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DEFILING THE DEAD: NECROPHILIA AND THE LAW

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I. INTRODUCTION

On September 19, 1995, two men allegedly broke into the mortuary at Forest Lawn Memorial Park in Hollywood Hills and engaged in sexual intercourse with two female corpses. The next day, police announced the two men were being held on suspicion of burglary.¹

According to police, the two men were not charged with having intercourse with a corpse because having sex with a corpse is not illegal in California.² This left the men liable only on charges that they broke into the mortuary and stole computer chips from a personal computer in the building.³

Notwithstanding the value of the property stolen from the mortuary, it seems wholly inadequate to charge individuals who engage in acts of necrophilia merely with suspicion of burglary or some other incidental crime. That society would be outraged by acts of necrophilia seems obvious. That there is no prohibition against such acts is baffling.

This article will examine the issue of criminal liability for necrophilia.⁴ Part II will address necrophilia in general and will discuss

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At the request of the authors, parallel citations to the official California reporters have been added for the benefit of practitioners.

1. Frank B. Williams, *Two Valley Men Arrested in Sex Assault on Corpse*, LOS ANGELES TIMES, Sept. 20, 1995, at B5.

2. *Id.*

3. *Id.*

4. Whether civil liability may be imposed for acts of necrophilia is beyond the scope

briefly why society finds such acts reprehensible. Part III will discuss existing criminal prohibitions against necrophilia in California and other states. Part IV will discuss the evidentiary use of necrophilia in proving other crimes. Finally, Part V will evaluate proposed legislation outlawing necrophilia.

II. BACKGROUND

A. NECROPHILIA DEFINED

Necrophilia is defined as a sick abnormal fascination with death and the dead; or more particularly, an erotic attraction to corpses.⁵ Necrophilia is a psychosexual disorder and is categorized with the group of disorders which comprise the paraphilias, a subtype of psychosexual disorder involving unusual or bizarre fantasies or acts that are necessary for full sexual excitement.⁶ In all, there are eight named paraphilias listed in the American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders ("The Manual"),⁷ including pedophilia (the act or fantasy of engaging in sexual activity with prepubescent children), exhibitionism (repetitive acts of exposing the genitals for the purpose of achieving sexual excitement), and sexual masochism (sexual arousal attained through being humiliated, bound, beaten, or otherwise made to suffer).⁸ In addition to the eight named paraphilias, there is a group of "Not Otherwise Specified" paraphilias,⁹ which in-

of this article. Although the possibility presents some interesting theoretical issues, there is only one reported appellate opinion addressing the question of civil liability for necrophilia. See *Draper Mortuary v. Superior Court*, 135 Cal. App. 3d 533, 185 Cal. Rptr. 396 (1982) (holding that mortuary had a duty of care to the decedent's husband to protect the decedent's body from sexual assault by a third party who entered the defendant's chapel through an unlocked door). At least one other such case resulted in a jury verdict for the plaintiff. See *Gonzalez v. Sacramento Memorial Lawn*, No. 286770 (Cal. Super. Ct. Apr. 21, 1982), described in 25 ATLA L. Rep. 348 (Oct. 1982) (discussed in note 23, *infra*).

5. WEBSTER'S NEW WORLD DICTIONARY 950 (2d ed. 1970).

6. AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 522-23 (4th ed. 1994).

7. *Id.*

8. The other five named paraphilias are: fetishism (use of nonliving objects); frotteurism (touching or rubbing against a nonconsenting person); sexual sadism (deriving sexual excitement from psychological or physical suffering of the victim); transvestic fetishism (cross-dressing); and voyeurism (observing unsuspecting individuals who are naked or engaging in sexual activity). *Id.* at 525-32.

