

January 1981

Homicide in Response to A Threat of Rape: A Theoretical Examination of the Rule of Justification

Judith Fabricant

Follow this and additional works at: <http://digitalcommons.law.ggu.edu/ggulrev>



Part of the [Criminal Law Commons](#), and the [Law and Gender Commons](#)

Recommended Citation

Judith Fabricant, *Homicide in Response to A Threat of Rape: A Theoretical Examination of the Rule of Justification*, 11 Golden Gate U. L. Rev. (1981).
<http://digitalcommons.law.ggu.edu/ggulrev/vol11/iss3/7>

This Article is brought to you for free and open access by the Academic Journals at GGU Law Digital Commons. It has been accepted for inclusion in Golden Gate University Law Review by an authorized administrator of GGU Law Digital Commons. For more information, please contact jfischer@ggu.edu.

HOMICIDE IN RESPONSE TO A THREAT OF RAPE: A THEORETICAL EXAMINATION OF THE RULE OF JUSTIFICATION

Judith Fabricant*

The intentional killing of a human being is the most serious of crimes.¹ Nevertheless, the law declines to punish homicides when they are committed under certain circumstances. The most broadly recognized defense against criminal liability for homicide is that of self-defense. The law permits homicide not only in defense of life, but also, under certain circumstances, in defense of such interests as property, liberty, and physical integrity.² That one who kills an aggressor in defense of his or her own life should escape punishment is hardly susceptible of serious debate. The privilege of self-defense under these circumstances is universally recognized, and legal scholars have developed coherent explanations for it.³ When the aggressor threatens interests other than life itself, however, the rationale for the

* J.D., Yale Law School, 1980. Ms. Fabricant is an associate with a Boston law firm. The author wishes to express her gratitude to Professors Jay Katz and Steven Duke of the Yale Law School for their invaluable criticism and guidance.

1. One commentator describes life as the highest value because it is the prerequisite to the enjoyment of all other values. Kadish, *Respect for Life and Regard for Rights in the Criminal Law*, 64 CALIF. L. REV. 871, 871 (1976). According to Blackstone, the taking of life is the most important crime because life "is the immediate gift of God to man." W. BLACKSTONE, 4 COMMENTARIES ON THE LAW OF ENGLAND 1432 (W. Lewis ed. 1897).

2. See RESTATEMENT (SECOND) OF TORTS § 143(2) (1965); E. COKE, THE THIRD PART OF THE INSTITUTES OF THE LAW OF ENGLAND 55 (London 1809); M. FOSTER, CROWN LAW 273-74 (London 1767); M. HALE, PLEAS OF THE CROWN 28-31 (London 1678); W. LA FAVE & A. SCOTT, HANDBOOK ON CRIMINAL LAW 403 (1972); J. LOCKE, TWO TREATISES OF CIVIL GOVERNMENT § 7, at 289-90 (P. Lasset ed. 1967); J. PERKINS, CRIMINAL LAW 981 (1969).

3. See, e.g., G. FLETCHER, RETHINKING CRIMINAL LAW 860 (1978); M. FOSTER, *supra* note 2, at 273-74; J. LOCKE, *supra* note 2, § 7, at 289; Fletcher, *Proportionality and the Psychotic Aggressor: A Vignette in Comparative Criminal Theory*, 8 ISRAEL L. REV. 367 (1967); Wechsler & Michael, *A Rationale for the Law of Homicide*, 37 COLUM. L. REV. 701 (1937).

law's acceptance of a homicidal response is less obvious. But the development of such a rationale is crucial to any critical evaluation of legal rules distinguishing between aggression which justifies or excuses the use of deadly force and that which does not.

One form of nondeadly aggression which can provoke a homicidal defensive reaction is the threat of rape. Anglo-American law has consistently recognized the right of a woman to defend herself against rape, even by killing her assailant.⁴ Although this rule of justification may be nullified in application by prosecutors and juries,⁵ the legal privilege has persisted even as the law of self-defense has narrowed in other respects.⁶

Although courts and commentators have recognized the rule almost without exception, they have failed to formulate any co-

4. See, e.g., CAL. PENAL CODE §§ 17 (West Supp. 1981), 197 (West 1970), 264 (West Supp. 1981). In California, homicide is justifiable when committed by a person resisting an attempt to commit a felony. *Id.* § 197. Felony is defined as any crime punishable by death or by imprisonment in the state prison. *Id.* § 17. Rape is punishable by imprisonment in the state prison. *Id.* § 264; see also ILL. ANN. STAT. ch. 38, § 7-1 (Smith-Hurd 1972) (use of deadly force justified to prevent a forcible felony), § 2-8 (rape is a forcible felony); N.J. STAT. ANN. § 2C:3-4(b)(2)(1)(b)(iii) (West 1980) (deadly force justified if necessary to prevent against death or serious bodily harm); N.Y. PENAL LAW § 35.15(2)(b) (McKinney 1975) (deadly force against another person justifiable in the reasonable belief that such other person is committing or attempting to commit a kidnapping, forcible rape, forcible sodomy or robbery); 18 PA. CONS. STAT. ANN. § 505(b)(2) (Purdon 1973) (deadly force justifiable if actor reasonably believes it necessary to protect against sexual intercourse compelled by force or threat); TEX. PENAL CODE ANN. § 9.32(3)(b) (Vernon 1974) (deadly force against another justified to prevent the imminent commission of rape or aggravated rape).

See also MODEL PENAL CODE § 3.04(2)(b)(1) (Tent. Draft No. 8, 1958); RESTATEMENT (SECOND) OF TORTS § 65(b) (1965); W. BLACKSTONE, *supra* note 1, at 1605-12; M. HALE, *supra* note 2, at 28-31; M. FOSTER, *supra* note 2, at 274; J. PERKINS, *supra* note 2, at 99.

5. After the conviction of Inez Garcia in her first trial for killing her rapist, a juror told interviewers that, "You can't kill someone for trying to give you a good time." Schneider & Jordon, *Representation of Women Who Defend Themselves in Response to Physical or Sexual Assault*, 4 WOMEN'S RIGHTS REP., 149, 154 (1978). In *Woods v. State*, 240 Ga. 265, 239 S.E.2d 786 (1977), two women claimed self-defense against rape as a defense to a murder charge. The trial judge refused to dismiss for cause a juror who had expressed disapproval of killing to avoid rape. The Georgia Supreme Court affirmed the conviction. See also S. BROWNMILLER, *AGAINST OUR WILL: MEN, WOMEN, AND RAPE* 356 (1975), quoting a woman who disabled a potential rapist with a kick to the groin, and was subsequently advised by police that, had he died, she would have faced a charge of manslaughter.

6. See, e.g., W. LAFAYE & A. SCOTT, *supra* note 2, at 399. MODEL PENAL CODE § 3.06(3)(d)(ii) (Tent. Draft. No. 8, 1958), provides a narrower rule on the law of self-defense against property crimes than that of the common law as stated in M. HALE, *supra* note 2, at 28-31, and E. COKE, *supra* note 2, at 55.

herent theoretical explanation for it in the context of self-defense doctrine and of the criminal law generally. This paper will attempt to identify the historical rationale for the privilege of self-defense and the application of that rationale to justify homicide in defense against rape. It will then evaluate the continuation of the privilege of self-defense against rape by application of the historical rationale to the experience of rape in the context of modern America.

This paper will attempt to show the criminal law has permitted homicide when committed in order to prevent crimes which threaten harm so severe and permanent as to be incapable of repair through subsequent legal proceedings. Rape has consistently been regarded as such a crime. The paper will identify the interests which rape has been seen to threaten as those interests which derive their significance from a social system in which women are the property of men. It will argue that, to the extent changing social values have reduced the significance of those interests, they are no longer adequate to support the privilege of homicidal self-defense against rape. To evaluate the current legitimacy of the rule, it is necessary to identify the harm of rape in the modern social context and to decide whether that harm is irreparable. This paper will attempt to identify at least some of the interests threatened by rape and to show how the deprivation of those interests might be irreparable, so as to justify a continuing privilege of homicidal self-defense.

For purposes of this paper, rape is defined as sexual intercourse involving some degree of genital penetration, accomplished by force or threat of force. Most of what follows would apply as well to anal penetration of one man by another, or even to penetration with an object by or upon a person of either sex. The paradigm of genital penetration of a female by a male is used because it is the most common form of sexual assault and because it is the type envisioned in the formulation of the common law rules. Consensual acts in which consent is legally invalid because of minority or incompetence, and those in which consent is obtained by fraud, are not considered because such cases are unlikely to give rise to homicidal acts of self-defense, and because the interests affected by such acts differ from those affected by forcible rape.

