LETHAL SELF-DEFENSE AGAINST A RAPIST AND THE CHALLENGE OF PROPORTIONALITY: JEWISH LAW PERSPECTIVE

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Abstract

Is a victim of sexual assault permitted, similar to a victim of a life-threatening attack, to defend herself by using deadly force against the attacker? While the practical significance of this question is quite self-evident, of no lesser importance are its theoretical foundations, mainly with regard to the conceptual question of proportionality. This Article will analyze the issue from a Jewish law perspective, alongside an intensive comparative legal discussion. Jewish law appears to present an approach far more complex than what may be gleaned at first blush, weaving together two parallel and complementary realms: on the level of theoretical law, Jewish law maintains complete proportionality between the severity of the assault and the measure of self-defense employed to repel it, and as a result limits the permissibility of killing a rapist in self-defense. However, the unique design of the law gives rise to an additional level of law in practice, in which deadly force against a potential rapist is broadly sanctioned in nearly all cases, and prohibition of such self-defense is rare to non-existent. In practice, the principle of proportionality is interpreted leniently, in favor of the victim. This duality is of great significance, allowing the law to mold a complex approach capable of embodying numerous contradictory considerations. Such duality may lend a new perspective to the current discourse in legal literature on this issue, fostering conceptual diversity in the study of self-defense.

INTRODUCTION

Criminal law widely recognizes and justifies the use of force by a victim against an attacker, at times even in lethal measure, when such action is taken in self-defense.[1] When

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1 *See generally* JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 221 [hereinafter DRESSLER, UNDERSTANDING]; GEORGE P. FLETCHER, RETHINKING CRIMINAL LAW 855 (2000) [hereinafter FLETCHER, RETHINKING]; WHITLEY R.P.

the life of a potential victim can be spared only by employment of deadly force against the assailant, it is permissible[2] for the victim or, alternatively, a third-party passerby coming to her assistance,[3] to protect the victim's life even at the expense of the attacker's. This right to self-defense has been recognized since antiquity,[4] and has been accepted in Jewish law from time immemorial.[5] In Jewish sources going back as far as the mishnaic period,[6] the sages related: "The following must be saved even at the expense of their lives: he who

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KAUFMAN, JUSTIFIED KILLING: THE PARADOX OF SELF-DEFENSE (2009); WAYNE R. LAFAVE, CRIMINAL LAW 539 (4th ed. 2003); FIONA LEVERICK, KILLING IN SELF-DEFENCE (2006); ROLLIN M. PERKINS & ROLAND N. BOYCE, CRIMINAL LAW 1148–54 (3d ed. 1982); PAUL H. ROBINSON, CRIMINAL LAW DEFENSES 105–34 (1984); BOAZ SANGERO, SELF-DEFENCE IN CRIMINAL LAW (2006); IRVING J. SLOAN, THE LAW OF SELF-DEFENSE: LEGAL AND ETHICAL PRINCIPLES (1987); SUZANNE UNIACKE, PERMISSIBLE KILLING: THE SELF-DEFENCE JUSTIFICATION OF HOMICIDE (1994); David Lanham, *Death of a Qualified Defence?*, 104 L. Q. REV. 239 (1988).

2 For the purpose of this discussion, I will assume (although it is not a given) that self-defense is a justification, and not merely an excuse. In this context, see FLETCHER, RETHINKING, *supra* note 1, at 759; ROBINSON, *supra* note 1; SANGERO, *supra* note 1, at 11; JOHN C. SMITH, JUSTIFICATION AND EXCUSE IN THE CRIMINAL LAW 109 (1989); Joshua Dressler, *New Thoughts About the Concept of Justification in the Criminal Law*, 32 U.C.L.A. L. REV. 61 (1984) [hereinafter Dressler, *New Thoughts*]; Albin Eser, *Justification and Excuse*, 24 AM. J. COMP. L. 621 (1976); Kent Greenawalt, *The Perplexing Borders of Justification and Excuse*, 84 COLUM. L. REV. 1897 (1984). This assumption is reflective of the Jewish law position, which perceives self-defense as a justification to be encouraged, as expressed by the sages: "If someone comes to kill you, rise and kill him first." BABYLONIAN TALMUD, *Berakhot* 62b. Furthermore, in the context of a third party using self-defense to protect a potential victim, Maimonides (Rabbi Moses ben Maimon, 1135–1204, Spain – Egypt) considers this a *mandatory duty*. *See* MISHNEH TORAH, *Laws of Murder and Preservation of Life*, 1:6. English quotations of Mishneh Torah are taken from *The Code of Maimonides* (Hyman Klein trans., Yale Univ. Press 1954). From these sources it is evident that killing an attacker in self-defense is not only permissible, but also morally *justified*. It should be noted, however, that alongside the widespread assumption of self-defense as a justification, there are those who currently consider self-defense as an *excuse*. *See* Whitley R.P. Kaufman, *Is There a 'Right' to Self-Defence?*, 23 CRIM. JUST. ETHICS 20 (2004); Cathryn Jo Rosen, *The Excuse of Self-Defense: Correcting a Historical Accident on Behalf of Battered Women Who Kill*, 36 AM. U. L. REV. 11 (1986).

3 For more on the status of a third-party passerby in the context of self-defense, see discussion *infra* Part IV.D.

4 *See* SANGERO, *supra* note 1, at 6 ("Self-defense is not a law that was created by man, but a law enacted by nature itself.") (quoting Cicero, Oration in Defense of Milo (52 B.C.E.)); *cf.* UNIACKE, *supra* note 1, at 57.

5 *See* SANGERO, *supra* note 1, at 31; JOSEPH B. STERN, THE RIGHT OF SELF-DEFENSE AND ABORTION IN JEWISH LAW (1983); Marilyn Finkelman, *Self-Defense and Defense of Others in Jewish Law: The Rodef Defense*, 33 WAYNE L. REV. 1257 (1987); Dov I. Frimer, *The Right of Self-Defense and Abortion*, *in* MAIMONIDES AS CODIFIER OF JEWISH LAW 195 (Nahum Rakover ed., 1987); David Jacobs, *Privileges for the Use of Deadly Force Against a Residence-Intruder: A Comparison of the Jewish Law and the United States Common Law*, 63 TEMP. L. REV. 31 (1990).

6 The Mishnah, a collection of laws compiled by Rabbi Judah the Prince around the end of the second century CE, summarizes the halakhic works of the sages of the Land of Israel from the first century BCE until then.

pursues after his neighbor to slay him . . . ."[7] The following Article will examine whether a potential rape victim, or alternatively a third-party passerby attempting to rescue her, may employ deadly force against the would-be rapist, should his death be the only effective means of preventing the rape.[8] Is a potential victim of sexual assault permitted, similar to a victim of a potentially life threatening attack, to use deadly force against her attacker, or rather is the former limited exclusively to non-life threatening forms of self-defense?[9]

While the practical significance of this question is quite self-evident, of no lesser importance are its theoretical foundations: as I will elaborate upon further, the use of lethal force against a potential rapist presents an instructive test case, shedding light on broader conceptual questions relating to the doctrine of self-defense in general, and concerning the requirement of *proportionate force* in particular.

The following Article will focus on the Jewish law approach to this issue, alongside a comparative legal perspective.[10] I will argue that the Jewish law approach differs sharply

Translations of mishnaic and talmudic sources are based on the Soncino edition with certain modifications. *See English Babylonian Talmud, Soncino Translation*, HALAKHAH.COM, http://halakhah.com/ (last visited Aug. 30, 2013).

7 *See* MISHNAH, *Sanhedrin* 8:7. The sages offered biblical sources for this law; *see Exodus* 22:1–2; *Deuteronomy* 22:25–27; *cf.* Haim Shapirah, *The Law of the Pursuer and the Source of Self-Defense in Jewish Law*, 16 JEWISH L. ASS'N STUD. 250 (2007).

8 The definition of rape is no trivial matter, and raises several questions. For example, does forcible intercourse between a husband and his wife constitute rape? What is the legal status of intercourse as a result of psychological coercion (as opposed to physical coercion), or consensual relations with a minor? Is the definition of rape sensitive to the gender of the victim and of the assailant? Attention should, of course, also be given to the question of whether rape is limited only to penetration of the vagina by the penis. For a broad discussion, see ENCYCLOPEDIA OF RAPE (Merril D. Smith ed., 2004) [hereinafter ENCY.]; CRAIG PALMER & RANDY THORNHILL, A NATURAL HISTORY OF RAPE: BIOLOGICAL BASES OF SEXUAL COERCION (2000); Sophie Day, *What Counts as Rape? Physical Assault and Broken Contracts: Contrasting Views of Rape Among London Sex Workers, in* SEX AND VIOLENCE: ISSUES IN REPRESENTATION AND EXPERIENCE 172 (Penelope Harvey & Peter Gow eds., 1994). For the purpose of this article, which focuses on early Jewish law sources, I will concentrate on the most stereotypical case of a man raping a woman. Therefore, in this context I find useful the ancient Roman definition of rape as "intercourse by force." *See* ENCY., *supra*, at 169. Some of the other aspects of the rape definition will be dealt with further on.

9 For example, infliction of severe bodily harm to the rapist without killing him.

10 For discussion of modern legal literature on the subject of killing a rapist in self-defense, see CYNTHIA K. GILLESPIE, JUSTIFIABLE HOMICIDE: BATTERED WOMEN, SELF-DEFENSE AND THE LAW 62 (1989); LEVERICK, *supra* note 1, at 143; Christine R. Essique, *The Use of Deadly Force by Women Against Rape in Michigan: Justifiable Homicide?* 37 WAYNE L. REV. 1969 (1991); Judith Fabricant, *Homicide in Response to a Threat of Rape: A Theoretical Examination of the Rule of Justification*, 11 GOLDEN GATE U. L. REV. 945 (1981); Don B. Kates

from the currently accepted approaches in most major modern legal systems. Furthermore, Jewish law presents an approach far more complex than what may be gleaned at first blush, weaving together two parallel and complementary realms: theoretical law (*halakha*) and law in practice (*halakha le-ma'aseh*).[11] On the level of theoretical law, Jewish law distinguishes between different categories of potential rape victims by their marital status, allowing the use of deadly force in self-defense by some but not others. This position stems from a general policy of maintaining complete proportionality between the severity of the assault and the measure of self-defense employed to repel it. However, the unique design of the law gives rise to an additional level of law in practice, in which deadly force against a potential rapist is broadly sanctioned in nearly all cases, and prohibition of such self-defense is rare to non-existent. In practice, the principle of proportionality is interpreted leniently, in favor of the victim. This duality is of great significance, allowing the law to mold a complex approach capable of embodying numerous contradictory considerations. Such duality may lend a new perspective to the current discourse being held in legal literature on this issue, fostering conceptual diversity in the study of self-defense.

Furthermore, the very distinction within Jewish law between theoretical law (*halakha*) and law in practice (*halakha le-ma'aseh*), as exemplified in this case, can itself enrich and inform the current legal discourse, particularly in the context of American legal realism, pertaining to the distinction between written law and the law in practice.[12]

The argument presented in the following Article is comprised of several stages. Following the introduction, Part I will be dedicated to a discussion of the unique characteristics of rape crimes in the context of the requirement of proportionality. Part II

& Nancy J. Engberg, *Deadly Force Self-Defense Against Rape*, 15 U.C. DAVIS L. REV. 873 (1982). For a criminological and practical legal perspective, see Elizabeth M. Schneider & Susan B. Jordan, *Representation of Women who Defend Themselves in Response to Physical or Sexual Assault*, 4 WOMEN'S RTS. L. REP. 149 (1978).

11 From a jurisprudence perspective, Jewish law differentiates between the realm of "*halakha*," the abstract normative principle, and "*halakha le-ma'aseh*," the practical imperative. *See* MENACHEM ELON, JEWISH LAW: HISTORY, SOURCES PRINCIPLES 975, 1456 (Bernard Aurbach & Melvin J. Sykes trans., 1994); Menachem Elon, *More About Research into Jewish Law*, *in* MODERN RESEARCH IN JEWISH LAW 66, 89 (Bernard S. Jackson ed., 1980); Izhak Englard, *Research in Jewish Law—Its Nature and Function*, *in* MODERN RESEARCH IN JEWISH LAW 21, 40 (Bernard S. Jackson ed., 1980); Moshe Simon-Shoshan, Halachah Lema'aseh: Narrative and Legal Discourse in the Mishnah (2005) (unpublished Ph.D. dissertation, University of Pennsylvania), *available at* http://search.proquest.com//docview/305409093.

12 *See* AMERICAN LEGAL REALISM (William W. Fisher et al. eds., 1993); JOHN H. SCHLEGEL, AMERICAN LEGAL REALISM AND EMPIRICAL SOCIAL SCIENCE (1995); Brian Leiter, *American Legal Realism*, *in* THE BLACKWELL GUIDE TO PHILOSOPHY OF LAW AND LEGAL THEORY 50 (W. Edmundson & M. Golding eds., 2003).

will review the subject of deadly force against a potential rapist in several major modern legal systems. Part III will present the *apparent* approach of Jewish law, as perceived at first blush, within the realm of *halakha*. In contrast, Part IV will discuss three factors underlying the differing position of Jewish law as applied in practice (*halakha le-ma'aseh*). The Article concludes with discussion of various aspects and meanings of this duality.

I. The Proportionality Requirement: Rape as a Test Case

There are several accepted conditions for the legitimate use of self-defense.[13] One of these conditions, at the focus of this Article, is the requirement of *proportionality*. In the following pages I will discuss several theoretical aspects of this requirement.

A. The Degree of Proportionality

Is a victim acting in self-defense necessarily required to maintain proportionality between his own interests (jeopardized by the assault), and the interests of the attacker (jeopardized by the act of self-defense)? This is no simple question, particularly in complex "gray" cases to be discussed further on, and much literature has indeed been written on the subject.[14] It stands to reason, for instance, that killing an attacker would be a reasonable act of self-defense in the context of attempted murder, whereas it would seem wholly

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13 The major requirements being that the attack is unlawful, poses imminent danger to the victim, and in no way results from fault on the part of the victim. Furthermore, the act of self-defense must employ the minimal force necessary to thwart the attack. These requirements may influence the discussion of such issues as battered women who kill their husbands, wherein the requirement of imminent danger may not be fulfilled, thus raising the question whether such cases may in fact be categorized as self-defense. *Cf.* CLARE DALTON, BATTERED WOMEN AND THE LAW 716–23 (2001); GILLESPIE, *supra* note 10; LEVERICK, *supra* note 1, at 89; ROBBIN S. OGLE, SELF-DEFENSE AND BATTERED WOMEN WHO KILL: A NEW FRAMEWORK 106–29 (2002); SANGERO, *supra* note 1, at 339; Holly Maguigan, *Battered Woman and Self-Defense: Myths and Misconceptions in Current Reform Proposals*, 140 U. PA. L. REV. 379 (1991); Richard A. Rosen, *On Self-Defense, Imminence, and Women Who Killed Their Batterers*, 71 N.C. L. REV. 371 (1993).

14 FLETCHER, RETHINKING, *supra* note 1, at 870; SANGERO, *supra* note 1, at 166; George P. Fletcher. *The Right and the Reasonable*, 98 HARV. L. REV. 949, 951–52 (1985) [hereinafter Fletcher, *The Right and the Reasonable*]; George P. Fletcher, *Proportionality and the Psychotic Aggressor: A Vignette in Comparative Criminal Theory*, 8 ISR. L. REV. 367 (1973) [hereinafter Fletcher, *Proportionality*]; Stuart P. Green, *Castles and Carjackers: Proportionality and the Use of Deadly Force in Defense of Dwellings and Vehicles*, 1999 U. ILL. L. REV. 1 (1999); Mordechai Kremnitzer, *Proportionality and the Psychotic Aggressor—Another View*, 18 ISR. L. REV. 178 (1983) [hereinafter Kremnitzer, *Another View*]; Mordechai Kremnitzer & Khalid Ghanayim, *Proportionality and the Aggressor's Culpability in Self-Defense*, 39 TULSA L. REV. 875 (2004) [hereinafter Kremnitzer & Ghanayim, *Aggressor's Culpability*]; Phillip Montague, *Punishment and Societal Defense*, 2 CRIM. JUST. ETHICS 30, 32 (1983).

disproportionate and unreasonable in the context of petty theft.[15] However, what would be the appropriate norm in more complicated cases? For instance, do kidnapping or unlawful imprisonment (under non-life-threatening circumstances) justify killing the attacker in self-defense? May public humiliation, such as public lashing, be prevented through any effective measure of self-defense, including the use of lethal force?[16]

These questions allow for a spectrum of answers. One possibility is to fully adopt the principle of proportionality, thus conditioning any act of self-defense upon the maintenance of *precise* proportion between the attack and the measure of force used to offset it.[17] For instance, if the attacker is attempting to injure the victim,[18] the victim may fend off the attack only by use of self-defense in a measure not exceeding that employed by the attacker.[19]

15 The requirement of *proportionality* is not to be confused with the requirement of *necessity*. It is possible to envision a situation in which the only way to prevent a crime would be to kill the attacker, and nonetheless such an act would be considered disproportionate in relation to the attack. For example, in the case of petty theft, even if the only way to stop the thief would be to kill him, and therefore such "self-defense" may be necessary, it would nonetheless be disproportionate to the attack and therefore prohibited based on the proportionality requirement—even at the expense of allowing the crime to take place. *See* Kremnitzer, *Another View*, *supra* note 14, at 178 n.3; Re'em Segev, *Fairness, Responsibility and Self-Defense*, 45 SANTA CLARA L. REV. 383, 389 n.17 (2005).

16 *See, e.g.*, State v. Bartlett, 71 S.W. 148 (Mo. 1902).

17 *Cf.* 4 BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 181 (16th ed. 1825) ("[No act] may be prevented by death unless the same, if committed, would also be punished by death."). In response, Fletcher commented that a literal interpretation of Blackstone would lead to the unreasonable conclusion that deadly force in self-defense can never be sanctioned under legal systems not employing the death penalty. It would seem, therefore, that Blackstone's intention was to emphasize the importance of maintaining precise proportion between the act of self-defense and the attack itself, just as the severity of a legal penalty must reflect the severity of the crime being punished. *See* FLETCHER, RETHINKING, *supra* note 1, at 870; *see also infra* text accompanying note 131.

18 For the purpose of discussion, I will assume, theoretically, the injury to be non-life threatening.

19 It may be noted that a similar outlook is expressed in the work of Nozick. In Nozick's view, self-defense should be perceived as a "down payment," of sorts, drawn against the anticipated punishment to be later meted out to the attacker by the court. *See* ROBERT NOZICK, ANARCHY, STATE AND UTOPIA 62 (1974); ROBERT NOZICK, PHILOSOPHICAL EXPLANATIONS 364 (1981). Nozick concludes that when self-defense is indeed employed, and the attacker is eventually tried and convicted, the outcome of the self-defense should be subtracted from the punishment given to the attacker (for instance, if the penalty for rape is fifteen years of incarceration, and the victim wounded the rapist in self-defense while trying to protect herself, the rapist's sentence should be reduced accordingly relative to the injury incurred). It might appear that Nozick's rule would limit self-defense to precisely proportionate action, as otherwise the attacker would suffer a penalty of greater severity than that accorded to the crime committed. For a criticism of Nozick's positions, see George P. Fletcher, *Punishment and Self-Defense*, 8 LAW & PHIL. 201 (1989) [hereinafter Fletcher, *Punishment*]. Fletcher also points out the similarities between Nozick and the position of some of halakhic authorities within Jewish law, along with the possible proximity of perceptions as to the balance of power between the state and the individual.

