Deadly Force Self-Defense Against Rape

BY DON B. KATES, JR.* AND NANCY JEAN ENGBERG**

*This article examines the common law privilege to use deadly force in self-defense against rape. Noting the paucity of judicial analysis of the privilege and the trend of recent judicial decisions, the authors undertake to clarify the principles which justify the use of deadly force to repel rape.****

INTRODUCTION

Rape[1] threatens the physical and emotional security of every woman. In general, the law sanctions women's use of force to defend themselves against this intrusion of mind and body. Resistance short of homicide is clearly condoned. Moreover, Ameri-

---

* Of Counsel, O'Brien & Hallisey, San Francisco, California; Partner, Benenson, Kates & Hardy, a national law firm specializing in firearms cases; L.L.B. Yale, 1966; Member, State Bars of California, Missouri, and the Bar of the District of Columbia.

** B.A., University of Connecticut, 1979; Executive Editor, U.C. Davis Law Review, 1981-82.

*** The authors wish to acknowledge the assistance and encouragement of Professors Jane Clarke, Margaret Howard and Jean Schultz, Ms. Lorraine Copeland, Ms. S. Skau and the Honorable Carol Ruth Silver.

[1] Throughout this article the terms "rape," "sexual attack" and "sexual assault" are used interchangeably to denominate any kind of forcible sexual intercourse. In general, no distinction is made between sexual attacks on the basis of the orifice toward which they are directed, because the self-defense principles are substantially identical. Of course, sodomy does not involve pregnancy, the danger of which may partially underlie the common law right to use deadly force in self-defense. However, the cases do not distinguish among the various types of sexual attacks in the self-defense context. *See, e.g.*, People v. Collins, 189 Cal. App. 2d 575, 11 Cal. Rptr. 504 (2d Dist. 1961) (upholding male's right to resist forcible homosexual attack, without regard to whether oral or anal sex was threatened); Held v. States, 496 S.W.2d 606 (Tex. Crim. App. 1973) (upholding defendant's right to use deadly force to resist forcible oral sex but affirming conviction based upon finding that danger had been removed). For commentaries supporting the privilege to resist rape and sodomy with deadly force, *see generally* 1 E. EAST, PLEAS OF THE CROWN 271-72 (1803); F. WHARTON, CRIMINAL LAW § 1026, at 529 (4th ed. 1857); 40 C.J.S. "Homicide" § 101, at 960-961 (1944).

can law, based on the English common law tradition, has always recognized a right to use deadly force if reasonably necessary to prevent rape. To the extent that deadly force is necessary to avert death or serious bodily harm, this ancient principle is unassailable. But recent cases and the general trend of modern thought make it less clear whether the self-defense privilege applies if a woman uses deadly force solely to prevent rape itself.

This article examines the right to defend against rape. It begins with a brief review of the law of self-defense and its application to rape, and discusses the fact that current law provides an unclear foundation for the privilege to repel rape with deadly force. Two theories supporting the deadly force privilege are then presented. The first speaks to the statistical probability of serious bodily injury or death resulting from rape and the victim's perception of the necessity to defend against such harm with deadly force. The second examines the type of injuries that can be sustained which, in their aggregate, constitute serious bodily harm and give rise to the self-defense privilege. The authors conclude that, under either theory, women are justified in using deadly force to prevent forcible intercourse itself. In addition, the authors suggest some "non-rational" considerations of the crime of rape which may be the true rationale for the self-defense privilege.

I. The Right to Forcibly Resist Unlawful Attack

A. Self-Defense in General

We have always had the privilege of defending ourselves and our property from harm unlawfully inflicted by others.[2] We are

---

[2] *See generally* W. LaFave & A. Scott, Handbook on Criminal Law 391-97 (1972); R. Perkins, Criminal Law 993-1018 (2d ed. 1969); Perkins, *Self-Defense Re-examined*, 1 U.C.L.A. L. Rev. 133 (1953).

The California Constitution specifically guarantees the right to self-defense. Cal. Const. art. 1, § 1. *See* People v. McDonnell, 32 Cal. App. 694, 163 P. 1046 (3d Dist. 1917). Although not explicitly mentioned in the federal constitution, the fourth and fourteenth amendments seem to incorporate some or all of the common law privilege to use deadly force in defense of self, family or home. The fourth amendment rests specifically upon the "castle doctrine"—the "ancient concept that 'a man's house is his castle' into which 'not even the King may enter.'" Rowan v. Post Office Dep't, 397 U.S. 728, 737 (1970). *See also* Payton v. New York, 445 U.S. 573, 596-97 (1980); Paris Adult Theatre I v. Slayton, 413 U.S. 49, 66 (1973); Silverman v. United States, 365 U.S. 505, 511 n.4 (1961). This doctrine developed from cases upholding the right to use

privileged to use otherwise unlawful force if it appears reasona-

---

deadly force against burglars, arsonists and others who invaded or threatened the sanctity of the home-castle. J.H. BEALE, JR., A SELECTION OF CASES AND OTHER AUTHORITIES UPON CRIMINAL LAW 529 (2d ed. 1907)); 4 W. BLACKSTONE, COMMENTARIES *223; E. COKE, INSTITUTES 162 (5th ed. 1671). *See* Bowle's Case, 77 Eng. Rep. 1252 (1615); Semayne's Case, 77 Eng. Rep. 195 (1603).

The fourteenth amendment incorporates Blackstone's formulation of a common law right to "personal security." *Cf.* Ingraham v. Wright, 430 U.S. 651, 672-24 (1977) (right to personal security); United States v. Price, 383 U.S. 787 (1966). Admittedly, these cases involved state interference with citizens' physical security. But, it can scarcely be denied that state legislation abolishing the common law right of self-defense and criminal punishment of citizens who exercise that right is state action. *Cf.* Sniadach v. Family Finance Corp., 395 U.S. 337 (1969) (state may not legislatively or judicially deprive alleged debtor of property until determination that the debt is valid and due); Cantwell v. Connecticut, 310 U.S. 296 (1940) (state may not punish the making of remarks offensive to the religious views of others as a breach of the peace).

Moreover, the legislative history of the fourteenth amendment suggests that it was intended to protect the self-defense privilege. The amendment's immediate purpose, of course, was to secure the rights of newly freed slaves. To understand what rights were in controversy it is necessary to consider the rights which slavery denied. As one of the authors of this article has noted in another context:

> The majesty and consistence of American Law [in the Slave States] uniformly regarded slaves as property, incapable of possessing a cognizable interest in personal security. Within this theory, the rape or murder of a slave was no more than a crime against property—and no crime at all if committed by the master.

Kates, *Attitudes Toward Slavery in the Early Republic,* 53 J. NEGRO HIST. 33, 43 n.25 (1968). This legal ideology was formally adopted by the federal courts in the Dred Scott Case, 60 U.S. (19 How.) 690 (1856).

The Civil Rights Act of 1866 was designed to reverse the *Dred Scott* decision and to guarantee the new freedmen the fundamental natural rights of human beings which were denied to them as slaves. In defining these rights the sponsors of the Act referred to three fundamental categories of liberty recognized by Blackstone and Kent: " 'the right of personal security, the right of personal liberty and the right to acquire and enjoy property . . . .' " CONG. GLOBE, 39th Cong., 1st Sess. 117, 118.

Shortly thereafter, Congress enacted the fourteenth amendment for the specific purpose of incorporating the principles of the Civil Rights Act into the constitution. *See generally* CONG. GLOBE, *id.* at 2449 (statement of House Speaker Thaddeus Stevens introducing the amendment). *Cf.* Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights?,* 2 STAN. L. REV. 5, 44-45 (1949); Frank & Munro, *The Original Understanding of 'Equal Protection of the Law',* 50 COLUM. L. REV. 131, 141 (1960). The history of the fourteenth amendment shows that it was intended to guarantee freedmen the right to keep and bear arms in order to protect themselves from terrorism by Southern whites. *See* Halbrook, *The Jurisprudence of the Second and Fourteenth*

bly necessary to ward off an aggressor's attack.[3] Of course, the attack must constitute or threaten a tort or crime;[4] self-defense is not an appropriate counter to lawful aggression.[5]

The law divides the types of force which can be used in self-defense into two categories: deadly force; and non-deadly, or moderate, force. The amount of force used must bear a reasonable relation to the amount of harm threatened by the aggressor.[6] Thus, a person subjected to an unlawful assault may always defend with non-deadly force regardless of whether the assault is a very serious one, such as attempted murder or manslaughter, or a simple battery.[7]

Amendment, 4 GEO. MASON L. REV. 1, 21-24 (1981), as well as the right of self-defense as it then existed in the American common law. If so, the right to use deadly force to repel rape may exist as a constitutional imperative over and above the arguments offered in this article.

[3] *See generally* W. LAFAVE & A. SCOTT, *supra* note 2.

[4] *See generally* W. LAFAVE & A. SCOTT, *supra* note 2. An aggressor can not normally invoke the privilege to totally exonerate himself, even when the affray is escalated by the other party so that the original aggressor has to kill to preserve his own life. *Cf.* People v. Reese, 65 Cal. App. 2d 329, 150 P.2d 571 (3d Dist. 1944).

[5] For example, there is no right to use force to resist a lawful arrest. The California Supreme Court has held there is no right to resist an *unlawful* arrest, either. People v. Curtis, 70 Cal. 2d 347, 450 P.2d 33, 74 Cal. Rptr. 713 (1969) (construing CAL. PENAL CODE § 834a). However, this holding must be distinguished from the right of citizens to resist a police officer's assault. The Model Penal Code also forbids forcible resistance to arrest. MODEL PENAL CODE § 3.04(2)(a)(i) (Proposed Official Draft, 1962) [hereinafter cited as MPC § _]. But many other jurisdictions permit the use of non-deadly force to resist an unlawful arrest. *See* Annot., 44 A.L.R. 3d 1078 (1972). *See also* Chevigny, *The Right to Resist an Unlawful Arrest*, 78 YALE L.J. 1128 (1969).

[6] People v. Lopez, 205 Cal. App. 2d 807, 23 Cal. Rptr. 532 (2d Dist. 1962) (resistance may not be disproportionate to injury threatened); People v. Anderson, 57 Cal. App. 721, 208 P. 204 (2d Dist. 1922) (simple assault does not justify homicide); People v. Shimonaka, 16 Cal. App. 117, 122, 116 P. 327, 329 (3d Dist. 1911) (defender may use only such force as is necessary to meet danger; if greater force is used defender transcends the law of self-defense and becomes an aggressor). *See generally* W. LAFAVE & A. SCOTT, *supra* note 2.