9. *Id.* at 532. The "Not Otherwise Specified" category is included in the Manual for coding paraphilias that do not meet the criteria for any of the named paraphilia categories. *Id.*

cludes necrophilia along with such disorders as telephone scatologia (obscene phone calls), zoophilia (animals), coprophilia (feces), klismaphilia (enemas), and urophilia (urine).¹⁰ The Manual cautions that paraphilias should be distinguished from the nonpathological use of sexual fantasies, behaviors, or objects as stimuli for sexual excitement in individuals without a paraphilia.¹¹ Fantasies, behaviors, or objects are paraphilic only when they lead to clinically significant distress or impairment, such as legal complications and interference with social relationships.¹²

Necrophilia also has been characterized as an "eligibility paraphilia,"¹³ that is, one in which self-abandonment to the ecstasy of the sinful act of lust can be achieved only if the partner qualifies as "eligible" by being beyond the limits, privileges, and protection of being undefilable.¹⁴ Necrophilia is the ultimate eligibility paraphilia,¹⁵ because the partner has "no power to resist, and [is] therefore capable of being absolutely subjugated."¹⁶ Necrophilia is viewed as a "blatant psychosis" in the opinion of some psychiatrists.¹⁷ Not everyone who engages in necrophilic acts can be termed a necrophile, however, because the paraphilias are measured by behavior which is addictively repetitious and compulsive, characteristics which may be missing in individuals who engage in necrophilia as a result of rage, experimentation or lust rather than sexual necessity or habit.¹⁸

While actual necrophilia is comparatively rare, less severe forms are not infrequent.¹⁹ Equivalentents are fantasies or situations where the other person is drugged, asleep, or is asked to assume a passive, inert role in sexual intercourse, especially in a coffin.²⁰ Necrophilia allows destructive urges toward the sexual partner, and fear of retaliation for

10. *Id.*

11. *Id.* at 525.

12. *Id.*

13. JOHN MONEY, VENUSES PENUSES: SEXOLOGY, SEXOSOPHY, AND EXIGENCY THEORY 445-46 (1986).

14. *Id.*

15. *Id.* at 446.

16. WILLIAM B. ARNDT, JR., GENDER DISORDERS AND THE PARAPHILIAS 331 (1991). A case study cited by Arndt quotes a necrophile as saying "[i]f they were dead they could not object to my company and my behavior. . . . If you were dead, I could kiss and hug you as much as I liked, and you could not refuse." *Id.*

17. *People v. Clark*, 3 Cal. 4th 41, 153, 10 Cal. Rptr. 2d 554, 617, 833 P.2d 561, 624 (1992).

18. MONEY, *supra* note 13, at 446.

19. ARNDT, *supra* note 16, at 330.

20. *Id.* at 331.

those wishes, to be controlled because the partner, being or playing dead, is already destroyed and cannot strike back.²¹ The inert partner creates a sense of power because the dead body is unable to attack or abandon the necrophile which provides relief from feelings of inadequacy and a heightened sense of control.²²

Although necrophilia is primarily engaged in by males, occasionally there have been reported instances of female necrophilia.²³

B. WHY SOCIETY VALUES THE REMAINS OF THE DEAD

All societies of which there is any record have had customs concerning respect for corpses and the treatment of the bodies of the dead.²⁴ Sometimes these customs are central to the basic values and symbols of a culture, like the Egyptian pyramids, mummies, and the Book of the Dead.²⁵ Sometimes the customs are based on rules concerning the treatment of human remains.²⁶ Regardless, funeral customs throughout the world share one factor common to all: the assumption that the dead person has not yet ceased to live.²⁷

Our own culture has rules governing the treatment of corpses,

21. *Id.*

22. *Id.* at 332.

23. In *Gonzalez v. Sacramento Memorial Lawn*, No. 286770 (Cal. Super. Ct. Apr. 21, 1982), an unreported trial court decision, a 21-year-old female employee of the mortuary admitted to committing 20 to 40 acts of necrophilia before stealing the body of the plaintiff's son. The mortuary was held liable for negligence in hiring, retaining and supervising the employee, who had been diagnosed as a paranoid schizophrenic and had been admitted to a state mental hospital for 22 months where she was raped by a male attendant. "This apparently was the first case of female necrophilia in the annals of sexual aberrancy." 25 ATLA L. Rep. 348, 348 (Oct. 1982) (summarizing the *Gonzalez* case). See also *State v. Walters*, 514 So. 2d 257, 261-62 (La. Ct. App. 1987) (describing acts of necrophilia engaged in by defendant and her lover with the bodies of two murder victims).