Alternatively, self-defense may be conditioned on a *firm*, albeit not necessarily absolute, standard of proportionality, whereby the victim would be permitted to act in self-defense even in a measure *slightly* more severe than that of attack itself, nonetheless upholding a high level of proportionality. Should the attacker attempt to cause severe bodily harm to the victim, the victim may prevent such an attack even by killing the attacker. However, should the attacker attempt to cause mild bodily harm to the victim, killing the attacker would be disproportionate and therefore unacceptable.

Going further on the spectrum, yet another approach may suffice in a *flexible* standard of proportionality, within which even certain severe crimes against property may be prevented by killing the perpetrator.

Diverging from all of the above approaches, one may even go so far as to suggest rejection of the proportionality requirement in self-defense altogether, whereby the prevention of *any attack whatsoever* would sufficiently justify all effective measures of self-defense, including taking the life of the attacker.[20]

Deciding between the different approaches to proportionality is intertwined with the question of the *rationale* underlying the right of self-defense.[21] For example, basing self-defense on the principle of *personal autonomy* would suggest a relatively lenient standard of proportionality.[22] According to this line of thinking, the right of self-defense is a function of man's inalienable rights to life, bodily integrity, and property,[23] being a

20 *See* Kremnitzer, *Another View*, *supra* note 14, at 192 (distinguishing between the necessity defense and the requirement of proportionality in self-defense).

21 *See* FLETCHER, RETHINKING, *supra* note 1, at 855; SANGERO, *supra* note 1, at 166; UNIACKE, *supra* note 1; Dressler, *New Thoughts*, *supra* note 2; Fletcher, *Proportionality, supra* note 14, at 369; Michael Gorr, *Private Defense*, 9 LAW & PHIL. 241 (1990); Sanford H. Kadish, *Respect for Life and Regard for Rights in the Criminal Law*, 64 CAL. L. REV. 871 (1976); Kremnitzer & Ghanayim, *Aggressor's Culpability*, *supra* note 14; Jeff McMahan, *Self-Defense and the Problem of the Innocent Attacker*, 104 ETHICS 252 (1994); Michael Otsuka, *Killing the Innocent in Self-Defense*, 23 PHIL. & PUB. AFF. 74 (1994); Segev, *supra* note 15, at 383; Judith J. Thomson, *Self-Defense and Rights*, *in* RIGHTS, RESTITUTION AND RISK 33 (William Parent ed., 1986); David Wasserman, *Justifying Self-Defense*, 16 PHIL. & PUB. AFF. 356 (1987); *see also* Green, *supra* note 14, at 2 n.1; Judith J. Thomson, *Self-Defense*, 20 PHIL. & PUB. AFF. 283 (1991).

22 *See* Fletcher, *Proportionality, supra* note 14, at 381 (arguing that there is an inherent contradiction between the requirement of proportionality and the rationale based on personal autonomy); *see also* Green, *supra* note 14, at 24. *But see* Kremnitzer & Ghanayim, *Aggressor's Culpability*, *supra* note 14, at 892 (criticizing the contradiction theory); *cf.* Kremnitzer, *Another View*, *supra* note 14.

23 Due to the limits of this discussion, I will assume as a given the basic rights to life, bodily integrity, and property.

necessary condition for the effective actualization of such fundamental rights.[24] Therefore, recognition of man's rights to life, bodily integrity, and private property necessarily imply recognition of his right to defend his personal space—both physical and possessory—from attack. This proposition, based upon the aforementioned unconditional rights, would lead to the conclusion that the right of self-defense includes any and all measures necessary to protect oneself, and maybe even one's property, from external threat.

In contrast, an alternate rationale, which would seem to lead to a more stringent standard of proportionality, is one based on the *attacker's responsibility*.[25] According to this rationale, the victim may cause harm to the attacker, because when the law must choose between the two, the fact that the attacker is a criminal and the victim is an innocent person tips the scales in favor of the victim. While the attacker's criminal status does not deprive him of his right to life and bodily integrity,[26] it does reasonably reduce these rights, a reduction brought to bear in a situation of self-defense. This rationale, it would seem, leads to a somewhat firmer demand for proportionality: since the criminal status of the attacker is the element justifying the harm caused to him, there must be a high level of congruence[27] between the type of crime being committed and the measure of self-defense employed by the victim.

Should we go on to add to the rationales justifying self-defense, the principle of maintaining public order,[28] this would imply acceptance of the requirement of proportionality, not necessarily in its most precise form, but rather in a more flexible view. According to this rationale, self-defense is justifiable, among other reasons, because in the victim's defensive action against the attacker he is essentially acting as the "long arm" of the law, reestablishing the public order that was disturbed by the attacker. If the victim is indeed perceived as effectively "filling the shoes" that *should* have ideally been filled by the police, the victim clearly must be subject to the standards of proportionate response, as applied

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24 Assuming that the law enforcement agencies cannot provide sufficient protection.

25 *See* Segev, *supra* note 15, at 383. At this stage, I will assume that the attacker's responsibility for the situation stems from guilt, although, as we shall see further, it is conceivable that in some situations the attacker may be held responsible for the situation even without guilt.

26 And therefore he cannot be punished without due process.

27 Although there does not necessarily have to be absolute congruence.

28 In English law, the principle of self-defense is intertwined with the obligation to prevent crime. *See, e.g.*, JOHN C. SMITH & BRIAN HOGAN, CRIMINAL LAW 252, 693 (9th ed. 1999); RICHARD CARD ET AL., CRIMINAL LAW 525 (13th ed. 1995); David Cowley, *Criminal Damage Act 1971—Lawful Excuse*, 53 J. CRIM. L. 176, 178 (1989); Andrew J. Ashworth, *Self-Defence and the Right to Life*, 32 CAMBRIDGE L.J. 282, 282–83 (1975).

to law enforcement agencies when using force against criminals.[29] While law enforcement personnel are permitted to use force against suspects, even in measure exceeding the force being employed by the suspects themselves, they may not do so in a measure drastically disproportionate to the crime at hand.

Finally, a rationalization of self-defense based on choosing the *lesser evil* would seem to lead to the conditioning of self-defense upon maintenance of precise proportion between the severity of the attack and the defensive force applied by the victim.[30] According to this rationale, the damage inflicted upon the attacker is in its essence negative,[31] and thus may only be permitted if the expected harm to the victim is *even worse*. Therefore, self-defense is permissible only if the harm to the assailant is of a lesser severity than the expected harm to the victim, and even when they are of equal severity the use of such force against the attacker would be considered the lesser evil; if one of them—the assailant or the victim—must lose his life, it would be the lesser evil for the former to do so rather than the latter.[32] However, if the damage caused to the attacker is of a greater severity than the expected damage to the victim as a result of the crime, such as in the case of an attacker attempting to amputate a victim's leg,[33] should the victim respond by killing the attacker—such an act of self-defense may not be the *lesser evil*.[34] In other words, according to this rationale, the act of self-defense may be considered the lesser evil when the measures employed by the victim do not worsen the outcome the attacker originally intended to cause.

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29 *See* Kremnitzer & Ghanayim, *Aggressor's Culpability*, *supra* note 14, at 899 (emphasizing that disproportionate employment of self-defense is a disturbance of public order).

30 Fabricant, *supra* note 10, at 950. *See also supra* note 17 (discussing Fletcher's interpretation of Blackstone, emphasizing the issues inherent in an ideal of precise proportionality).

31 As it entails causing physical harm to a person yet to be tried or convicted.

32 This is based on several considerations, such as retribution (towards one who attempted to attack another individual), prevention (of repeated assault by the attacker), and deterrence (discouraging other potential criminals from committing similar acts).

33 Assuming, theoretically, that no threat is posed to the victim's life.

34 This, for example, is the position taken by Leverick, who argues that an attacker may be killed only under the condition of absolute proportion between the attack and the act of self-defense. Therefore, in her opinion, an attacker threatening to cause severe, but not life threatening, bodily harm to a victim (e.g., an abductor threatening to cut off a hostage's finger and use it as leverage for ransom), may not be killed by the victim in self-defense. LEVERICK, *supra* note 1. The reason for this, according to Leverick, is that the "life of even a terrorist or kidnapper is worth more than the bodily integrity of another person." *Id.* at 152.

There are several relevant test cases that may help sharpen the discourse surrounding the proportionality requirement. For example, what are the outer limits of permissible self-defense against property crimes (e.g. killing a carjacker or an arsonist, assuming that there is no direct threat to the human life)?[35] Such cases were discussed intensively in Jewish law sources, as well as in modern legal literature. In a nutshell, Jewish law demonstrates a strong commitment to proportionality between the crime and the defensive force used to prevent it, allowing the application of lethal force only in cases where human life is at stake.[36] Modern legal systems are far less decisive on this point.[37]

From this perspective, however, the complexity of applying lethal force against a rapist makes it a much more challenging test case for the demand of proportionality.

B. Application to Cases of Rape

Killing a rapist in self-defense invites a delicate distinction between full proportionality and incomplete proportionality.[38] As will be clarified further, the characteristics of the crime of rape, distinguishing it from other forms of assault,[39] necessitate an examination of the unique and complex aspects of the principle of proportionality in self-defense.

The underlying assumption of our discussion[40] is that rape, heinous as it may be, is of

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35 *See* JACOBS, *supra* note 5; LAFAVE, *supra* note 1, at 553; LEVERICK, *supra* note 1, 131; ROLLIN M. PERKINS & ROLAND N. BOYCE, CRIMINAL LAW 1148–54 (3d ed. 1982); ROBINSON, *supra* note 1, at 105–34; SANGERO, *supra* note 1, at 252; Dressler, *Understanding*, *supra* note 1, at 259; Green, *supra* note 14; Renée Lettow Lerner, *The Worldwide Popular Revolt Against Proportionality in Self-Defense Law*, 2 J.L. ECON. & POL'Y 331 (2006).

36 *See* JACOBS, *supra* note 5, at 34.

37 *See* Lerner, *supra* note 35.

38 For a discussion of the difference between self-defense against property crimes and self-defense against sex crimes, see George P. Fletcher, *The Right to Life*, 13 GA. L. REV. 1371, 1378 (1979) [hereinafter Fletcher, *The Right to Life*]. *See also* LEVERICK, *supra* note 1, at 147; SANGERO, *supra* note 1, at 182.

39 *See infra* text accompanying note 58.

40 *See infra* note 60 for opposing positions.

lesser severity than murder.[41] This is reflected in the scale of criminal penalties,[42] which generally assigns punishments of greater severity to homicide than to crimes of sexual assault.[43] This was sharply expressed in a 1977 case, in which a federal court overturned a death penalty imposed by a Georgia state court on a convicted rapist in aggravating circumstances, ruling that: "a sentence of death is grossly disproportionate and excessive punishment for the crime of rape, and is therefore forbidden by the Eighth Amendment

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41 As opposed to a victim of homicide, a rape victim stays alive, and the physical and emotional scars ensuing from the rape may, over time and with tremendous efforts, be partially healed, whereas homicide is clearly irreversible.

The argument that homicide is more severe than rape may, at first blush, seem problematic particularly against the backdrop of biblical law, which in one verse seems to equate rape to murder:

> But if in the open country a man meets a young woman who is betrothed, and the man seizes her and lies with her, then only the man who lay with her shall die. But you shall do nothing to the young woman; she has committed no offense punishable by death. For this case is like that of a man attacking and murdering his neighbor, because he met her in the open country, and though the betrothed young woman cried for help there was no one to rescue.

Deuteronomy 22:25–27.

However, in context, it is clear that the comparison made by the biblical narrator relates to the innocence of the rape victim, and not necessarily to the severity of the crime. Indeed, there is some ambiguity as to the punishment meted out by Jewish law to the rapist, but in any event rape is clearly not punishable by the death penalty (unless the rape was accompanied by an additional crime, such as adultery or incest), in contrast to murder. *Cf.* ALAN M. DERSHOWITZ, THE GENESIS OF JUSTICE: TEN STORIES OF BIBLICAL INJUSTICE THAT LED TO THE TEN COMMANDMENTS AND MODERN LAW 147 (2000); JUDITH HAUPTMAN, REREADING THE RABBIS: A WOMAN'S VOICE, 77 (1998); CAROLYN PRESSLER, THE VIEW OF WOMEN FOUND IN THE DEUTERONOMIC FAMILY LAWS 31 (1993); LEONARD SWIDLER, WOMEN IN JUDAISM: THE STATUS OF WOMEN IN FORMATIVE JUDAISM, 150 (1976); *Raping a Virgin, in* 1 ENCYCLOPEDIA TALMUDICA 452–64; Joseph Fleishman, *Exodus 22:15–16 and Deuteronomy 22:28–29: Seduction and Rape? or Elopement and Abduction Marriage?*, 14 JEWISH L. ASS'N STUD. 59 (2004); Ben-Zion Scherechewsky, *Rape, in* 13 ENCYCLOPEDIA JUDAICA 1548–49 (2007).

42 For the purposes of this discussion, I will assume that the severity of criminal penalty correlates to the severity of the crime. Therefore, the death penalty corresponds with the crime of greatest severity. Obviously, there may be additional factors affecting the severity of punishment aside from the nature of the crime itself, such as a conscientious opposition to the death penalty, but such considerations go beyond the breadth of this article.

43 When attempting to draw conclusions as to the severity of a crime from the severity of its corresponding punishment, it is important to distinguish between the maximum sentences set by the legislator, as opposed to the sentencing handed down by courts in practice. Therefore, it is important to compare the punishments meted out to perpetrators of rape and murder on each one of these scales. *See* SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS (Ann L. Pastore & Kathleen Maguire eds., 2013), *available at* http://www.albany.edu/sourcebook/index.html (statistical analyses of sentencing for rape and murder).

as cruel and unusual punishment."[44] This assumption is further backed by polls taken regarding the public assessment of the severity of different crimes.[45]

If so, can a potential rape victim be permitted to prevent her rape, even at the expense of the attacker's life, or rather should the victim be limited to actions that do not exceed the severity of the rape itself, such as causing bodily harm to the rapist?[46] Needless to say, the victim has the right to use violence in self-defense, even causing severe bodily harm to the rapist—a response proportionate to the crime itself. The real question in this case has to do with *killing* the rapist, which would seem, at first blush, to be more severe than the harm intended by the rapist. An approach requiring absolute proportionality would tend to prohibit the use of deadly force against a rapist. On the other hand, an approach willing to moderate, even minimally, the standard of proportionality, may argue that while application of deadly force against a thief should be forbidden, use of such force should nonetheless be permitted against an aggressor attempting to cause severe bodily harm, rape included.

C. Possible Approaches: For and Against

Both possible approaches, either permitting or prohibiting the killing of a rapist in self-defense, have relative advantages, while at the same time raising considerable difficulties.

An approach conditioning self-defense on precise proportion between the assault and the defensive action aptly reflects its rationale with great clarity, providing an accurate measuring stick for its practical application. According to this approach, the life of the attacker is protected by the law just as anybody else's.[47] Taking the life of the attacker is permissible only if the alternative (in this case, the death of the victim) is even worse. However any other alternative not causing loss of life is a lesser evil in comparison to any loss of life (including the attacker's), and therefore the only justification for use of

44 Coker v. Georgia, 433 U.S. 584, 592 (1977). Incidentally, this ruling left an opening to allow for the death penalty in cases of rape of a minor by an adult. However, this possibility was later rejected in the case of *Kennedy v. Louisiana*, 554 U.S. 407, 412 (2008). *See also infra* note 77 (discussing the comment that rape is not to be considered a "serious injury").

45 MARVIN E. WOLFGANG ET AL., THE NATIONAL SURVEY OF CRIME SEVERITY vi–xiv (1985). *See also* SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS, *supra* note 43.

46 The equivalence between rape and the defensive action employed to prevent it may be measured, for instance, by the severity of the punishments designated to them accordingly.

47 *See supra* text accompanying note 30. This approach obviously does not conform to all of the rationales, as several of them, such as the concept of personal autonomy, do not support such an interpretation of the requirement of proportionality.

deadly force in self-defense would be to prevent the loss of another life—not including the prevention of rape. This standard is simple to operate, as it provides a clear criterion defining when killing the attacker would be permissible, limiting it to life-saving circumstances alone.

On the other hand, this approach may lead to problematic, not to say intolerable, outcomes. According to this line of thinking, if the only way for a victim to escape her rape would be to kill the rapist, she will be legally expected to passively submit to the agony of rape, for the sake of sparing the rapist's life.

An approach allowing for a somewhat tempered standard of proportionality also encounters significant difficulties. While such an approach does give reasonable protection to the potential rape victim, encouraging her to use all available measures of self-defense, including deadly force, adopting such a position creates several difficulties, both theoretical and practical.

Theoretically, permitting the victim to kill her rapist in self-defense would seem to significantly weaken the standard of proportionality, in ways not entirely compatible with several of the rationales underlying the right of self-defense.[48] Indeed, the conceptual acrobatics performed by theoreticians in their attempts to justify the killing of a rapist within the constraints of proportionality reflect the core complexity of the problem: Some argue that the *cumulative damage* anticipated by the rape victim[49]—including pain and physical harm, infectious STDs,[50] unwanted pregnancy,[51] and emotional trauma[52]—join

48 *See supra* text accompanying note 21.

49 *See, e.g.*, Gillian Mezey, *Reactions to Rape: Effects, Counseling and the Role of Health Professionals*, *in* VICTIMS OF CRIME: A NEW DEAL? 66 (Mike Maguire & John Pointing eds., 1988); Irvin Waller, *The Needs of Crime Victims*, *in* THE PLIGHT OF CRIME VICTIMS IN MODERN SOCIETY 252, 262 (Ezzat A. Fattah ed., 1989).

50 Sexually transmitted diseases may, at times, be of great danger, far beyond a mere nuisance. It is important to note that studies have shown that sex offenders carry STDs at a percentage significantly higher than other criminals. *See* Kates & Engberg, *supra* note 10, at 896 n.87.

51 *See* People v. McIlvain, 130 P.2d 131, 137 (Cal. Ct. App. 1942) (Schauer, J., concurring) ("Surely pregnancy as a result of forcible rape is great bodily injury."). The damage incurred by pregnancy remains, regardless of whether the rape victim chooses to have an abortion or to carry through with the pregnancy (for instance, due to religious or moral beliefs).