I. THE RATIONALE FOR THE PRIVILEGE OF HOMICIDAL SELF-DEFENSE

Defenses to criminal liability are assertions of facts that identify the act as one which, although within a general category defined as criminal, the state declines to punish. The early common law recognized the defense of crime prevention as a justification; the act was proper, and therefore not prohibited.⁷ The doctrine of crime prevention justified a homicide committed by an innocent actor if necessary to prevent an "atrocious crime."⁸ The defense applied whether the crime prevented had been directed at the actor or at a third party. If the act met the definition of crime prevention, it was fully lawful and justified, and the actor was worthy of "commendation rather than blame."⁹

In stating that an act of crime prevention deserves commendation, even when it entails a homicide, Blackstone suggests the intuitively acceptable idea that one who kills to prevent the commission of a serious crime furthers the common purpose of protecting the essential characteristics of human life. Unfortunately, Blackstone fails to indicate precisely how homicide serves that purpose. Because the immediate effect of the act is to destroy life and to frustrate the state's effort to protect the life of the homicide victim, the act seems contrary to that purpose. An effort to understand and evaluate the scope of the defense of crime prevention must begin by identifying more clearly the general rationale underlying the defense.

A. CHOICE OF EVILS THEORY

At least three rationales for recognizing the defense may be considered. The first may be called the "choice of evils" theory. According to this theory, the aggressor, who becomes the victim of the homicide, has created a situation in which at least one life must be lost. Having thwarted the state's effort to protect all life, he or she has forced the state to choose among the values it seeks to protect. Faced with the alternatives of one death or another, the state chooses to protect the life of the innocent actor

7. See G. FLETCHER, *supra* note 3, at 798, for a discussion of the difference between justification and excuse.

8. W. BLACKSTONE, *supra* note 1, at 1432.

9. *Id.*

at the cost of that of the aggressor.

The weighing of values involved in the choice of lives is not immediately apparent. If the state allows an innocent actor to kill the aggressor, the result is one death. Similarly, if the state prohibits such a killing, the result could also be one death. The difference between the two possible choices, in this situation, is the identity of the life protected. Unless those lives differ in value, the state's choice between them is arbitrary.

If all people are considered equal, and all life is valued equally, the choice among lives cannot rest on any judgment of the social value of particular individuals or categories of persons, as a matter of social utility. But one factor which might be weighed is the culpability of the parties. According to this view, the aggressor's guilt reduces the value of his or her life, so that, in sacrificing that life to the life of the innocent potential victim, the state preserves the greater value. If the threatened aggression is directed at a lesser crime than murder, the value of the aggressor's life is reduced proportionately. Depending on the seriousness of the crime threatened, the aggressor's guilt may bring the value of his or her life to a level below that of whatever interest he or she has threatened.¹⁰

At first glance this analysis seems consistent with the idea of punishment by desert; the aggressor deserves to die, and, therefore, his or her death is just. But to say that one deserves to die does not mean one's life has less value than other lives or the interests of others.¹¹ Rather, the principle of punishment by desert is premised on the idea of equality; the natural equality between offender and victim is restored by imposing upon the offender a deprivation equal to that which he or she has inflicted.¹² The aggressor's guilt does not reduce the value of his or her life.

The theory of discounting the life of the aggressor according to guilt also fails to account for the case in which the aggressor's

10. G. FLETCHER, *supra* note 3, at 858.

11. Kadish, *supra* note 1, at 880. See also I. KANT, *THE PHILOSOPHY OF LAW* 196 (W. Hastie trans. 1887).

12. I. KANT, *supra* note 11, at 196.

act is excused, and therefore reflects no guilt.¹³ For example, if the aggressor is a child or an insane person, and therefore not responsible for his or her actions, the attempted homicide indicates no moral culpability which could serve as a rationale for discounting the value of his or her life. Even under those circumstances, however, the law permits an innocent person to prevent the homicide by killing the excused aggressor.

If valuation of the aggressor's life cannot be reduced according to guilt, then the "choice of evils" rationale fails entirely to explain the privilege of homicidal prevention of non-deadly crimes even if it is accepted to explain the privilege to prevent murder. If the privilege of self-defense is viewed as a choice by the state between the aggression threatened and the aggressor's death, it follows that homicide is justified only by threats to interests which outweigh the value of the aggressor's life. Life itself, however, is generally regarded as the highest of values.¹⁴ The value of life suggests that the only threat which would justify homicide is a threat to life itself.¹⁵ But such a strict limitation on the privilege of self-defense has never prevailed in the law.

Some courts and commentators have attempted to rationalize the justification of homicide as a defense to lesser threats by suggesting that each of the lesser threats included carries an implicit threat to life itself.¹⁶ Thus, a "dangerous felony," which may be prevented by homicide, is one that carries a "substantial risk of death or serious bodily harm";¹⁷ "serious bodily harm" is defined as "harm which creates a substantial risk of fatal consequences."¹⁸ The privilege of self-defense thus extends to prevention of threats of serious bodily harm because such threats carry a direct or indirect risk of death. The argument is further extended to justify homicide in defense of the actor's habitation, because the possession of a safe home is necessary to the protec-

13. See G. FLETCHER, *supra* note 3, at 376; Kadish, *supra* note 1, at 880.

14. See note 1 *supra*.

15. See Note, *Justification for the Use of Force in the Criminal Law*, 13 STAN. L. REV. 566 (1961).

16. See J. PERKINS, *supra*, note 2, at 991; *State v. Harris*, 222 N.W.2d 462 (Iowa S. Ct. 1974).

17. W. LAFAVE & A. SCOTT, *supra* note 2, at 406.

18. RESTATEMENT (SECOND) OF TORTS § 63(1) (1965).

tion of his or her life from any and all threats.¹⁹

This theory has also been extended to account for the inclusion of rape in the list of crimes which may be prevented by homicide; courts have relied on a presumption of danger to life in the act of rape.²⁰ But this presumption involves a failure to distinguish between the crime of rape and the other crimes which may accompany it. A rapist may kill his victim or may inflict bodily injury so severe as to create a risk of fatal consequences; in that case he commits a second crime in addition to rape. That second crime threatens life, and would therefore justify prevention by homicide even without the rape, but the rape itself does not necessarily threaten life.²¹ Unaccompanied by another crime, rape may fit within the category of nonserious bodily harm, defined by the Restatement of Torts as "any physical impairment of the condition of another's body, or physical pain or illness."²² Although some rapes may be accomplished without physical impairment, pain, or illness, the act does necessarily entail such risks.

When applied to crimes which do carry an inherent risk of death, this reasoning fails to account for the equation between certain death and risk of death. The actor is permitted to kill the aggressor to avoid a danger which poses some possibility of his or her own or another's death. The probability ranges from the more remote risk involved in an intrusion into one's home to the greater risk in the infliction of a gunshot or knife wound. In

19. See *People v. Eatman*, 405 Ill. 2d 491, 91 N.E.2d 387 (1950).

20. *State v. Harris*, 222 N.W.2d 462 (Iowa S. Ct. 1974). See also *J. PERKINS*, *supra* note 2, at 991.

21. Rape does necessarily carry a risk of pregnancy for those women who are fertile, and pregnancy does carry some risk of death. For some women, because of their physical or social characteristics, the risk of death in childbirth as a result of rape may be so great that a threat of rape would, by itself, carry a substantial risk of death. For these women, this reasoning may be adequate to support the privilege. For other potential victims, it is at least arguable that, because rape is so often accompanied by other violent crimes, a threat of rape is always sufficient to engender in the woman threatened a reasonable fear of being killed. If this proposition were accepted, there would be no need for a privilege of self-defense against rape; any woman who killed a man attempting to rape her would be able to assert the privilege of self-defense against murder, citing the threatened rape as evidence of her reasonable fear of death at the hands of her assailant. In that case, the question raised by this paper would be a purely hypothetical one: If a woman threatened with rape did not experience a fear of death, would she nevertheless be justified in killing her assailant to prevent the rape? And if so, why?

22. RESTATEMENT (SECOND) OF TORTS § 15 (1965).

each case, however, the probability is less than the complete certainty of death which actually occurs. As long as each life is valued equally, nothing less than 100 percent certainty can outweigh the value of the aggressor's life.²³

A somewhat more satisfying variant of the "choice of evils" rationale is the theory that, by choosing the life of the innocent person over that of the aggressor, the law protects life in general, because the aggressor poses a general threat to life, which the innocent person does not. Although the two lives in question on this occasion have equal value, the loss of one is less an evil than the loss of the other; one poses a greater threat of future evil. Thus, the state serves its overriding goal of protecting life by preferring the life that poses less danger to others. This explanation acknowledges the underlying purpose of state authority and of the criminal law, without violating the principle of equality. But it rests on an empirical assumption which is open to question: that one who attempts to kill on one occasion is more likely than others to do so again.

The "choice of evils" theory, in all its variations, focuses on the relationship between the state and the homicide victim (the original aggressor), and seeks to explain the state's willingness to permit the death of the aggressor under the circumstances. The theory attempts to formulate criteria to measure the social loss resulting from a particular death, and to balance the loss against the evil threatened by the aggressor. The "choice of evils" theory does not address the rights or interests of the actor who commits the homicide (the victim of the original aggression); it merely evaluates the social costs and benefits of the act.