[7] *See generally* W. LAFAVE & A. SCOTT, *supra* note 2. However, the use of excessive force in self-defense may reduce an intentional homicide from murder to manslaughter, since one who kills in fear of his or her own life lacks the malice essential to a murder charge, even if that fear is unreasonable. W. LAFAVE & A. SCOTT, *supra* note 2, at 397. *See, e.g.*, People v. Mathews, 91 Cal. App. 3d 1018, 154 Cal. Rptr. 628 (3d Dist. 1979) (murder reduced to manslaughter where jury found that defendant acted intentionally, but in fear of her life).

The right to use deadly force in self-defense is more limited, however. The privilege to kill in self-defense derives from "the universal judgment that there is no social interest in preserving the lives of the aggressors at the cost of those of their victims."[8] Deadly force is that either intended or substantially likely to cause death or serious bodily injury.[9] Only a reasonable belief that an aggressor is about to inflict this type of injury justifies the use of deadly force in self-defense.[10] Thus, a victim must *actually* perceive the need to use deadly force,[11] and that perception must be objectively *reasonable*.[12] In determining whether the victim reasonably used deadly force, the law recognizes, and allows leeway for, the effect of personal peril upon human judg-

---

[8] Wechsler, *A Rationale of the Law of Homicide*, 27 COLUM. L. REV. 701, 736 (1937).

[9] MPC § 3.11(2), *supra* note 5. However, under the Model Penal Code, one under a non-deadly attack is privileged to display a deadly weapon and threaten its use as a means of deterring the attack—so long as the defender does not in fact actually use it. *Id. See also* W. LAFAVE & A. SCOTT, *supra* note 2, at 392.

[10] The California Penal Code codifies the general rule as follows: "A bare fear . . . is not sufficient . . . . [t]he circumstances must be sufficient to excite the fears of a reasonable person, and the party killing must have acted under the influence of such fears alone. CAL. PENAL CODE § 198 (West 1970). *See, e.g.*, People v. Adams, 85 Cal. 231, 24 P. 629 (1980) (defendant's belief that deceased and armed is insufficient to justify homicide, unless the circumstances were such that a reasonable person would believe that deceased was armed); People v. Jackson, 78 Cal. App. 442, 248 P. 1061 (2d Dist. 1926) (instruction that the mere apprehension of danger is insufficient to justify homicide properly states the law). *But see* MPC § 3.04(1), *supra* note 5, discussed in note 12 *infra*.

[11] People v. Sonier, 113 Cal. App. 2d 277, 248 P.2d 155 (1st Dist. 1952) (self-defense requires a showing that defendant actually was in fear of his life or serious bodily harm).

[12] *See* sources cited in note 10 *supra*. There is some support for the proposition that the defense is good so long as the defendant actually fears for his or her life or safety, regardless of the reasonableness of that belief. The Model Penal Code requires only that the actor believe that force is necessary, on the theory that there should be no liability for crimes requiring unlawful purpose where the defendant is merely negligent in assessing the need for deadly force. MPC § 3.04(1), *supra* note 5; MODEL PENAL CODE § 3.04(1), comment (Tent. Draft No. 8, 1958) at 15-18. Even under the Model Penal Code, however, liability may attach for crimes established by negligence or recklessness. MODEL PENAL CODE § 3.09(2), comment (Tent. Draft No. 8, 1958) at 76-80. For an excellent discussion of justification and the effect of the Model Penal Code, *see* Note, *Justification: The Impact of the Model Penal Code on Statutory Reform*, 75 COLUM. L. REV. 914 (1975).

ment. In Justice Holmes' famous words: "Detached reflection cannot be demanded in the presence of an uplifted knife."[13] Moreover, the privilege applies even where the danger, although reasonably apparent, is unreal.[14] Thus, a person may reasonably fear a murderous attack when accosted by an enemy who is known to carry a weapon and who reaches suddenly into his pocket—even though it turns out that he was unarmed and only reaching for a handkerchief.

Deadly force is also permitted to prevent certain crimes. Historically, the common law authorized the use of deadly force to prevent or stop any felony.[15] This made sense when few crimes were felonies, and most felonies were punishable by death. But, with the modern categorization of many relatively minor offenses as felonies,[16] the law now limits the privilege to dangerous felonies that involve a substantial risk of death or serious bodily harm.[17]

---

[13] Brown v. United States, 256 U.S. 335, 343 (1921). *See also* People v. Collins, 189 Cal. App. 2d 575, 589, 11 Cal. Rptr. 504, 513 (2d Dist. 1961) ("where the peril is swift and imminent and the necessity for action immediate, the law does not weigh in too nice scales the conduct of the assailed . . . .").

[14] *See, e.g.*, People v. Anderson, 44 Cal. 65, 68 (1972) (if a gun is used to produce a reasonable belief that it is loaded and will be fired, using deadly force to avert the apparent danger is justified, although the gun is not loaded); People v. Collins, 189 Cal. App. 2d 575, 558, 11 Cal. Rptr. 504, 513 (2d Dist. 1961) (justification of self-defense homicide does not depend on actual danger, but on appearances). The privilege of self-defense also protects against criminal liability to innocent bystanders who are inadvertently injured. Thus, if A, in a proper exercise of self-defense against B, misses B and accidently injures C, A has not committed a crime against C. A's privilege against B "transfers" to his use of force against C. *See, e.g.*, People v. Mathews, 91 Cal. App. 3d 1018, 1024, 154 Cal. Rptr. 628, 631-32 (3d Dist. 1979) (self-defense applies where defendant inadvertently shot passenger riding in car of someone against whom defendant claimed self-defense). *See generally* W. LaFave & A. Scott, *supra* note 2, at 396.

[15] *See, e.g.*, People v. Collins, 189 Cal. App. 2d 575, 11 Cal. Rptr 504 (2d Dist. 1961) (person has right to defend against the commission of a felony); People v. Lillard, 18 Cal. App. 343, 123 P. 221 (2d Dist. 1912) (citizens are justified in killing a fleeing felon). *See generally* W. LaFave & A. Scott, *supra* note 2, at 406-07.

[16] For example, in California any "crime which is punishable . . . by imprisonment in the state prison" is a felony. Cal. Penal Code § 17 (West Cum. Supp. 1981).

[17] *See, e.g.*, People v. Ceballos, 12 Cal. 3d 470, 526 P.2d 241, 116 Cal. Rptr. 233 (1974) (shooting a would-be burglar by a trap gun arranged to fire when door opened held to be unreasonable where no one else was on the premises);

B. Self-Defense Against Rape

Like any other victim of unlawful aggression, a woman has the right to defend herself against rape. Her right to resist rape with non-deadly force is absolute. However, while womens' capacity for armed self-defense is the subject of some controversy,[18] it is clear that deadly force may be the only effective defense. While non-deadly resistance such as biting, scratching, kicking, hitting and screaming may dissuade some rapists, others will retaliate with extreme brutality.[19] Thus, the choice confronting the law is a stark one: allow women to effectively resist rape with deadly weapons or limit resistence to non-deadly force which may provoke the attacker to greater violence and lead many women to deem submission their only alternative.[20]

Kortum v. Alkire, 69 Cal. App. 3d 325, 138 Cal. Rptr. 26 (1st Dist. 1977) (city residents challenged legality of police department directives that authorized deadly force to apprehend suspects of non-violent crimes; court held deadly force permissible only if crime is a violent felony threatening death or great bodily harm); People v. Piorkowski, 41 Cal. App. 3d 324, 115 Cal. Rptr. 830 (2d Dist. 1974) (while theft of a dollar bill and wallet constituted felony of burglary, the character and nature of the crime did not warrant defendant's use of deadly force); Commonwealth v. Chermansky, 430 Pa. 170, 242 A.2d 237 (1968) (private person may not use deadly force even when no lesser force will suffice to apprehend a fleeing person suspected of a non-violent felony).

[18] In response to recommendations that handgun ownership be prohibited to the general population, Newton and Zimring comment that "women are less capable of self-defense and less knowledgeable about firearms" than men. G. NEWTON & F. ZIMRING, FIREARMS AND VIOLENCE IN AMERICAN LIFE 64 (1970). M. YEAGER, HOW WELL DOES THE HANDGUN PROTECT YOU AND YOUR FAMILY? 32-34 (1976) considers women's armed self-defense against rape in somewhat greater detail, but reaches the same result. Neutral criminological studies disagree, however. *See, e.g.,* Kleck and Bordua, The Assumptions of Gun Control (paper presented to the 1980 annual meeting of the American Sociological Association). For a detailed espousal of women's armed self-defense, *see* Silver & Kates, *Self-Defense, Handgun Ownership and the Independence of Women in a Violent, Sexist Society* in RESTRICTING HANDGUNS: THE LIBERAL SKEPTICS SPEAK OUT 139-170 (D. Kates ed. 1979).

[19] In general, non-lethal weapons recommended for use against rapists are equally ineffective and likely to provoke greater violence. M. AYOOB, IN THE GRAVEST EXTREME 35-41 (1980); F. STORASKA, HOW TO SAY NO TO A RAPIST AND SURVIVE 31-52 (1973).

[20] It bears emphasis that women who submit do not obtain thereby any guarantee of safety. S. BROWNMILLER, AGAINST OUR WILL, MEN, WOMEN AND RAPE 360 (1975). Rapists often gratuitously injure or murder victims who have submitted to them without struggle. *See* notes 54-55 and accompanying test *infra*. Moreover, victims who are raped only after strong resistance appear less

The trend of modern law is to treasure the life of the criminal and limit the right of victims or the state to threaten it. Evidence of this trend is found in judicial restrictions on the imposition of criminal penalties[21] and the limitations on the use of deadly force to prevent the commission of felonies.[22] This trend questions the continued validity of the common law privilege to resist rape with deadly force. As previously discussed, modern law limits the privilege to resist the commission of felonies with deadly force to felonies involving a substantial risk of death or serious bodily harm.[23] Thus, while rape is a felony, resistence with deadly force is not automatically privileged.

In addition, two recent decisions, although not directly on point, may reflect adversely on the continued validity of the common law privilege to resist rape with deadly force. In *Coker v. Georgia,*[24] the United States Supreme Court held that the death penalty may not be imposed for rape, no matter how savage or brutal the particular rape.[25] In *People v. Caudillo,*[26] the California Supreme Court considered whether rape, committed in the course of a burglary, justified the imposition of enhanced penalties[27] for the infliction of great bodily harm during the burglary. Despite evidence that the victim was raped twice, and forced to perform and submit to sexually abusive acts, the court held that the rape—without evidence of other injury—was insuf-

---

likely to suffer lasting psychological trauma. QUEEN'S BENCH FOUNDATION, RAPE VICTIMIZATION STUDY 14-20 (1975).

[21] *See, e.g.,* Bullington v. Missouri, 451 U.S. 430 (1981); Beck v. Alabama, 447 U.S. 625 (1980); Adams v. Texas, 448 U.S. 38 (1980); Coker v. Georgia, 433 U.S. 584 (1977); People v. Caudillo, 21 Cal. 3d 562, 580 P.2d 274, 164 Cal. Rptr. 859 (1978).