52 Extensive literature has been written on Rape Trauma Syndrome, describing the symptoms of psychological damage, both short and long term, experienced by rape victims, at times so scarring as to lead to suicide attempts. *See, e.g.*, EDNA B. FOA & BARBARA O. ROTHBAUM, TREATING THE TRAUMA OF RAPE (1998); Ann W. Burgess & Lynda L. Holmstrom, *Rape Trauma Syndrome*, 131 AM. J. PSYCHIATRY 981 (1974); Patricia

together a critical mass of damages sufficient to justify killing the rapist.[53] However, others argue that these injuries, severe as they may be, are not equivalent to loss of life, and therefore cannot justify killing the rapist.[54] Instead, they prefer to base the justification for killing the rapist upon another characteristic of rape, beyond the aforementioned physical and emotional damages, and of even greater severity: the dehumanization of the rape victim[55] and the obliteration of her personality, by her reduction to a mere sexual object.[56]

A. Resick, *The Psychological Impact of Rape*, 8 J. INTERPERSONAL VIOLENCE 223, 223–50 (1993). As to the questions whether the psychological scars of a rape victim are considered "severe bodily harm," *see infra* note 77.

53 Kates & Engberg, *supra* note 10, at 895. The assumption is that none of the damages alone would justify killing the rapist, but the cumulative weight of the damages combined is sufficient to tip the scales.

54 *See, e.g.*, LEVERICK, *supra* note 1, at 153, who notes that some of the emotional and physical damages enumerated above may be healed over time, and that those damages that are irreversible are not equivalent to depriving the victim of her life. It may also be argued that not every case of rape incurs all of the cumulative damages mentioned (e.g., if the rapist uses protection, the victim may be spared the dangers of unwanted pregnancies and/or STDs), but even so, this does not lessen the severity with which we view the rape, and should therefore not deny her right to self-defense even at the expense of the rapist's life. Therefore, it would seem that the above theory relating to the cumulative damages of rape cannot serve, on its own, as a theoretical justification for killing a rapist in self-defense.

55 *See, e.g.*, Coker v. Georgia, 433 U.S. 584, 597 (1977) (describing rape as "the ultimate violation of self"). *See also* ANDREA DWORKIN, LIFE AND DEATH: UNAPOLOGETIC WRITINGS ON THE CONTINUING WAR AGAINST WOMEN 77–101 (1997); John Gardner & Stephen Shute, *The Wrongness of Rape*, *in* OXFORD ESSAYS IN JURISPRUDENCE, FOURTH SERIES 193 (J. Horder ed., 2000); Jean Hampton, *Defining Wrong and Defining Rape*, *in* A MOST DETESTABLE CRIME: NEW PHILOSOPHICAL ESSAYS ON RAPE 118 (Keith Burgess-Jackson ed., 1999).

56 *See, e.g.*, LEVERICK, *supra* note 1, at 143 ("[R]ape is a denial of humanity and thus approaches the same level of seriousness as a threat to the accused's life."). *Cf.* Kates & Engberg, *supra* note 10, at 906, (arguing at the end of their analysis 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."). A similar argument is found in Fabricant, *supra* note 10, at 979–980:

> 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 non-deadly 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 . . . is no longer fully a person . . . . 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.

Fabricant supports this conclusion, based in part on the preference of some rape victims to die rather than be raped. *Id.* at 969. *Cf.* Rashi, *infra* note 195.

Yet even this line of argument does not fully maintain proportionality between the assault and the act of self-defense; rape in all its incomparable horror is still not equivalent to the severity of loss of life. Finally, there are some who attempt to allow for killing of a rapist in self-defense, based on the potential threat to the victim's life accompanying the rape itself.[57] While this argument maintains congruence between the danger to the victim's life and the act of self-defense employed to prevent it, others counter that such an argument actually implies that prevention of rape itself (independent of any accompanying danger to the victim's life) *does not* justify killing the rapist.[58]

The forgone conclusion, therefore, is that it is difficult to claim that rape, in all its severity, is equal to murder,[59] and hence allowing a victim to kill her rapist in self-defense necessitates a significantly reduced standard of proportionality, with all of the accompanying theoretical ramifications.[60]

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57 Kates & Engberg, *supra* note 10, at 885. A study conducted in the United States found that fifty four percent of rape victims felt their lives were in danger or that they were in danger of severe bodily harm (beyond the rape itself). *See* Ron Acierno et al., *Rape and Physical Violence: Comparison of Assault Characteristics in Older and Younger Adults in the National Women's Study*, 14 J. TRAUMATIC STRESS 685, 690 (2001).

58 LEVERICK, *supra* note 1, at 149; Fabricant, *supra* note 10, at 951. *Cf.* GILLESPIE, *supra* note 10, at 62. While cases of rape unaccompanied by danger are not necessarily the stereotypical rape cases, they are certainly possible, for instance in cases of rape in contexts of authority or abuse of power, without use or threat of physical force, or cases in which the victim's "consent" is given by a minor and/or through deception, fraud or drugging. Also, cases of domestic rape could be classified in this category. *See* Steven BOX, POWER, CRIME AND MYSTIFICATION 127–29 (1983).

59 As is indeed reflected in the ranking of criminal punishments. *See supra* text accompanying note 42. For a differing opinion within Jewish law, that may even suggest similarity between the ramifications of rape and murder, see Rabbi Achai Gaon, *Sheiltot, Va'era* 42 ("[S]ince he [the rapist] violated her it is considered as if he killed her.").

60 Against this backdrop, of particular interest is the position taken by Leverick, *supra* note 1, at 143. As mentioned, Leverick justifies the killing of a rapist in self-defense, in light of the dehumanization of the rape victim, while at the same time maintaining that self-defense must be conditioned on precise proportionality, so much so that in her opinion, even severe injury to a victim (including loss of limb) does not justify killing an attacker in self-defense. *See supra* note 34. Leverick struggles to build her argument that rape is of far greater severity than any other physical injury, equivalent to taking a life. Leverick argues that the combination between the dehumanization of the rape victim, combined with the physical act of penetration, amplifies rape to proportions justifying killing the rapist (similar, in her opinion, to ongoing physical torture, which in her view is also of greater severity than injury alone, justifying killing the attacker in such a case, as well). However, even if Leverick is able to convey the severity of rape in relation to other physical injuries, I am doubtful whether her explanations sufficiently explain why rape should be equated to murder.

On the practical level, this approach may encounter even more serious difficulties, due to the problem of placing the boundary line. Permitting the killing of rapists in self-defense blurs the boundaries between permissible and impermissible behavior, creating a troubling lack of clarity.[61] For example, may a potential victim of sodomy kill the offender in order to prevent the attack, similar to a rape victim?[62] Does the same go for a victim of sexual molestation? It is safe to assume a consensus that sexual harassment, for instance, does not justify the use of deadly force against the harasser. If so, where do we lay down the boundary between rape and sexual harassment? Once the standard of proportionality has been reduced, it is hard to rationally and explicitly determine where to draw the line.[63] Indeed, as will be shown further, it appears that the American legal system has struggled with this question quite a bit.[64] Of course, this problem can be resolved technically by way

61 Kates & Engberg, *supra* note 10, at 894, argue that there is no reason for concern regarding the possible ramifications of expanding the permissibility of killing a rapist in self-defense, as rape victims tend to avoid the use of violent force altogether, therefore leaving little room for fear that rape victims would misuse such a license. However, it would seem to me that although this argument may be true for rape victims themselves, it is most certainly not the case regarding third parties attempting to come to the rape victim's aid. Therefore, setting down boundaries as to the permissibility of killing a rapist remains significant nonetheless.

62 Similar to the issue of defining rape, *supra* note 8, defining sodomy is also a complicated task. *See* ENCY., *supra* note 8, at 236. For the purpose of this article "sodomy" means all sexual acts outside of procreative sex—namely, both anal and oral sex. *See also infra* note 92. It should be noted that although the term "sodomy" is derived from biblical narrative, Jewish law did not use this term in sexual context, but rather as a term describing abuse of rights.

63 *Cf.* Fletcher, *The Right to Life*, *supra* note 38, at 1378:

> [L]et us suppose that the sexual aggressor merely wants to massage her breasts and he makes his purpose clear as he commences his assault. If we held to the first rationale of self-defense [an absolute privilege], the woman could use all the force necessary to repel the sexual assault. If under the circumstances that meant she had to kill him, so be it. But many people would regard this as an injustice, even as to a malicious and perverse aggressor. The woman should surely have the right to hit him, perhaps to wound him, but killing him would seem to be excessive. If she had no effective option short of killing the aggressor, the alternative rationale would require a weighing of the competing interests and presumably would issue in the requirement that she suffer the invasion of her breasts rather than kill the aggressor. If deadly force seems justified even in this context, we could further enlarge the disparity between the conflicting interests. What if the victim had merely to suffer repeated pats on the head or the aggressor's searching through her purse? Should she be permitted to kill to prevent these assaults to her person and privacy? People might judge the competing interests differently, but for most people these would be a breaking point, a point after which the victim's interest seemed so minor that it would be "unreasonable" to kill the aggressor rather than suffer the invasion.

64 *See* GILLESPIE, *supra* note 10, at 74:

of an arbitrary determination, e.g., deadly self-defense may be used against rape but not sodomy, or against rape and sodomy but not against molestation and sexual harassment. However, arbitrary rules would reasonably raise questions as to their justification. Fletcher articulates this discomfort fittingly:

> Everyone seems to agree that a defender should be able to inflict more harm than he or she avoids by acting in self-defense, e.g., a woman threatened with rape should be able to kill to protect her sexual and bodily autonomy. The scales may be tipped in favor of the innocent victim and against the wrongful aggressor . . . . Yet no one knows how much more harm the defender may inflict on the aggressor, how much the scales may be tipped in favor of the person attacked, before reaching the point of perceived injustice. All we know is that at a certain point, we sense that the scales are so far out of kilter that criteria of justice displace our commitment to the right and the sanctity of individual autonomy.[65]

II. Lethal Self-Defense Against Rapists in Contemporary Legal Systems

There seems to be a consensus among contemporary criminal law jurists that while the crime of rape does not justify the death penalty,[66] a rape victim may nonetheless protect herself even at the expense of her attacker's life, and that such self-defense does not exceed the limits of proportionality.[67] Furthermore, killing a rapist in self-defense is perceived as a

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> The imminence requirement reaches the point of complete absurdity in the rape situation. If she acts too soon, before the man has actually initiated any specifically sexual activity, there is often a question about whether rape was precisely what was imminent when he approached her in sexually menacing way. If she acts too late, after intercourse is completed, she is presumed to be indulging in vengeance. The only point at which she can act in her own defense is the one at which she is least able to do so, when she is pinned down and the rape is actually taking place.

See also id., at 186.

65 Fletcher, *Punishment*, *supra* note 19, at 214. *See also* LEVERICK, *supra* note 1, at 148.

66 *See supra* note 44.

67 *See, e.g.*, GERALD H. GORDON, THE CRIMINAL LAW OF SCOTLAND 315, 325 (3d ed. 2000); LAFAVE, *supra* note 1, at 541 n.15; SANGERO, *supra* note 1, at 183–84; Fabricant, *supra* note 10, at 947; Kadish, *supra* note 21, at 888; Kates & Engberg, *supra* note 10, at 873; Kremnitzer & Ghanayim, *Aggressor's Culpability*, *supra* note 14, at 893.

legal *justification*, and not merely as an excuse.[68]

As for legal systems rejecting the requirement of proportionality in self-defense altogether, such as Soviet law and German law (at certain periods in history),[69] the permissibility of deadly self-defense against a rapist is obvious and goes without saying. If a victim may stop an attacker by any and all means—even in property crimes that are less severe—all the more so in cases of rape.[70] The real challenge, therefore, arises when attempting to rationalize such a position within legal systems upholding the requirement of proportionality in self-defense.

Common law systems generally accept the requirement of proportionality,[71] allowing only minor flexibility with regard to the degree of power applied against the attacker.[72] According to these systems, a victim is usually not permitted to use deadly self-defense in cases of property crimes,[73] and may do so only if the attacker is attempting to cause serious bodily harm in the process.

note 14, at 893.

68 SANGERO, *supra* note 1, at 183; Fletcher, *The Right to Life*, *supra* note 38, at 1376. *See also* Fletcher, *Punishment*, *supra* note 19, at 214; Stanley M. H. Yeo, *New Developments in the Law of Self-Defence in Australia*, 7 OXFORD J. LEGAL STUD. 489, 490 (1987).

69 Fletcher, *Proportionality*, *supra* note 14; Fletcher, *The Right and the Reasonable*, *supra* note 11, at 951–52; Kremnitzer, *Another View*, *supra* note 14. *See also* Coker v. Georgia, 433 U.S. 584, 592 (1977). Fletcher notes that from a historical perspective, German law progressed towards acceptance of the requirement of proportionality. *Proportionality*, *supra* note 14, at 368.

70 Compare with the argument of Fabricant, *supra* note 10, at 958, on justifying deadly self-defense against a rapist based on the notion of breach of the social contract.

71 For a summary of the early British law position, see William Hawkins, A TREATISE OF THE PLEAS OF THE CROWN 71 (3d ed., 1739). *See also* GILLESPIE, *supra* note 10, at 33, 62. For a review of British, Canadian, and Australian law on this issue, see Leverick, *supra* note 1, at 144–46. For a review of Australian law, see further Yeo, *supra* note 68, at 489, 490.

72 RONALD N. BOYCE ET AL., CRIMINAL LAW AND PROCEDURE 956 (9th ed. 2004); LAFAVE, *supra* note 1, at 540; Fletcher, *Proportionality*, *supra* note 14. Truth be told, the distinction between Anglo-American and Continental law on this subject is not clear at all, as there are several legal systems within the Continental law that accept the requirement of proportionality. *See, e.g.*, Art. 122–5, The French Penal Code of 1994 as Amended as of Jan. 1, 1999 (Edward A. Tomlinson trans., 1999); *see also* SMITH, *supra* note 2, at 109; Fletcher, *Proportionality*, *supra* note 14, at 368. For an in-depth review of the status of the requirement of proportionality in a variety of jurisdictions, see Kremnitzer & Ghanayim, *Aggressor's Culpability*, *supra* note 14, at 893. For deliberations in Australian court rulings see Lanham, *supra* note 1, at 241–42.

73 However, at times it is permissible to kill an attacker in cases of particularly severe property crimes. *See supra* note 35; *infra* note 83.

Against this backdrop, there is an ongoing debate within American legal literature on the subject of killing a rapist in self-defense.[74] Some states have enacted specific legislation allowing for the use of deadly self-defense against rapists,[75] with some court rulings expanding this license even further,[76] despite the fact that it is not clear that courts recognize rape as equivalent to serious bodily harm (a necessary condition for use of deadly self-defense in numerous criminal codes).[77] This doctrine is deeply rooted in the history of the common law.[78]

As for the gender of the rape victim, while many court rulings have recognized the right to use deadly force in self-defense by both female and male victims,[79] there are those who debate whether or not a male rape victim may in fact use deadly force in self-defense.[80]

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74 *See* sources cited *supra* note 10.

75 *See, e.g.*, the wording of the Penal Code of New York: "A person may not use deadly physical force upon another person . . . unless . . . he or she reasonably believes that such other person is committing or attempting to commit a kidnapping, forcible rape, forcible criminal sexual act or robbery . . . ." N.Y. PENAL LAW § 35.15 (Consol. 2004). Similar laws have been enacted in the penal codes of other states such as California, Texas, Colorado, Illinois, and New Jersey, as well as in the Model Penal Code. MODEL PENAL CODE § 3.04(2)(b)(1).

76 *See, e.g.*, State v. Hollis, 108 S.C. 442 (1918); Romero v. State, 663 S.W.2d 121 (Tex. Ct. App. 1983); Scott v. State, 79 S.W. 543 (Tex. Crim. 1904). *But see* Kates & Engberg, *supra* note 10, at 874 (suggesting that the trend of courts is toward limiting right to kill to defend against rape itself).

77 For an approach skeptical of the assumption that rape should be considered severe bodily harm, see *People v. Caudillo*, 21 Cal. 3d 562, 588–89 (1978); Raymond A. Tabar, Comment, *Criminal Law—Rape Alone Does Not Constitute Great Bodily Harm for Penalty Enhancement Purpose*, 19 SANTA CLARA L. REV. 269, 273 (1979); *cf.* GILLESPIE, *supra* note 10, at 64–67. Nonetheless, within the question of rape as severe bodily harm, it may be necessary to distinguish between the issue of the *penalty* for rape, as opposed to the issue of *self-defense* against rape.

78 See Fabricant, *supra* note 10, at 958 for a detailed overview of the conceptual developments within common law relating to the essential understanding of rape, and the resulting changes regarding the justifications for self-defense against rape. In general, the common law once perceived rape as a desecration of the victim's chastity, thus harming both the victim and the man to whom she "belonged" (either her father or her husband). This view was later abandoned in favor of viewing rape as a crime against the victim as an autonomous being, free to choose and model her relationships. On this matter, see further *infra* note 107.

79 People v. Collin, 189 Cal. App. 2d 575 (1961); People v. Miller, 981 P.2d 654 (Colo. App. 1998); State v. Robinson, 328 S.W.2d 667 (Mo. 1959); People v. Coleman, 122 A.D.2d 568 (N.Y. App. Div. 1986); Commonwealth v. Lawrence, 236 A.2d 768 (Pa. 1968); *cf.* Kates & Engberg, *supra* note 10, at 873 n.1.

80 *See* State v. Havican, 213 Conn. 593 (1990) (holding that self-defense is generally appropriate against sodomy or rape). Another example may be found in a ruling handed down several decades ago in Scotland, in which the court distinguished between rape of a woman, justifying use of deadly self-defense, and sodomy of a man, not justifying use of such force in self-defense. *See* McCluskey v. H.M. Adv., [1959] J.C. 39. For further

American court rulings are not entirely clear on the question of the *punctum archimedis* justifying the killing of a rapist in self-defense.[81] Is this because of the threat to the life of the rapist, or does the rape itself provide justification enough?[82] Either way, it must be emphasized that American law does permit use of deadly self-defense against a rapist—despite the seeming disproportion between the attack and the defensive action employed by the victim. This is part of a general policy of interpreting the requirement of proportionality somewhat leniently, so much so that killing an attacker may even be permitted in cases of severe property crimes, and all the more so in cases of severe sexual assault.[83]

This policy within American law, as expressed in court rulings, sharpens the aforementioned problem of setting down a clear boundary. There are two major dilemmas that arise from the variety of court rulings on this issue:

First, is the use of deadly self-defense permitted in cases of sexual assault of lesser severity than rape?[84] May a potential sodomy victim kill his attacker?[85] May a molester be

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discussion on this court ruling see GORDON, *supra* note 67, at 326; LEVERICK, *supra* note 1, at 145. Differing from the above position, there are those who argue that the legal climate is quite the opposite. According to Schneider & Jordan, *supra* note 10, at 154, courts actually tend to acquit men using deadly self-defense against their attackers, more often than women acting in a similar manner. However, it would appear that while this theory may have been correct, to a certain degree, in the past, it does not accurately portray the legal situation in recent years.

81 According to Kates & Engberg, *supra* note 10, at 905, this lack of clarity may stem from the fact that allowing the use of deadly self-defense against a rapist seems intuitively correct, with few actually seeking an exact definition. However, "recent case law might suggest that it is instead a legal anomaly awaiting clarification." *Cf.* Fabricant, *supra* note 10, at 947.