B. AD HOC DEATH PENALTY THEORY

A second rationale for the justification of crime prevention is that the rule serves to deter crime by operating as sort of an ad hoc death penalty; the potential felon is put on notice that he or she is subject to homicide at the hands of any person, private or official, who acts to prevent the crime. By deterring crime in this way, the state serves its general purpose of protecting the

23. See G. FLETCHER, *supra* note 3, at 858.

essential values of human life.²⁴

This explanation assumes first that potential felons know of the rule and plan their crimes accordingly. Second, it assumes that the threat of death deters crime, an assumption that has been widely discredited in the on-going controversy over the death penalty.²⁵ Third, the theory assumes that the threat of an ad hoc death penalty imposed before or during the act adds to the deterrence value of the death penalty to be imposed after the crime. In a system of imperfect law enforcement and uncertain punishment, this assumption may have some basis in fact. But it seems highly unlikely, at least to this writer, that the privilege of self-defense would be eliminated even if law enforcement were perfect and every felon were punished.²⁶

Even if these empirical assumptions proved correct, however, the ad hoc death penalty rationale entails two theoretical problems. First, if that rationale explains the justification of crime prevention, it fails to explain the limitation of that justification: the act must be necessary to prevent the crime. If the actor's privilege is intended to deter crime, it should logically extend to one who kills when the crime could be prevented by less drastic means, or even to one who witnesses a crime and kills the fleeing felon.

Second, the ad hoc death penalty theory fails to account for cases in which the aggressor's act, although unlawful, is excused. Here again, it is useful to consider the example of a child or an insane person who is about to kill an innocent person. To put such a person on notice that his or her act of aggression may result in his or her own death can hardly serve as a deterrent to that aggression. Even when applied to excused aggressors, the rule may serve to deter other potential felons who would not be

24. Wechsler & Michael, *supra* note 3, at 735-36; *Erwin v. State*, 29 Ohio 186, 200 (1876). Blackstone lends support to this theory with the observation that any crime "in itself capital" may be prevented by the death of the aggressor. W. BLACKSTONE, *supra* note 1, at 1432. See also L. KANOWITZ, *WOMEN AND THE LAW* 92-93 (1968), observing that state laws which excuse or justify a husband's killing his wife's lover establish a rule of ad hoc capital punishment for men who commit adultery with married women.

25. See, e.g., C. BLACK, *CAPITAL PUNISHMENT: THE INEVITABILITY OF CAPRICE AND MISTAKE* 25-27 (1974).

26. See also Kadish, *supra* note 1, at 880.

excused.²⁷ But, if so applied, the rule would use the aggressor for the benefit of the rest of the community; it would deprive him or her of state protection to increase the protection afforded to the potential victims of other aggressors. Such use of the excused aggressor would subordinate his or her life and interests to the interests of others, denying him or her treatment as the equal of all others.²⁸

The ad hoc death penalty theory, like the "choice of evils" theory, focuses on the utility of the act of homicide for the state's overall purpose of protecting life generally. It attempts to rationalize the state's failure to protect the life of the aggressor (victim of the homicide) by balancing the loss of that life against the general social benefit resulting from the homicide. The theory does not address any rights or interests of the actor (victim of the original aggression) who commits the homicide.

C. SOCIAL CONTRACT THEORY

A third theory invokes the concept of a social contract as to the source of state authority. Under this view, the state in a civilized society has the exclusive right to use force, because the individual members of the society have all relinquished to it their natural right of self-protection by force. The members of the society have joined in the social contract for the sake of the greater protection afforded by a common authority. Because the state exists for the protection of its members, the social contract includes a built-in limitation: each individual retains his or her natural rights for exercise in situations where appeal to established authority is impossible. Such a situation arises when aggression is sudden and immediate, so that state intervention cannot prevent its effect, and when the effect of the aggression threatened would be so severe and lasting that no subsequent state response could adequately substitute for prevention. In such cases, the parties are no longer fellow citizens whose interaction is regulated by a common authority; they are, in Locke's phrase, combatants in a "state of war." By depriving his or her victim of the possibility of appeal to law, the aggressor bypasses the interaction with civil society and loses any claims to its pro-

27. G. FLETCHER, *supra* note 3, at 815.

28. *Id.*

tection. The victim of aggression is restored to his or her rights under natural law, including the right to protect him or herself just as each individual would if no state authority existed.²⁹

This rationale shifts the focus of analysis from the state's abandonment of its responsibility to protect the homicide victim (the original aggressor) to the natural right of the actor (the original victim) to protect those interests for the protection of which the state was established in a situation in which state protection is unavailable. Because the actor has that right naturally, and has not relinquished it to the authority of the state, the state has no power to prohibit its exercise. Recognition of the justification, then, is not a choice by the state to serve its purposes, but an acknowledgement of the limitations on its authority. Those limitations derive from the purposes for which free individuals established the state and consented to its imposition of a criminal law.

This rationale applies to the case of the excused aggressor as well as that of the culpable aggressor. The essential factor which triggers the natural right of self-defense is not the guilt of the aggressor, but the victim-actor's lack of opportunity for appeal to the law. The excused aggressor, the child or insane person, may be unwitting, and therefore not responsible. But the aggressor's lack of responsibility is irrelevant, because the victim's act of homicide in self-defense does not constitute punishment of the aggressor or valuation of his or her life. Nor does the rule suggest a greater valuation of the life of the victim-actor. Rather, the rule simply recognizes the natural right of the actor, in the absence of legal authority, to protect his or her own interests. The lack of legal authority to which to appeal is the result of the aggressor's use of force, and it is thus the aggressor who triggers the actor's right. But the right itself derives from nature, not from any act or any culpability of the aggressor.³⁰

The social contract theory is thus consistent with the common law rule of self-defense, and provides a rationale through which the rule may be understood. The common law rule per-

29. J. LOCKE, *supra* note 2, § 19, at 298; Kadish, *supra* note 1, at 247. See also Ashworth, *Self-Defense and the Right to Life*, 34 CAMBRIDGE L.J. 282, 282-83 (1975); Fletcher, *supra* note 3, at 378.

30. Fletcher, *supra* note 3, at 376.

mitted homicide when necessary to prevent an act of unlawful aggression, without regard to the identity of the aggressor. This rule follows logically from the idea that the state's monopoly on the use of force extends only to those situations in which state protection is available, because the state's authority derives from the voluntary association of individuals for the purpose of their common security.

To summarize, the common law rule of crime prevention may be best understood through a rationale based on the theory of social contract: In situations of necessity, when state authority is unavailable to protect a citizen, the citizen is released from the obligation to refrain from the use of force and is restored to the natural right of self-protection.

II. THE SCOPE OF THE DEFENSE: RAPE AS IRREPARABLE HARM UNDER THE COMMON LAW

The social contract theory provides a rationale for the privilege of homicide in situations in which state protection is unavailable: the state's monopoly on the use of force, because it derives from the voluntary grant of its members' powers of self-protection, extends only as far as the state's power to protect its members. When an act of aggression prevents resort to the common authority, the individual is restored to his or her natural right of self-defense.

The privilege of self-defense therefore extends to all acts of aggression which preclude resort to state authority. Any event is, of course, subject to official response after the fact. In that sense, no form of aggression completely precludes state protection. But some types of aggression result in injury which is so irreparable as to preclude any effective state response after the fact. Because no subsequent action can fully repair the harm caused by such acts, only prevention can adequately protect the citizen whose interests are threatened. These forms of aggression, then, remove the interaction from the jurisdiction of the common authority and restore to the individual the right of prevention by force.³¹

31. *Allen v. United States*, 164 U.S. 492, 497 (1896) (homicide justified in response to threat of "permanent injury"); M. FOSTER, *supra* note 2, at 274 (homicide to prevent rape justified because "the injury intended can never be repaired or forgotten"); J.

The privilege of self-defense therefore applies to prevention of crimes which have permanent, irreparable consequences. Death, of course, is clearly the most permanent consequence of an act of aggression; no subsequent governmental action can restore the victim's life. The threat of homicide eliminates all possibility of appeal to authority for prevention of its consequences, and thus restores to the victim his or her natural right to use force to prevent the act. Similarly, other threats of permanent deprivation, such as dismemberment or maiming, render state protection unavailable and place the authority for crime prevention in the hands of the individual.

Every experience is permanent in the sense that its occurrence cannot be undone. Even simple assault, once committed, cannot be undone by subsequent governmental action against the offender. But simple assault does not trigger a right of homicidal self-defense.³² Permanence of the event, therefore, as distinguished from permanence of the consequences of the event, does not adequately describe the type of harm that may legitimately be prevented by homicide.

The difference between death and dismemberment, on the one hand, and simple assault on the other, is in the significance of the interest affected, as well as in the permanence of the loss of that interest as a consequence of the act. The interest in life is indisputably paramount; a deprivation of life, therefore, cannot be adequately compensated by subsequent events. The interest in physical wholeness also holds a universally recognized importance; few people would trade a body part for any form of compensation. Moreover, these interests, once lost, are gone forever. The interests affected by a simple assault are less important, and they are not forever lost because of a single event. Reparation after the fact, therefore, may be sufficient to compensate for the deprivation suffered.

The type of harm which may be prevented by homicide may

LOCKE, *supra* note 2, § 19, at 292 (victim of threatened murder may kill assailant because threatened loss of life "irreparable").