[22] *See* notes 15-17 and accompanying text *supra.*

[23] *See* note 17 and accompanying text *supra.*

[24] Coker v. Georgia, 433 U.S. 584 (1977).

[25] *Id.* In *Coker,* the defendant was serving a life sentence for the rape and murder of one woman and the subsequent kidnapping, rape and beating of another woman. He escaped from prison and raped and kidnapped another woman. It was at his trial for this offense that the jury imposed the death sentence which the Supreme Court reversed. Two justices voted that the death penalty is per se unconstitutional. *Id.* at 601-02. Five justices opined that its imposition for mere rape is cruel and unusual punishment in violation of the eighth amendment. *Id.* at 587-605.

[26] 21 Cal.3d 562, 580 P.2d 274, 146 Cal. Rptr. 859 (1978).

[27] The California Penal Code enhances penalties for felonies accompanied by the infliction of great bodily injury. CAL. PENAL CODE § 461 (burglary); *id.* § 213 (robbery); *id.* § 209 (kidnapping); *id.* § 264 (rape).

ficient to sustain the finding of great bodily injury[28] necessary to trigger penalty enhancement.[29]

In contrast to this trend is the long standing recognition of the right to resist rape with deadly force. Judicial decisions regularly include rape, and sometimes sodomy, in illustrative lists of crimes which may be resisted with deadly force.[30] Likewise, the Model Penal Code authorizes the use of deadly force when necessary to prevent "death, serious bodily harm, kidnapping or sexual intercourse committed by force or threat."[31]

The trend illustrated by *Coker* and *Caudillo* necessitates renewed consideration of the privilege to defend against rape with deadly force. Indeed, the basis for the conclusion that rape threatens death or great bodily harm which justifies deadly force self-defense is not immediately apparent. In terms of the sex act itself, it is obvious that death is an unlikely result of forcible sexual intercourse. The concept of "great bodily harm," how-

---

[28] For purposes of the penalty enhancement statutes, "great bodily injury" is defined at CAL. PENAL CODE § 12022.7 (West Cum. Supp. 1981) set forth in note 124 *infra*.

[29] People v. Caudillo, 21 Cal. 3d 562, 585, 580 P.2d 274, 287, 146 Cal. Rptr. 859, 872 (1978). The court recognized that the decisional law construing "great bodily harm" was in conflict. In People v. Cardenas, 48 Cal. App. 3d 203, 121 Cal. Rptr. 426 (2d Dist. 1975), the defendant raped as well as robbed his victim. In holding that the act of rape was sufficient to sustain the jury's finding of great bodily harm, *Cardenas* cited an earlier dissenting opinion that argued that the outrage to the person and feelings of the female victim should be considered great bodily injury. *Id.* at 207, 121 Cal. Rptr. at 428-29 (citing People v. McIlvain, 55 Cal. App. 2d 322, 334, 130 P.2d 131, 137 (2d Dist. 1942) (Schauer, P.J., dissenting)). People v. Richardson, 23 Cal. App. 3d 403, 100 Cal. Rptr. 251 (1st Dist. 1972), involved the same issue as *Caudillo* and *Cardenas*. The *Richardson* court, however, rejected the argument that rape is great bodily harm for purposes of the penalty enhancement statute. *Id.* at 411, 100 Cal. Rptr. at 258. For arguments that these cases should not apply to cases involving the use of self-defense against rape, *see* notes 126-127 and accompanying text *infra*.

[30] *See, e.g.*, People v. Ceballos, 12 Cal. 3d 470, 478, 526 P.2d 241, 245, 116 Cal. Rptr. 233, 237 (1974); Flynn v. Commonwealth, 204 Ky. 572, 575, 264 S.W. 1111, 1112 (1924); Lewis v. State, 118 So. 708, 709 (S. Ct. Miss. 1928); State v. Nodine, 198 Ore. 679, 690, 259 P.2d 1056, 1067-68 (1953); Commonwealth v. Chermansky, 430 Pa. 170, 173, 242 A.2d 237, 240 (1968); Howsley v. Gilliam, 517 S.W. 2d 531, 532 (S. Ct. Tex. 1975); State v. Payne, 199 Wisc. 615, 617, 227 N.W. 258, 260 (1929). *But see* People v. Jones, 191 Cal. App. 2d 478, 12 Cal. Rptr. 777 (2d Dist. 1961) (wife's fear of beating, a simple assault, held not to justify use of deadly force self-defense).

[31] MPC § 3.04(2)(b), *supra* note 5.

ever, is more amorphous that the cold reality of death.[32] Its various definitions include "bodily injury," which involves "substantial" rather than "trivial or insignificant" injury or damage;[33] "serious" as opposed to "moderate" harm;[34] and "protracted impairment" of bodily function.[35] Obviously, these definitions provide little assistance in determining whether forcible sexual intercourse constitutes great bodily injury.

Of course, in some cases the danger of death or great bodily harm is clear. Many sexual attacks begin with an explicit threat of death or great bodily harm[36] or the display of a weapon capable of producing those effects.[37] Moreover, the superior physical strength and combat skills of most men over most women enables even the unarmed rapist to carry out his expressed intent to kill or grievously injure his victim if she does not comply. In such cases, the threat of death or great bodily harm clearly justi-

---

[32] Courts have generally held that there is no precise definition of great bodily harm. Consequently, the cases seem inconsistent. *Compare* Gonzalas v. State, 146 Tex. Crim. 108, 172 S.W. 2d 97 (1943) (no great bodily injury though victim was stabbed in the back and thigh with a knife and required two and one-half days hospitalization and several weeks recuperation) *with* Brooks v. Sheriff, 89 Nev. 260, 510 P.2d 1371 (1973) (upholding finding that a cut on forehead and swollen eyes constitutes substantial physical injury) *and* People v. Tallman, 27 Cal. 2d 209, 163 P.2d 857 (1945) (great bodily injury found where defendant did no more than grab a school girl with his arm and put his hand under her dress).

[33] People v. Wells, 14 Cal. App. 3d 348, 360, 92 Cal. Rptr. 191, 198 (3d Dist. 1971).

[34] People v. Richardson, 23 Cal. App. 3d 403, 411, 100 Cal. Rptr. 251, 257 (1st Dist. 1972).

[35] CAL. PENAL CODE § 12022.7, 1976 Cal. Stats. 5162, *amended by* 1977 Cal. Stats. 679. This statute specifically defined great bodily injury as including:

(a) Prolonged loss of consciousness.
(b) Severe concussion.
(c) Protracted loss of any bodily member or organ.
(d) Protracted impairment of function of any bodily member or organ or bone.
(e) A wound or wounds requiring extensive suturing.
(f) Serious disfigurement.
(g) Severe physical pain inflicted by torture.

This section was amended in 1977 to strike the detailed definition and substitute "significant or substantial injury" as the definition of great bodily injury. 1977 Cal. Stats. 679 (codified at CAL. PENAL CODE § 12022.7 (West Cum. Supp. 1981)).

[36] *See* note 59 *infra.*

[37] *See* note 59 *infra.*

fies the privilege to defend with deadly force.

Conceptually, however, the privilege to defend against such explicit threats of grievous injury does not derive from a right to resist rape, per se. Rather, the victim in such cases is simply defending against an immediate threat of death or grievous injury. The existence of the self-defense privilege in these circumstances does not determine whether rape itself—in the absence of threats of other physical injury—may be repelled with deadly force. Unfortunately, both courts and commentators seem to consider that the privilege is self-evident. Neither have taken any pains to define what precisely it is about the act of rape which threatens death or great bodily harm and gives rise to the self-defense privilege.

Judicial decisions offer little insight into the justifications for the self-defense privilege against rape. Perhaps this is because no prosecutor has ever challenged the assumption that deadly force may be used to repel forcible rape or sodomy. Cases in which courts have articulated this assumption without probing its rationale fall into four factual patterns. First, and by far the most numerous, are decisions that do not involve rape at all, but merely mention rape as one of a general list of felonies that may be resisted with deadly force.[38]

The second type of case involves women claiming that they defended against forcible sex attacks, but who are prosecuted on the ground that the claim is false; that there was either no sexual advance at all or that it was not pressed forcibly.[39] Few appellate decisions of this type exist, probably because women who make credible claims of self-defense are rarely prosecuted, or, if prosecuted, convicted. In each case the court upheld the conviction, noting that the jury had been instructed on the woman's right to self-defense but found no factual basis for self-defense.

Third are cases involving men, claiming to have killed in self-defense against forcible sodomy, who are prosecuted on the theory that their claim is fraudulent. Again, the courts hold that

---

[38] *See* cases cited in note 30 *supra*.

[39] People v. De Los Angeles, 61 Cal. 188 (1882) (felony assault conviction for stabbing); State v. Goodseal, 186 Neb. 359, 183 N.W.2d 258 (1971) (prostitute killed customer who attempted to obtain her services by threat and fraud); Hill v. State, 496 S.W.2d 606 (Tex. Crim. App. 1973) (court found no proof to support defendant's claim that she killed husband in resisting his attempt to force her to commit fellatio).

deadly force is justified if necessary to resist the attack, leaving it to the jury to determine whether those circumstances existed in the particular case.[40]

The fourth type of case involves defendants, not themselves threatened, alleging that they used deadly force to protect a woman from sexual attack. Again, these decisions do not impugn the privilege as a matter of law, but challenge the defendant's version of the facts. Typical prosecutorial claims in these cases are that the defendant killed in outrage at his wife's, lover's or daughter's consensual sexual partner,[41] and that the defendant killed in revenge after the attack.[42]

Considered individually, it is understandable that none of these cases extensively discussed the privilege to resist sexual attack. But, given the great number of cases and the volume of commentaries on the law of self-defense, it is surprising that the issue is nowhere considered with depth or specificity. This paucity of analysis may derive from a belief that the privilege is self-evident and so well-established that neither questioning nor analysis is needed. However, to understand the privilege and preserve its place in the law of self-defense, consideration of the basis for the privilege seems justified.

Some insight into the issue is found in the California case of *People v. McIlvain.*[43] Although this was not a self-defense case, it illustrates the uncertainty over the elements of rape which might justify the self-defense privilege. The issue in *McIlvain* was the defendant's claim that he could not be convicted of both

---

[40] People v. Zatzke, 33 Cal. 2d 480, 202 P.2d 1009 (1949); People v. Collins, 189 Cal. App. 2d 575, 11 Cal. Rptr. 504 (2d Dist 1961); State v. McQueen, 431 S.W.2d 445 (S. Ct. Mo. 1968); State v. Robinson, 328 S.W.2d 667 (S.Ct. Mo., 1959); Commonwealth v. Robson, 461 Pa. 615, 337 A.2d 573 (1975); Commonwealth v. Mitchell, 460 Pa. 665, 334 A.2d 285 (1975); Caraway v. State, 489 S.W.2d 106 (Tex. Crim. App. 1971).