82 *See, e.g.*, People v. Landrum, 407 N.W.2d 614, 617 (Mich. App. 1986) ("[T]he nature of sexual assault involving forced penetration is so serious that a victim is justified in using deadly force to repel the attack."); *see also* Kates & Engberg, *supra* note 10, at 873, 883.

83 In several American court rulings there is a noticeable connection drawn between self-defense against property crimes and self-defense against sexual assault. *See, e.g.*, the ruling in State v. Hollis, 108 S.C. 442 (1918): "[A]ny person . . . has a right to kill another in the act of committing a felony, to wit: in the act of burning a house, or in the act of stealing property over the value of twenty dollars, or in the act of committing an assault with intent to rape." *See also* State v. Robinson, 328 S.W.2d 667, 670 (Mo. 1959).

84 As for the question whether killing a rapist is permissible even in cases of rape not involving use of physical force by the attacker, but rather, for example, taking advantage of the victim's age (despite her consent), see *Moore v. State*, 91 Tex. Crim. 118 (1922). *See also* Fabricant, *supra* note 10, at 947.

85 *See* Howard v. State, 172 Tex. Crim. 352 (1962).

killed in self-defense?[86]

Second, at what chronological point during the unfolding of the rape does it become permissible to kill the rapist?[87] Is such self-defense permissible only during the actual rape itself, or rather in the earlier stages of the crime as well, for instance in response to sexual assault that may reasonably escalate to rape?[88]

In one case, the court accepted an argument by a mother who shot a man that hugged and caressed her minor daughter, with his hands under her clothing, claiming she feared that he intended to rape her daughter.[89] On the other hand, the court rejected a claim of self-defense made by a man who claimed that he was attacked by another man who grabbed his genitalia, and killed the attacker out of fear of being raped.[90] Allowing the use of lethal self-defense in earlier stages of the crime (both from a chronological perspective and in terms of the level of severity), or even in the very preliminary stages of sexual harassment,

86 *See* Kates & Engberg, *supra* note 10, at 882.

87 It should be emphasized that the criminal-penal aspect of this question does not necessarily overlap with the self-defense aspect. It is certainly possible for there to be a difference between the stage at which sexual assault crosses over to attempted rape in terms of *the attacker's conviction*, versus the stage at which the sexual assault escalates to rape in the context of *permissibility of deadly self-defense*.

88 From an analytical perspective, the second dilemma is not unique to self-defense against rape. Attempted murder, for example, may raise similar questions as to the stage at which the victim is permitted to kill the attacker (only from the moment the attacker pulls out his gun, or rather at earlier stages of the assault?). Moreover, the second dilemma relates more to the requirements of necessity and imminence (i.e., at what point throughout the rape does it become necessary to kill the attacker), and less to the requirement of proportionality. However, the first dilemma (i.e., which forms of sexual assault justify killing the attacker in self-defense) reflects upon and complicates the second dilemma. Thus for instance, molestation may raise questions as to the justification of killing the molester, on two realms—relating both to the severity of the molestation itself, and to the concern that the molestation may be prelude to rape.

89 Moore v. State, 237 S.W. 931 (Tex. Crim. App. 1922) (reversing and remanding based on jury instructions). Only recently, newspapers reported a case in which a Texas father beat a man to death for trying to molest his four-year-old daughter at their rural ranch. The father has not been arrested and is unlikely to face charges. *Texas Father Kills Man Trying to Sexually Assault Daughter Police Say*, FOX NEWS, June 11, 2012, *available at* http://www.foxnews.com/us/2012/06/11/texas-father-kills-man-trying-to-sexually-assault-daughter-police-say/.

90 McKee v. State 785 S.W.2d 921, 929 (Tex. App. 1990). The court's opinion asserted that this fear was unjustified, and therefore while the assault justified use of physical force in self-defense, it did not justify use of deadly force. The dissent, however, suggested that the transition between molestation and full-fledged rape may happen quickly, the victim not knowing at what point his attacker would stop, if at all. Therefore it is legitimate for the victim to fear attempted rape, and to stop the attacker by use of deadly force even at the earlier stage of molestation. *Id.* at 929 (Chapa, J., dissenting).

may create an unwanted increase in the use of deadly force against sexual harassers. On the other hand, delaying the possibility of such self-defense to the final stages of the rape may be too late and too cruel to the rape victim.[91]

I believe that these dilemmas aptly exemplify the inherent problems stemming from permissibility of deadly self-defense against a rapist. These dilemmas express the practical and theoretical difficulties encountered when loosening the standard of proportionality. On the one hand, it is difficult to accept the proposition that a rape victim should not be allowed to defend herself from rape in any way possible, even at the expense of the rapist's life. On the other hand, it is difficult to rationally and explicitly explain the boundaries beyond which a victim should not be permitted to take the life of the attacker in contexts of sex crimes. In my opinion, these difficulties may help to clarify the Jewish law position on this matter. As I will discuss throughout the remainder of this Article, the duality of the Jewish law position on the issue of killing a rapist in self-defense—through both the dimensions of *halakha* and *halakha le-ma'aseh*—allows for a rethinking of the complexities described above, which modern legal systems continue to grapple with, each in their own way.

III. "In Pursuit of a Maiden"—The Theoretical Law (*Halakha*)

A. The Mishnaic Ruling

Killing a rapist in self-defense was discussed in Jewish law by the sages, dating back as far as the Mishnah: "The following must be saved even at the cost of their lives: He who pursues after his neighbour to slay him, [or] after a male [for pederasty, or] after a betrothed maiden [to dishonour her]."[92] Before discussing the legal conceptions reflected in this Mishnah, it is important to clarify some of the characteristics of the rape situation it discusses, in light of the differences between rape as described in ancient times and current understandings of the phenomenon. It seems that when the Mishnah mentions rape, it envisions a scenario of a man forcing himself violently on a victim, usually a woman (it nonetheless also addresses a same-sex rape scenario). The Mishnah also generally assumes that the passerby coming to the victim's aid is a man as well. Thus, we see here a clear division in which operators of physical power—assailant and rescuer—are men, whereas

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91 See, on this issue, the position taken by GILLESPIE, *supra* note 10, at 74.

92 MISHNAH, *Sanhedrin* 8:7. As to the creative interpretation given by the sages to the verses of the Pentateuch as a basis for this halakhic ruling, see Israel Zvi Gilat, *Exegetical Creativity in Interpreting the Biblical Laws on Capital Offenses*, 20 JEWISH L. ANN. 41 (2013).

women are perceived as being passive, non-users of force.[93] Therefore, the Mishnah does not discuss a female rape victim defending herself, and hence the importance of addressing a (male) passerby who comes to her rescue.[94] Furthermore, when the sages discuss rape, they envision forcible intercourse through violent means.[95] In contrast, in light of current understandings of rape, we are much more aware that rape often takes place through non-violent means,[96] and that most rape cases occur between acquaintances (friends, partners, relatives), often in the familiar space of the raped victim (home, workplace). This differs from the sages' assumption of rape occurring somewhere other than the familiar environment of the victim.[97] However, in order to properly understand and examine the legal conception of the sages from within their own outlook and assumptions, I will make use of their characterizations of rape, even when they are not always congruent with contemporary ones.

Let us go on to analyze the legal conception presented by the Mishnah.

The Mishnah permits the killing of a rapist in self-defense, however limiting the warrant to do so, only to cases in which the rape victim is either a betrothed maiden or a man (being raped by another man). Are these indeed the only two cases in which killing a rapist in self-defense is permissible? According to the Tosefta, these two cases merely serve as examples representing a broader group:[98]

> Both betrothed maiden [who is pursued by a rapist] and each of the other cases of incest[99] should be saved by killing the pursuer, but a High Priest

93 *Contra Deuteronomy* 25:11 ("When men fight with one another and the wife of the one draws near to rescue her husband from the hand of him who is beating him and puts out her hand and seizes him by the private parts.").

94 A more up-to-date discussion would undoubtedly include the possibility of a woman applying force, either to defend herself or others, or alternately as an assailant. *See infra* note 210.

95 "He who pursues after . . . ." MISHNAH, *Sanhedrin* 8:7.

96 Such as deception, fraud, statutory rape, or abuse of trust or authority as a family member, employer, or public official. *See supra* note 58.

97 *See Deuteronomy* 22:25–27; *supra* note 41.

98 TOSEFTA, *Sanhedrin* 11:11. The Tosefta is a compilation of complementary sources from the mishnaic period.

99 Known in biblical terms as "*gilui arayot*," a term referring to forbidden sexual relations in general, including such transgressions as incest, adultery and sodomy. *See, e.g.*, MISHNEH TORAH, *Laws of Forbidden Intercourse* 21:8.

> in pursuit of a widow, and an ordinary priest in pursuit of a divorcee or a *haluzah*,[100] may not be saved at the cost of their lives.[101]

Similarly, the Babylonian Talmud relates:

> Our Rabbis taught: He who pursues after his neighbour to slay him, he who pursues a male [for pederasty], or a betrothed maiden, a woman forbidden to him on pain of death at the hands of court, or one forbidden on pain of extinction—these are saved at the cost of their lives. But a High Priest in pursuit of a widow, and an ordinary priest in pursuit of a divorcee or a *haluzah*, may not be saved at the cost of their lives.[102]

These sources differentiate between two types of rape. Rape involving an additional element of forbidden sexual relations punishable by death—either by court or by heavenly decree ("extinction")[103]—justifies preventing the rape even at the expense of the rapist's life. On the other hand, rape not involving an additional element of such severely forbidden relations, even if such relations are proscribed by a prohibition of lesser severity ("*Lav*"—a transgression punishable by lashes), one may not prevent the rape at the expense of the rapist's life.[104] According to this structure, when a rape victim is an unmarried woman, a divorcee or a widow, deadly self-defense may not be used. Indeed, the consensus among

100 According to Jewish law, a widow left without children from her late husband must choose between levirate marriage to her husband's brother, or the ceremony of "*halitza*" releasing her from marriage to her brother-in-law, and allowing her to marry freely.

101 According to Jewish law, an ordinary priest is forbidden from marrying a divorcee or a "*halutza*" (a woman released from levirate marriage through *halitza*), and a High Priest is forbidden from marrying a widow, as well. These prohibitions are of lesser severity than other forbidden sexual relations, and are punishable by lashes rather than death.

102 BABYLONIAN TALMUD, *Sanhedrin* 73a. The Talmud is a commentary on the Mishnah, comprising the study of the Mishnah by the sages in the centuries following its completion. The Jerusalem Talmud was concluded in the fourth century CE, and the Babylonian Talmud at the end of the fifth century CE.

103 At a relatively early stage in its history (circa first century CE), Jewish law all but ceased implementation of the death penalty. As a result, all discussions of death penalty in Jewish law sources were almost entirely theoretical in nature, with the death penalty serving mainly as an indicator of the severity of a transgression. On the subject of the death penalty in Jewish law, see BETH A. BERKOWITZ, EXECUTION AND INVENTION: DEATH PENALTY DISCOURSE IN EARLY RABBINIC AND CHRISTIAN CULTURE (2006); *Capital Punishment*, *in* 4 ENCYCLOPEDIA JUDAICA 445; Aharon Enker, *Aspects of Interaction between the Torah Law, the King's Law, and the Noahide Law in Jewish Criminal Law*, 12 CARDOZO L. REV. 1137 (1991).

104 Maimonides rules accordingly, MISHNEH TORAH, *Laws of Murder and Preservation of Life* 1:11. *See also* SHULCHAN ARUCH, *Hoshen Mishpat* 425:3.

scholars is that the sages limited this sanction to the few cases of rape involving unique aggravating characteristics (severely forbidden sexual relations), whereas in all other cases of rape it would be impermissible to kill a rapist in self-defense.[105]

This is not to say, of course, that the unmarried rape victim may not forcefully defend herself against her attacker. On the contrary, the context of the discussion in the Mishnah indicates that in the case of rape of an unmarried woman, she may be saved by injuring the rapist, short of causing his death.

B. The Justification

What is the conceptual justification for killing a rapist in the case of a betrothed maiden, and why does it not hold equally true regarding a single woman?[106]

Some will argue intuitively that the sages are motivated here by an underlying patriarchal perception of woman as property of man. As such, the sages differentiate between rape of a betrothed maiden, who already "belongs" to a man, versus the rape of a single woman who "belongs" to no one, and thus only the former case would be severe enough to justify killing the rapist. According to this line of thinking, the rapist may be killed in self-defense only when the rape "hurts" the *man* to whom the victim belongs (as in the case of the betrothed maiden).[107] Therefore, rape of a male victim would also be sufficiently severe as to justify killing the attacker, as it involves causing damage to a man.

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105 *See* SANGERO, *supra* note 1, at 183 n.761; Finkelman, *supra* note 5, at 1260–61.

106 From here on, rape of a betrothed maiden will be brought as an example of the entire category of rape involving severely forbidden sexual relations, and rape of a single woman will similarly serve as an example of the entire category of rape not involving forbidden sexual relations, unless otherwise stated.

107 *See* Fabricant, *supra* note 10, at 958. Fabricant argues that such was the historical perception of early English law, justifying killing a rapist in self-defense. The rape was considered a crime against the man to whom the woman "belonged" (her father, husband, etc.), with the damage to the woman considered to be mainly an affront to her chastity and to her future marriage possibilities. In her words: "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." *See also supra* note 78. Thus in the early English legal tradition, it was impossible to charge a husband for raping his wife or mistress (and at times, even for the rape of his slave). *Cf.* Fabricant, *supra* note 10, at 960 n.35. For similar reasons, it has been argued that one may not be accused of raping a prostitute, but rather only of the element of physical assault, at most. *Id.* at 961. It goes without saying that this perception was never held by Jewish law sages, who actually assigned even greater severity to rape of one's wife in comparison to rape of a strange woman. *See also Current Topics*, 55 AUSTL. L. J. 59, 60 (1981); Asher Maoz, *Can Judaism Serve as a Source of Human Rights?* 64 HEIDELBERG J. INT'L L. 677, 696 (2004).

However, this explanation appears to be inadequate, as the sages consistently apply the permission to kill a rapist in self-defense, to all cases of rape involving an element of severely forbidden sexual relations. Thus, for instance, it is permissible to kill a rapist in the case of a brother attempting to rape his sister, or a son attempting to rape his mother (even if the sister or mother are unattached to any man). In such cases, an explanation having to do with the woman "belonging" to a man[108] is wholly irrelevant and therefore cannot be accepted as the overarching rationale behind the sages' ruling.

Furthermore, it would seem that the very perception of woman "belonging" to man in the legal sense of ownership is incongruent with the sages' outlook in general,[109] rendering it irrelevant here.[110]

What, then, is the rationale behind the ruling of the Mishnah? A clue may be found in the following Tosefta, and the ensuing talmudic discussion. The Tosefta states: "R Judah said: If she said [to her rescuers] 'Let him be,' they should not try to kill him, since [the justification for killing the rapist is based on the concern that] without saving her he might slay her."[111]

Rabbi Judah's ruling seems to indicate that in his opinion, the legal justification behind killing a rapist is based upon the adjunct fear for the victim's life, not necessarily related to the rape itself. This was noted by the sages of the Babylonian Talmud in the following discussion:[112]

> In which case do they [R Judah and sages] differ? [113] Raba said: when she objects to being dishonored, yet permits him, so that he should not slay her. The sages maintain, the Divine law was insistent for her honour, and since she too is particular about it [her pursuer may be slain]. But R Judah maintains that the reason that the Divine Law decreed that he should

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108 As the rape victim—the sister of the rapist or his mother—may be a single, divorced, or widowed adult.

109 *See* MOSHE MEISELMAN, JEWISH WOMAN IN JEWISH LAW 96 (1978); JACOB NEUBAUER, TOLDOT DINEI HANISUIN BAMIKRA UVATALMUD [THE HISTORY OF MARRIAGE LAWS IN BIBLE AND TALMUD] 28 (1994, Hebrew).

110 This, perhaps, differing from biblical law, which may in fact base the criminality of rape upon the offense to the victim's chastity and future marriage possibilities. *See* Fabricant, *supra* note 10, at 959.

111 TOSEFTA, *Sanhedrin* 11:11.

112 BABYLONIAN TALMUD, *Sanhedrin* 73b.

113 The Talmud assumes that Rabbi Judah is presenting his individual opinion, opposed by the sages.

> be slain is because she is prepared to give her own life [rather than be violated]; but this one is not prepared to do so.

In other words: According to this talmudic discussion, the disagreement between the sages and Rabbi Judah relates to the case of a woman being forcibly raped, who nonetheless chooses not to protect herself (neither on her own nor through the help of a third party), in order to spare her life.[114] Such a case is characterized by the talmudic discussion as a test case exemplifying a rape not posing danger to the victim's life. Rabbi Judah argues that because the theoretical right to kill a rapist is based upon the fear for the victim's life,[115] if such a fear is neutralized, it is no longer permissible to kill the rapist in self-defense.[116] On the other hand, the sages permit killing a rapist in response to the rape itself ("the Divine Law was insistent for her honour"), regardless of danger to the victim's life, and therefore even in the above test case not involving threat to the victim's life, she may employ deadly self-defense against her attacker.

It would appear, therefore, that in Rabbi Judah's opinion, even rape involving severely forbidden sexual relations would not justify killing the rapist, as fear for the victim's life is the only possible justification for use of deadly self-defense. Rabbi Judah's position thus conditions self-defense upon absolute proportionality, and any attack of lesser severity than a direct threat to the victim's life does not justify use of deadly force in self-defense.[117] The sages, on the other hand, view certain types of rape—rape involving severely forbidden sexual relations—as justifying killing the rapist, in their own right. In other words, the

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114 It must be emphasized that there is no halakhic requirement placed upon the victim to do so. She is not expected to refrain from self-defense to avoid aggravating the situation. This may be compared with the absence of a *duty to retreat* in the case of a robber breaking into one's residence. *See Responsa Minchat Shlomo* 1:7.

115 *See* Rashi, commenting on the BABYLONIAN TALMUD, *Sanhedrin* 73b (s.v. *dimasra nafsha liktala*). Rashi refers to Rabbi Shlomo Yitzhaki, 1040–105, France.

116 The corresponding version of this discussion as it appears in the Jerusalem Talmud seems to suggest a different explanation of Rabbi Judah's position: "Rabbi Judah said: If she said [to her rescuers] 'Let him be,' they should not try to kill him, because if they will he might slay her." JERUSALEM TALMUD, Sanhedrin 8:9. According to this, Rabbi Judah's position is that a third-party passerby may not employ defense of another in a manner unreasonably endangering the life of the victim. Therefore, if the victim fears for her life and asks not to kill the rapist, a third party may not attempt to harm the rapist, as doing so would pose a threat to the safety of the victim.