24. THOMAS C. GREY, *THE LEGAL ENFORCEMENT OF MORALITY* 105 (1983).

25. *Id.*

26. *Id.*

27. WILLIAM HENRY FRANCIS BASEVI, *THE BURIAL OF THE DEAD* 1 (E.P. Dutton and Co. 1920):

Everywhere we find this indicated, in tradition and practice, among races far asunder the culture, space, and time, whose manners and ceremonies have little else in common. In or near the grave are placed food, clothes, and weapons; while the body is protected from molestation often most elaborately. All this provision conveys the idea that there is something more in burial than the disposal of a dead man's bones. It is all so eminently practical, though so ill-timed, and so exclusively concerned with material needs—with a strange insistency, as though fearful that we might forget or fail to understand—that it is dealing with a living person.

Id. at 1-2.

including many enforced by law, which are based primarily on widespread horror at corpse desecration.²⁸ "In our society, we treat the dead with dignity and respect"; violation of that respect "goes against the basic mores of society" and "cause[s] great suffering to the surviving families of the deceased."²⁹ Some have argued that such rules may not be all that different in kind from the cultural prohibition of deviant sexual practices that have traditionally been called perverted and unnatural.³⁰ These sexual prohibitions typically have as their justification widespread disgust of the prohibited acts.³¹

If it is true that our culture determines its treatment of the dead the same way it determines its reaction to unusual sexual practices, by some sort of societal trepidation meter, then it is important to inquire whether emotion, however intense, can support coercive law.³² Certainly scholars generally would be dissatisfied with such an emotional method of legislating. Unlike other deviant sexual behaviors, however, necrophilia also violates other cultural norms which traditionally have been considered less subjective, such as requiring consent, protecting ownership of personal property, and protecting public health and safety. The presence of these additional concerns, therefore, makes it appropriate to impose criminal liability for acts of necrophilia. The next section will discuss the extent to which acts of necrophilia are already subject to such liability.

III. CRIMINAL LIABILITY

A. CRIMINAL LIABILITY IN CALIFORNIA

1. *Health and Safety Code*

There is currently no statute in California specifically outlawing necrophilia. The California Health and Safety Code contains several provisions concerning the protection of dead bodies in general, but it is unclear whether these code sections provide dead bodies protection from sexual assaults.

Health and Safety Code section 7052 provides: "Every person who willfully mutilates, disinters, or removes from the place of interment

28. GREY, *supra* note 24, at 105. See also discussion of criminal laws *infra* part III.

29. *State v. Ryan*, 899 P.2d 825, 828 (Wash. Ct. App. 1995).

30. GREY, *supra* note 24, at 105.

31. *Id.*

32. *Id.*

any human remains, without authority of law, is guilty of a felony."³³ The California Supreme Court has suggested in dicta that the language "willfully mutilates" could be construed to include the damage done to a dead body during intercourse.³⁴ Other case law, however, holds that "[t]he term 'mutilate,' as applied to a person, means to cut off a limb or an essential part of the body, and in criminal law means to deprive a person of the use of those limbs which may be useful in fight."³⁵ Subsequent legislative history³⁶ and cases from other jurisdictions³⁷ concur with the latter definition. The sort of damage done to a corpse during intercourse, especially that which is specifically attributable to the act of intercourse itself, typically will not result in the removal of a

33. CAL. HEALTH & SAFETY CODE § 7052 (West Supp. 1997).

34. See *People v. Stanworth*, 11 Cal. 3d 588, 604 n.15, 114 Cal. Rptr. 250, 262 n.15, 522 P.2d 1058, 1070 n.15 (1974) (although the crime of rape requires a live victim, "[n]evertheless, dead bodies are not without protection; . . . In protecting the physical integrity of a dead body, section 7052 of the Health and Safety Code makes it a felony to mutilate, disinter or remove from the place of interment 'any human remains without authority of law. . . .'"); *People v. Ramirez*, 50 Cal. 3d 1158, 1176 n.3, 270 Cal. Rptr. 286, 297 n.3, 91 P.2d 965, 976 n.3 (1990) (noting that the Model Penal Code has an abuse of corpse provision covering sexual contact with a dead body, and that "California has a comparable statute punishing mutilation of a dead body.").