[41] *See, e.g.,* People v. Cook, 39 Mich. 36 (1956); Litchfield v. State, 8 Okla. Crim. 164, 126 P. 707 (1912); State v. Young, 52 Ore. 227, 96 P. 1067 (1908); State v. Besares, 283 P. 738 (S. Ct. Utah 1929); State v. Payne, 199 Wisc. 615, 227 N.W. 258 (1929). As a general rule, the law of self-defense permits the use of force to defend another. *See generally* W. LaFave & A. Scott, *supra* note 2, at 397-99. Under the Model Penal Code, the use of force is justifiable to protect a third person when "the actor would be justified . . . in using such force to protect himself against the injury he believes to be threatened to the person whom he seeks to protect . . ." MPC § 3.05, *supra* note 5.

[42] *See, e.g.,* State v. Neville, 51 N.C. 423 (1859).

[43] 55 Cal. App. 2d 322, 130 P.2d 131 (2d Dist. 1942).

rape and assault with force likely to cause great bodily injury because every element of the latter crime was implicit in the former. The majority opinion rejected this claim, holding that the gravamen of the crime of rape is not injury through the use of force, but injury to the woman's feelings.[44] In a dissenting opinion, Justice Schauer argued that assault with force likely to cause great bodily harm is a necessary element of rape.[45] In a brief opinion, Justice Schauer outlined the kinds of harms implicit in every rape:

> The very force necessary to overcome the resistance essential to constitute the offense of forcible rape, coupled with the implications of such attempt, which if successfully carried out include not only physical, mental and psychic shock but also a likelihood of causing the victim to become pregnant, should be held to be such as is 'likely to produce great bodily injury.' Surely pregnancy as a result of forcible rape is great bodily injury. So also is the 'outrage to the person and feelings of the female' which constitutes the essential guilt of rape.[46]

In the absence of more concrete guidance from the self-defense cases, common sense and analogy must provide the framework for understanding the privilege to use deadly force to resist rape. This framework may be founded on either of two discrete rationales: that rapists so often kill, mutilate, or otherwise seriously injure their victims that women may reasonably believe that deadly force is always necessary; and that the physical and psychological trauma incident to rape itself constitutes great bodily injury that justifies the use of deadly force.

II. The Correlation Between Rape and Deadly Harm

It is common knowledge that many rapists kill or severely injure their victims incident to raping them.[47] Clearly, a woman confronted with such brutality may defend herself with deadly force. The imminent threat of death or serious physical injury triggers the privilege in such cases.[48] This right exists irrespective of whether forcible sexual intercourse alone justifies using

---

[44] *Id.* at 334, 130 P.2d at 136.

[45] *Id.* at 334, 130 P.2d at 136.

[46] *Id.* at 334, 130 P.2d at 137.

[47] *See* M. Amir, Patterns In Forcible Rape 154-161 (1971) for studies and analysis of the incidence of physical violence accompanying rape. *See also* notes 54 & 55 *infra*.

[48] *See* notes 2-14 and accompanying text *supra*.

lethal force.

In individual rape situations, however, this principle of self-defense is difficult to apply. The victim's opportunity to defend herself is short-lived in most rape situations. It will almost certainly be extinguished before she can determine whether her assailant intends to kill or severely injure her in addition to raping her. By the time the rapist sufficiently overpowers her to accomplish forcible intercourse, the victim may not be able to resist further physical assault. Thus, unless she stops her attacker at the very outset of the assault, the victim may be unable to stop him at all.

The law of self-defense does not require a victim to wait until the likelihood of serious physical injury is absolutely certain. A woman confronted by a rapist "is not required to take out pencil and paper and figure as to whether [s]he could prevent the commission of the crime by resort to some other means . . . . All that the law requires is that [s]he should act in good faith and upon reasonable appearances of imminent danger . . . ."[49] Thus, deadly force is permissible if serious injury reasonably *appears* to be imminent.[50] The privilege applies even though no harm other than the rape was *in fact* intended or threatened.[51]

A. Probability of Death or Great Bodily Harm

The high incidence of brutal rape and rape-murder may justify using deadly force against all rapists,[52] even those that do

---

[49] Litchfield v. State, 8 Okla. Crim. 164, 171, 126 P. 707, 713 (1912) (father killed man attempting to rape his daughter).

[50] *See* notes 13-14 and accompanying text *supra*.

[51] *See* note 14 and accompanying text *supra*. It is necessary to distinguish the situation where a woman clearly may use deadly force because the rapist has explicitly threatened to kill or grievously injure her. In that situation, her privilege is based on her reasonable belief that the rapist's threats are real. *See* text accompanying notes 47-48 *supra*. However, the issue considered in this section is whether deadly force is permissible in all cases, even in the absence of explicit threats to the victim's life or limb, on the basis that rapists so frequently kill or injure their victims that a victim of rape may reasonably presume that such will be her fate.

[52] The precise likelihood of rapists inflicting severe injury or death is a subject of dispute among criminologists and sociologists. This dispute reflects fundamental disagreements about the character and motivation of rapists. Some experts assert that rapists are essentially normal men, indistinguishable from the general male population except for the belief that they can get away with rape. *See, e.g.*, Comment, *Rape and Rape Laws: Sexism in Society and Law*,

not explicity threaten such harm. Although the majority of rapists are unarmed,[53] empirical studies indicate that one to three per cent do murder their victims,[54] and another 15 to 18 per cent

---

61 CALIF. L. REV. 919, 922-24 (1973). Others reject this view, asserting that a deeper examination reveals that most rapists are severely disturbed individuals. *See, e.g.*, S. BROWNMILLER, *supra* note 20, at 185, 206-08, 298-99. Even those experts who characterize rapists as essentially normal, admit that the motivation for rape is often more antagonism toward the individual victim or toward all women, rather than a desire for sexual satisfaction. Comment, *supra*, at 924. *See generally* M. AMIR, *supra* note 47, at 292-333 for analysis of various psychological theories about the causes of rape. *See also* QUEEN'S BENCH FOUNDATION, RAPE: PREVENTION AND RESISTANCE 86-87 (1976) for reports of rapists' responses to why they raped.

A survey of convicted rapists in California's Atascadero State Hospital elicited the following information about the rapists' motivations for and reactions to the crime: 50.7% raped their victims to achieve "dominance, humiliation and/or revenge"; 27.4% reported becoming excited when the victim resisted their attacks; 34.2% admitted that overcoming the victim's resistance made them feel "powerful, dominant, or good." On the basis of this study, the researchers concluded that, obviously, "the decision to rape did include violence." *Id.* at 80-85.

[53] A national victimization survey reports that only 11% of all reported rapes involve guns and 6% involve knives. M. YEAGER, *supra* note 18, at 32 (1976). A study of San Francisco rape victims found that 12% of the rapists were armed with guns and 21% were armed with knives. QUEEN'S BENCH FOUNDATION, *supra* note 52, at 22, 39. A study of rapes in Philadelphia found that 21.1% involved weapons. M. AMIR, *supra* note 47, at 153.

However, it is incorrect to conclude that rapists are not dangerous when unarmed. Empirical studies show that victims of rape are *more* likely to be injured if the rapist is unarmed. L. CURTIS, CRIMINAL VIOLENCE 102 (1974) (injury by firearm in 1.4% rapes; injury by bodily means in 17.7% rapes). One expert concludes that "when a gun is involved in a victimization, both the victim and the offender appear to be more restrained and interested in avoiding an attack with the weapon." M. HINDELANG, CRIMINAL VICTIMIZATION IN EIGHT AMERICAN CITIES 263 (1974). *See also* W. SKOGAN, SAMPLE SURVEYS ON VICTIMS OF CRIME 15 (1976); M. YEAGER, *supra* at 33.

[54] One study found that approximately 3% of the attacks made by deviated sex offenders in New York involved murder. B. GLUECK, NEW YORK FINAL REPORT OF DEVIATED SEX OFFENDERS 210 (1956). A national study found a 1.4% murder rate in rape attacks in 1978, 1.7% in 1977, and 1.8% in 1976. F.B.I. UNIFORM CRIME REPORTS, CRIME IN THE UNITED STATES 1978, at 13 (1979).

These reports probably underestimate the true incidence of rape-murders. First, most rape-murders are treated as homicides by the police, not as rapes. S. BROWNMILLER, *supra* note 20, at 197. Second, it may be impossible to determine whether the murder victim was also a victim of attempted rape, since the murderer-rapist may have killed his victim out of frustration at his own impotence. One study reports that rapists often resort to or increase violence when they are unable to get an erection to complete the rape. QUEEN'S BENCH FOUN-

inflict serious bodily harm of various kinds.[55] A rapist now confined in California's Atascadero State Hospital expressed his anger at a woman who refused to go to a party with him by beating her continuously for hours, cutting her with a butcher knife, and finally pinning her to the floor with the knife and raping her. He left her for dead.[56] A San Francisco woman was hospitalized for over three months with third degree burns over her face and body, which her attacker inflicted apparently just for his amusement.[57] In another San Francisco case, a junior high school girl was hospitalized in critical condition for three weeks after being raped and sodomized by four men. Although she neither offered nor was capable of any effective resistance, her injuries included several broken ribs, loss of blood, dislocated muscles and a serious eye injury in addition to lacerations and other wounds.[58]

DATION, *supra* note 52, at 85.

[55] It is difficult to correlate the injuries inflicted by rapists (beyond the rape) with the kind of injury against which deadly force may be used. Both rape studies and judicial opinions use the term "great bodily injury" without clearly defining it. In a study of San Francisco rape victims, "serious injury" is defined to include broken bones, burns, lacerations over substantial portions of the body, concussions, or other severe injuries. This study found that 14.2% of rape victims were seriously injured using this standard. QUEEN'S BENCH FOUNDATION, *supra* note 52, at 27. Although 75.3% of the rapists interviewed at California's Atascadero State Hospital had a weapon with them during the rape, only 16% actually used their weapons to inflict injury. Physical strength of the rapist caused the injuries in most of the rapes. *Id.* at 74. A study of rapes in 17 American cities found that 18.9% of uncleared cases resulted in serious injury inflicted even without the use of firearms. M. YEAGER, *supra* note 18, at 33. A study of Philadelphia rapes reported that 20.4% of the victims had been "beaten brutally" before, during, or after rape, M. AMIR, *supra* note 47, at 155, and that some sort of violence—either roughness, beating or choking—was involved in 85.1% of the reported rapes. *Id.* at 156.