117 Rabbi Judah's position does not explain the differentiation between rape of a betrothed maiden and of an unmarried woman. Both victims would be on equal footing from a right-to-life perspective. Unlike the sages, then, it might be that Rabbi Judah is not recognizing the Mishnah's distinction.

sages express a somewhat more flexible standard of proportionality.[118]

C. The Apparent Rationale Behind the Emphasis of the Victim's Marital Status

If the sages perceive rape as justification enough for the use of deadly self-defense, what then distinguishes rape of a single woman from rape of a betrothed woman? If the sages are indeed of the position that "the Divine Law was insistent for her honour," meaning that the law permits killing the rapist to avoid the rape itself, would it not seem that they should apply this rule in all cases of rape, regardless of the personal status of the victim? I will argue that the rationale behind this mishnaic ruling is not based on a distinction between the *outcomes* of the different types of rape, but rather on another factor altogether, to be identified further on.[119]

Thus, for instance, the rationale behind the distinction between different categories of rape has nothing to do with the loss of the victim's virginity, as such an outcome does not uniquely characterize the rape of a betrothed maiden, and could equally apply to a victim who is a single woman.[120]

Similarly, the rationale may not be chalked up to the danger that the betrothed maiden may become pregnant and give birth to a bastard ("*mamzer*" a halakhically illegitimate child).[121] This would be, of course, an unfortunate and tragic outcome, not relating to cases of an unmarried woman,[122] but it is insufficient as an explanation, being inapplicable to

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118 The way in which the Talmud interprets the argument between Rabbi Judah and the sages raises many other questions, to be addressed further on. *See infra* text accompanying note 191.

119 In fact, there may be room to distinguish between numerous sub-stages in the development of the law on this issue throughout the generations of the talmudic sages. An in-depth examination of this subject goes well beyond the scope of this study. The following discussion reflects the consolidated, final stage of the editing process of Talmud.

120 On the other hand, loss of virginity is not relevant in the case of a married or a male rape victim. *See* Rashi, commenting on the BABYLONIAN TALMUD, *Sanhedrin* 73a (s.v. *pagim lah*); *Responsa Radbaz* 1:388. For a review of the status of virginity in biblical literature, see Tikva Frymer-Kensky, *Virginity in the Bible, in* GENDER AND LAW IN THE HEBREW BIBLE AND THE ANCIENT NEAR EAST 79 (Victor H. Matthews, Bernard M. Levinson, & Tikva Frymer-Kensky eds., 1998).

121 *See also* Rashi, commenting on the BABYLONIAN TALMUD, *Sanhedrin* 73b (s.v. *apigma rabba*).

122 In Jewish law, the title *mamzer* (literally "bastard") refers singularly to a child born from forbidden relations, such as incest or adultery, whereas a child born out of wedlock is not considered to be a *mamzer*. A *mamzer* is forbidden to marry another member of the Jewish nation. A *mamzer*'s offspring inherits this status,

rape of a man, as well as to several categories of married women.[123]

It is no more likely that the explanation stems from the anticipated harm to the victim's future married life. Halakhically, the victim—single or married—is not forbidden from marriage,[124] so formally there is no difference between a rape victim who is single or betrothed. In reality, and considering the social atmosphere of ancient times, a betrothed rape victim may have suffered to a greater degree, possibly being rejected by her groom, no longer interested in marrying her.[125] However, one can argue that a single woman would have suffered equally, perhaps unable to find a suitable mate, as well.

Indeed, the Talmud itself emphasizes that the "dishonour" attached to the rape victim does not sufficiently explain the ruling relating to killing the rapist, for rape of a man is not considered to similarly "dishonour" the victim,[126] and yet does nonetheless justify killing a rapist in self-defense. On the other hand, rape of a single woman—certainly "dishonouring" her at least to some degree—does not carry such permission.[127]

D. The Severity of the Transgression

It would appear, then, that the reasoning behind the Mishnah's distinction between rape of a betrothed maiden and the rape of an unmarried woman, has nothing to do with the *outcome* of the rape, but rather stems from the differing levels of *severity of the transgression*.[128] Thus, killing a rapist is justified when defending against a rape that

and therefore it is viewed as a tragic situation to be avoided. On the halakhic status of *mamzer*, see further *Mamzer, in* 13 ENCYCLOPEDIA JUDAICA 442.

123 I refer here to rape of a married woman unable to become pregnant, such as an already pregnant or post-menopausal woman.

124 According to Jewish law, a rape victim may marry any member of the Jewish nation, except for a priest. *See, e.g.*, MISHNEH TORAH, *Laws of Forbidden Intercourse* 18:7.

125 *See, e.g.*, Rashi, commenting on the BABYLONIAN TALMUD, *Sanhedrin* 73b (s.v. *velo nafish*) ("A betrothed maiden, beloved and attractive to her groom, becomes dishonored in his eyes, whereas in all other cases of forbidden relations with unmarried virgins, they do not become so dishonored, and similarly married women do not become so dishonored as the betrothed maiden.").

126 *See* BABYLONIAN TALMUD, *Sanhedrin* 73a (stating that a male "is not thus dishonored").

127 *See* BABYLONIAN TALMUD, *Sanhedrin* 73b (differentiating between a rape causing "*pigma rabba*" (great dishonor) versus "*pigma zuta*" (small dishonor)).

128 The question of the reasoning behind the Mishnah's distinction between the two categories of rape must be distinguished from the much broader question dealt with at length by later halakhic authorities: whether

would itself be punishable by death. On the other hand, rape carrying a lesser penalty than death does not justify killing the rapist. Therefore, rape characterized by severely forbidden sexual relations punishable by death justifies killing the rapist in self-defense, whereas rape not characterized by forbidden relations punishable by death does not warrant killing the rapist in self-defense. As stated in the Babylonian Talmud: "Now, had the Divine Law written 'sin' [only], I would have thought it applies even to those who are forbidden merely by a negative precept;[129] therefore the Divine Law added 'death.'"[130]

What then is the correlation between the death penalty placed upon the rapist (should he complete his crime and be apprehended) and the permissibility of deadly self-defense against him? It would seem that the sages, in their own way, also recognize the need for proportionality between the attacker's action and the defensive response employed to counter it; however, they measured such proportionality by the severity of the attacker's crime, as reflected in the severity of the corresponding penalty.[131] Therefore, the permission to kill a rapist in self-defense is limited to those cases of rape punishable by death, or in the words of Jewish law, cases involving a combination of rape and severely forbidden sexual relations.

It must be emphasized that according to the ruling of the Mishnah, both elements—rape and forbidden sexual relations—must be present, while each element alone does not justify use of deadly self-defense. Therefore, just as a rapist may not be killed in the case of an unmarried woman, it is similarly impermissible to kill a person engaging in consensual forbidden sexual relations. In such a case, even if the sexual relations are punishable by

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the right to self-defense is founded upon the need to protect the victim's life, or rather upon the need to prevent the attempted transgression. It would seem that both play a role in the justification of self-defense. The pertinent question thus is limited to the precise relative weight of each factor. *See, e.g.*, MAIMONIDES, THE GUIDE FOR THE PERPLEXED 3.40, at 556 (Shlomo Pines trans., 1963) ("This Law—I mean the prescription to kill him who wishes to accomplish an act of disobedience before he performs it—is only applicable to two kinds of acts: if one pursues his fellow man in order to kill him, and if one pursues someone in order to expose the latter's nakedness. For these are acts of wrongdoing that cannot be repaired once they have been accomplished."). While every rape involves both transgression and damage to the victim, I will argue that the *distinguishing factor* between different categories of rape discussed in the Mishnah has to do with the severity of the transgression.

129 In other words, killing a rapist should also be permitted in cases of rape punishable by lashes, even if not punishable by death. *See supra* note 101.

130 BABYLONIAN TALMUD, *Sanhedrin* 73b.

131 This is similar to Blackstone's approach. *See supra* note 17.

death,[132] the judgment may only be handed down by a court of law, and not by a partisan initiative taken by a passerby.[133]

E. Proportionality and the Mishnaic Ruling

In summary, it would appear that although the term "proportionality" does not appear in the sages' lexicon, the essential concept of proportionality plays a central role in their discussion of the limits of self-defense. The tannaitic sources assume that the right to self-defense is conditioned upon full proportionality between the crime and the corresponding defensive action taken in response. Therefore, self-defense against rape does not automatically include the right to kill the rapist, aside from certain specific cases.

Rabbi Judah extrapolates that deadly self-defense must be limited to cases involving a threat to the victim's life. Rape itself does not justify the use of deadly force in self-defense.

The sages expanded the boundaries of legitimate self-defense somewhat further, ruling that in any case in which the penalty for the sexual assault would be death, the victim is permitted to defend herself even at the expense of the attacker's life. In keeping with this, the sages rule that in cases of rape accompanied by aggravating circumstances—rape combined with forbidden sexual relations—the victim may employ deadly self-defense against her rapist. However, in more common cases of rape, not punishable by death, the victim is not permitted to kill her rapist in self-defense.

As mentioned, while the above discussion is generally considered by scholars to sum up the Jewish law position on this issue,[134] in the following part I will attempt to challenge this view and present a more complex picture.

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132 On the death penalty in Jewish law, see *supra* note 103.

133 This is evident, for instance, from the Mishnah's emphasis: "He who *pursues* . . . after a betrothed maiden [to dishonour her]"—pursuit indicating force. This is also evident from the fact that the Mishnah limits the right to employ deadly self-defense to social crimes between *people*, as opposed to the position held by Rabbi Shimon ben Yochai and his son Rabbi Elazar, who ruled to expand the use of deadly force to transgressors of religious laws (between man and God), e.g., the right to kill one attempting to worship idols or desecrate the Sabbath. *See* BABYLONIAN TALMUD, *Sanhedrin* 73b.

134 *See* sources quoted *supra* note 105.

IV. "In Pursuit of a Maiden"—The Law in Practice (*halakha le-ma'aseh*)

A. Introduction

I will argue that while the previous section accurately reflects the theoretical law (*halakha*) on this matter, it is not fully representative of the realm of the law in practice (*halakha le-ma'aseh*). On a practical level almost every case of killing a rapist in self-defense may be sanctioned de facto,[135] regardless of the victim's marital status (betrothed or single).[136] Furthermore, not only will the defender be acquitted post facto, but it would seem that in practice, employing such self-defense will be considered appropriate to begin with.[137]

In light of the Mishnah's characterization of rape,[138] the following analysis will mainly address a third-party passerby defending the victim. Later on I will also discuss action that can be taken by the rape victim herself.

This duality lends a fascinating complexity to the ruling of the Mishnah. On one level, discernible by the common reader, the Mishnah creates the impression (*halakha*) of a rigid standard of proportionality and exacting precision as to the use of deadly force in self-defense; killing a rapist in self-defense is only permissible in *particularly severe* cases. On another level, accessible only to the critical one, the Mishnah's ruling sets a practice (*halakha le-ma'aseh*) of a somewhat more lenient standard of proportionality, effectively allowing almost *all* rape victims to defend themselves even at the expense of the rapist's life. This phenomenon is reminiscent of Meir Dan-Cohen's discussion of "acoustic separation."[139] However unlike in Dan-Cohen's work, which notes the distinction between "conduct rules" and "decision rules" (in other words, one set of rules addressed to the general public and another set of rules addressed to the judges), here the emphasis is on the distinction within the conduct rules themselves, whereby the law seems to voice one rule to the average citizen reading the law at first glance and a different rule to the citizen reading

135 Assuming, of course, that the situation meets the other conditions of legitimate self-defense, such as necessity, imminence, etc. *See supra* note 13.

136 *Contra* People v. Heflin, 456 N.W.2d 10, 22 (Mich. 1990): "Only an archaic system of justice would suggest that a woman cannot use deadly force to defend herself against common law rape."

137 In other words, this would be a justification rather than an excuse. *See supra* note 2.

138 *See supra* text accompanying note 94.

139 Meir Dan-Cohen, *Decisions Rules and Conduct Rules: On Acoustic Separation in Criminal Law*, *in* HARMFUL THOUGHTS: ESSAYS ON LAW, SELF AND MORALITY 37 (2002).

the law from a more cautious and complex perspective.

Nevertheless, this case is not the classical example of the distinction between law (*halakha*) and the law in practice (*halakha le-ma'aseh*). In general, the difference between *halakha* and *halakha le-ma'aseh* usually stems from the existence of numerous contradictory sources, with one source expressing the position of *halakha*, and another the position of *halakha le-ma'aseh*.[140] In contrast, the duality within the case at hand seems to stem from the difference between the theoretical and practical readings of the very same legal source. I will argue that while the theoretical examination of the sources discussed above would point to a distinction between different types of rape (based on the marital status of the victim), the practical application of these same sources almost always leads to the conclusion that the rapist may be killed irrespective of the victim's marital status. This duality of the law is inherently built into its design by the sages.[141]

It would, of course, be most instructive to study "real cases," that is historical trials, demonstrating the practical application of Jewish law in cases of self-defense against a rapist. However, for a variety of reasons, Jewish law has had an extremely limited functional criminal judicial system,[142] with criminal law being preserved mainly through textual analyses as opposed to case law. Therefore, in regards to criminal law issues, the study of these textual analyses is almost the only way to understand the approach of Jewish law on this issue, both in terms of *halakha* and of *halakha le-ma'aseh*.[143]

B. Self-Defense Under Uncertainty

1. The Difficulty of Being Certain of Marital Status

As discussed above, the Mishnah's ruling is based on its distinction between victims, depending on their marital status. The defensive action that a third party is permitted to

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140 Numerous contradictory sources may be, for example, a *halakhic* codex book versus a responsa, or even contradictory rules mentioned at different points within a single *halakhic* book.

141 For a "softer" version of the analysis of the distinction between the two realms of the law, see *infra* note 246 (basing the distinction not on the vertical schism between the theoretical law (*halakha*) and the practical law (*halakha le-ma'aseh*), but rather on the horizontal schism between the partial ruling brought by the Mishnah).

142 *See* THE PRINCIPLES OF JEWISH LAW 29 (Menahem Elon ed., 1975).

143 In other words, *halakha le-ma'aseh* (the law in practice) does not necessarily have to be identified with the real historic case law, but rather with the desirable pragmatic law had it actually been applied in case law.

employ against a rapist should be dependent upon whether the victim is single or betrothed. I will argue that while this distinction may be interesting and thought-provoking from a theoretical standpoint, its application is altogether impractical. The question of self-defense against rape must be explored not only from an academic perspective, but also from a practical one, as would be taken, for instance, by an attorney representing a client charged with murdering a rapist, claiming to have done so as an act of self-defense.

The Mishnah assumes that during the rape itself, a third party coming to the assistance of the victim is cognizant of her marital status and must act accordingly. However, it would seem that this would often be an entirely unrealistic assumption. In many cases, it is unreasonable to expect that a third party would know the victim's name let alone her marital status, and he must often act under conditions of uncertainty. Take, for instance, one common image of the rape scenario, of someone stumbling upon an attempted rape in a dark alley. Assuming that the only way to save the victim is by killing the rapist, the third party has only seconds to decide whether to come to the victim's assistance and do so, or stand aside and allow the attack to continue. In the dark of night and in the commotion of the situation, it is highly doubtful that a third party would be able to identify the victim and determine if she is married or single. It should be noted that even while in ancient times a woman's attire might have reflected her marital status (head covering, ring, etc.), these distinguishing demarcations would hardly be identifiable in the dark and violent circumstances of rape, throughout which garments may become torn or sullied in the struggle, hair may become uncovered, etc. This remains true even in a small community, with only several hundred women. In other words, a third-party passerby would commonly find himself in a situation of uncertainty, not knowing the victim's marital status. Therefore, an attorney defending such a third party under the rule of the Mishnah would certainly argue that his client did not know if the victim was single or married and consequently chose to take the risk of using deadly force against the rapist without such knowledge.

It follows that an appropriate application of the Mishnah's ruling would require us to address the question of whether in cases of doubt as to the victim's marital status, this doubt should tip the scales in favor of the rapist (forbidding deadly force against the rapist), or in favor of the victim (permitting use of deadly force against the rapist).

It must be emphasized that this state of doubt is not merely incidental or technical. This doubt is inherently built in to the Mishnah's ruling, as designed by the sages, who chose to condition deadly self-defense upon the *legal status* of the rape victim – a status that is not apparent or known to all. A meticulous assessment of the marital status of a rape victim is something that may be possible over the course of a slow and careful deliberation before

a court of law, but it is entirely impractical for a third party incidentally stumbling upon a violent rape scene, making a split-second decision of whether to attack the rapist. The element of uncertainty is therefore inherently built in to such a situation.

2. Categories of Uncertainty

The question of self-defense in a case of uncertainty as to the marital status of the victim must be examined against the backdrop of the general question of self-defense under uncertainty.

I believe that it would be useful, in this context, to distinguish among several categories of uncertainty that may accompany an act of self-defense.[144] As we shall see, while each category involves uncertainty (and for the sake of argument, we may assume the odds of uncertainty to be fifty-fifty),[145] the different characteristics of each category lead to different outcomes:[146]

> 1. Uncertainty relating to *the attacker's intent*, i.e., whether or not the attacker does, in fact, intend[147] to unlawfully harm the victim. For example, if a third party notices a person running and another person pursuing him clutching a knife, it might be difficult for the third party to determine if he is witnessing an attempted assault or murder, a police officer chasing an escaped murderer,[148] or perhaps even a joke involving a toy knife.[149] Should the third party witnessing such an interaction come to the aid of the apparent victim and kill the attacker? Another example is that of a person who sees a criminal suspiciously approaching another person, but doesn't know if the criminal is attempting to commit a petty property crime (such

144 The common factor among all of the categories of uncertainty to be discussed is the clarity regarding the identities of the suspected attacker and the apparent victim. Another type of uncertainty could arise when two parties are equally suspect as the attackers. *See* JERUSALEM TALMUD, *Sanhedrin* 8.9.

145 Unless otherwise stated.

146 For a philosophical discussion of the problem of uncertainty accompanying self-defense, see Michael J. Zimmerman, LIVING WITH UNCERTAINTY 97–117 (2008). Zimmerman's discussion focuses on one particular type of uncertainty, which I will describe as the first category of uncertainty.

147 In this context, the word "intend" will include criminal intent on the part of the attacker, including recklessness as to the possibility that his actions will cause the death of the victim.

148 In other words, uncertainty whether the assault is lawful or unlawful.

149 In other words, doubt as to whether an assault is even taking place.

as pickpocketing)[150] or murder. Does a third party have the right, in such a case, to protect the victim from being unlawfully attacked, at the expense of the attacker's life?

2. Uncertainty as to *the effective capabilities of the attacker*, i.e., whether or not the attacker, intending to unlawfully harm his victim, actually has the capacity to complete his objective. An example of this is a passerby witnessing a criminal attempting to shoot and kill his victim. While there is no doubt as to the attacker's criminal intent, it could be unclear whether or not he can indeed accurately shoot and kill the victim. Is a third-party passerby permitted to use deadly force against such an attacker in order to save the victim?

3. Uncertainty regarding *the legal categorization of the crime*, i.e., situations involving an attacker with both criminal intent and sufficient capability to unlawfully harm the victim, with uncertainty as to whether the attack may be categorized as an offense warranting deadly self-defense. For example, we can assume that the law proscribes killing an attacker who lacks criminal responsibility,[151] such as a psychotic attacker.[152] If a third party sees an attacker attempting to kill his victim in a manner leaving no doubt as to his intentions or capabilities, there still may be uncertainty as to whether the attacker is of sound mind or is suffering from a psychotic episode. Would a third-party passerby witnessing such a situation be permitted to kill the attacker in order to save the victim?