32. See *People v. Jones*, 191 Cal. App. 2d 478, 482, 12 Cal. Rptr. 777, 780 (1961), in which the court observes: "A misdemeanor assault must be suffered without the privilege of retaliating with deadly force." See also W. LAFAYE & A. SCOTT, *supra* note 2, at 393, observing that the use of deadly force against a nondeadly attack is never reasonable.

be described as not only permanent, but irreparable: A deprivation of interests which, like the interest in life itself, are so vital to their holder that the permanent deprivation cannot be repaired by any form of compensation after the fact. This category of harm includes death and dismemberment, but it may also include whatever other experiences would permanently deprive an individual of interests which, in the particular cultural setting, are considered crucial to a life worth living.³³

Anglo-American law has consistently included rape among the crimes that may be prevented by homicide. This rule reflects a social judgment that the harm of rape is irreparable: a deprivation of the interests affected by rape cannot be repaired by any subsequent compensation. To evaluate the continuing legitimacy of the privilege of self-defense against rape, it is necessary to identify that harm and those interests.

A review of the law of rape and the history of that law indicates that the crime of rape has been viewed as a threat to interests both of the female victim herself and of her husband, father, or other male relative. For the male, rape has been felt as a threat to his interests in exclusive possession of a particular woman as a sexual object, either for his own use, in the case of a husband, or for transfer to another, in the case of a father or other relative. Threatened also has been the male's interest in the social status, prestige, and "honor" which he gained through exclusive possession of the woman involved. The history of rape laws indicates that these interests have been considered of highest importance, worthy of the greatest protection available in law.

The interests of the female victim that have received recognition in the law of rape are primarily interests which derive

33. Wechsler & Michael, *supra* note 3, at 740, describe the ends, other than preservation of life, that justify homicide as follows:

Such an end . . . must be one the achievement of which by common agreement is almost indispensable if life is to be worth living Precisely as homicide is sometimes a necessary means to the preservation of life, it is sometimes a necessary means to the prevention of physical and psychic injuries that usually prove to be permanent and seriously impair the human capacities of those who suffer them.

from her role as a possession of the male. By destroying the exclusiveness of the male's possession of her, rape has destroyed her value to him. The law of rape expresses a recognition of the female's interest in her value to men, along with the social status and material well-being she might derive from it, as an interest of great significance.

The identity of the interests protected by the law of rape appears in the language of commentators, in the methods of law enforcement, and in the application of the law to cases involving women of differing status in relation to the property interests of men.

Common law authorities as well as American cases refer frequently to rape as a violation of the victim's "chastity."³⁴ The word "chastity," as used by these sources, means more than voluntary abstinence from sexual activity. Abstinence is not even suggested when the word is used in reference to a married woman. Rather, the word "chastity," as used by common law judges and commentators, connotes conformity with a sexual code imposed by law, social convention, and religious doctrine. In describing rape as a violation of chastity, these sources indicate that the most significant harm of rape, the harm which is so significant as to justify prevention by homicide, is the sexual act unapproved by law or social convention.

The interests protected by the code of chastity are implicit in the terms of the code itself; according to law and sexual convention in the Anglo-American world, chastity means premarital abstinence and marital fidelity. A chaste woman, therefore, is one who grants sexual access to one man alone, permanently and irrevocably, becoming his exclusive possession. For a man, a threat to chastity is a threat to the exclusiveness of his possession of the women of his household. For a woman, the deprivation of her own chastity is the deprivation of her capacity to grant exclusive access to one man. The interests of both sexes in the chastity of women have held a place of such importance that their deprivation has been viewed as so irreparable as to warrant prevention by homicide.

34. See, e.g., *State v. Martinez*, 30 N.M. 178, 187, 230 P. 379 (1924); W. BLACKSTONE, *supra* note 1, at 1610; M. FOSTER, *supra* note 2, at 274.

The interests protected by the law of rape appear also in the exceptions to the prohibition of rape. The most notable exception, often stated in the definition of rape, is that between spouses. The element of force or threat of force may be present, but if the aggressor is the victim's husband, no act of sexual intercourse is prohibited by the law of rape.³⁵

If the law of rape were intended to protect the victim's autonomy or freedom of choice, this exception would be anomalous; the use of force effects the same deprivation of choice no matter who applies it. Hale explains the rule by the notion of perpetual consent through marriage, but this explanation is a legal fiction at best.³⁶ Perkins offers a more persuasive explanation for the marriage exception. According to his definition, rape is "unlawful carnal knowledge"—that is, sexual intercourse "not authorized by law," and accomplished by force.³⁷ Because the law authorizes sex within marriage, no act of sexual intercourse between spouses can be unlawful, despite the use of force and the absence of consent. Perkins' explanation reveals his understanding that the harm of rape is primarily the unlawful sex act, the act in violation of chastity, not the use of force to deprive the victim of her freedom of choice. A more candid restatement of Perkins' explanation of the marriage exception would be that, because a wife is the exclusive property of her husband, his use of her cannot violate his own property interest in her. According to Hawkins, ancient law extended the marital exception to concubinage as well.³⁸ And a similar exception existed for the rape

35. See generally 1 M. HALE, *THE HISTORY OF THE PLEAS OF THE CROWN* 628 (R. Stokes & M. Ingersoll eds. 1847); J. PERKINS, *supra* note 2, at 156; G. STEPHEN, *A DIGEST OF THE CRIMINAL LAW* 156 (7th ed. 1926); MODEL PENAL CODE § 207.4(1) (Tent. Draft No. 4, 1955) ("not his wife" included in definition). A Connecticut statute, enacted in 1975, includes what its authors must have considered a "modern" change in the common law rule: "[I]t shall be an affirmative defense that the defendant and the alleged victim were, at the time of the alleged offense, living together by mutual consent in a relationship of cohabitation, regardless of the legal status of their relationship." CONN. GEN. STAT. § 53a-67(b) (West Supp. 1981). A few states have changed their rape laws in recent years to eliminate the exception for spouses. See, e.g., OR. REV. STAT. § 163.305 (1977), and 163.375 (1971).

36. "[F]or by their mutual matrimonial consent and contract the wife hath given up herself in this kind unto her husband, which she cannot retract." M. HALE, *supra* note 35, at 628.

37. J. PERKINS, *supra* note 2, at 156.

38. "It was anciently said to be no rape to force a man's own concubine." I W. HAWKINS, *PLEAS OF THE CROWN* 122 (J. Curwood ed. 1824). Compare Hawkins with the Con-

of a slave by the master. Since she was the master's own property, his use of her could hardly violate the property interests of any other man.³⁹

If the law of rape exists to protect the property interests of men, and the interests of women which derive from their status as the property of men, it would follow that the law's protection excludes the rape of a prostitute, who is the property of no man, or perhaps of all men alike. And indeed the common law authors express substantial doubts as to whether a prostitute can be a victim of rape. Blackstone reports that "the civil law seems to suppose a prostitute or common harlot incapable of any injuries of this kind; not allowing any punishment for violating the chastity of her who hath indeed no chastity at all, or at least hath no regard to it."⁴⁰ However, Blackstone distinguishes English law, which, he explains, punishes the rape of a prostitute because of the possibility that she might reform and regain her chastity.⁴¹

Blackstone's explanation assumes that the purpose of the law of rape is to protect chastity. The prostitute is protected by the law of rape because of the possibility that she might someday conform to the code of chastity and deliver herself to the exclusive possession of some hypothetical man, whose interests would then be violated by any other man's use of her, and whose valuation of her would be diminished accordingly.

Perkins differs with Blackstone on application of the law of rape to prostitutes. He observes that a rape differs from the prostitute's usual activity only in the absence of payment, so that it can hardly be considered an outrage to her. In his view, the rape of a prostitute should be treated as a lesser crime, such as assault and battery.⁴²

Although they reach different conclusions, Perkins and Blackstone base their views on the same implicit assumptions: that the primary harm of rape is the act of sexual intercourse outside of a legally sanctioned relationship. Because the prosti-

necticut statute at note 35 *supra*.

39. S. BROWNMILLER, *supra* note 5, at 162-63.

40. W. BLACKSTONE, *supra* note 1, at 1610.

41. *Id.*

42. J. PERKINS, *supra* note 2, at 158.

tute engages in such illicit sex regularly, the rape deserves no special punishment in Perkins' view. Blackstone's thinking is more generous, granting the possibility of reform and consequent restoration to a status worthy of legal protection.

Modern rape laws include no explicit exception for prostitutes, and no formal requirement of previous chastity on the part of the victim. Nevertheless, rape trials often include inquiries into the previous sexual activity of the victim. In theory, such evidence is admitted to support an inference of consent on the occasion in question based on the fact of consent to similarly illicit acts in the past. Whether or not such an inference is fairly drawn, the experience of modern rape victims during trials, and the infrequency of convictions, suggests that juries and defense lawyers may use evidence of the victim's past sexual behavior to support application of an exception for unchaste victims even though none exists in the law.⁴³ A woman whose sexual choices preclude her the status as one man's exclusive property may still be considered unworthy of the law's protection, because no man's property interests are affected by her violation, and because she has chosen to relinquish her ability to grant exclusive possession to one man.