Clearly, most, if not all, of this conduct constitutes force likely to cause great bodily harm. *See* notes 31-35 *supra* for definitions of great bodily harm. Nor is there any doubt that great bodily harm can be committed by even an unarmed assailant, particularly one who is larger, heavier, stronger and who takes his victim by surprise. *See, e.g.*, State v. Perry, 5 Ariz. App. 315, 426 P.2d 415 (1967) (innoculation); Owens v. State, 289 So. 2d 472 (Fla. App. 1972) (broken nose, cut lip, eye blackened and closed); Thomas v. State, 164 Ind. App. 647, 330 N.E.2d 325 (1975) (blow to face causing three inch head wound); Anderson v. State, 155 Ind. App. 121, 291 N.E.2d 579 (1973) (five blows to face causing broken bones which required surgery).

[56] QUEEN'S BENCH FOUNDATION, *supra* note 52, at 85.

[57] QUEEN'S BENCH FOUNDATION, *supra* note 20, at 15.

[58] QUEEN'S BENCH FOUNDATION, *supra* note 52, at 28.

These cases vividly illustrate the brutality that often accompanies rape. Moreover, estimates of deaths and serious injuries incident to rape underestimate the extent to which rapists use force *likely* to cause death or serious bodily harm. Since about 20 per cent of rape victims *actually* suffer such harm,[59] force *likely* to cause such results is probably used in a far larger percentage of attacks. Thus, even without considering whether rape alone constitutes great bodily harm, the risk of other grievous injury is substantial. Consequently, it is not unreasonable for a woman to believe from the outset that a rape attack may result in her death or serious injury.

1. "Familiar Rapes"

The discussion thus far has attempted to justify the use of deadly force against all rapists on the ground that any rape victim may reasonably fear death or serious bodily harm. On its face, this proposition appears most appropriate to the "stranger lurking in the bushes" rapes, where the victim reasonably fears the crazed and sadistic intentions of her attacker. When the rapist is well-known to the woman, perhaps a former boyfriend or husband, business associate or social acquaintance, the justification seems less cogent. In these so-called "familiar" rapes, it may be questionable whether the victim would be reasonable in assuming that her attacker intends to kill or seriously harm her.

Quantitative study has resolved this question in favor of the victim. An exhaustive empirical study of reported rapes indicates that familiar rapes are frequently more brutal than those perpetrated by strangers.[60]

---

[59] *See* note 55 and accompanying text *supra*. Death and great bodily harm are *threatened* in many more cases. One study reports that in 49% of the cases, the assailant began the attack by verbally threatening the woman's safety or well-being. QUEEN'S BENCH FOUNDATION, *supra* note 52, at 17. Another study reported that rape victims were verbally threatened 24.9% of the time, intimidated with a weapon 21.1% of the time, and intimidated by gestures or physical violence 41.2% of the time. M. AMIR, *supra* note 47, at 152-53. Moreover, threats may be conveyed even where no verbal statement is made, People v. Ellis, 137 Cal. App. 2d 408, 413, 290 P.2d 266, 269 (3d Dist. 1955) (citing People v. Flores, 62 Cal. App. 2d 700, 145 P.2d 318 (4th Dist. 1944), and no weapon is displayed. *Ellis*, 137 Cal. App. 2d at 413, 290 P.2d at 269 (citing People v. Bumbaugh, 48 Cal. App. 2d 791, 120 P.2d 703 (2d Dist. 1941).

[60] This study found that 51.9% of rapists are complete strangers, the rest

> [It] seems that neighbors and acquaintances are the most potentially dangerous people as far as brutal rape is concerned. [This] . . . may reflect the fact that the offender who is trusted by the victim, establishing or having primary relationships with her, must subdue her instantly. . . . Also, since violence comes after the initial manipulation of the victim by temptation or coercion, the latter were ineffective measures for subduing the victim and made the use of violence necessary.[61]

The results of this study are not surprising. Since a disproportionately high percentage of murders are committed by acquaintances of the victim,[62] it follows that rapes committed by acquaintances would also be marked by unusual savagery. In sum, a woman attacked by a rapist may reasonably fear death or serious bodily injury, irrespective of whether the rapist is an utter stranger or a familiar acquaintance.

B. Gender Bias in Self-Defense Rules

The traditional test of deadly force self-defense judges the victim's conduct in light of what a reasonable man would perceive and do in the same situation.[63] The victim's use of deadly force is justified only if a reasonable man would have apprehended the need to use deadly force. Traditionally, this objective test has contemplated the factual circumstances confronting the victim. This test generally justifies the use of deadly force self-defense only where the attacker is armed or manifestly physically superior.[64] But the imposition of this standard to rape situations may unfairly discriminate against women by failing to consider the additional psychological and social factors that specially affect female victims of male sexual abuse.

Recently, several cases have arisen where female victims of

---

are familiar with their victims. M. AMIR, *supra* note 47, at 229-44. A study of rapists confined to California's Atascadero State Hospital found that 78% of the rapists' victims were strangers, 20.5% were people the rapists had merely seen before, and 21.0% were acquaintances. QUEEN'S BENCH FOUNDATION, *supra* note 52, at 66. *See also* C. HURSCH, THE TROUBLE WITH RAPE 26-28, 107-112 (1977); Hindeland & Davis, *Forcible Rape in the United States: A Statistical Profile,* in FORCIBLE RAPE 85, 95 (1977).

[61] M. AMIR, *supra* note 47, at 245.

[62] For example, in 1978, 18% of murder victims were acquainted with or related to the offender. F.B.I. UNIFORM CRIME REPORTS, *supra* note 54, at 13 (56% acquainted; 25% related).

[63] *See* note 10 and accompanying text *supra.*

[64] *See* cases cited in note 6 *supra.*

sexual attack have used deadly force against their assailants,[65] suggesting that a woman's psychological and social background may make her fear of death or great bodily harm reasonable even though a man's fear in a similar situation might not be reasonable.[66] These cases propose what the Washington Supreme Court has described as a "subjective" analysis of women's response to male attack. In *People v. Wanrow*[67] a female defendant appealed a second degree murder conviction for killing a man she believed was about to sexually molest her child. The Washington Supreme Court reversed the conviction on the basis of erroneous and prejudicial errors in the jury instruction relating to self-defense. First, the court held that the masculine gender used in the instruction created the erroneous impression that the standard applies to the female defendant was the same as the standard applicable to an altercation between two men.[68] In addition, the court found that using an objective rather than a subjective standard to judge the reasonableness of the defendant's actions was reversible error.[69] It held that the jury had to

---

[65] *See, e.g.,* People v. Garcia, 54 Cal. App. 3d 61, 126 Cal. Rptr. 275 (1st Dist. 1975), *cert. denied,* 426 U.S. 911 (1976), *on retrial,* People v. Garcia, No. 4259 (Super. Ct. Cal. March 4, 1977); State v. Little, No. 74-4176 (Super. Ct. N.C., Aug. 15, 1975); State v. Wanrow, 88 Wash. 2d 221, 559 P.2d 548 (1977). For a collection of cases, *see* N. GAGER & C. SCHURR, SEXUAL ASSAULT: CONFRONTING RAPE IN AMERICA 196-200 (1976); Schneider & Jordan, *Representation of Women Who Defend Themselves in Response to Physical or Sexual Attack,* 4 WOMEN'S RTS. L. RPTR. 149 n.3 (1978).

[66] *See* Schneider & Jordan, *supra* note 65, at 149.

[67] 88 Wash. 2d 221, 559 P.2d 548 (1977). For an analysis of the *Wanrow* decision and its unresolved issues, *see* Comment, *Women's Self-Defense Under Washington Law,* 54 WASH. L. REV. 221 (1978).

[68] State v. Wanrow, 88 Wash. 2d 221, 241, 559 P.2d 548, 559 (1977). *Compare* State v. Little, 27 N.C. App. 467, 472, 219 S.E. 2d 494, 499 (1975) (court found no error in use of masculine gender in jury instruction for female defendant, stating that the issue "required no serious discussion"). For arguments that the masculine gender, particularly the phrase "reasonable man," is "latent with gender bias," as opposed to a "neutral, generic term," *see* Collins, *Language, History and the Legal Process: A Profile of the "Reasonable Man",* 8 RUT.-CAM. L.J. 311 (1977).

[69] State v. Wanrow, 88 Wash. 2d 221, 240, 559 P.2d 548, 558 (1977). The court held that the instruction erroneously limited the jury's consideration to circumstances "at or immediately before the killing." *Id.* at 234, 559 P.2d at 555. The court found the proper approach under Washington law to be that the jury consider "all the facts and circumstances known to the defendant, including those known substantially before the killing." *Id.*

consider the "condition appearing to [the defendant] . . . not . . . the condition as it might appear to the jury in the light of testimony before it."[70]

The *Wanrow* court pointed out the importance of special psychological and social factors affecting female victims of sex crimes. Among these factors is the effect that "our nation's 'long and unfortunate history of sex discrimination' " has on women's perception of their ability to defend against male attackers.[71] The court indicated that women's general lack of access to self-defense training, for example, could contribute to their perception of deadly force as the only effective means to repel sexual attack.[72]

While the *Wanrow* court chose to cloak its decision in fashionable feminist rhetoric, even going so far as to suggest that applying "male" standards to women claiming self-defense violates equal protection,[73] its conclusion is merely a logical extrapolation of quite orthodox—indeed elementary—principles of self-defense. To the extent possible the jurors must divorce themselves from their own identities, own physical and mental characteristics, to judge the reasonableness of the defendant's conduct. They must put themselves in the defendant's shoes in a situation which may have required instantaneous decision-making under the stress of sudden confrontation by a violent attacker.[74] Thus, the jury must consider the relative size, strength, and health of the assailant and victim.[75] Those jurors who happen to

---

[70] *Id.* at 240, 559 P.2d at 558 (quoting State v. Miller, 141 Wash. 104, 105, 250 P. 645, 645 (1926)).

[71] People v. Wanrow, 88 Wash. 2d 221, 240, 559 P.2d 548, 559 (1977) (quoting Frontiero v. Richardson, 411 U.S. 677, 684 (1973)). The court held the instruction prejudicial in part because it denied the female defendant's right to equal protection of the law, *id.*, however, it failed to explain this finding. It is unclear whether the objective standard violates equal protection in all cases or only as applied to individual defendants. For an analysis of this aspect of the court's decision, *see* Comment, *supra* note 67, at 226-27.