3. Uncertainty of Intent

Uncertainty of the first category was discussed by the sages in the mishnaic and talmudic periods in the context of the law of "a thief found breaking up," i.e., self-defense in the case of breaking and entering.[153] The tannaitic sources clearly ruled that in the particular case of breaking and entering, it is permissible to kill the burglar even if there is uncertainty as to

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150 Assuming this were a minor property crime, it would be impermissible to kill the criminal, in accordance with the requirement of proportionality.

151 *See* Michael Clark, *Self-Defense Against the Innocent*, 17 J. APPLIED PHIL. 145 (2000); McMahan, *supra* note 21, at 252; Otsuka, *supra* note 21, at 74.

152 This is due to the attacker's lack of responsibility for his actions. This type of situation is the focus of much contemporary literature on the matter of self-defense. *See, e.g.*, SANGERO, *supra* note 1, at 49; Kremnitzer, *Another View*, *supra* note 14; Fletcher, *Proportionality, supra* note 14.

153 For a discussion of the rule of "a thief breaking up," see Jacobs, *supra* note 5.

his intentions,[154] out of concern for the lives of the home's inhabitants: "If a thief be found breaking in," etc:[155] "With what case does this law deal? With a case where there is doubt whether the burglar came merely to steal or to kill as well . . . ."[156]

It is therefore ruled, accordingly, that killing the burglar would be forbidden if the situation is clearly a property crime, and the burglar is not in any way endangering life: "[I] f it is known that this burglar had peaceful intention towards the owner,[157] and yet the latter kills him, he is guilty of murder."[158]

The Babylonian Talmud, after some deliberation,[159] arrives at a similar conclusion: that in cases of uncertainty, the burglar may be killed. In its characteristically colorful descriptiveness, the Talmud rules that even if the burglar is the homeowner's son, and thus the chances of him murdering his own father are assumed to be relatively slim, the father may nonetheless kill his son if he is in any way fearful for his life.[160]

However, from the above sources, it would seem that the permission to use deadly self-defense in cases of uncertainty as to the attacker's intent is limited to the unique case of a burglar breaking and entering into one's place of residence. The sages' interpretation, allowing use of deadly force against a burglar, even when it is unclear if he intends to harm

154 Here, and in the remaining categories of uncertainty discussed further on, the idea that in some cases of uncertainty it is permissible to kill the attacker refers to a justification, and not merely an excuse. Compare with the discussion of Re'em Segev, *Justification, Rationality and Mistake: Mistake of Law Is No Excuse? It Might Be a Justification*, 25 LAW AND PHIL. 31 (2006).

155 The complete verse is: "If a thief is found breaking in and is struck so that he dies, there shall be no bloodguilt for him." *Exodus* 22:2.

156 3 MEKHILTA DE-RABBI ISHMAEL, Ch. 13 (Jacob Z. Lauterbach trans. 1935) [hereinafter MEKHILTA].

157 On the meaning of the term "in peace with him," see Jacobs, *supra* note 5, at 35.

158 MEKHILTA, *supra* note 156.

159 "Our Rabbis taught: . . . 'if it is as clear to thee as the sun that his intentions are not peaceable, slay him; if not, do not slay him.' Another tannaitic source taught: . . . 'if it is as clear to thee as the sun that his intentions are peaceable, do not slay him; otherwise, slay him.' These two unnamed tannaitic sources contradict each other." BABYLONIAN TALMUD, *Sanhedrin* 72a.

160 The Talmud rules that only if the burglar is the father of the homeowner, there is an assumption that he would not kill his son, and the burglar should not be killed. *See* Rashi, commenting on the BABYLONIAN TALMUD, *Sanhedrin* 72b (s.v. *av*). For the halakhic ruling on this issue, see MISHNEH TORAH, *Laws of Theft* 9:10. It should be noted that there seems to be a different understanding of this in a parallel discussion in BABYLONIAN TALMUD, *Pesachim* 2b. *See* Rashi, commenting on the BABYLONIAN TALMUD, *Pesachim* 2b (s.v. *hachi ka amar*) and Tosefot, commenting on the BABYLONIAN TALMUD, *Pesachim* 2b (s.v. *e peshita*).

the home's inhabitants, seems to be based upon the unique characteristics of burglary.[161] Thus, in all other cases of attacks outside of the home setting, it would seem to be impermissible to kill an attacker whose intentions are unclear.[162]

Therefore, for example, if a third party sees a person holding a knife pursuing a victim and it is unclear to the third-party observer if the pursuer is indeed attempting to unlawfully kill the victim,[163] it would be impermissible for the third-party observer to kill the pursuer. Furthermore, even if it is clear that the pursuer is a criminal attempting to harm the victim, but it is unclear whether he intends to merely steal the victim's wallet or rather to kill him,[164] it would still be impermissible to kill the pursuer.[165] In such cases where it is uncertain whether there is any intention to endanger the victim's life, there is no justification to tip the scales against the suspected attacker.

4. Uncertainty of Capabilities

As opposed to uncertainty of the first category (relating to the attacker's intentions), it would seem that the second category of uncertainty (relating to the attacker's capabilities) begs the opposite outcome. When it is clear that the attacker is attempting to kill his victim,

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161 I will not delve into the unique characteristics of breaking and entering into a home of residence, the scope of which goes beyond the discussion here. On this matter, as dealt with in current legal systems, see Green, *supra* note 14, at 25.

162 As worded by Rabbi Joseph D. Soloveitchik: "The ruling which is explicated in the Talmud, that even in a case of uncertainty slaying the pursuer's is permitted, is made only in reference to the case of a burglar breaking up, and not in reference to all pursuers in general." *Besugya De-haba Bamahteret*, BET YITZHAK 179, 188 (1994).

163 Assuming there is a reasonable possibility that the situation is, for example, one of a police officer chasing a criminal, or a prank between youths.

164 Assuming that the harm to property does not endanger human life, and assuming that stealing property does not justify by itself killing the robber in self-defense.

165 This was noted by Rabbi Asher Weiss, who wrote:

> The law of the pursuer applies only in the cases of a clear and definite pursuer. However, it is forbidden to kill a may-be-pursuer, as a possible danger to [the apparent victim's] life does not overrule a definitive danger to [the suspected attacker's] life. Nonetheless, in the case of a burglar breaking into the house (*haba bamahteret*), such certainty is not necessary. Only if it is clear as day that the robber does not in any way endanger life, it is forbidden to kill him, but when there is any element of doubt – it is permissible to kill him.

MINHAT ASHER, *Shemot* 39:2.

but there is doubt as to his abilities to effectively do so, logic would have it that deadly self-defense should be permissible to save the life of the victim. Therefore, when an attacker is attempting to shoot and kill someone, even substantial doubt as to the gunman's ability to shoot accurately[166] does not diminish the right to employ deadly self-defense.[167]

It is important to clarify that in both cases of uncertainty described above,[168] it is unclear whether the victim is in danger, and the chances may even be comparable. However, it would seem that the desirable outcomes of each category are quite different. While uncertainty as to the attacker's intentions ought to be decided in favor of the attacker (forbidding deadly self-defense), uncertainty as to the effective capabilities of the attacker ought to be decided in favor of the victim (permitting deadly self-defense).

The rationale behind this distinction is clear and is rooted in the criminality of the suspected attacker. When there is uncertainty as to the very identification of the attacker as a criminal or as an innocent person, there is good reason not to favor the apparent victim over the suspected attacker. It is entirely possible that the "attacker" is none other than a law-abiding citizen, whose death would be for naught,[169] and in such a situation there doesn't seem to be any reason to favor the "victim" over the "attacker." In contrast, when it is clear that there is an attacker willfully attempting to kill another person and the uncertainty is only as to his effective capabilities to do so, it is logical to favor the safety of the innocent victim over that of an undoubtedly criminal attacker.

This insight was noted by one of the rabbis of Jerusalem in the twentieth century, Rabbi Tzvi Yehuda Kook:[170]

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166 For instance, when the shooter is located at a far distance and it is unclear whether he can aim and shoot accurately.

167 Needless to say, the result would be anticipated to change in a case of a high level of certainty that the attacker is not able to successfully harm the victim. Therefore, if there is good reason to believe that the gunman's weapon is damaged or that the distance between the gunman and the attacker is greater than the maximal range of such a weapon, it would be impermissible to kill the gunman in self-defense.

168 Doubt as to the intentions of the attacker and doubt as to his effective capabilities of harming the victim.

169 On this issue, I believe that we should not distinguish between cases of uncertainty as to the innocence of the suspected attacker and uncertainty as to whether the suspect is a property criminal. With regard to using deadly force in self-defense, the possibility that the attacker is "only" a property criminal is comparable to the possibility that he is innocent altogether, for even against a property criminal deadly force is not allowed.

170 Rabbi Tzvi Yehuda Kook, commenting on on *Responsa Daat Cohen* 92, at 442.

> In the case of a pursuer, killing the attacker out of uncertainty should not be forbidden. This rule applies only when the pursuer is certainly indenting to commit homicide, and the only uncertainty is . . . regarding the danger posed by the pursuer. [171] However when there is uncertainty relating to whether the criminal only looks for money and may not be a pursuer at all, [172] how can one decide to apply the law of a pursuer to such a person?

Truth be told, the second category of uncertainty is relevant in almost every situation of self-defense. Under what circumstances would it be possible to know for certain that the attacker could successfully complete his crime? There is always a reasonable possibility that the attack will not be successful, either as a result of a mishap on the part of the attacker, or as a result of the victim managing to get away. Despite the significant possibility that the attack will not be completed, in such common cases of attack we permit use of deadly self-defense against the attacker.[173]

5. Uncertainty of the Crime

The third category of uncertainty is more complicated. This category involves an attacker with both criminal intent and effective capabilities. The uncertainty in this case stems from the lack of clarity surrounding the legal criminality of the attack, putting into question the justification for using deadly self-defense.

This kind of uncertainty can exist in a range of situations and for a variety of reasons. For instance, let us assume a rule that one may not kill an attacker suffering from a psychotic episode (and therefore not considered responsible for his actions),[174] and let us assume

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171 In other words, the types of situations described in the context of the second category of uncertainty, in which an attack is definitively taking place, while the effective possibility of its success remains unclear.

172 In other words, the type of situation described in the context of the first category of uncertainty, involving doubt as to whether the suspect even intends to harm the life of the victim or rather only steal his possessions.

173 This insight was noted by an early twentieth-century *halakhic* authority, RABBI GERSHON HANOKH FISHMAN, SIMHAT HA-HAG 17 [*hereinafter* SIMHAT HA-HAG]:

> In truth, every case of a pursuer carries uncertainty as to whether the pursuer will kill the one being chased, or rather the one being chased will overcome him. However, such is the law of the pursuer: If there is only uncertainty as to whether he will kill his victim, he is deserving of death because he is undoubtedly pursuing his friend with the intention of killing him. Because he may kill his friend, the law of the pursuer applies to him.

174 *See supra* note 152.

that during the attack it is unclear whether the attacker is sane or psychotic. Under such conditions, would it be permissible for the victim, or a third-party passerby attempting to assist the victim, to kill the attacker in self-defense?

Another example would be a situation in which the law forbids killing an attacker attempting to cause an abortion of an unborn fetus, but permits killing an attacker attempting to kill a newborn.[175] What, then, should be done in a case of an attacker attempting to break into a delivery room to kill the child of the birthing mother, while it is unclear if the baby is still in utero or post delivery? Would it be permissible for a third party to kill the attacker in such a case of uncertainty?

It would appear that when there is no doubt as to the intentions of the attacker to kill the victim, nor to his effective capability to do so, and the uncertainty is limited to the legal characterization of the crime as such, the case should be determined in favor of the victim, allowing for deadly self-defense to save her life. In the broad scheme of things, the fact that there is an attacker attempting to commit a crime that would effectively end the victim's life would seem to tip the scales against the attacker, despite the uncertainty as to the legal definition of his action.[176]

This question was discussed at length by a nineteenth-century *halakhic* authority, Rabbi Joseph Babad.[177] In his opinion, in such cases the ruling should indeed be against the attacker and not the victim, allowing for use of deadly self-defense:

> In the case of a pursuer, in which [the victim's life] can be saved, we see that the law permitted killing a criminal, such as a pursuer, in order to save the victim's life. Such an act as killing was permitted by the law in order to save a life, just as all other transgressions [which are permitted when necessary to save a life]. If so, even if there is only a possible danger to life, since the law clarified that in the case of a criminal, concern for

175 The justification for this is rooted in the normative determination that causing an abortion is less severe than homicide. Therefore, killing the attacker would be considered disproportionate (and therefore forbidden) in order to prevent abortion. Needless to say, one would have to make the largely hypothetical assumption that such an abortion does not endanger the life of the pregnant woman, as a threat to her life would certainly allow for killing the attacker in order to save her, unrelated to the protection of the fetus.

176 Uncertainty stemming from the mental state of the attacker (such as a psychotic episode) or from the legal status of the victim (for instance, whether the victim is a fetus).

177 Rabbi Joseph Babad, MINCHAT CHINUCH, Commandment 600, sec. 1. *See also* MINCHAT CHINUCH, Commandment 296. Rabbi Tzvi Yehuda Kook quoted this ruling approvingly. *See supra* note 170.

> the criminal's life is set aside, there is no longer any difference between possible and certain saving of the victim's life.[178]

This conclusion seems intuitively correct, as the third type of uncertainty inherently differs from the first: when it is unclear whether the "attacker" is an attacker or rather an innocent civilian, there is no reason to kill this may-be attacker to save a may-be victim. However, when it is clear that there is an attacker and there is also a victim in danger, the uncertainty is limited only to the question of the *legal definition* of the crime, and hence it is reasonable to favor the victim's interest over the attacker's, allowing for the use of deadly self-defense.[179] In the context of the cases discussed above, it would be permissible to kill the attacker even if there is a chance he may be suffering a psychotic episode,[180] or even when there is doubt whether the victim may be an unborn fetus.[181]

6. Uncertainty About Marital Status Revisited

At this point, I would like to return to the case of killing a rapist and the understanding that in the vast majority of rape cases, a third party would not know the victim's marital status.[182] The third party would therefore be expected to act under conditions of uncertainty, as the victim may be a betrothed maiden, thus permitting deadly self-defense against the rapist, or on the other hand a single woman, making it impermissible to kill the rapist. Assuming that the third party cannot ascertain these facts in the commotion of the rape, he has only moments to make his decision: how should he be expected to act?

I will argue that the uncertainty in this case is analogous to the third category of uncertainty discussed above. In this case, it is clear that the attacker is attempting to rape

178 MINCHAT CHINUCH, Commandment 296.

179 For a discussion of another possible approach among the *halakhic* authorities, see *infra* note 184.

180 In this I assume that despite the psychotic attacker's absolution from responsibility, his actions may still be considered criminal. This assumption is not to be taken for granted, as there is not necessarily consensus on this point. A full discussion of this issue goes beyond the scope of this article.

181 The discussion above would seem to indicate that in the case of an attacker pursuing a victim, with clear intent to kill and undoubted ability to do so, with uncertainty pertaining only to the criminality of the pursuit (e.g., an attacker or a police officer chasing an escaped convict), it would seem clear that one may not kill the attacker, despite the possibility that he may indeed be a homicidal criminal. The reason is simple: While it is true that this case involves a definite attack, in light of the price of possibly killing an innocent person (or worse yet, a person fulfilling his duty by law), it is forbidden to kill the attacker. From an analytic perspective, this case belongs to the first category of uncertainty.

182 *See supra* Part IV.B.1.

the victim, and it would seem that he is effectively able to do so. The only real uncertainty in such a case relates only to the legal severity assigned to the attempted crime: is it rape alone or a combination of rape and severely forbidden sexual relations?[183] In my opinion, in the case of such uncertainty, the doubt should work against the attacker, allowing his death to save the victim. Indeed, this is the conclusion of Rabbi Joseph Babad, after deliberation on the subject.[184]

One of the interesting outcomes of categorizing rape within the third type of uncertainty is the broad applicability of this kind of case. While the third category of uncertainty would seem to be the least common (in situations such as attempted murder, there is generally sufficient clarity as to the criminality of the act), in the context of rape it actually becomes the most prevalent form of uncertainty. Marital status is an internal legal fact (as opposed to external realistic fact), thus it stand to reason that for the most part, a victim's marital status is not necessarily known to a third-party passerby coming to her aid, and therefore the third party is in doubt as to whether he is witnessing crime of rape per se or rape combined with forbidden relations. Therefore, the assumption that cases of the third type of uncertainty should be ruled in favor of the victim would be relevant to most cases of rape.

C. Rape and Mortal Danger

The second argument pointing to the distinction between the *halakha* and the *halakha le-ma'aseh* on the use of deadly self-defense against a rapist is based upon the relationship between the crime of rape and the mortal danger posed to the victim.

1. The Danger to Life Posed by Rape

As stated, the Mishna discusses both the case of homicidal pursuit and the case of pursuit after a betrothed maiden or a male for the purpose of rape. The question that must be raised is what law should apply in a case including both elements, that is, a sexual assault endangering the life of the victim. Logic would dictate that when there is a combination of rape and attempted murder, the more severe of the two crimes should indicate the measure of permissible self-defense. Therefore, if one attacks a single woman, attempting to rape and murder her, it is clear that even according to the Mishna's ruling, a third party is

183 This is analogous to the cases discussed *supra* text accompanying notes 174–75.

184 MINCHAT CHINUCH, Commandment 600. It should be noted that in Commandment 296, the MINCHAT CHINUCH discusses this question, there actually coming to the opposite conclusion, ruling to forbid killing the rapist. *See also Responsa Radbaz*, 1:288. However, according to the chronological order of the writings, it would seem that the conclusion in section 600 was later than that expressed in Commandment 296.

permitted (and even commanded)[185] to kill the attacker to save the victim.

While this observation seems trivial, it leads directly to the practical question: is danger to the rape victim's life unusual, characterizing only the minority of rape cases, or is it rather a basic characteristic of the rape situation, constantly accompanying rape? Is the escalation from rape to murder rare, or are the two inherently linked?[186] This question is critical in order to determine when Jewish law would allow for killing a rapist in self-defense.

This question must be examined from a criminological perspective, paying necessary attention to the statistical aspects of this phenomenon.[187] However, it must also be examined from a legal perspective—specifically, what is the legal assumption made by the law regarding the level of danger posed by the rape? In this context, one must take into account historical developments, as the current inclination towards expanding the definition of rape to include even situations not involving the use of physical force (such as statutory rape, consent based upon fraudulent grounds, etc.) has weakened the link between rape and danger to the life of the victim. In contrast, when rape was historically characterized by the element of physical force, the association between rape and danger to the life of the victim was quite strong.[188]

The Mishnah does not address this question, and doesn't even hint to it. Nonetheless, if one seeks to extract from the Mishnah an indirect allusion to the issue, one could reasonably argue that if a burglar entering into one's home is automatically assumed to be endangering the home's residents,[189] one physically attacking a woman and violating her body must, all the more so, be assumed to be endangering her life. A rape victim surely has the right to steadfastly resist her attacker, to no lesser a degree than the resistance allowed to a homeowner defending his home, and if so, it is reasonable to assume that the attacker may react in kind, perhaps with deadly force, no less than that expected from a burglar. Does a rapist endanger his victim's life less than a burglar endangers the lives of a home's

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185 *See supra* note 2 (discussing the duty of a third party to protect the victim).