The interests protected by the law of rape appear in the design of enforcement mechanisms as well as in exceptions to the law. Perhaps the most illuminating example is the ancient Hebrew law, cited by Blackstone, that one who raped an unbetrothed virgin must pay a fine to the victim's father and marry her with no power of divorce.⁴⁴ This penalty suggests a scheme of reparation for injury to the father's interest in arranging a profitable marriage for his daughter. The requirement of marriage without right of divorce served both to relieve the father of the burden of maintaining his daughter and to compensate the victim herself for the loss of her interest in marriage. All other

43. See S. BROWNMILLER, *supra* note 5, at 370-74. See also *Tolbert v. State*, 31 Ala. App. 301, 15 So.2d 745 (1943) (evidence as to murder defendant's previous sexual relationship with deceased admissible to impeach her credibility on rape claim, thereby disproving her claim of self-defense against rape); *State v. Goodseal*, 186 Neb. 359, 183 N.W.2d 258 (1971) (evidence as to murder defendant's activities as a prostitute admissible to discredit her claim of self-defense against rape).

44. W. BLACKSTONE, *supra* note 1, at 1607, citing Deuteronomy 22:25. The rapist was punished by death if the victim was betrothed. *Id.*

possibility of marriage had been destroyed with her virginity, because she could no longer be offered to a potential husband as his exclusive possession.

Hawkins reports a slightly modified version of this rule in early English law. Under the English version, one who raped a virgin would be punished with death, "unless such virgin would accept of the offender for her husband."⁴⁵ This rule placed a particularly high priority on the recognized interests of the victim; by marrying the rapist, she could salvage at least one of the benefits that depended on her virginity. The alternative of the death penalty for the offender might suggest that the damage to the victim's value to her potential husband could at least be minimized if the other claimant to possession of her were dead.

In Hale's time, rape was punished by death. But its prosecution occurred only upon instigation by someone in the role of a victim. If the woman herself failed to appeal, the right of appeal passed to her husband, or, if the victim was unmarried, to her father or his heir. This rule follows quite logically from a rape law designed to protect the property interests of men as well as the interests of women in preserving their chaste status; the husband or father, whose property interest had been violated, could vindicate that interest in court, regardless of the wishes of the victim herself.⁴⁶

The interests protected by rape laws in the common law tradition receive additional illumination from consideration of a related crime, that of stealing an heiress. This felony occurred when a propertied virgin was abducted from the custody of her parents or guardian and married, "defiled," or both. The common law writers discuss heiress-stealing in the same chapters as rape, and the one crime may be considered a subcategory of the other.⁴⁷ The specific prohibition on stealing an heiress served to protect the special interests of propertied families in the orderly transfer of land and material wealth through a daughter to her husband and children. This particular purpose could, perhaps, have been effected by a rule invalidating marriages achieved by

45. W. HAWKINS, *supra* note 38, at 121-23.

46. M. HALE, *supra* note 2, at 153.

47. See, e.g., E. COKE, *supra* note 2, at 60; W. HAWKINS, *supra* note 38, at 123; G. STEPHEN, *supra* note 35, at 265.

abduction. But such a rule would hardly deter the would-be husband, who could well expect the family of a "defiled" and possibly pregnant heiress to prefer him to no husband at all. The act of rape was thus an act of possession, rendering both the victim and her inheritance the property of the rapist. Although the special attraction of an heiress gave rise to the need for a special criminal prohibition, the forcible possession of a propertied virgin differed from that of any other woman only in the value of the stolen property.⁴⁸

As we have seen, rape law in the common law tradition has been designed to protect the interests of both men and women in the preservation of the chastity of women. The privilege of homicidal self-defense against rape demonstrates the significance which the law has recognized in these interests; a threat to these interests, like a threat to life itself, has been viewed as a threat of harm so irreparable that prevention is vital. A close examination of these interests and of the consequences of their deprivation will explain their importance.

The concept of a man's "honor" as a function of the chastity of his wife or daughter runs deep in western culture and in the Anglo-American legal tradition. That particular form of "honor" which derives from the exclusive possession of a woman has been regarded as an essential element of the definition of a man, comparable to ideals of potency or bravery. A man's status in his family and community, his prestige, and his self-esteem may all depend on this form of honor. The man who has been dishonored by unchastity in the women of his household may be ostracized from the ranks of men, much like the one dishonored by cowardice in battle. His conformity to the definition of manhood is undermined, and his place in the world of men becomes uncertain.⁴⁹

48. "Eleanor of Aquitaine . . . lived her early life in terror of being 'rapt' by a vassal who might through appropriation of her body gain title to her considerable property." S. BROWNMILLER, *supra* note 5, at 17. See also *id.*, at 17-20, on the acquisition of wives through rape among primitive peoples of the Philippines and Africa and among the Ancient Hebrews (citing the book of Judges and the story of Dinah in Genesis).

49. The protection of male honor, defined as exclusive possession of one's wife, has been considered so important that a few American jurisdictions have, until recently, permitted a husband to kill a man whom he finds in the act of adultery with his wife. N.M. STAT. ANN. § 40A 2-4(7) (1953) (repealed by 1964 N.M. Laws); TEX. PENAL CODE ANN. art. 1220 (Vernon) (repealed by 1973 Tex. Gen. Laws ch. 399, § 3 (a)); UTAH CODE ANN.

The importance of masculine "honor," as thus defined, is partly a matter of the prestige that derives from property ownership. The owner of material wealth derives social status from his property and loses that status if his property is stolen. Similarly, the husband or father of an attractive woman gains prestige from his prized possession; if she is raped, his possession of her is incomplete and his prestige declines accordingly.⁵⁰

But masculine "honor," more than the price of possession, is a symbol of a man's control over his domain and indeed of his status as a free man. The western concept of freedom for men has implied not only power over one's own activities but also control over the use of one's property and over the fate of one's dependents. A free man has been defined as one who has the capacity to own property and to support and protect his family. The rape of a man's wife or daughter, like the theft of his property, has undermined his sense of control over his household and, with it, his sense of freedom; in his own eyes and those of his peers, he is less free, and less of a man than he was before.

The role of ownership and control as elements of freedom may be seen in common law doctrines regarding robbery and burglary, as well as rape. Coke observed that one may kill a robber on the highway with impunity, "for a man shall never give way to a thief . . . neither shall he forfeit anything."⁵¹ This reasoning indicates a view that the harm of robbery goes far be-

§ 76-30-10(4) (1953). See L. KANOWITZ, *supra* note 24, at 92-93. Some courts have carried this rule so far as to deny the adulterer the right to resist the husband's attack except by flight. See generally *Dabney v. State*, 21 So. 211 (Ala. 1897); *Drysdale v. State*, 83 Ga. 747, 10 S.E. 358 (1889); *Reed v. State*, 11 Tex. Crim. 509 (1882). Under the common law, a husband's killing of his wife's lover was manslaughter, although the common law recognized that adultery was "the highest possible invasion of property." W. HAWKINS, *supra* note 38, at 84 n.4. See also M. HALE, *supra* note 2, at 486.

50. The importance of the property interest survives into the modern era.

[The consent standard in rape law] fosters, and is in turn bolstered by, a masculine pride in the exclusive possession of a sexual object. The consent of a woman to sexual intercourse awards the man a privilege of bodily access, a personal 'prize' whose value is enhanced by sole ownership . . . an additional reason for the man's condemnation of rape may be found in the threat to his status from a decrease in the 'value' of his sexual 'possession' which would result from forcible violation . . .

Note, *Forcible and Statutory Rape*, 62 YALE L.J. 55 (1952).

51. E. COKE, *supra* note 2, at 55.

yond the loss of property; such a loss alone would not justify prevention by homicide. The harm of robbery, as Coke describes it, is the "giving way": The experience of being forced, arbitrarily and under no claim of right, to give up what is rightfully one's own, and the impact of that experience on the status of the victim as a free man.

Burglary also justified prevention by homicide under the common law, for, according to Coke, "a man's home is his castle."⁵² The rule suggests that the impact of burglary, like robbery and rape, goes beyond property to the deeper value symbolized by the holding of property: the status of a man as safe, secure, and in control of his environment. This status has been viewed as a vital element of manhood, essential to the value of a man's life. The threat to this status posed by the crimes of robbery, burglary, and rape has thus been viewed as a threat of irreparable harm.

For the male, then, the chastity of the women close to him has been essential to his "honor," which, in turn, has implicated his prestige, social status, and self-esteem. The consequences of a deprivation of this "honor" have been severe and lasting. Its loss through rape has thus been viewed as irreparable.

For women, too, chastity has been the source of a particular kind of "honor," the loss of which has had serious consequences for a woman's social status, self-esteem, and material well-being. Womanly honor has meant reputation for chastity; and an honorable woman is one who is regarded by her community as in conformity with sexual convention and, therefore, available for exclusive possession by one man.