[72] State v. Wanrow, 88 Wash. 2d 221, 239, 559 P.2d 548, 558 (1977). The court stated: "In our society women suffer from a conspicuous lack of access to training in and the means of developing those skills necessary to effectively repel a male assailant without resorting to the use of deadly weapons." *Id.*

[73] *See* note 71 *supra.*

[74] *See* note 13 and accompanying text *supra.*

[75] People v. Moore, 43 Cal. 2d 517, 524, 275 P.2d 485, 490 (1954) (where a defendant in a murder prosecution claims self-defense, evidence of the defendant's physical condition is admissible since it helps determine whether the

be physically superior to the defendant should not judge the defendant on the basis of whether they would have found it reasonable or necessary to defend with deadly force. *Wanrow's* holding that the jury must consider psychological and environmental factors that affect the reasonableness of a woman's self-defense fully comports with these orthodox teachings. A woman is likely to be smaller, lighter and weaker than a male attacker. All of these factors have traditionally been considered in judging the reasonableness of the use of deadly force in self-defense.[76] By parity of reasoning, the jury can and should consider the subtle difference which socialization imparts on men and women. From childhood, men are inculcated with the skills and attitudes of violence, and encouraged to use their bodies aggressively, while women are socialized to be passive and to eschew physical violence.[77]

In this context, *Wanrow's* unelaborated reference to equal protection issues[78] becomes clear. For a jury to evaluate the reasonableness of a woman's defense against a male attacker as if she were a man of equivalent size, strength, belligerence and combat skill violates the principle that the state may not heedlessly treat clearly different people identically.[79] However, the *Wanrow* holding is needlessly obscured by references to an ob-

---

defendant reasonably feared death or great bodily injury from the attacker).

[76] *Cf.* People v. Ghione, 115 Cal. App. 2d 252, 253, 251 P.2d 997, 998 (1st Dist. 1953) ("applying the reasonable man test a former amateur fighter 6 feet 1 inch in height and weighing 180 pounds would hardly be in fear [of death or great bodily injury] of a man 5 feet 8 inches tall and weighing 147 pounds" whose hands were visibly not clutching a weapon).

[77] *See* B. BABCOCK, A. FREEDMAN, E. NORTON & S. ROSS, SEX DISCRIMINATION AND THE LAW—CAUSES AND REMEDIES 943-1070 (1975). Susan Brownmiller notes:

> The female did not choose this battlefield, this method of warfare, this surprise contestant. Her position, at once, is unprepared and defensive. She cannot win; at best she can escape defeat. Force, or the threat of force, is the method used against her, and a show of force is the prime requisite of masculine behaviour that she, as a woman, has been trained from childhood to abjure. She is unfit for the contest. Femininity has trained her to lose.

S. BROWNMILLER, *supra* note 20, at 360.

[78] State v. Wanrow, 88 Wash. 2d 221, 240, 559 P.2d 548, 559 (1977). *See* note 71 and accompanying text *supra*.

[79] *See, e.g.*, Douglas v. California, 372 U.S. 353 (1963); Griffen v. Illinois, 351 U.S. 12 (1956).

jective-subjective dichotomy.[80] This reference implies the misleading spectre of the Model Penal Code's almost universally rejected "subjective" analysis which exonerates a defender who acted on the basis of a sincere, but irrational belief in the need for deadly force.[81] In contrast, *Wanrow* is simply an application of the universally accepted "objective" standard under which the jury determines the reasonableness of the defendant's conduct based on the circumstances actually confronting the defendant.

Nonetheless, the *Wanrow* approach emphasizes important factors which may underlie women's privilege to use deadly force against rape. Considering *Wanrow* and the empirical evidence about rape together, the discussion so far suggests that the following factors tend to validate the common law per se privilege to resist rape with deadly force: Given the impact of female socialization against violence and the development of skills and attitudes to cope with violence, most women will react to a rape attack with the conviction that their only chance lies in the use of deadly force; that this is not unreasonable in light of empirical facts which show that a substantial number of rapists cause great bodily injury to their victims; and that the dangers of a *per se* privilege to resist with deadly force are minimized by the fact that those to whom the privilege is granted are, by their very aversion to violence, the least likely to abuse it.[82]

III. The Types of Harm Incident to Rape

The rape self-defense privilege may be justified on the basis that the act of rape alone constitutes great bodily harm, and thus is the type of attack that may be repelled by using deadly force. This assertion is based on the observation that rape, without other violence, causes four types of potential injury: physical pain and injury to the abused areas, venereal disease, pregnancy,

---

[80] State v. Wanrow, 88 Wash. 2d 221, 240, 559 P.2d 548, 558 (1977). *See* note 69 and accompanying text *supra*.

[81] MPC § 3.04(1), *supra* note 5. *See* note 12 *supra*.

[82] *See* D. Lunde, Murder and Madness 5, 10 (1976) (women are responsible for only one quarter of all murders, though they constitute slightly more than half of the population; and most of their homicides are precipitated by violent assaults upon them). It is noteworthy that in 1980, female homicides had fallen to 20%. F.B.I. Uniform Crime Reports, Crime In the United States 10 (1980).

and psychological trauma. In considering this proposition, each type of harm must be examined in isolation to determine whether it, of itself, constitutes great bodily harm. Then, all harms suffered by the victim are combined and considered as a single injury to determine whether the deadly force self-defense privilege is justified.

A. Pain and Physical Injury

Since even desired intercourse may cause some physical discomfort, forcible rape is likely to cause great pain. Tearing of sensitive genital tissues and resultant bleeding are common injuries of rape. As a result, victims are likely to suffer prolonged and often extreme sensitivity in the affected areas. In many cases the intercourse is brutal,[83] for the rapist seeks additional pleasure from inflicting pain. However, as serious as these injuries are, they seldom produce permanent physical injury. Thus, it is difficult to argue that the purely physical injuries concomitant with rape justify using deadly force against the rapist.

It is possible, however, that physical pain coupled with the degradation and humiliation of rape justify the use of deadly force. Analogous cases provide some support for this proposition. For example, in 1902, a Missouri court stated that a man could take another's life rather than submit to the pain and humiliation of an unprovoked public whipping by a younger man.[84] More recently, the Supreme Court of Nevada upheld the conviction of a defendant charged with aggravated battery for kicking a woman in the groin area.[85] Thus, pain coupled with extreme humiliation may constitute grievous injury well beyond ordinary battery.[86]

---

[83] *See* notes 54-58 and accompanying text *supra*.

[84] State v. Bartlett, 170 Mo. 658, 71 S.W. 148 (1902).

[85] Andrason v. Sheriff, 88 Nev. 589, 503 P.2d 15 (1972). *See also* People v. Tallman, 27 Cal. 2d 209, 163 P.2d 857 (1945) (conviction for assault with force likely to cause great bodily harm upheld against a child molester who attempted unsuccessfully to rape junior high school girls).

[86] In his exhaustive study of rape, Menachem Amir asserts that the various forms of sexual humiliation which often accompany forced intercourse are often psychologically and physically more damaging to the victim than the other aspects of rape. M. AMIR, *supra* note 47, at 158.

B. Venereal Disease

Venereal disease can be transmitted by a rape, the same as by consensual intercourse. In fact, sex offenders are perhaps 20 times more likely to carry such diseases than other criminals.[87] Although the reasons for the high incidence of venereal disease in rapists are unclear, rape clearly poses a substantial danger of sexually transmitted disease.[88]

Many venereal diseases, if left untreated, result in serious and permanent physical harm. For example, venereal infection can cause permanent scarring of the fallopian tubes, making future pregnancies difficult and dangerous.[89] Another type of venereal disease, herpes, simply cannot be cured.[90] In one of its many forms, herpes can be transmitted during pregnancy to the fetus.[91] In other forms, herpes is transmitted to a child during birth, and may cause serious brain and eye damage to the newborn.[92]

There is no reason why the rules of self-defense should not apply to physical attacks accomplished through bacterial media such as venereal disease. Indeed, a gunman is no less a murderer if his victim dies from an infected wound rather than shock or blood loss. The privilege may also justify a woman's acts in de-

---

[87] A study conducted in Michigan prisons found sex offenders to be afflicted with venereal diseases on an average of 112 out of 1000, while the general prison population average was 5.4 per 1000. MICHIGAN GOVERNOR'S STUDY COMMISSION ON SEX DEVIATES, REPORT 29 (1951). Note that the term "sex offender" is not synonymous with the term "rapist." Some of the Michigan sex offenders studies may have been guilty only of statutory rape, public exposure or other sex crimes. However, the fact that their crimes were serious enough to warrant incarceration in the state prison system suggests that most of those sampled were convicted of some type of forcible sex act.

[88] One study of rape victims reported that 6% of the studied victims contracted venereal disease. QUEEN'S BENCH FOUNDATION, *supra* note 52, at 121.

[89] *See generally* CALIFORNIA STATE DEP'T OF HEALTH, CONTROL OF COMMUNICABLE DISEASE IN CALIFORNIA 178-81, 183-85 (1977).

[90] *Id.* at 206-09.

[91] *Id.*

[92] *See* Josey, *Herpes Genitalis, Effects on Infants*, 26 AUDIO-DIGEST, OBSTETRICS AND GYNECOLOGY No. 3 (Feb. 6, 1979). To avoid transmission of the disease, most doctors recommend that women with a history of herpes deliver their babies by caesarian section. *But see* Yeager, *Genital Herpes Simplex Virus (HSV), Infections and Pregnancy*, 1 THE HELPER No. 2, at 1-2 (1979). The caesarian section itself is major surgery, posing increased risks to mother and child.

fense of her unborn child.[93]

While venereal disease can have serious medical consequences, it is standard post-rape procedure to treat rape victims for venereal disease.[94] Thus, venereal disease does not threaten serious permanent harm to victims who receive medical attention. However, many rapes go unreported.[95] Victims of unreported rape may also neglect post-rape medical treatment. To these silent rape victims, venereal disease is a serious physical threat.

C. Pregnancy

Unwanted pregnancy is as likely to result from forcible rape as from consensual intercourse.[96] Indeed, it is a far more likely result of rape since the victim has no opportunity for contraceptive protection before intercourse. It is surely a significant and physical result of the attack. Even apart from the physical dangers of giving birth, an unwanted pregnancy resulting from forcible rape may be considered great bodily injury.[97]

It is routine post-rape procedure to offer a post-coital abortifacient, usually diethylstilbestrol, to rape victims.[98] If a rape victim does become pregnant, early abortion can terminate the pregnancy with relative safety. Of course, some women may refuse this treatment on religious or moral grounds. Even for women who decide to abort, the abortion procedure may be emotionally traumatic.

Whether the threat of pregnancy justifies the use of deadly

---

[93] *See* sources cited in note 41 *supra*.

[94] A national survey of police departments reported that 76% have special medical facilities available for rape victims. NATIONAL INSTITUTE OF LAW ENFORCEMENT AND CRIMINAL JUSTICE, FORCIBLE RAPE: A NATIONAL SURVEY OF THE RESPONSE BY POLICE 31 (1977).

[95] Rape is the most under-reported crime of all crimes indexed by the FBI. F.B.I. UNIFORM CRIME REPORTS, *supra* note 54, at 15.

[96] A study of San Francisco rape victims reported that 6% became pregnant as a result of rape and underwent abortions. QUEEN'S BENCH FOUNDATION, *supra* note 52, at 121. It is difficult to estimate the incidence of pregnancy since reported rape victims are offered an abortifacient as standard post-rape procedure. *See* note 98 and accompanying text *infra*.

