'S LAW DICTIONARY, (5th ed. 1979).

111. *Rape*, BLACK'S LAW DICTIONARY, (5th ed. 1979).

112. *Id.*

113. Even if we twist the Restatement view of ravishment to one which aligns with the Oxford definition, we are still faced with the reality that the Restatement is not the law in every state nor is it followed in its entirety.

114. *Jury Management State Links*, NAT'L CTR. FOR ST. CTS., https://www.ncsc.org /topics/jury/jury-management/state-links.aspx?cat=Model%20Jury%20Instructions (last visited Mar.13, 2019).

115. Commonwealth v. Cataldo, 423 Mass. 318, 321 (1996).

must have a reasonable apprehension of great bodily harm or death, without a reasonable belief that other means can prevent such harm. Put another way, the proper exercise of self-defense means that a person in the defendant's circumstances would reasonably believe that she was about to be attacked and that she was in immediate danger of being killed or seriously injured, and that there was no other way to avoid the attack."[116]

The model rule defines non-deadly force as:

> Non-deadly Force: Non-deadly force is force that is not intended or likely to cause death or great bodily harm. If the defendant had reasonable grounds to believe that he was in imminent danger of harm from which he could save himself only by using non-deadly force, and had availed himself of all proper means to avoid physical combat before resorting to non-deadly force, then the defendant had the right to use whatever non-deadly means were reasonably necessary to avert the threatened harm, but he could use no more force than was reasonable and proper under the circumstances.[117]

Similar to common law, under the model rule, to defend oneself with deadly force, one must face a threat of death or serious bodily harm— the threat of simple bodily harm is not enough. Hence, while there are those who support the victim's ability to use deadly force if they are raped, courts and the law do not align with that assertion. Unless rape ("ravishment") is statutorily defined as "serious bodily injury" or statutorily amended to allow for the use of deadly force in self-defense, victims facing a "basic" rape are currently deprived of the right to use deadly force against an attacker.

Since 1955, when cases first arose, courts interpreting statutory self-defense in Massachusetts have been consistent:

> In order to create a right to defend oneself with a dangerous weapon likely to cause *serious injury* or death, it must appear that the person using the weapon had reasonable apprehension of *great bodily harm* and a reasonable belief that no other means would suffice to prevent such harm.[118]

As to the use of deadly force in self-defense against "basic" rape, Massachusetts courts have been silent since the 1980 passage of the current state rape laws. In one of the few cases discussing the issue, the court explicitly chose not to answer the question.[119] This case involved an appeal of a murder conviction where the defendant allegedly shot his employer in

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116. *See id.*

117. MODEL JURY INSTRUCTIONS COMMONWEALTH OF MASSACHUSETTS 58 (2009).

118. Commonwealth v. Houston, 127 N.E.2d 294, 296 (Mass. 1955) (emphasis added).

119. *See generally* Commonwealth v. McDermott, 471 N.E.2d 1302 (Mass. 1984)

self-defense against rape. The issue on appeal was which of the following instructions to the jury the trial judge should have given: "(1) the defendant had the right to use deadly force to resist rape, or (2) the defendant had the right to use non-deadly force to resist rape as distinct from serious injury or deadly or extreme force."[120]

The Massachusetts Supreme Judicial Court in *Commonwealth v. McDermott* took the bold step of declining to answer on the following basis: "While we leave open the question of the amount of force one properly may exercise to resist rape, we find that it is clear from the entire record that the self-defense charge, as given, could only have related to an *attempted* rape."[121] In other words, because the instruction involved an "attempted rape" charge, not a "rape" charge, the court refused to rule on the proper instructions for self-defense against a completed rape.

It is not clear why the court distinguished between the level of force permissible under self-defense against rape and the type of force permissible in an attempted rape. In fact, the reasoning seems to be circular—the purpose of self-defense is to avoid an actual rape. So, therefore, if one is successful in defending oneself, by definition the rape was only attempted. Did the court really mean to say that, if the perpetrator was unable to carry out the rape, then the victim cannot use deadly force? If so, what happened to the standard of a victim being in reasonable fear of harm?

Other states have similar results. Both the Maryland, Kentucky, and New Jersey legislatures and the UCMJ all seem equally unwilling to make the act of rape rise to a level justifying deadly force in self-defense.[122] Each of these jurisdictions does not equate the act of rape to serious bodily harm, removing the ability of the victim to use deadly force against an attacker. As a New Jersey statute plainly indicates, "[t]he use of deadly force is not justifiable under this section unless the actor reasonably believes that such force is necessary to protect h[er]self against death or serious bodily harm."[123] If the use of deadly force is not automatically permitted in the face of any rape, then the clear implication is that not all rapes are legally deemed to be "serious bodily harm."

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120. *Id.*

121. *See id.*; *see also* Commonwealth *v.* Genius, 387 Mass. 695, 698 (1982); Commonwealth *v.* Richmond, 379 Mass. 557, 562 (1980) (emphasis added).