The "honor" of a woman, because of its implications for the "honor" of any man with whom she might be associated, has dictated in large measure her value to men. And in a world in which women have been dependent on and subordinate to men,

52. "A man's home is his castle . . . for where shall a man be safe if not in his house?" *Id.* at 161. This common law concept has persisted. See, e.g., W. LAFAYE & A. SCOTT, *supra* note 2, at 400. See generally *People v. Eatman*, 405 Ill.2d 491, 91 N.E.2d 387 (1950); *State v. Patterson*, 45 Vt. 308 (1873). Some modern sources include a requirement that the invader appear to intend to commit a felony against the inhabitants. MODEL PENAL CODE § 3.06(3)(d)(ii) (Tent. Draft No. 8, 1958).

the fate of any particular woman has depended in large part on her value to men. A threat of rape has posed to the female victim a loss of her "honor," with irreparable damage to her value to men and with consequent harm to all aspects of her life thereafter.⁵³

If the victim of rape happens to be a virgin, her loss is permanent in a particularly measurable way.⁵⁴ The loss of virginity through rape has been described as "defilement" and "defloration"; these words connote the permanent destruction of a vital element of one's value—a permanent stain on one's identity.⁵⁵ That stain might destroy her prospects for marriage, which may offer the only opportunities for social status and material security.⁵⁶ The victim may also suffer ostracism from both her peers and her family as a result of the destruction of her value on the scale by which young women have been measured. Along with these consequences to her status, position, and future, the rape victim also suffers the risk of pregnancy, which would doom both her and her child to economic hardship and social ostracism.⁵⁷

A rape victim who happens to be married might suffer consequences as severe as the maiden's loss of virginity. The wife in Anglo-American tradition has depended on her husband for financial support, social status, and prestige, and for her own sense of identity and value. His esteem for her is vital to every element of her well-being. But rape threatens the husband's regard for his wife; it threatens her interests in all the benefits she receives from him. To the extent that the wife's value to her husband depends on his exclusive possession of her, the rape might cause a loss of his affection and support, comparable to

53. Kant regards "womanly honor" as such an important interest as to excuse the killing by a mother of her illegitimate child. I. KANT, *supra* note 11, at 202.

54. See M. FOSTER, *supra* note 2, at 274.

55. "Words like 'ravage' and 'despoiled' used to describe the rape victim reflect the notion of a stain attaching to the body of the girl." Note, *supra* note 50, at 72.

56. The Hebrew and early English rules requiring the rapist to marry his victim may have served to compensate the victim for this loss as well as her father for the loss to his status and estate. See also Note, *supra* note 50, at 70, which states that, in a social structure in which marriage is an exchange of sexual access to the woman for economic support from the man, "the woman's power to withhold or grant sexual access is an important bargaining weapon."

57. One commentator suggests that the risk of pregnancy may have been viewed as the principle harm of rape. G. STEPHEN, *supra* note 35, at 254.

the loss that would result from an act of adultery. In ancient Israel, for example, a wife who was raped would be stoned along with her assailant, just as if she had committed adultery.⁵⁸ This rule might reflect a popular disbelief in the occurrence of an actual rape, and an assumption that the act was in fact adultery; but it conveys also a judgment that the victim's role in the act carried little significance. Her value to her husband as an object in his exclusive possession was destroyed by the event, regardless of the wife's behavior.

A husband's reaction of rejection following the rape of his wife has occurred in modern times as well. During the 1970 war in Bangladesh, hundreds of thousands of women were raped by invading soldiers. And, in accord with Moslem tradition, most of the victims' husbands subsequently rejected their wives, despite the new government's efforts to persuade the men of the country that these women were national heroines.⁵⁹ This response drew international attention in an era of mass media and of concern over rape as a political issue, but there is every reason to believe that the more commonplace occurrence of rape on a city street or in a burgled home has provoked similar responses.

Even if the experience of rape does not cause a husband to reject his wife, the loss of her "honor," as defined above, might well affect her value as an asset to him, and consequently his respect and affection for her.⁶⁰ In addition to these consequences on the raped wife's marriage and related interests, the experience of rape poses to a wife the same very practical risk it poses to the unmarried woman: pregnancy, with attendant social and financial consequences in the absence of a supportive father-to-be.

With a woman's social position, family relationships, and financial security dependent on her "honor," which is a function of her "chastity," her interest in avoiding rape may be seen as comparable to her interest in the preservation of her life. Indeed, many women have preferred death to rape, and that

58. S. BROWNMILLER, *supra* note 5, at 19. The Babylonian rule was the same, except that execution was by drowning. *Id.*

59. *Id.* at 79-80.

60. Brownmiller notes that, "Divorce after rape is not uncommon." *Id.* at 124.

choice has received broad social and religious approval. The Roman legend of Lucretia, for example, tells of a rape victim who killed herself to avoid shaming her husband. Her act of heroism inspired the Romans to revolt against the Tarquin invaders, including Lucretia's assailant, and drive them from Rome. Lucretia's suicide expresses her conclusion that the rape destroyed the value of her life, which was dependent on her chaste status. Having lost her honor, she was more a liability to her husband than an asset, and all she could offer him was proof of her spiritual purity through the act of suicide. Lucretia's judgment of her own worth after being raped has been ratified by the survival of her act in legend.⁶¹

The heroic female role of the chaste martyr has survived into the modern era. In 1902, an eleven-year-old Italian girl named Maria Goretti suffered death by stabbing at the hands of a potential rapist whose demands she resisted. The rapist admitted later that he had given Maria the choice of submitting to his will before he killed her, but she preferred death to unchastity. In 1950, Maria Goretti was canonized by the Roman Catholic Church.⁶²

Along with Maria Goretti and Lucretia, women throughout history have viewed rape as literally a fate worse than death. That view has been sanctioned and perpetuated by religious institutions and by popular opinion as expressed in literature and legend. It is no surprise, then, that the law has allowed women to protect themselves from rape through means as drastic as they would use to protect themselves from death.⁶³

61. *Id.* at 328.

62. *Id.* at 330-31.

63. According to the rule of "utmost resistance," which prevailed for a time in a few American jurisdictions, the rape victim had not only a privilege but perhaps even a duty to resist by any means available. Under this rule, unless the victim resisted "to the utmost," no rape had occurred. The rule suggests a distrust in the credibility of a woman's expressions of non-consent; however much she might protest, she is presumed to consent unless she resists "to the utmost." But, considering the danger to the woman's life that might arise from resistance to an armed and determined rapist, the rule of utmost resistance may also suggest a social judgment that her chastity is as important as her life. However, the rule of utmost resistance never prevailed under the common law and has died out in those states that once applied it. *See, e.g.,* *State v. Hunt*, 178 Neb. 783, 135 N.W.2d 475 (1965); *Reynolds v. State*, 27 Neb. 90, 42 N.W. 903 (1889); *Sowers v. Territory*, 6 Okl. 436, 50 P. 257 (1897); *Perez v. State*, 50 Tex. Crim. 34, 94 S.W. 1036 (1906); *State v. Hoffman*, 228 Wis. 235, 280 N.W. 357 (1938).

The loss of a woman's chastity, the chief harm which the law has recognized in the crime of rape, has thus threatened irreparable damage to both the victim herself and her male relatives. The law has seen in the act of rape an irreparable loss to the victim, susceptible of no adequate compensation or reparation after the fact. The permanence and significance of this harm has included rape with murder, in a category of crimes the prevention of which is a fundamental purpose of the state. Thus, when a situation arises in which state protection against the crime is unavailable, the state has found no legitimate role and has refrained from interference. Under such circumstances, the law has recognized a privilege of the individual to act to prevent the crime, just as he or she might if no state authority existed.

The common law doctrine of a privilege of homicidal self-defense against rape reflects a recognition of irreparable harm in the destruction of chastity through rape. This judgment is premised on the view that destruction of chastity is the primary harm of rape, and that chastity is an interest vital to both men and women. These premises have been valid in the context of a social system in which women hold the status of property, possessed by men through the sexual act, and valued according to the completeness of that possession by a particular man. That same system of social values still predominates in many parts of the world as well as in certain areas in American society; elements of it still pervade American culture and law.

But a process of change has at least begun in both law and culture. Although chastity may still be valued as a voluntary expression of the special love between spouses, it is no longer the foundation of honor for either sex, and its loss through rape no longer mandates the irreparable destruction of social position and self-esteem. As chastity has lost its importance, other values, such as personal autonomy for women, have gained increasing recognition in law and public opinion. A movement has developed demanding changes in the law of rape to reflect a modern understanding of the interests affected by rape, and some legal changes have occurred. Rules of evidence in some states now prohibit inquiry into the victim's previous sexual activity, and a few states have eliminated the exception for forc-

Women's Law Forum

ble rape between spouses.⁶⁴

If a changing understanding of the interests at stake necessitates changes in the law of rape, it also necessitates a re-examination of the privilege of homicidal self-defense against rape. If a threat to chastity is no longer a threat of irreparable harm, it cannot provide continuing legitimacy for the privilege. Unless rape threatens irreparable harm to some other, newly recognized interest, the rule of self-defense is obsolete and deserving of change. A critical judgment of the rule of self-defense thus depends on identification and evaluation of the interests at stake.

III. THE SCOPE OF THE DEFENSE: RAPE AS IRREPARABLE HARM IN THE MODERN WORLD

Modern efforts to describe the harm of rape have abandoned the language of chastity and focus instead on personal harm to the victim. So far these efforts are only initial attempts, and no precise statement of the harm of rape is yet available in the law. Nevertheless, the descriptions that exist do identify some of the interests affected.