[97] In a dissenting opinion Justice Schauer of California's Second District Court of Appeals stated: "Surely pregnancy as a result of forcible rape is great bodily injury." People v. McIlvain, 55 Cal. App. 2d 322, 334, 130 P.2d 131, 137 (1942) (Schauer, P.J., dissenting). *See* notes 43-46 and accompanying text *supra* for a discussion of this case.

[98] *See, e.g.*, P. MILLS, RAPE INTERVENTION RESOURCE MANUAL (1977).

force self-defense necessarily depends upon the subjective attitudes of individual rape victims. The issue is inextricably tied to each victim's perception of pregnancy and abortion, issues requiring individual resolution and defying objective analysis. However, pregnancy and the possible decision to abort are clearly traumatic consequences feared by all victims of rape. Their impact on the victim's life is sufficiently great and long lasting to justify the conclusion that they constitute great physical harm.

D. Psychological Trauma

The intense, often irreparable damage that violent rape can do to victims' psyches is well-known. Edwardian laments of "the soul" destroyed while the body lives on[99] and Victorian descriptions of "moral desolation . . . [women sent] suddenly and with unbearable sorrow to their graves"[100] attest to rape's most devastating injury. In modern terms, rape destroys personality. It causes psychological harm so serious it cannot be measured, with some victims "so grievously injured physically and psychologically that life is beyond repair."[101] These descriptions are found in works written by victims, physicians, and psychiatric specialists, examining the lasting effects of rape.[102] Perhaps the most succinct expression of the effect of rape upon its victims is that *rape approaches a death experience.*[103]

As best, the rape victim will have suffered what the United States Supreme Court described as "the ultimate violation of self."[104] Often, brutal physical attack has accompanied that violation.[105] Rape victims uniformly report their feelings during rape as horror and terror induced by fear of being killed,

---

[99] Litchfield v. State, 8 Okla. Crim. 164, 171, 126 P. 707, 713 (1912).

[100] Biggs v. State, 29 Ga. 723, 76 Am. Dec. 630 (1860).

[101] Coker v. Georgia, 433 U.S. 584, 603 (1977) (Powell, J., dissenting).

[102] *See, e.g.*, S. BROWNMILLER, *supra* note 20; C. HURSCH, *supra* note 60; G. SHULTZ, HOW MANY MORE VICTIMS (1965); Burgess & Holmstrom, *Rape Trauma Syndrome* in FORCIBLE RAPE 315 (1977); Hilberman, *Rape: The Ultimate Violation of the Self*, 133 AM. J. PSYCHI. 436 (1976); Sutherland & Scherl, *Crisis Intervention With Victims of Rape* in FORCIBLE RAPE 329 (1977). For a summary and analysis of victim responses, *see* QUEEN'S BENCH FOUNDATION, *supra* note 20, at 15-30.

[103] QUEEN'S BENCH FOUNDATION, *supra* note 20, at 29.

[104] Coker v. Georgia, 433 U.S. 584, 597 (1977).

[105] *See* notes 54 & 55 and accompanying text *supra*.

maimed or mutilated, in addition to fears of pregnancy and venereal disease.[106] All too often, those fears prove justified. And even those victims who recover from or escape serious physical injury suffer psychological damage that continues long after the attack.[107]

The psychological consequences of rape are sufficiently definite and well-documented to have their own name, Rape Trauma Syndrome. Some experts dichotomize victim reaction into two or even three temporal stages,[108] while others see no particular divisions.[109] Nevertheless, there is general agreement on the symptoms and effects of Rape Trauma Syndrome. The experts report that the victim's life-style is completely disrupted in the initial acute period, which lasts several weeks.[110] Victims commonly exhibit "major emotional disturbances" including se-

---

[106] QUEEN'S BENCH FOUNDATION, *supra* note 20, at 16.

[107] For an excellent analysis of Rape Trauma Syndrome, *see* Burgess & Holmstrom, *supra* note 102. The following results are summarized from in-depth interviews of over 60 rape victims, most of whom had been raped more than three months before the interview:

> more than 90% of the rape victims . . . said their lives were altered by the experience . . . often the women withdrew from friends or family members; and in some cases, they virtually barricaded themselves in their homes, isolating themselves from all human contact for several months. . . . More than ¾ of the women saw the world as a more frightening place to live . . . and ⅓ were frightened into placing such stringent restrictions on their lives that normal activities were interrupted.

QUEEN'S BENCH FOUNDATION, *supra* note 52, at 121.

> Those women who felt their self-concept was negatively affected by the rape suffered strong feelings of shame (87%), guilt (87%), anxiety (75%), and helplessness(75%) . . . Depression or withdrawal from social relationships plagued 12% of the sample in the months following the rape. . . . Only 14% reported positive changes in feelings over time. . . . Victims experiencing massive effects most often became depressed or felt their depression increased over time. One obvious conclusion is that for these women, time was no healer. The impact of rape was prolonged, profound and painful.

QUEEN'S BENCH FOUNDATION, *supra* note 20, at 17.

[108] *See, e.g.*, Burgess & Holstrom, *supra* note 102 (two phases; acute phase and long-term reorganization phase); Sutherland & Sherl, *supra* note 102 (three phases of victim reaction).

[109] *See generally* sources cited in note 102 *supra*.

[110] Burgess & Holmstrom, *Rape Trauma Syndrome* in FORCIBLE RAPE, *supra* note 102, at 319-321; QUEEN'S BENCH FOUNDATION, *supra* note 52, at 121-122; QUEEN'S BENCH FOUNDATION, *supra* note 20, at 15-20.

vere depression and acute stress.[111] Psychosomatic reactions include soreness all over the body, constant nausea, and a marked decrease in appetite.[112] Wild mood swings and emotional imbalance are common, as well as hysterical reactions to minor stimuli.[113]

This reaction is not necessarily confined to the acute stage. Many victims are able to resume only a minimally functional level even after the acute stage ends.[114] The long-term effects of rape include phobias, hypochondria and paranoia, as well as cessation of sexual desire.[115] Obviously, the severity of the psychological reaction depends upon the circumstances of the rape and the psychological health of the victim. Victims with previously vulnerable personalities are likely to exhibit the most neurotic or psychotic reactions. Such victims commonly suffer major emotional disturbances,[116] which may even lead to actual or attempted suicide.[117]

Although the severity of Rape Trauma Syndrome varies from victim to victim, even previously well-adjusted women suffer its effects. The danger is sufficiently great to conclude that rape threatens grievous *psychological* injury. The question then becomes whether such injury is the type of "great bodily harm"

---

[111] A. BURGESS & L. HOLMSTROM, RAPE: VICTIMS OF CRISIS 39 (1974). Burgess and Holmstrom conducted a one year study of rape victims who entered the emergency ward of Boston City Hospital. For a concise report of their findings, *see* Burgess & Holmstrom, *supra* note 102. *See also* Halleck, *Emotional Effects of Victimization,* in SEXUAL BEHAVIOR AND THE LAW 673-86 (R. Slovenko ed. 1965).

[112] Burgess & Holmstrom, *supra* note 102, at 319-20.

[113] *Id.* at 319. Burgess and Holmstrom reported that victims' feelings in the acute stage ranged from fear, humiliation and embarrassment to anger, revenge, and self humiliation. Fear of physical violence was the primary feeling described. *Id.* at 320.

[114] *See* S. BROWNMILLER, *supra* note 20, at 362-64 *and* QUEEN'S BENCH FOUNDATION, *supra* note 20, at 15-30 for accounts by several rape victims of their feelings after the rape.

[115] Based on their study of rape victims in Boston, Burgess and Holmstrom reported that victims developed several types of phobias. Common phobias included fear of indoors, fear of outdoors, fear of being alone, fear of crowds, and fear of people behind them. In both the acute and secondary phases, victims commonly experienced insomnia and episodic screaming. Burgess & Holmstrom, *supra* note 102, at 323-25.

[116] *Id.* at 325-26.

[117] Victim attempts at suicide are discussed in Haymen, *Rape in the District of Columbia,* 113 AM. J. OBSTET. GYNES. 91, 95 (1973).

against which the law permits deadly force self-defense.

Unfortunately, the voluminous case law construing "great bodily injury" offers little guidance for rape cases.[118] A disturbing exception is the 1978 case of *People v. Caudillo*.[119] In *Caudillo*, the California Supreme Court considered whether rape triggers penalty enhancement[120] for felons who inflict great bodily injury in the course of committing another crime.[121] The defendant in *Caudillo* was convicted of raping his victim in addition to kidnapping and robbing her.[122] The court found that the victim suffered serious psychological and emotional trauma but only "insubstantial" physical injuries.[123] The court held that the psychological injury generally experienced by rape victims does not constitute "great bodily injury."[124] The court stated: "It is

---

[118] Rape Trauma Syndrome was asserted as a defense by the female defendant convicted of manslaughter in People v. Mathews, 91 Cal. App. 3d 1018, 154 Cal. Rptr. 628 (3d Dist. 1979). However, the prosecution in *Mathews* did not contest the applicability of Rape Trauma Syndrome to self-defense, but instead claimed the facts showed that the defendant was the aggressor. *Id.* at 1025, 154 Cal. Rptr. at 632.

[119] 21 Cal. 3d 562, 580 P.2d 274, 146 Cal. Rptr. 859 (1978).

[120] *See* note 27 and accompanying text *supra*.

[121] For an analysis of this case and its effect on the penalty enhancement statutes, *see* Comment, *Criminal Law - Rape Alone Does Not Constitute Great Bodily Harm for Penalty Enhancement Purposes*, 19 SANTA CLARA L. REV. 269 (1979).

[122] For a discussion of the facts in *Caudillo*, *see* notes 26-29 and accompanying text *supra*.

[123] People v. Caudillo, 21 Cal. 3d 562, 588-89, 580 P.2d 274, 289-90, 146 Cal. Rptr. 859, 874-75 (1978). The prosecution in *Caudillo* argued that the injuries inflicted on the victim—in addition to the rape—constituted great bodily injury. The court recognized that:

> The physical effects to . . . the victim—beyond the bodily invasions resulting from the acts of rape, sodomy and oral copulation—consisted of her gagging, spitting and vomiting from the oral copulation, and bowel evacuations from the sodomy. [The doctor] who examined the victim . . . found that she had incurred a superficial 3 inch laceration at the front of her neck and a superficial 1.5 inch laceration on the back of her neck.

Id. The court held that these injuries "can at most be considered to be insubstantial in nature . . ." and could not support a finding of "great bodily injury." *Id.*

[124] *Id.* at 585, 580 P.2d at 287, 146 Cal. Rptr. at 872. The *Caudillo* court relied on the definition of great bodily injury contained in the enhancement statute itself. That statute states: "As used in this section, great bodily injury means a significant or substantial *physical* injury." CAL. PENAL CODE § 12022.7 (West Cum. Supp. 1981) (emphasis added). The court stated:

apparent to us . . . that . . . the Legislature intended the term great bodily injury to refer to a substantial or significant injury 'in addition to that which must be present in every case of rape.' "[125]

The California court's pronouncement that rape does not constitute great bodily injury is disturbing precedent. *Caudillo* apparently precludes finding great bodily injury in the psychological harm caused by rape. Persuasive arguments exist, however, to limit the *Caudillo* holding to the penalty enhancement context in which the case arose.