122. *See* MD. CODE ANN., CRIM. LAW § 3-303 (LexisNexis 2018); MD. CODE ANN., CRIM. LAW § 3-304 (LexisNexis 2018); KY. REV. STAT. ANN. § 510.040 (West 2018); N.J. STAT. ANN. § 2C:43-7 (West 2004); UNIFORM CODE OF MILITARY JUSTICE, MANUAL FOR COURTS-MARTIAL UNITED STATES I-1 (2019).

123. N.J. STAT. ANN. § 2C:3-4 (West 2019).

C. Correlation Between State Gun Laws and State Self-Defense Laws

An interesting observation about the use of deadly force as self-defense is that there is a correlation with states' policies on the use of deadly force in the context of guns. Many of the states with harsh gun control laws have also, perhaps to promptly minimize the use of guns, adopted a tiered statutory framework for rape, removing the victim's ability to use deadly force, unless the rape falls under a higher offense.[124]

For example, California tops the list of states with the strictest gun control laws.[125] Although California's Model Jury Instruction allow the use of deadly force as a defense, it fails to impose the suggested self-defense definition as a legal requirement for trial courts.[126] Massachusetts ranks third among states with the strictest gun laws.[127] As previously illustrated, in Massachusetts, unless the force used in the rape is elevated to aggravated rape, the degree of injury is insufficient to justify the use of deadly force.[128] Maryland ranks seventh on the list.[129] As discussed, Maryland also has a two-tiered rape system, permitting the victim to use deadly force if the rape qualifies as a first degree offense, and if grievous bodily injury is sustained.[130]

It appears that in each of these states, the legislative goal of minimizing the possession and use of firearms may have contributed to removing the ability of rape victims to protect themselves from an attacker. If this objective is indeed a contributing factor to the statutory limitation, facts pointing to the use of guns during the commission of a rape include: (1) most rapes today are committed without a weapon, so current statutes afford very few rape victims the right to use deadly force; (2) legalizing the use of deadly

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124. Matthew Hartvigsen, *10 States with the Strictest Gun Laws,* DESERET NEWS (Apr. 17, 2013, 10:36 AM), https://www.deseretnews.com/top/1428/0/10-states-with-the-strictest-gun-laws.html; *see also* M.G.L.A. 265 § 22(a)-(b) (2019) (categorizing rape into first and second degree rape, or aggravated rape); *see also* MD Code, Criminal Law, § 3-303; *see also* MD Code, Criminal Law, § 3-304.

125. Hartvigsen, *supra* note 124.

126. People v. Runnion, 36 Cal. Rptr. 2d 203, 206 (Cal. Ct. App. 1994) (noting that there is no evidence of its use at trial).

127. Hartvigsen, *supra* note 124.

128. *Right to Self-Defense*, MAHONEY TRIAL AND LITIG. GROUP, https://www.relentlessdefense.com/what-should-i-do/right-to-self-defense/ (last visited Mar. 13, 2019) (""You may use deadly force – force intended or likely to result in the death or great bodily harm of an assailant – only where you reasonably believe your assailant poses a threat to cause you great bodily harm or death.").

129. Hartvigsen, *supra* note 124.

130. MD Code, Criminal Law, § 3-303; *see also* MD Code, Criminal Law, § 3-304.

force in these situations does not mean that all victims will avail themselves of a firearm; and (3) the mere pointing of a weapon at the attacker may well suffice in stopping the attack.[131] Rape is now understood by experts to be, in and of itself, a "serious bodily injury"[132]—why should the law single out rape victims from a level of self-defense afforded to all other victims in similarly threatening situations? Since most rapes today are "basic," not aggravated,[133] these systems, as currently worded, fail to allow victims of most rapes to effectively protect themselves.

Ultimately, other than to identify the most relevant and consequently most effective lobbying strategy to affect change, it does not really matter whether the two tier rape systems are the result of a gun averse culture, an obsolete understanding of the extent of harm that rape causes, or a misworded attempt to acknowledge that rapes which also cause other serious bodily injuries warrant harsher penalties.

IV. CONCLUSION: A LEGISLATIVE CORRECTION IS NEEDED

What is a person to do if they are being raped? The legal reality is rather bleak. Legally, a victim is not permitted to use deadly force because of the notion that the act is "simple" rape, or "just" sexual assault—there is no fear of imminent death or serious bodily injury. Again, only if the crime is aggravated rape or aggravated sexual assault is the victim allowed to assert self-defense. Without the presence of those aggravating factors, the victim legally is left in a bad position.

A. The Option of Deadly Force is Often Vital for Rape Victims

When asked whether a rape victim could legally use deadly force in self-defense, practicing attorneys consulted seem to fall into two distinct categories. Those attorneys who practice criminal law admitted, albeit hesitantly, that deadly force may not be used to defend against "basic" rape. Their hesitancy was generally evidenced by some statement like this: "You are not going to like my answer to that question." This common preface to their answers indicates an awareness, by those working regularly in criminal courts, that the absence of this legal defense is socially unacceptable. These same attorneys were not confident that a judge or jury would overlook the rape law limiting the degree of self-defense to non-deadly force, absent the use of clearly deadly force by the rapist. In fact, it was a common belief

131. *See* Casteel, *supra* note 17, (stating that only 11% of rapes today involve a weapon.).