The California Penal Code describes the harm of rape as follows: "The essential guilt of rape consists of the outrage to the person and feelings of the victim of the rape."⁶⁵ This definition lacks precision, but it suggests two of the interests at stake: physical integrity and psychological well-being. The United States Supreme Court, in *Coker v. Georgia*,⁶⁶ recognized a third characteristic of the harm of rape, the deprivation of a woman's power to choose her sexual partners:

[Rape] is highly reprehensible, both in a moral sense and in its almost total contempt for the personal integrity and autonomy of the female victim and for the latter's privilege of choosing those with whom intimate relationships are to be established. Short of homicide, it is the "ultimate vio-

64. See, e.g., OR. REV. STAT. §§ 163.305 (1977), 163.375 (1971).

65. CAL. PENAL CODE § 263 (West Supp. 1981), enacted in 1872. The statutory language was amended in 1979 to refer to the person and feelings of "the victim of the rape" rather than those of the "female involved." 1979 Cal. Stats., ch. 994, § 3. See also F. LUDWIG, RAPE AND THE LAW 3 (1977), in which the author states that the prohibition of rape "is designed primarily to protect women from psychical and emotional outrage."

66. 433 U.S. 584 (1977).

lation of self."⁶⁷

A close examination of these three interests—psychological health, physical integrity, and freedom of sexual choice—may lead to a more precise understanding of the harm of rape. It is well documented that an experience of rape tends to cause psychological injury to the victim. For some victims, because of their age or psychological predispositions, or because of the particular circumstances of the occurrence, the psychological injury may be permanently crippling; for them, the harm of rape is irreparable in the same way that the loss of life or limb is irreparable.⁶⁸

Whether or not a particular victim suffers serious psychological damage as a result of rape, the experience necessarily involves a physical invasion of the victim's most private inner being.⁶⁹ The social value of personal space is evident in the recognition of individual rights of privacy in both law and culture. The importance of personal space appears also in the elaborate system of etiquette that controls bodily proximity in everyday interactions. The body, as the "envelope of the self," includes the most personal of private spaces.⁷⁰ Some forms of bodily invasion are, of course, trivial aspects of life in society—*e.g.*, a hand on the shoulder or bodily contact in a crowd.⁷¹ Medical examinations and treatment are a more significant form of bodily invasion which occur under controlled circumstances for important reasons. The bodily contact that occurs in sexual intercourse goes beyond any of these events to involve the most invasive form of contact with the most private of personal spaces. The same physical act may be transformed by willing participation into a mutual exchange of love; indeed the consensual act derives its significance as a form of expression at least in

67. *Id.* at 597.

68. See generally Burgess & Holstrom, *Rape Trauma Syndrome*, in *FORCIBLE RAPE: THE CRIME, THE VICTIM, AND THE OFFENDER* (D. Chappell & R. Geis, G. Geis ed. 1977); E. HILBERMAN, *THE RAPE VICTIM* (1976); C. HURSH, *THE TROUBLE WITH RAPE* (1977); F. LUDWIG, *supra* note 65; and S. BROWNMILLER, *supra* note 5, at ch. 10.

69. See S. BROWNMILLER, *supra* note 5, at 376, on bodily invasion in the definition of rape. See also E. HILBERMAN, *supra* note 68, at ix-x, on invasion of personal space as violation of the self; G. FLETCHER, *supra* note 3, at 705, suggesting that consent be viewed as a justification for the bodily invasion of sexual contact.

70. E. HILBERMAN, *supra* note 68, at ix.

71. G. FLETCHER, *supra* note 3, at 705.

part from the cultural and psychological importance of the personal space to which each participant grants the other access. But without consent, the sexual act is the most extreme deprivation of physical integrity.

In addition to bodily invasion, rape involves a deprivation of the victim's right of choice over her sexual activity—a violation of her autonomy in an area which, for biological, historical, and cultural reasons, has great significance. An individual's sexual choices reflect factors ranging in importance from the mood of the moment to one's readiness to reproduce; among these factors may be marital commitments, religious faith or even religious vows, personal values, health considerations, and personal taste. The rapist overrides all factors, ignoring the victim's preferences and demonstrating the predominance of his choices over hers.

Along with a danger of psychological damage, rape, by definition, involves a deprivation of physical integrity and autonomy. But these interests are also implicated by other violations, such as burglary, robbery, false arrest, and kidnapping which do not, at least under modern law, trigger a right of homicidal prevention. By examining these crimes and considering how the violations they involve differ from the violations involved in rape, we may identify more precisely the harm of rape.

An invasion of private space occurs in the crime of burglary as well as in rape. A home and its contents may be viewed as an extension of the self. An intrusion into one's dwelling space may be experienced as a violation comparable to the violation of bodily space.⁷² But the space involved, while identified with the individual as an extension of his or herself, is still separate from the individual. The burglary victim can disassociate himself or herself from the violated space and establish a new home, if the experience is so traumatic as to warrant such a response. But the rape victim is intimately and inseparably connected to the

72. E. HILBERMAN, *supra* note 68, at ix. As we saw before, the significance of burglary in the common law reflected the importance to the male head of household of control over his domain as a symbol of his identity as a free man. But a man's control over his household has lost at least some of its former importance for his status, and this change is reflected in the modern rule that one may kill to prevent burglary only if one reasonably fears that the burglar intends to commit a felony against the inhabitants of the home in addition to the felonious entry. See MODEL PENAL CODE § 3.06(3)(d)(ii) (Tent. Draft No. 8, 1958); W. LAFAVE & A. SCOTT, *supra* note 3, at 400.

space which is violated by the crime; that space is not merely an extension of her, replaceable at will, but her own body.⁷³

Although the experience of physical invasion may be perceived as the most immediate offense of rape, the physical act involved constitutes an invasion rather than an event of a wholly different character simply because it occurs without choice. The deprivation of choice, then, is the primary offense and deserves close examination.

Deprivations of autonomy occur in robbery, false arrest, and kidnapping as well as in rape. The robbery victim is, in Coke's words, forced to "give way";^{73.1} that is, he or she is deprived of the freedom to choose between retaining property and relinquishing it. Control over one's property once carried such significance for the definition of a man that its deprivation through robbery could legally be prevented by homicide. But the cultural significance of this form of autonomy has lessened, so that the modern rule permits homicide in prevention of robbery only if the victim reasonably fears death or serious bodily harm.⁷⁴ The difference between the deprivation of autonomy inflicted by robbery and that inflicted by rape is in the particular choices which the victim is prevented from making, and the cultural significance assigned to those choices. When the freedom to control one's property symbolized the status of a free man, the deprivation of that freedom was viewed as irreparable harm. If sexual freedom holds a comparable symbolic value in modern culture, then its deprivation similarly constitutes irreparable harm, triggering a privilege of self-defense.

73. The only other crime which involves a violation of such intimate personal space is forcible sodomy, which both the common law and modern statutes have unanimously held to justify prevention by homicide. W. BLACKSTONE, *supra* note 1, at 1579-80; MODEL PENAL CODE § 3.04(2)(b)(i) (Tent. Draft No. 8, 1958); *See also* People v. Collins, 189 Cal. App. 2d 575, 11 Cal. Rptr. 504 (1961); State v. Robinson, 328 S.W.2d 667 (Mo. S. Ct. 1959).

73.1 E. COKE, *supra* note 2, at 55.

74. W. LAFAYE & A. SCOTT, *supra* note 3, at 400. *See also* J. LOCKE, *supra* note 2, at 125-26, observing by way of analogy to robbery that an attempt to enslave also creates a privilege to kill, since enslavement would give the aggressor the power to destroy the victim's life. The analogy suggests the importance of autonomy as both a symbolic element of personhood and a source of capacity for self-protection. *See also* E. HILBERMAN, *supra* note 68, at ix-x, on the violation of self and the consequent psychic stress involved in robbery.

The victim of false arrest is also deprived of autonomy; he or she loses freedom of movement during the period of detention, and may also suffer indignity, inconvenience, and damage to reputation. Nevertheless, false arrest has not traditionally been held to justify prevention by homicide, although it has been viewed as provocation sufficient to reduce homicide from murder to manslaughter.⁷⁵

The deprivation of autonomy involved in false arrest differs from that involved in rape in at least two respects. First, as in the case of robbery, it differs in the cultural significance assigned to the particular choices which the victim is prevented from making. A deprivation of freedom of movement for a short period of time, although important, does not carry the degree of significance for an individual's status as a free person that the deprivation of control over one's property or over one's household once carried, or that a deprivation of sexual freedom may carry today. A second, and perhaps even more important difference, is that false arrest occurs under a claim of right, which includes an implicit recognition of the victim's status as a free person; the victim is guaranteed due process, through which he or she can expect vindication in due course. Thus, although the victim is temporarily unable to exercise autonomy, his or her status as a person with general rights of autonomy is not impaired.

Kidnapping also involves a deprivation of freedom of movement. The deprivation involved in kidnapping is greater than that involved in false arrest, because it may be prolonged and because it occurs under no claim of right. Case law and commentary on the question of self-defense against kidnapping is scarce, perhaps because a kidnapping which would not support the victim's reasonable fear of death is so unimaginable that a separate rule for kidnapping has been unnecessary. Neither common law writers nor most modern statutes include kidnapping in their lists of crimes that justify homicidal self-defense,⁷⁶ although, of

75. W. LAFAVE & A. SCOTT, *supra* note 3, at 396-97. *But see* *Perdue v. State*, 5 Ga. App. 821, 63 S.E. 922 (1909); *State v. Bethune*, 112 S.C. 100, 99 S.E. 753 (1883), for a contradictory judicial view. *See generally* Chevigny, *The Right To Resist an Unlawful Arrest*, 78 YALE L.J. 1128 (1969).