The considerations in *Caudillo* differ markedly from the issues involved in self-defense. The legal inquiry in applying penalty enhancement provisions is whether the felon *in fact* inflicted great bodily injury. This inquiry is made *ex post,* and considers the circumstances of the actual crime. The deterrence and punishment purposes of penalty enhancement are served by limiting enhancement to especially atrocious crimes.[126] In con-

---

> We deem it significant that [the statute] speaks of *physical* injury . . . . We agree that rape . . . constitutes a serious crime and that substantial *psychological* and *emotional* distress is experienced by rape victims generally. But we are aware of no principle of statutory interpretation that would permit the legislative language—great *bodily* injury—to be construed as including a rape victim's psychological and emotional trauma.

Id. at 582, 580 P.2d at 285, 146 Cal. Rptr. at 870.

[125] *Id.* at 585, 580 P.2d at 287, 146 Cal. Rptr. at 872 (quoting People v. Richardson, 23 Cal. App. 3d 403, 412, 100 Cal. Rptr. 251, 258 (1st Dist. 1972)).

The court also based its decision on a reading of the statute in conjunction with the enhancement statutes for other felonies. Since the legislature added a penalty enhancement provision to the crime of rape as well as to other felonies, the court concluded that the statutes contemplate some injury in addition to the injuries normally caused by rape; otherwise, the court reasoned, the enhancement provision for rape would be meaningless. In her concurring opinion, Chief Justice Bird expressed her "personal repugnance" to the crime of rape but noted that it is precisely the fact that rape is such an emotionally charged issue that the court should adhere to legislative intent and the strict language of the statutes rather than to its members' personal beliefs. *Id.* at 589, 580 P.2d at 290, 146 Cal. Rptr. at 875.

[126] The penalty enhancement statutes were enacted to authorize additional penalties for felonies committed with excessive violence. *Id.* at 585, 580 P.2d at 287, 146 Cal. Rptr. at 872. The fact that a particular crime is deemed not to involve such excessive violence does not mean that it was not violent. Furthermore, that there was *in fact* no excessive violence, does not render unreasonable the victim's fear of great bodily harm. Moreover, the *Caudillo* court was bound to strictly construe the enhancement statute in order to protect the de-

trast, the issue in self-defense is whether the victim's perception of the attack justified her defensive acts. The purpose of the inquiry is to determine whether criminal responsibility exists for harm inflicted in self-defense. Admittedly, a definitional inconsistency results if psychological harm suffices for self-defense but not for penalty enhancement, but the underlying difference in purpose justifies a different standard of great bodily injury for penalty enhancement and self-defense.[127]

IV. The Non-Rational Factors And The Limits of Criminal Sanctions

The use of statistical evidence to justify women's right to resist with deadly force is not intended to suggest that a full appreciation of the harm suffered by rape victims is calculable by percentages or statistics. Truly, rape is one case in which the whole is greater than the sum of the parts. What rape means to its victims cannot be understood from mere statistics or empirical studies. Perhaps this "ultimate violation of self" defies description in rational terms at all.

Nevertheless, the proposition that deadly force self-defense is justified if it reasonably appears that no lesser means of defense will suffice, seems intuitively obvious. We can merely illustrate with examples the intuitive reasons which undoubtedly justify the privilege. One of the authors' experience with classroom discussions of self-defense is illustrative. Invariably, the proposition that women may defend against rape with deadly force was questioned or even denounced by male students. However, when

---

fendant's due process rights. "In construing a criminal statute, a defendant must be given the benefit of every reasonable doubt as to whether the statute was applicable to him." *Id.* at 576, 580 P.2d at 282, 146 Cal. Rptr. at 867 (citing People v. Baker, 69 Cal. 2d 44, 46, 442 P.2d 675, 676, 69 Cal. Rptr. 595, 596 (1968)). No such construction is necessary under the law of self-defense.

[127] Limitation of the *Caudillo* holding to penalty enhancement cases is not inconsistent with the language of the enhancement statutes. The definition of great bodily injury applied in *Caudillo* appears only in the enhancement statutes. Cal. Penal Code § 12022.7 (West Cum. Supp. 1981) set forth in note 124 *supra*. This definition does not appear in the justifiable homicide statute. Cal. Penal Code § 197 (West 1970). Furthermore, the definition in the enhancement statute begins with the limitation, "[a]s used in this section . . . ." Cal. Penal Code § 12022.7 (West Cum. Supp. 1981). Thus, by its own terms, the definition of great bodily injury applied in *Caudillo* applies only to penalty enhancement.

reminded that women are not the only victims of rape, that homosexual rape is a frequent occurence, the doubters invariably changed their attitudes. Likewise, it is noteworthy that appellate courts have unanimously affirmed the right to use deadly force to repel forcible sodomy, despite the fact that such attacks involve lesser potential harm since the male victim is not threatened by pregnancy.[128]

Consider, also, the Model Penal Code's principle that the threat of robbery by non-deadly means does not justify resistance with deadly force.[129] In contrast, the Code unhesitatingly defines rape as a crime properly resisted with deadly force even though the rapist threatens neither life nor limb in attempting to accomplish the rape.[130] Obviously, the drafters of the Model Penal Code viewed rape as a crime that justifies resistance with deadly force on some basis other than the physical harm it threatens. Likewise, the Model Penal Code's duty to retreat[131] remains a minority rule.[132] The retreat rule, which demands that victims of unlawful aggression retreat, if possible, before resorting to deadly force,[133] was once hailed as a rule of enlightened justice. However, few jurisdictions have accepted the rule and, even where adopted, the rule is diminishing in scope as excep-

---

[128] *See* cases cited in note 40 *supra*.

[129] MPC § 3.04, *supra* note 5. Perkins, in criticizing it, describes the proposed rule:

> At common law, but not under the Code, a bank messenger carrying $25,000 in a briefcase would be privileged to shoot if necessary to prevent being robbed, even if the robbers, by superior strength and numbers, would be able to take the money without causing any serious injury to him and assured him that they would not hurt him in any way.

R. PERKINS, *supra* note 2, at 992-93.

[130] MPC § 3.04(2)(b), *supra* note 5.

[131] MPC § 3.04(2)(b)(ii), *supra* note 5.

[132] *See generally* MODEL PENAL CODE § 3.04, comment (Tent. Draft No. 8, 1958) at 23-25; S. KADISH & M. PAULSEN, CRIMINAL LAW AND ITS PROCESSES 504-08 (1975); R. PERKINS, *supra* note 2, at 1010-1012.

[133] New York's formulation of the retreat rule is typical:

> A person may not use deadly force upon another person . . . unless (a) He reasonably believes that such person is using or about to use deadly physical force. Even in such cases, however, the actor may not use deadly physical force if he knows that he can with complete safety as to himself and others avoid the necessity of so doing by retreating . . . .

N.Y. PENAL LAW § 35.15(2)(1) (McKinney Supp. 1981).

tions are created for honest citizens who reasonably use deadly force without prior retreat.[134]

These facts cast doubt upon the wisdom of applying criminal sanctions to behavior which the citizenry, either rationally or irrationally, deems it unjust to punish. It deserves re-emphasis that prosecutors have apparently never challenged the right of women to repel rape with deadly force.[135] The implication for the self-defense privilege against rape is clear. A legislature or court could perhaps mandate criminal penalties for women who resist rape with deadly force.[136] But, the law cannot compel prosecutors to prosecute them or jurors and judges to convict them. Clearly, there is little point to a rule that cannot be enforced because it outrages the public's conscience.

CONCLUSION

To be justified in killing an attacker, a female rape victim must actually and reasonably believe that the rapist intends to kill or grievously injure her. In many rape situations, the threat of severe physical harm is clear; the rapist is armed, or threatens death or grievous injury. In such cases, deadly physical assault triggers the self-defense privilege. Situations where a rapist does not explicitly or implicitly threaten physical harm beyond forcible intercourse are less clear-cut. Current law does not clearly articulate a basis for the right to use deadly force self-defense where an objective reasonable person believes that harm is limited to forcible intercourse. Perhaps this is because the right is

---

[134] For example, under the Model Penal Code the duty to retreat exists only "if the actor knows that he can avoid the necessity of using [deadly] force with complete safety by retreating . . ." MPC § 3.04(2)(b)(ii), *supra* note 5. In addition, the duty does not apply if the attack occurs in one's dwelling or place of work. MPC § 3.04(2)(b)(ii)(1), *supra* note 5. *See also* Kelly v. State, 226 Ala. 80, 145 So. 816 (1933) (a guest has no duty to retreat when attacked by an intruder in his host's dwelling); Henderson v. State, 20 Ala. App. 124, 101 So. 88 (1924) (fact that victim knew assailant to be blood-thirsty and dangerous does not mandate speedier retreat); Dodson v. Commonwealth, 159 Va. 976, 167 S.E. 260 (1933) (duty to retreat limited to circumstances where homicide only excusable and not justifiable); State v. Hiatt, 187 Wash. 226, 60 P.2d 71 (1936) (no duty to retreat from public highway); Bird v. State, 77 Wisc. 276, 45 N.W. 1126 (1890) (no duty to seek aid from others before resorting to personal resistance).

[135] *See* notes 39-43 and accompanying text *supra*.

[136] *But see* note 2 *supra* for arguments that the self-defense privilege may be required by the United States.

self-evident, but recent case law might suggest that it is instead a legal anomaly awaiting clarification.

·Two rational theories have been opposed here to justify using deadly force against rape, even when no other injury is threatened, on the basis of traditional self-defense principles. First, the high frequency of murder and serious injury incident to rape was examined with consideration to special factors inhibiting female responses to male aggression. The coincidence of these concerns leads to the conclusion that rape victims may reasonably believe that any rape attack threatens them with death or great bodily harm. Second, the types of injuries caused by forcible intercourse were examined. This section reveals that rape causes pain, physical injury, and psychological trauma. It threatens to result in venereal disease and unwanted pregnancy. Each of these injuries, viewed in isolation, may or may not constitute great bodily harm. Nonetheless, the victim of rape reasonably fears all of these injuries. To the victim, each is but one element of a whole injury she reasonably repels. That the physical and psychological damage from rape constitutes great bodily injury becomes, as a consequence, inescapable. Finally, the authors assert that some additional element inherent in the crime of rape—something in the nature of the violation which the law and common sense recognize—justifies the privilege to resist rape by any and all means. Although impossible to verify or quantify, this subtle understanding of the crime of rape may be the true justification for the self-defense privilege against rape.