132. *See supra*, n. 4-16, and accompanying text.

133. *Id.*

among the surveyed criminal attorneys that, if a jury were to acquit in a situation where the rape victim clearly used deadly force (e.g., a firearm), a judge would be likely to set that verdict aside.[134]

Surveyed practicing non-criminal law attorneys uniformly stated vehemently something like this: "No jury would ever convict a rape victim of killing her assailant!"[135] This latter group's faith that our legal system would never convict a rape "victim" denies the experience of practicing criminal attorneys and the truth of our criminal system, wherein judges apparently concur with this paper's earlier analysis of state statutory law. It does not appear that our court systems, absent legislative action, are ready to allow a rape victim to defend herself with deadly force, even in the prevention of a crime now widely understood to routinely cause serious injury. The tough conclusion is that, since justice is blind, a victim today may be tomorrow's defendant in a homicide trial. The non-criminal attorneys' response quoted above implies that, despite the law, they expect that jury nullification would protect a rape victim from a homicide conviction, but conviction statistics do not support this.[136] Indeed, government statistics suggest that conviction rates among rape victims who kill their attackers are significantly higher than the conviction rates of rapists.[137]

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134. *Id.*

135. *Id.*

136. Carol Jacobsen, *When Justice Is Battered*, SOLIDARITY, https://solidarity-us.org/atc/130/p729/ (last visited Mar. 13, 2019) (article summarizing conviction data of all domestic violence victims (of whom rape victims are a subset) who kill in self-defense, stating that the reviewed data shows that "for most women, . . . the laws of self-defense [do not] work for women in actual trials. Hence 75-80% of women who killed in self-defense are convicted or convinced to plead guilty, and are sentenced to long terms).

137. *The Criminal Justice System: Statistics, The Vast Majority of Perpetrators Will Not Go to Jail or Prison* Rape Abuse and Incest National Network (RAINN) https://www.rainn.org/statistics/criminal-justice-system (reviewing and summarizing Department of Justice (DOJ) data from *Department of Justice, Office of Justice Programs, Bureau of Justice Statistics, National Crime Victimization Survey, 2010-2016* (2017), and reporting that there is a 55% conviction rate for rapists who actually make it to trial). In addition to the significant difference between this conviction rate and the 75-80% conviction rate for victims who kill their attackers (*Id.*), this statistic is compelling because the same set of data also establish that: only 23% of DOJ estimated actual number rapes are reported (whereas presumably all self-defense killings by rape victims are reported); of reported rapes, only 20% lead to arrest; of those arrested for rape, only 19% are referred to a prosecutor; and, of those referred to a prosecutor, 55% are convicted of a felony. Another dismaying perspective on this data is that only 2% of reported rapes lead to convictions and 0.5% of the estimated number of actual rapes (including both reported and unreported) lead to conviction. These various data, extracted from the government survey, when examined together, illustrate how few

B. Simple, but Powerful, Proposal

State rape statutes are not adequately protecting victims. Without deadly force, other avenues available to one against an attacker are not available.[138] Mere physical force—even with specialized self-defense training rarely stops such an aggressor. Even stuns and pepper spray are minimally effective.[139] Therefore, without the option of deadly force, many victims remain virtually defenseless.

The solution to the current imbalance between the seriousness of the injuries inflicted on rape victims and the type of defense against an attacker is the addition of two words to state rape laws. In all two-tiered rape statutes, modifying the definition of aggravated (or first degree) rape to include the phrase "a second" before the phrase "serious bodily injury" or "severe physical injury," would clarify that a simple rape is also a serious bodily injury and, therefore, permitting a victim to utilize deadly force in defending against an attack.[140]

Without statutory amendments, state laws will continue to characterize the act of rape to be less than serious bodily injury resulting in rape victims remaining victims—either victims of rape or of an unjust homicide conviction. A victim's only chance is that the judge or the jury will act outside of the legal constraints to do what is right. This risk is one that rape victims should not have to face.

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rapes are reported, how few reported rapists are arrested, how few arrested rapists are referred to a prosecutor, and how few referred are actually convicted. This illustrates that the overall reported rapist conviction rate of 55% is very misleading since this only applies to defendants who are reported, arrested, and referred.

138. A.E. Miller et al., *Gender Differences in Strength and Muscle Fiber Characteristics*, 66 EUR. J. APPL. PHYSIOL. OCCUP. PHYSIOL. 254 (1993), https://www.ncbi.nlm.nih.gov/pubmed/8477683.

139. Abigail Pesta, *Do U.S. Women Need Guns? Self-Defense Expert Paxton Quigley Says Yes*, DAILY BEAST (July 25, 2012, 4:45 AM), https://www.thedailybeast.com/do-us-women-need-guns-self-defense-expert-paxton-quigley-says-yes.

140. Alternatively, the same correction would result if states were to add "or rape" to their statutory jury instructions of when deadly force is legally permissible in self-defense. However, this fix would perpetuate the outdated statutory references to rape as mere "bodily injury." By listing rape as an *alternative* reason why one could use deadly force, rape would continue to be itself something less than a "serious bodily injury. "