186 *See, e.g.*, People v. Landrum, 407 N.W.2d 614, 616 (Mich. App. 1986) (exemplifying how sexual assault can easily escalate to attempted murder of the victim: "she admitted she was not afraid that defendant would kill her until after she hit him with the telephone receiver [while defending herself from a sexual assault].").

187 *See supra* note 57.

188 *See infra* text accompanying note 195.

189 *See* JACOBS, *supra* note 5, at 34.

inhabitants?[190]

It appears that parallel sources from this time period address this more explicitly.

2. The Talmud's Assumptions About the Threat to Life Involved in Rape

As seen above,[191] the Babylonian Talmud discusses the argument between Rabbi Judah and the sages, interpreting this argument as revolving around the question whether the permissibility of killing a rapist is based upon the fear for the victim's life (Rabbi Judah) or upon the rape itself, providing sufficient justification on its own (the sages). As this source is relevant to the discussion at hand, I will quote it again:[192]

> In which case do they [Rabbi Judah and the sages] differ?[193] Raba said: when she objects to being dishonoured, yet permits him, so that he should not slay her. The sages maintain, the Divine law was insistent for her honour, and since she too is particular about it [her pursuer may be slain]. But Rabbi Judah maintains that the reason that the Divine Law decreed that he should be slain is because she is prepared to give her own life [rather than be violated]; but this one is not prepared to do so.

Above I discussed this Talmudic source in the context of identifying the basis for permitting deadly self-defense against a rapist. Here, I would like to reexamine this excerpt from a different perspective, namely the link between rape and murder.

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190 This argument is more normative than factual. In other words, this is not to say that a rape victim is expected to resist her rapist with greater force than a homeowner protecting his home, but rather that she has the right to do so. While it is certainly possible that a rape victim may employ such force, it is no less likely that she may be paralyzed with fear and not resist (see also, the talmudic discussion of the rape victim calling out "let him [the rapist] be," in hopes of sparing her life). I argue that as the rape victim has the right to resist her rapist with no less force than that permitted to the homeowner (and there is some possibility that she might exercise this right), one must then take into consideration that the rapist may, in response, increase his respective use of force, so much so as to endanger the victim's life.

191 *See supra* note 111.

192 BABYLONIAN TALMUD, *Sanhedrin* 73b.

193 Unlike in ancient times, today it is no longer difficult to imagine additional rape situations not posing danger to the victim's life, for instance: rape relying not on force, but rather authority or abuse of power. Another example is that of rape defined as such despite the victim's seeming consent to sexual relations, due either to the victim's age (statutory rape) or to fraudulent acquisition of consent. *See supra* note 96.

In order to sharpen the doctrinal argument between the sages and Rabbi Judah, the Talmud (in line with the Tosefta) brings up a test case: rape not involving danger to the victim. When, according to the Talmud, could such a situation take place? When the victim, fearing for her life, cries out to those attempting to rescue her, "let him [the rapist] be," in order that the rapist not be provoked to kill her, but rather spare her life after completing his crime. In such a case, the Talmud claims that Rabbi Judah would not allow deadly self-defense against the rapist, because there is no danger to the victim's life, whereas the sages would allow for deadly self-defense, as the prevention of rape is justification enough to do so.

This test case is significant, and the way in which it is presented teaches a great deal about how talmudic sages understood the potential danger posed by rape. It should be noted that in order to isolate rape from danger to the victim's life, the Talmud had to present a highly unusual and unlikely case: A case in which a victim calls out to those attempting to rescue her to refrain from doing so in hopes of her life being spared.[194] This clearly implies that in the standard rape scenario, the rapist is seen as endangering the life of the victim.[195] This danger stems from the reasonable assumption that the victim will resist the rapist, and the rapist—aware of this—may in response murder the victim throughout the course of the rape.[196] In other words, this talmudic discussion teaches that the sages make a general assumption that the "typical" case of rape involves danger to the life of the victim. This assumption may, of course, be refuted in specific circumstances in which there is no danger to the victim's life; however, barring such unique circumstances, it may generally be assumed that the rape victim faces mortal danger.

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194 Therefore, in the paradigmatic case of rape of a betrothed maiden, Rabbi Judah and the sages are in agreement that the rapist may be killed in self-defense, whether in order to prevent the rape itself (the sages), or in order to protect the victim's life (Rabbi Judah).

195 In the words of Rashi: "There are modest women that would prefer to give their lives and be killed rather than to have sexual relations with him, hence the Torah teaches to save her life." Rashi, commenting on the BABYLONIAN TALMUD, *Sanhedrin* 73b (s.v. *demasra nafsha lektala*).

196 This can be presented as follows: It was suggested above (*supra* note 117) that Rabbi Judah, basing the right to kill the rapist on the protection of the victim's life, would apply this rule to all cases of rape, regardless of the victim's marital status, unlike the sages, who permit deadly self-defense to prevent the rape itself, but limit this license to the case of the betrothed maiden. At this point, it becomes clear that the sages do not in fact disagree with Rabbi Judah's reasoning, but seek to add an additional reasoning. Therefore, they too would be expected to agree that in all cases of rape endangering the victim's life (most cases), the rapist may be killed in self-defense. However they add to this the argument that even in the unusual situation not endangering the life of the victim, it would still be permissible to kill the rapist, under the particular aggravating circumstance of a betrothed maiden.

3. Two Parallel Justifications for Killing a Rapist in Self-Defense

If indeed the sages assume that most cases of rape involve mortal danger to the victim, the justification for applying deadly self-defense by a betrothed maiden would seem to be twofold, due both to the forbidden sexual relations accompanying the rape and the danger to the victim's life. While the Mishnah focuses on the former, perhaps in order to sharpen and emphasize this insight, the latter nonetheless must not be ignored.

Furthermore, from the perspective of the first justification, it is indeed necessary to distinguish between different victims based on their marital status, as different rules apply to the betrothed maiden, unlike her single counterparts. However, this is not the case from the perspective of the second justification, leading to identical rulings for all victims alike. The fear for the victim's life is blind to marital status. In any case involving danger to the victim's life—meaning the vast majority of rape cases—the victim must be saved even at the expense of the rapist's life.

A similar insight was presented by a sixteenth-century scholar, Rabbi David ibn Zimra, emphasizing that one who kills a rapist fulfills the Biblical imperative: "You shall not stand up against the life of your neighbor,"[197] since "the victim may not submit herself, and might be killed by the rapist."[198] In other words, the victim is expected to resist the rapist, placing her in mortal danger, and thus killing the rapist is considered to be saving the life of the victim.[199]

So too, Rabbi Joshua Leib Diskin, a late nineteenth-century *halakhic* authority,[200] ruled in a different context that saving a rape victim from her rapist is equivalent to saving her from death, as "when [rapists] intend to rape her, there is concern that a modest woman may prefer to give up her life."[201]

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197 *Leviticus* 19:16.

198 5 Rabbi David ibn Zimra, *Responsa Radbaz*, 218.

199 The Radbaz suggests an additional explanation as to why killing a rapist fulfills the commandment of "You shall not stand up against the life of your neighbor": "The meaning of this verse is that one may not idly stand against one's neighbor's mishap, and [in the case of rape] the woman is being dishonored by these sexual relations." *Id.*

200 Rabbi Joshua Leib Diskin, *Responsa Maharil Diskin, Kuntras Aharon* 5:34.

201 *Cf.* Rashi, *supra* note 195.

While the Radbaz and Rabbi Diskin didn't explicitly rule that in the majority of rape cases deadly self-defense should be permitted in order to save the victim's life (even if she is a single woman), this would seem to be the logical conclusion from their writings.

4. Self-Defense Is Permitted in the Majority of Cases

A synthesis of the elements discussed above would seem to lead to the following understanding: The Mishnah's ruling, limiting the use of deadly self-defense to the case of the betrothed maiden, addresses rape cases not involving danger to the victim's life. However, such a case is most unusual,[202] with the vast majority of rape cases involving mortal danger to the victim.[203] Therefore, rape victims generally fall into the category of "he who pursues after his neighbor to slay him." If so, the marital status of the victim becomes irrelevant, as all victims must be saved from mortal danger even at the expense of their attackers' lives.

It follows from this that the Mishna's ruling, limiting deadly self-defense to cases of a betrothed maiden, represents the realm of theoretical law (*halakha*). However, in practice (*halakha le-ma'aseh*), in almost every rape situation, one who kills a rapist may claim that he did so justifiably, in order to save the victim's life. Truth be told, this approach does not isolate the prevention of rape itself as justification for killing a rapist, but rather focuses on the accompanying characteristic of danger to the rape victim's life.[204] Nonetheless, according to my view, this is exactly the essence of the sages' position: On a declarative level, the sages promote a meticulous standard of proportionality, thus categorically prohibiting deadly self-defense against a rapist, aside from the particular exception of rape involving severely forbidden sexual relations. Practically, however, they stretch the requirement of proportionality by significantly expanding the definition of mortal danger to the victim.

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202 This would seem to be the case of the rape victim calling out to her rescuers to refrain from intervening on her behalf.

203 For a similar argument in contemporary literature, see *supra* note 57.

204 See criticism discussed *supra* note 58.

D. Self-Defense by the Victim Versus Self-Defense by Third Party

1. Self-Defense by the Raped Victim as a Distinct Category

In this section, I will offer a third point of view, further distancing the image created by the Mishnah's ruling (forbidding the use of deadly self-defense against a rapist in the case of a single woman), from the rule in practice (permitting such self-defense under certain circumstances). However, this section is not based upon the distinction between *halakha* and *halakha le-ma'aseh*, but rather on the distinction between principles within the law (*halakha*) itself. I should note that the idea suggested in this section is more speculative than those presented above, and I approach it more cautiously and with a lesser degree of certainty.

I will suggest that the freedom accorded to a victim to defend herself is broader than that accorded to a third-party passerby coming to her rescue.[205] While the definition of self-defense as a justification generally allows for defensive action by a third party as well,[206] there may be several exceptions, according to which the scope of permissible self-defense by a victim may be broader. This idea may lead to the conclusion that the Mishnah, distinguishing between rape of a betrothed maiden versus a single woman, is directed towards a third-party passerby coming to the victim's rescue. Beyond the assessment of the severity of the attack, the third-party passerby must also consider the severity of the transgression being committed by the attacker. According to my argument, it is possible that this distinction is not directed at the victim herself, who is allowed in any case to kill her rapist in self-defense.[207] A rape victim attempting to protect herself by killing her rapist must only consider the danger posed to her own safety, regardless of the severity of transgression itself. Therefore, from the victim's perspective, she need not give any thought to the fact that she is single and not betrothed.[208]

205 The very fact that a third party may kill an attacker must not be taken for granted. In Jewish law, this rule is founded upon the exegesis "smitten – by any man," BABYLONIAN TALMUD, *Sanhedrin* 72b, and as ruled in MISHNEH TORAH, *Laws of Murder and Preservation of Life* 1:6. For a further discussion of this point, see Justice Elon in CrimA 89/78 Afangar v. State of Israel, 33(3) PD 141 [1979] (Isr.). For a more general discussion of this issue, see FLETCHER, RETHINKING, *supra* note 1, at 868.

206 *See* FLETCHER, RETHINKING, *supra* note 1, at 762.

207 I refer here to the permission given to a rape victim to kill her rapist as a justification, and not only as a mitigating factor relating to the sentencing, weighing such considerations as the victim's anxiety and stress in the heat of the moment. Cf. MISHNEH TORAH, *Laws of Murder and Preservation of Life* 1:13.

208 This contrasting with Fletcher's argument that if the victim may protect herself by killing the rapist, such a license applies equally to a third party. *See* Fletcher, *The Right to Life*, *supra* note 38, at 1377.

Indeed, the very wording of the Mishnah seems to be addressing only a third party attempting to rescue the victim—"these are saved"[209]—altogether ignoring the possibility of self-defense by the victim herself.[210] Therefore, one may argue that the freedom given to a rape victim to defend herself is not necessarily congruent to that accorded to a third party. Needless to say, this linguistic nuance alone cannot be sufficient to prove my hypothesis.[211] However, I will argue that the distinction between self-defense by a victim versus self-defense by a third party is founded upon sound legal reasoning, and as such is also to be found in the writing of several *halakhic* authorities, hinted to even in writings dating back as far as the period of the Rishonim.[212] In this chapter, I will review these positions, in a nutshell attempting to pinpoint the differing legal underpinnings of each category of self-defense.

2. *Halakhic* Teachings Demonstrating the Distinciton Between Victim and Third Party Self-Defense

Rabbi Menahem Ha-Meiri offered an interpretation of a Mishnah stating that in some cases it is impermissible to abort a fetus endangering the mother's life during birth,

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209 BABYLONIAN TALMUD, *Sanhedrin* 73a.

210 From a feminist perspective, one may argue that this emphasis is not coincidental, but rather stems from stereotypical social assumptions, according to which men generally wield force, whether as aggressors or defenders, whereas women generally are victims of force, and are neither aggressors nor able to defend themselves. *See* Lance K. Stell, *The Legitimation of Female Violence, in* JUSTICE, LAW, AND VIOLENCE 250 (James B. Brady & Newton Graver eds., 1991). Indeed, according to contemporary feminist understanding, the male perspective tends to perceive women who are armed with weapons as dangerous to both themselves and their surroundings, posing a threat greater than any benefit to be reaped by the use of such weapons. Therefore, women are often advised, in situations of danger, to scream, call the police, or to protect themselves with their car keys, a bat, or other household objects, but not to use firearms on their own. *See* MARTHA MCCAUGHEY, REAL KNOCKOUTS: THE PHYSICAL FEMINISM OF WOMEN'S SELF-DEFENSE (1997); Jocelyn A. Hollander, *"I Can Take Care of Myself": The Impact of Self-Defense Training on Women's Lives*, 10 VIOLENCE AGAINST WOMEN 205 (2004). For a broader discussion of this subject, see Catharine A. MacKinnon, *Sexual Abuse as Sex Inequality,* in WOMEN'S LIVES, MEN'S LAW 109 (2005); Catharine A. MacKinnon, *Rape, Genocide and Women's Human Rights,* 17 HARV. WOMEN'S L.J. 13 (1994); Carol R. Silver & Don B. Kates, Jr., *Self-Defense, Handgun Ownership, and the Independence of Women in a Violent, Sexist Society, in* RESTRICTING HANDGUNS: THE LIBERAL SKEPTICS SPEAK OUT 139 (Don B. Kates Jr. ed., 1979); Mary Zeiss Stange, *From Domestic Terrorism to Armed Revolution: Women's Right to Self-Defense as an Essential Human Right*, 2 J.L. ECON. AND POL'Y 385 (2006).

211 Furthermore, one could argue that on the contrary, the very fact that the Mishnah does not specifically address the rape victim indicates that there is no difference between her and a third party.

212 The rabbinic authorities in the period from the eleventh century to the fifteenth century.

specifically when the fetus has entered into the world and his life is valued as human life.[213] In relation to this ruling, Ha-Meiri expressed the position that while it is true that if the fetus has pushed its head out, the physician may not kill the fetus to save the mother, the mother herself is not bound by this law, and is permitted to abort the fetus in order to save her own life: "For the woman herself may cut it [abort the fetus], as she is considered as one being pursued, and in any case one being pursued, when no one else is stopping the pursuer, the one being pursued may do so himself."[214] This is one of the first references to a distinction between the extent of self-defense permitted to a victim, as opposed to a third party.[215]

In his commentary "Mishneh LaMelech," Rabbi Judah Rosanes makes a similar distinction in the context of the requirement of necessity, referred to by the sages with the phrase "one who may be saved with one of his limbs."[216] According to this requirement, killing the attacker is forbidden if the attacker may be stopped by an injury.[217] According to Rabbi Rosanes's understanding, "This law refers to another person coming to save [the victim], but a victim need not be meticulous regarding this matter."[218]

In this vein, Rabbi Saul Nathanson notes this difference in the case of an attacker who is a minor.[219] While the sages viewed such an attacker as devoid of criminal responsibility,[220] they nonetheless ruled that the attacker, despite his age, may be killed in self-defense.[221] However, in light of the problematic nature of using deadly self-defense against an attacker not bearing criminal responsibility, some *halakhic* authorities significantly limited the right

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213 *See* MISHNAH, *Ohalot* 7:6; BABYLONIAN TALMUD, *Sanhedrin* 72b; MISHNEH TORAH, *Laws of Murder and Preservation of Life*, 1:9; SHULCHAN ARUCH, *Hoshen Mishpat* 425:2.

214 Rabbi Menahem Ha-Meiri, *Beit Ha-Bekhira*.

215 An additional source from the period of the Rishonim can be found in PISKEI HA-ROSH, *Sanhedrin* 8:4.

216 BABYLONIAN TALMUD, *Sanhedrin* 74b; MISHNEH TORAH, *Laws of Murder and Preservation of Life* 1:13.

217 On the requirement of necessity in self-defense, see *supra* note 15.

218 Rabbi Judah Rosanes, MISHNEH LAMELECH, *Laws of Injury and Damage*, 8:10; *see also* Rabbi Elijah Mizrahi, commenting on Rashi, *Genesis* 32:8.

219 Rabbi Joseph Saul Nathanson, *Responsa Shoel U-Meshiv, Mahadurah Reviah* 2:50.

220 Contemporary discussions of assault by attackers not bearing criminal responsibility focus mainly on the case of a psychotic attacker. *See supra* note 153.

221 BABYLONIAN TALMUD, *Sanhedrin* 72b; MISHNEH TORAH, *Laws of Murder and Preservation of Life* 1:6; SHULCHAN ARUCH, *Hoshen Mishpat* 425:1.

to kill an underage attacker.[222] In reference to these positions, Rabbi Nathanson argued that the limitations apply only to a third party attempting to rescue the victim by killing the young attacker, as opposed to the victim himself, who is permitted to employ necessary force to protect himself, even if the attacker is a minor lacking criminal responsibility.[223]

Finally, Rabbi Joseph Shalom Eliashiv has recently made similar use of this distinction. In his opinion, while Jewish law does permit killing a burglar breaking into a home, even when the danger to the lives of the home's inhabitants is uncertain,[224] this applies only to the homeowner himself. A third party would be permitted to do so only when there is clear and definite danger being posed to the home's residents, and not in cases of uncertainty.[225]

This distinction has been discussed at length by other *halakhic* authorities as well,[226] most often in agreement.[227]

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222 On the words of the Talmud: "A minor in pursuit may be slain to save the pursued" (*Sanhedrin* 72b), Rashi commented and added: "A minor in pursuit—of another minor, to slay him." From Rashi's commentary it may be deduced that a third party may only kill a minor in pursuit after another minor, as opposed to a minor in pursuit of an adult.

223 In truth, the innovation of *Responsa Shoel U-Meshiv* is even more radical. As mentioned, he argues that when a minor endangers an adult life, the victim himself may kill the minor, but a third party is forbidden from doing so. However, if a minor endangers a minor's life, the author believes that a third party may kill the attacker, due to the fact that the young victim cannot sufficiently protect himself, and therefore special permission is given to a third party to protect the victim, even at the expense of the young attacker's life.