35. See *People v. Bullington*, 27 Cal. App. 2d 396, 400, 80 P.2d 1030, 1032 (1938) (quoting *State v. Cody*, 23 P. 891, 896 (Or. 1890)) (holding that the removal of two gold crowns from the teeth of a dead body was not a "mutilation" of the body within the meaning of a statute making it a felony to mutilate a dead body). The statute at issue in *Bullington* was former Cal. Penal Code § 290, which was later superseded by Health & Safety Code § 7052. See 1939 Cal. Stat. 1000, c. 60, § 40000.

36. See *infra* note 41.

37. See, e.g., *Holloman v. State*, 656 So. 2d 1134, 1139 (Miss. 1995) (defining mutilate as "[to] deprive a person of the use of any limb of his body or to cut off or permanently destroy or cripple or to radically alter as to make imperfect."); *Parker v. State*, 849 P.2d 1062, 1069 (Nev. 1993) (defining mutilate as "to cut off or permanently destroy a limb or essential part of the body, or to cut off or alter radically so as to make imperfect."); *Elliott v. James Patrick Hauling, Inc.*, 490 S.W.2d 284 (Mo. Ct. App. 1973) (same). See also BLACK'S LAW DICTIONARY 1020 (6th ed. 1990) ("In criminal law, the depriving a man of the use of any of those limbs which may be useful to him in fight, the loss of which amounts to mayhem.") (citing *Bullington*); *id.* at 979 (defining "mayhem" as the removal, dismemberment, disablement or permanent disfigurement of some bodily member); but see Comment, *Criminal Law: Mutilation of a Dead Body*, 27 CAL. L. REV. 217 (1939) (criticizing *Bullington*). Compare *Kirby v. State*, 272 N.W.2d 113, 117 (Wis. Ct. App. 1978) ("'cuts or mutilates' as used in the statute requires proof of an act of greater severity than a mere nick with a knife."); *Washington v. City of Columbus*, 222 S.E.2d 583, 588 (Ga. Ct. App. 1975) (four puncture marks the size of a matchstem or a toothpick "simply does not constitute mutilation as a matter of law.") with *State v. Richmond*, 886 P.2d 1329, 1336 (Ariz. 1994) (mutilation includes post-mortem stab wounds and carving of word "Bonzai" in victim's back); *Allinger v. Kell*, 302 N.W.2d 576, 577-78 (Mich. Ct. App. 1981) (removing hands and hair of corpse constituted mutilation).

limb or an essential part of the body. Under this interpretation, therefore, most acts of necrophilia would not be prohibited by section 7050.

Another section of the Health and Safety Code provides: "Every person who knowingly mutilates or disinters, wantonly disturbs, or wilfully removes any human remains in or from any location other than a dedicated cemetery without the authority of law is guilty of a misdemeanor."³⁸ Again, the language "knowingly mutilates or . . . wantonly disturbs" could be construed to include intercourse with dead bodies. However, in enacting this section, the California Legislature specifically stated that the purpose of this section was to protect Native American burial grounds.³⁹ Given this purpose, it is difficult to believe that the California Legislature intended the crime of removing human remains from a location other than a dedicated cemetery to include committing sexual acts with corpses. Moreover, even if this section of the statute was construed to include intercourse with a corpse, it would only apply to acts committed on land other than a dedicated cemetery. This section of the Health and Safety Code, therefore, provides little or no assistance in making acts of necrophilia unlawful.

Division 7 of the Health and Safety Code contains several sections concerning the disposal of unclaimed dead bodies. Section 7208 provides that: "Every person who unlawfully disposes, uses, or sells the body of an unclaimed dead person, or who violates any provision of this chapter is guilty of a misdemeanor."⁴⁰ If courts construe the term "uses" to include intercourse, this section would protect unclaimed dead bodies from acts of necrophilia. This section would not protect identified or claimed corpses, however, nor would it provide felony liability for those who engage in acts of necrophilia.

2. Penal Code

Only one provision in the California Penal Code specifically provides protection for dead bodies. Penal Code section 642 makes it unlawful to remove any articles of value from dead bodies.⁴¹ On its

38. CAL. HEALTH & SAFETY CODE § 7050.5 (West Supp. 1992).

39. See 1982 Cal. Stat. 5777, c. 1492, § 1(b):

The purpose of this act is: (1) To provide protection to Native American human burials and skeletal remains from vandalism and inadvertent destruction. (2) To provide a regular means by which Native American descendants can make known their concerns regarding the need for sensitive treatment and disposition of Native American burials, skeletal remains, and items associated with Native American burials.