76. Some statutes encompass kidnapping. *See, e.g.*, N.Y. PENAL LAW § 35.15(2)(b) (McKinney 1968); ILL. ANN STAT. ch. 38, § 7-1 (Smith-Hurd 1962).

course, an act of kidnapping could trigger a right of self-defense by providing evidence of a threat of death, serious bodily harm, or rape.⁷⁷ Kidnapping alone, however, unaccompanied by other crimes, involves only a deprivation of autonomy. Like false arrest, kidnapping differs from rape to the same extent that freedom of movement differs in cultural significance from sexual freedom.

The deprivation of autonomy that occurs in rape differs from the deprivation involved in these other crimes in the nature and significance of the choice that is prevented; the extent of the harm of rape, then, depends on the importance of sexual autonomy for women in modern American culture. If a woman's sexual autonomy is an essential characteristic of her status as a free person, comparable in significance to the "honor" of a man or woman under the common law, then rape still causes irreparable harm and should still trigger a right of homicidal self-defense.⁷⁸

Two aspects of a woman's sexual autonomy give it particular importance: first, the role of sexuality as a means of emotional expression, and second, the history of denial of sexual freedom to women. The significance of sexual freedom as a characteristic of personhood derives, at least in part, from the importance of sexuality as a means of emotional expression. The development and expression of emotional bonds, separate from the urges of biology or instinct, is one of the characteristics of human life that distinguishes people from all other animals. The ability to express feelings of love is fundamental to the human quality of a person's life. The rape victim is deprived of sexuality as a medium of emotional expression, on the occasion of the rape and perhaps thereafter as well. The memory of an act of sex without choice, performed by the rapist and experienced by the victim as an expression of contempt rather than of love, may

77. W. BLACKSTONE, *supra* note 1, at 1714, specifies fine and imprisonment, rather than death, as punishment for kidnapping. In light of his capital punishment standard for self-defense, the penalty suggests that kidnapping does not justify homicidal prevention.

78. See G. FLETCHER, *supra* note 3, at 706, observing that changing attitudes toward chastity should not be regarded as reducing the harm of rape, because "[t]he more seriously one takes the sexual autonomy of adult men and women, the more incriminating an act of forcible intercourse."

cause the victim to associate sexuality with the emotions she felt on that occasion. That association could impair her ability thereafter to experience sexual intercourse as an expression of love given and received. That result severely impairs her identity as a human being.

Sexual freedom carries additional significance for women because it is a type of autonomy which they have only recently acquired, if they have it at all. Freedom of sexual choice has not been a characteristic historically associated with women; indeed it may be safe to say that most women throughout history have had little or no autonomy in sexual matters. For this reason rape has been viewed as a crime against the victim's "chastity" or her husband's property rights, but seldom as a violation of the victim's own liberty.

Deprivation of sexual freedom has been one of the most effective means by which women have been denied the status of persons and reduced to the status of property. That men have had sexual autonomy while women have not has stood as a symbol of the subordinate position of women in relation to men. While men have been free people, capable of making choices and acting upon their own choices, women have been the objects of those choices, acted upon but prevented from acting on their own behalf.⁷⁹

The deprivation of sexual autonomy in rape has functioned as a symbol of the power of men over women. Rape has been used in primitive cultures as a form of ritual discipline, applied by groups of men to women who rebel against the restraints of the feminine role.⁸⁰ The rape of an unknown woman on a modern city street may be another form of the same type of disciplinary action. The man who simply assumes that a lone woman is a fair target is, in a sense, punishing his victim for presuming to

79. The value that men have always placed on their own sexual autonomy is evident in the rule that forcible sodomy justifies prevention by homicide. *See* note 73 *supra*. *See also* S. BROWNMILLER, *supra* note 5, at 257-68, on homosexual rape in prisons as a method of "conquest and degradation," through which physically strong men achieve status in a social hierarchy by forcing weaker men to act as passive sexual objects, the role assigned to women in the outside world.

80. S. BROWNMILLER, *supra* note 5, at 284-85, reports on systematic gang rape as a method of punishment for rebellious women among primitive tribes in New Guinea and Brazil.

think that she may live an independent life free of male protection. Both the men of the primitive tribe and the rapist on the modern city streets use rape to preserve and enforce the supremacy of men over women in their societies. Through a graphic reminder of women's lack of sexual choice, they remind the rape victim and all other women of their overall subordination to men.

Rape operates to dehumanize women further when, as often occurs during warfare between nations, classes, or races, men rape to degrade other men through violation of "their" women.⁸¹ Under these circumstances, the woman's right to sexual freedom is denied even the recognition inherent in its deliberate violation. Her body is the battleground for a struggle between men, and the violation of her autonomy is only an incidental by-product of warfare in which she does not otherwise participate. This form of rape serves to impress upon all women that they are not free persons, possessing rights of autonomy and integrity. They are, rather, items of property existing for use both by and against their male owners.

Because of the history of its denial, sexual autonomy for women carries an importance that goes well beyond the significance of sexuality as a means of emotional expression. Freedom of sexual choice symbolizes the full and independent personhood that women are only beginning to achieve. The deprivation of that freedom through rape symbolizes revival of the subordinate status to which women were so long relegated.

The harm of rape in the modern world, then, is the same as the harm which the common law recognized in burglary, robbery, or the rape of a man's wife or daughter. Just as the male head of household who suffered these crimes experienced an irreparable blow to his "honor"—his status as a free man in control of his environment and possessions—so the modern rape victim may experience irreparable damage to her precarious status as a full-fledged human being, in control of herself, her body, and her sexuality. Through the deprivation of interests which symbolize the status of a free person, interests in bodily integrity, sexual autonomy, and the capacity to freely and actively

81. See generally *id.*, at chs. 3, 4 & 7.

participate in sexual activity as a form of emotional expression, the rape victim is deprived of her personhood just as, according to the social perceptions underlying the common law rules, the male victim of robbery or burglary, or the husband or father of a rape victim, was deprived of his personhood. The deprivation that occurs in the modern rape is irreparable for the same reason that those deprivations were considered irreparable: Because no subsequent legal proceeding can adequately compensate for the loss which the victim has suffered. No amount of monetary damages could make the victim whole, because the value of the lost sense of personhood is immeasurable, and no punishment inflicted on the perpetrator could provide full vindication to the victim. Because compensation is impossible, prevention is essential. The modern rape victim, therefore, like the victim of burglary, robbery, or rape under the common law, has the right to prevent the crime by any means necessary, including homicide.

IV. CONCLUSION

The privilege of self-defense is a form of recognition in the criminal law of the purposes of the state and the limitations on state authority. If government is a creation of free individuals, established for the purpose of protecting the interests of its members in their lives as human beings, then the authority of government ends when it is unable to serve that purpose. An individual who faces an immediate threat of irreparable damage to his or her interests in human life is therefore freed of legal restraint and privileged to employ any means necessary to prevent that deprivation.

Human life involves more than mere biological existence. The rules of self-defense, which have always permitted the use of deadly force in prevention of certain nondeadly crimes, express a universal judgment that certain interests are so important to the human quality of life that life without them does not deserve the designation "human." One who loses these vital interests, according to the universal judgment expressed in the law of self-defense, is no longer fully a person. The identity of those interests is a matter of social judgment within each culture, subject to change as cultural values change.

The rules of self-defense under the common law reflect a set of cultural judgments identifying the interests considered crucial

to personhood. For men, these interests have included the status of a free man, in control of his actions and his environment, in full possession of whatever material wealth he may own, and perhaps most important, in full and exclusive possession of the women of his household. For women, these interests have included chastity and "honor," a status of bodily purity defined as sexual "possession" by one man alone.

These cultural judgments have changed through time, so that in modern American society the control over material possessions carries less significance for a man's personhood than it once did. Cultural changes now in progress are rendering obsolete the concept of a man's "possession" of a woman through sexuality, so that the chastity of a woman now carries less significance. The threat of such a deprivation therefore no longer justifies a homicidal response.

But other interests have increased in the value accorded by cultural judgment. Personal autonomy, particularly in matters of sexuality, and bodily integrity are two of the most important values in modern society, values that modern American culture considers vital to the identity of an individual as a full and free person. For women, who have long been denied these essential elements of humanity, these interests carry particular significance in the definition of personhood.

Rape is an actual and symbolic deprivation of the victim's vital interests in sexual autonomy and bodily integrity. The experience of rape thus irreparably impairs the victim's status as a full and free person. As a deprivation of personhood, or of life as a human being, rape is one of the occurrences that government exists to prevent. Where government intervention is unavailable, however, and no less drastic method would prevail, prevention may occur through an individual's use of the deadly force usually reserved for the state. By declining to prohibit or punish the use of deadly force under such circumstances, the criminal law expresses a recognition of the origin and purposes of the state and of the limitations on its power.