224 *See supra* note 153.

225 Rabbi Joseph Shalom Eliashiv, Comments on Tractate Pesahim (Jerusalem, 2010) 2b, in the context of a burglar breaking up: "One being pursued certainly should be rescued by any person even at the expense of the life of the pursuer. But in a case of uncertainty whether the pursuer is indeed a pursuer, it is forbidden [for a third party] to kill the pursuer, although the one being pursued may surely save himself even in such a case of uncertainty, based on the dictate: 'if he come to slay thee, forestall by slaying him.'"

226 *See* SIMHAT HA-HAG, *supra* note 173, at 17; *see also infra* note 239. *See* Rabbi Joseph Babad, MINCHAT CHINUCH 296; Rabbi Naftali Zvi Yehuda Berlin, *Meromei Sadeh*, *Sanhedrin* 73a (s.v. *tos*); Rabbi Moshe Feinstein, *Responsa Igrot Moshe*, *Even Ha-Ezer* 1:39; Rabbi Abraham Isaac Ha-Cohen Kook, *Responsa Mishpat Cohen* 139; Rabbi David ben Moshe of Navahrudak, *Responsa Galia Masechet*, *Yoreh Deah* 5; Rabbi Yehiel Mikhel Rabinowitz, *Afikei Yam* 2:40.

227 However, some rejected this distinction. *See, e.g.*, Rabbi Isaac Ze'ev Soloveitchik, *Hidushei Maran Riz Halevi, Laws of Murder and Preservation of Life* 1:13.

3. Justifying the Distinction

What, then, is the reasoning behind this differentiation? Why is self-defense treated differently when used by a victim, as opposed to a third party?[228]

Indeed, some of the distinctions described above may have practical underpinnings: For instance, the difference relating to the requirement of necessity[229] may be understood in light of the subjective difference between the victim and a third party. From the subjective perspective of the victim, undoubtedly under stress, it may be impossible and unreasonable to demand use of only the lowest necessary level of force. A third party, on the other hand, is under less stress than the victim.[230] Such an explanation was suggested by several *halakhic* sources.[231]

However, this does not account for the other distinctions described above,[232] seeming to indicate a categorical difference between self-defense by a victim as opposed to self-defense by a third party. If so, the question remains—what is the rationale behind this distinction?

In order to clarify this point and identify the categorical difference, we may revisit the rationales behind the doctrine of self-defense. Allowing a third party to kill an attacker must be based, at least to a certain degree, upon a rationale relating to the guilt and criminal responsibility of the attacker.[233] This is because the third party protecting a victim

228 A separate question beyond the scope of this study is who should be considered a victim and who a third party. Is a person protecting his family considered a third party protecting them, or in the context of self-defense could he himself be considered a victim? *See* Rabbi Mordechai Yaffe, *Levush Ha-Orah*, commentaing on *Genesis* 38:8: "If one person rises against another, even if he doesn't intend to kill him, but rather his wife and children, or even his servants or other inhabitants of his home, does he not know that this one would rise against him to save them? Certainly he knew this, and he intends to kill him if he rises up to save his wife and children and household."

229 *See supra* text accompanying note 217.

230 The assumption being that the necessity test is subjective, rather than objective. In other words, it is irrelevant whether in retrospect it may have been possible to stop the attacker with lesser means, and the deciding factor is whether in the actual moment of the attack one could have been reasonably expected to think of less deadly means to thwart the attacker.

231 *See, e.g.*, Rabbi Isaac ben Sheshet, *Responsa Ribash* 238; Rabbi Isaac Ze'ev Soloveitchik, *supra* note 227.

232 *See supra* note 213 (abortion of a fetus), and note 219 (a minor).

233 *See supra* note 25.

is essentially choosing one life over another, something that may be justified only by an objective reason to prefer the victim's life over the attacker's.[234] Indeed, such a preference may be warranted by virtue of the fact that the attacker is a criminal, responsible for the violent situation at hand, whereas the victim is an innocent, bearing no responsibility for it. Therefore, the Mishnah rules that in order to permit lethal self-defense, the attacker must be committing a crime punishable by death. This is a vital condition, without which a third party may not save the victim's life at the expense of the attacker's.

However, the victim's right to self-defense bases itself upon the rationale of personal autonomy. The victim is permitted to prefer his own life over the life of his attacker, because his very own life is being unlawfully threatened by someone else. This relates not to the type of crime being committed, nor its severity, but rather to the very fact that the attacker is unlawfully endangering the victim's life. This is reminiscent of the words of Rabbi Akiva, in a different context: "thy life takes precedence over his life."[235] This teaches that the main consideration guiding the victim should be the level of danger posed to his life, and the permissibility of killing the attacker must be decided accordingly.[236]

Therefore, for example, when an attacker is a minor, lacking criminal responsibility, there may be a distinction between the victim himself, permitted under any circumstances to save himself from danger, versus a third party, given a more limited license to kill the young attacker.[237]

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234 On this issue, I see eye to eye with Sangero: While the rationale of personal autonomy may justify the right to self-defense by the victim himself, this rationale does not sufficiently explain the right to self-defense by a third party. *See* SANGERO, *supra* note 1, at 65, 243. Therefore, proponents of this rationale must seek additional rationales to justify the right to self-defense by a third party. *See* FLETCHER, RETHINKING, *supra* note 1, at 868–89.

235 "If two are travelling on a journey [far from civilization], and one has a pitcher of water, if both drink they will [both] die, but if one only drinks he can reach civilization—The Son of Patura taught: It is better that both should drink and die, rather than that one should behold his companion's death. Until Rabbi Akiva came and taught: 'that thy brother may live with thee': your own life takes precedence over your fellow's life." BABYLONIAN TALMUD, *Bava Metzia* 62a.

236 Provided, of course, that the attack is unlawful, as even according to the rationale of personal autonomy, a victim may not kill his attacker if the attacker is acting lawfully. Thus, for instance, a criminal attempting to kill his victim, and in doing so kills a police officer trying to intervene and save the victim, may not claim in his defense that he was acting in self-defense based upon the rationale of personal autonomy.

237 See the opinion presented in *Responsa Shoel U-Meshiv*, *supra* note 219.

This distinction was noted by Rabbi Naftali Tzvi Yehuda Berlin:[238]

> Another person may not kill an attacker except to prevent murder, and not for the sake of fulfilling the commandment to save a life . . . . Not so is the case of the victim himself, who may kill his attacker in order to save himself, as one's own life comes before the life of his neighbor.[239]

4. Applying the Distinction to the Law of Rape

It would seem, that this distinction may be of significance in other contexts within the rules of self-defense,[240] and I will focus in particular on the influence it may have in the case

238 Rabbi Naftali Zvi Yehuda Berlin, *Meromei Sadeh, Sanhedrin* 73a (s.v. *ve-domeh*).

239 *See also* SIMHAT HA-HAG, *supra* note 173, at 17:

> If another person comes to save [the victim] and can kill the attacker, this is by reason of the punishment deserved [by the attacker] and not for the sake of saving [the victim's] life alone. But as for the victim himself, he does not need the justification of punishment at all [in order to justify killing the attacker], since the only justification is saving his own life. Hence it is irrelevant to ask here whether your blood is redder than your neighbor's, because every person's blood is redder in his own eyes, and certainly one is not required to forsake oneself and allow oneself to be killed, but rather may use any possibility of saving himself, even if the expense be the blood of the pursuer, and this is for the sake of saving his life alone.

240 For instance, in the case of a psychotic attacker. As discussed above, contemporary literature views a psychotic attacker as the exemplary test case of an attacker lacking criminal responsibility. *See supra* note 152. Approaches basing the right to self-defense on the principle of personal autonomy would tend to justify employing deadly self-defense against a psychotic attacker. On the other hand, approaches basing the right to self-defense on the attacker's guilt are forced to conclude that the attacker must not be killed, as he, just like the victim, bears no criminal responsibility (and is, in a way, himself a victim of the circumstances). According to the distinction discussed in this section, there may be room to suggest the following complex conclusion: a victim being attacked by a psychotic attacker is allowed to prefer his own life over the life of the attacker, regardless of the attacker's guilt or responsibility. However, a third party must exercise a standard that takes into consideration the attacker's responsibility and guilt. Therefore, such a third party would not be permitted to intervene on behalf of a victim, if the price of doing so would be killing a psychotic attacker, as both parties are equally innocent (if the victim is not capable to defend himself then the law may be different, since it would be reasonable to allow the third party to step into the victim's shoes; see *supra* note 223). *Contra* Re'em Segev, *The Distributive Justice Theory of Self-Defense*, 22 ETHICS & INT'L AFF. 5 (2008). Segev argues that in the case of the psychotic attacker, there is no justification to kill the attacker, who, like the victim, is innocent. However, should the victim himself kill the attacker, he would be exempt from criminal responsibility. This exemption would be given to the victim, but not to a third party acting similarly. While I tend to agree with the distinction made by Segev between the victim and a third party, there may be room to consider whether the use of deadly self-defense by a victim in such a case, should be considered a justification and not just an excuse.

of self-defense against a rapist. As discussed above, the Mishnah permits killing a rapist in self-defense, only when the crime is of a severity[241] warranting the death penalty. Then, and only then, does the situation accumulate the necessary "critical mass," comprised of both the harm to the victim and the severity of the rapist's transgression, to warrant the use of deadly self-defense.

However, we must ask ourselves if this limitation should also apply to the rape victim herself, or rather only to a third party coming to her aid. What significance should be given to the fact that the Mishnah itself speaks only of a third party coming to the victim's aid?[242] I would cautiously suggest that according to the Mishnah, the victim herself may fall under a different rule: She must weigh only the severity of the harm expected to be incurred by her and not the legal severity of the transgression being committed by the rapist. As a result, the victim need not consider her marital status and its ramifications vis-à-vis the severity of the rapist's actions, and she may kill the rapist in self-defense. Such use of deadly self-defense will be considered in itself justified (and not only excusable), regardless of the victim's marital status.

In other words: I suggest that the Mishnah's ruling on deadly self-defense against a rapist must be read in two parts: First, the Mishnah rules that in general, rape is similar to murder, in that both may be prevented by killing the attacker. Second, the Mishnah rules that a third party may intervene in favor of the victim at the expense of the rapist's life only in the presence of an additional element tipping the scales against the rapist. Because the third party is not facing direct harm, there must be an additional justification in order to prefer the victim's interest of preventing the rape, over the rapist's interest in maintaining his life. This justification exists, according to the Mishnah, when the rapist commits his rape under aggravating circumstances, involving forbidden sexual relations punishable by death. The severity of the crime becomes the defining factor. However, this requirement does not apply to the victim herself, who must consider only the severity of the attack she is about to undergo, and not the legal severity of the crime being perpetrated by the attacker. Therefore, from the point of view of harm to the victim, her marital status as an unmarried or betrothed maiden is of no consequence whatsoever,[243] and the victim may legitimately use deadly self-defense against her rapist. [244]

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241 Due to the severely forbidden sexual relations accompanying the rape.

242 *See supra* note 209.

243 *See supra* note 125.

244 *Contra supra* note 136.

CONCLUSION

The Mishnah's ruling on deadly self-defense against a rapist was carefully crafted. At first glance, it would appear that the Mishnah permits killing a rapist in only limited cases, in which the rape is considered particularly severe, as a result of severely forbidden sexual relations accompanying it. However, a closer, critical reading of the Mishnah reveals several factors, together indicating quite the opposite conclusion—that in the vast majority of rape cases, deadly self-defense is permissible regardless of the victim's marital status, whether because of uncertainty as to the victim's marital status, mortal danger posed to the rape victim, or because of the broader range of self-defense allowed to the victim herself (as opposed to a third party).

This complexity is no coincidence, but rather stems from the way in which the law is presented by the Mishnah. The parameter chosen by the Mishnah – the victim's marital status – is by its very nature a hidden characteristic, most likely unknown to a third party happening upon the rape scene.[245] In addition, the distinction made by the Mishnah between

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245 There would seem to be some similarity between my argument regarding the impracticality of ascertaining a victim's marital status and one aspect of the law of the stubborn and rebellious son. The Biblical verses regarding the stubborn and rebellious son rule:

> If a man have a stubborn and rebellious son, who will not obey the voice of his father, or the voice of his mother . . . [t]hen his father and his mother shall take hold of him, and bring him out to the elders of his city . . . [and] all the men of his city shall stone him to death with stones.

Deuteronomy 21:18–21.

Among the sages, there were those who set decisively impractical parameters preventing the implementation of this law. For instance, according to Rabbi Judah: "[I]f his mother is not like his father in voice, appearance and stature, he does not become a rebellious son." Indeed, the Talmud notes that according to this position, "There never has been a 'stubborn and rebellious son' nor [will] there ever be one in the future. Why then was the law written? So that you may study it and receive reward." BABYLONIAN TALMUD, *Sanhedrin* 71a. In other words, both the law of the stubborn and rebellious son and the law of killing a rapist in self-defense involve parameters that essentially render the law impossible to apply. In both cases, the central value of the law is in its theoretical study and the impression it leaves upon the reader ("study it and receive reward"), as opposed to the practical application, which may almost never take place in a court of law. Nonetheless, there are notable differences between the two cases. First, in the case of the stubborn and rebellious son, the impractical parameters set down by the sages were a relatively late development, in response to the moral difficulty felt by the sages arising from this law. *See* MOSHE HALBERTAL, MAHAPEIKHOT PARSHANIOT BEHITHAVUTAN [INTERPRETATIVE REVOLUTIONS IN THE MAKING] 59 (1997, Hebrew). This differs from the rules of deadly self-defense against a rapist, which from the outset involved a noticeably impractical parameter. Second, in the case of the stubborn and the rebellious son, the impractical standard is intended to essentially negate the law and leave it as a dead letter. Therefore, it was important to the sages to clearly emphasize to the reader the "there never has been a

one pursuing after his neighbor to slay him, versus one pursuing a betrothed maiden for purpose of rape, seems to serve only didactic and analytic purposes. In practice, sexual assault often involves a threat to the victim's life, and both categories of pursuit are closely tied to one another. Finally, the Mishnah's focus upon a third party killing a rapist opens up the possibility that there may be a different standard applied to the victim herself.[246]

This complexity may be of significance in the context of the requirement of proportionality, allowing the Mishnah to simultaneously achieve two somewhat contradictory ends: On a declarative level, the Mishnah creates the impression of meticulous proportionality, allowing deadly self-defense against a rapist only in the most severe cases involving a transgression punishable by death. Preventing rape as such does not justify ending the rapist's life (although it certainly justifies other drastic measures against the rapist, including use of force). The projection of this image significantly reinforces the value of human life and its protection by the law. On the second, practical level, the Mishnah allows a somewhat more flexible standard of proportionality. In practice, killing a rapist will be permitted in the vast majority of rape cases, and in this way the victim's interests are sufficiently protected. The Halakha limits the use of deadly self-defense in cases of rape, but in practice (*halakha le-ma'aseh*) these limitations are significantly eased. This creates the necessary schism, a sort of acoustic dissonance,[247] between that which

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'stubborn and rebellious son' nor there ever be one in the future." This is in contrast to the case of deadly self-defense against a rapist, in which the sages do not outwardly note the impracticality of the standard set down by the Mishnah, a fact noticeable only to the more critical reader.

246 A "softer" version of the explanation of the distinction between the two levels of the law would be that the Mishnah's ruling (differentiating between various rape victims based on marital status) is indeed practical, but only partially. This ruling does not describe the final legal outcome, but rather only one element affecting it. Beyond this, there are additional elements that the Mishnah does not mention, which must also be taken into consideration: uncertainty, danger to the victim's life, and special laws relating to self-defense by a victim. According to this explanation, one may not draw conclusions from this Mishnah alone, as this Mishnah shows only a partial picture, which must be completed with additional elements found in other places in the Mishnah. This possible explanation is therefore not based on the vertical schism between the theoretical law (*halakha*) and the practical law (*halakha le-ma'aseh*), but rather on the horizontal schism between the partial ruling brought by the Mishnah and additional laws to be considered in drawing a final conclusion. I tend not to adopt this "softer" explanation for two reasons. First, as discussed above, I believe that the distinction set down by the Mishnah between the single and betrothed rape victims is decidedly unpractical. It assumes a third party's certainty as to the marital status of the victim, while in the most common cases such an assumption is completely ill founded. Therefore, I prefer to understand the Mishnah's distinction as a mainly theoretical one. Second, the additional elements influencing the final ruling (uncertainty, danger to the victim, and unique laws relating to self-defense by a victim), are not readily apparent from the Mishnah at hand, but are rather subtly hinted to, in a way noticeable only through a close, careful reading of the Mishnah.

247 *See supra* note 139.

the Halakha seeks to impress upon the layman studying the literal meaning of the law, as opposed to the practical outcome of the law in this complex field.[248]

In my opinion, our contemporary legal discourse may be significantly enriched by this duality. We are trapped between the Scylla of leniency towards rape victims by reducing the demand of proportionality, at the risk of encouraging "trigger happy" behavior and loss of human life, and the Charybdis of a stringent demand for proportionality, which may save lives at the expense of proper protection of rape victims. Jewish law invites us to seek a formula that enables co-existence of both of these elements: rhetoric restricting the use of lethal force against sexual offenders along with flexible practice regarding the right of rape victims to self-defense. Needless to say, I do not suggest that modern law should implement this complexity by adopting a distinction similar to that found in Jewish law between different "levels" of rape based on the marital status of the victim. This distinction is irrelevant to contemporary law, which considers rape of an unmarried woman no less severe than rape of a married woman.[249] How exactly should such a complex formula be designed? While I am afraid that I do not have an adequate answer to this question, I hope that my analysis may inspire new thinking and serious discussion, towards a re-evaluation of our approach to self-defense and proportionality in the context of rape.

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248 It would seem reasonable to suggest the opposite logic, according to which the declarative realm should rather give extra protection to the rape victim and her safety, even at the expense of the rapist's life, thus emphasizing the idea that women should be protected from violence even with the help of deadly measures. In my opinion, the sages recognized the human tendency towards spontaneous, unbridled violence and quick-triggered responses. Therefore, on a declarative level, they emphasized the importance of restraint and precise proportionality, while on a practical level they allowed a more flexible standard of behavior.

249 But see the unusual recent decision in *People v. Morales*, 212 Cal. App. 4th 583, 586 (2013) (stating that because of the historical anomalies of the nineteenth-century statutory definition of rape, convicting a perpetrator of rape of an unconscious person is possible only if the victim is a married woman, but not if she is unmarried).

COLUMBIA JOURNAL *of* GENDER & LAW

Issue 26.2

The spacious home of today's feminist movement.

The *Columbia Journal of Gender and Law* (*CJGL*) is published by students at Columbia University School of Law. Please direct general correspondence to the following addresses:

Columbia Journal of Gender and Law
Columbia University School of Law
435 West 116th Street
New York, NY 10027

Email: jrngen@law.columbia.edu

Subscriptions: Subscriptions are $65 per volume for institutions, $50 per volume for public interest organizations, $40 per volume for individuals, and $20 per volume for current students. For international subscribers, please add $10. Individual issues may be purchased for $20, subject to availability.
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