40. CAL. HEALTH & SAFETY CODE § 7208 (West 1970).

41. CAL. PENAL CODE § 642 (West 1970):

face, this section only addresses removal of property from a dead body and not protection of the body itself; thus, it cannot be construed to prohibit committing sexual acts with corpses.

In the absence of a specific statute prohibiting necrophilia, some prosecutors have attempted to charge defendants who engage in acts of necrophilia with rape. The Penal Code defines rape as "an act of sexual intercourse accomplished with a person . . . against [the] person's will."⁴² The pertinent legal issue, therefore, is whether a dead body is a "person" within the meaning of the statute.

The California Supreme Court discussed the issue of whether a dead body is a person in *People v. Kelly*.⁴³ The defendant in *Kelly* was convicted of the murder and attempted rape of one victim, and the murder, rape and robbery of a second victim.⁴⁴ At trial, the defense contended that the defendant first acquired the intent to have intercourse with the victims after they were already dead.⁴⁵ The defense apparently raised this theory not only to argue that the defendant was not guilty of rape or attempted rape, but also to negate the prosecution's reliance on those charges as a predicate for felony murder⁴⁶ and as a predicate for a finding of special circumstances warranting imposition of the death penalty.⁴⁷ Over a defense objection, however, the trial court gave the following nonstandard instruction to the jury: "It is legally possible to rape a dead body. Where a defendant attempts to coerce his victim into intercourse with him, fails to accomplish the purpose while she is alive and kills her to satisfy his desire

Every person who willfully and maliciously removes and keeps possession of and appropriates for his own use articles of value from a dead human body, the theft of which articles would be petty theft is guilty of a misdemeanor, or if the theft of the articles would be grand theft, a felony.

This statute was enacted one year after the decision in *Bullington*. See note 35 and accompanying text; 1939 Cal. Stat. 2209, c. 691 § 1. One can infer that this statute was intended to criminalize the conduct that occurred in *Bullington*. Significantly, however, the Legislature did not change or overrule the definition of "mutilate" contained in *Bullington*.

42. CAL. PENAL CODE § 261(a)(2). See also CAL. PENAL CODE § 261(a)(6) & (7) ("against the victim's will").

43. 1 Cal. 4th 495, 3 Cal. Rptr. 2d 677; 822 P.2d 385 (1992).

44. *Id.* at 512, 3 Cal. Rptr. 2d at 683, 822 P.2d at 391.

45. *Id.* at 524, 3 Cal. Rptr. 2d at 691, 822 P.2d at 399.

46. See CAL. PENAL CODE § 189 (defining felony murder as including a killing "committed in the perpetration of, or attempt to perpetrate, . . . rape.").

47. See CAL. PENAL CODE § 190.2(a)(17)(iii) (Special circumstances include murder "committed while the defendant was engaged in or was an accomplice in the commission of, [or] attempted commission of" a rape.).

with her corpse, the killing falls within the felony murder rule."⁴⁸

The California Supreme Court agreed with the defendant that the first sentence of the trial court's instruction was erroneous and required reduction of the defendant's rape conviction to attempted rape, stating unequivocally that "[r]ape requires a live victim."⁴⁹ The court explained:

Rape must be accomplished with a person, not a dead body. It must be accomplished against a person's will. A dead body cannot consent to or protest a rape, nor can it be in fear of immediate and unlawful bodily injury [as required by Cal. Penal Code section 261, subdivision (2)]. Penal Code section 263 provides, '[t]he essential guilt of rape consists in the outrage to the person and feelings of the victim of the rape. . . .' A dead body has no feelings of outrage.⁵⁰

However, the Court rejected the defendant's argument that this error invalidated the defendant's convictions for murder and the findings of special circumstances, saying: "A person who attempts to rape a live victim, kills the victim in the attempt, then has intercourse with the body, has committed only attempted rape, not actual rape, but is guilty of felony murder and is subject to the rape special circumstance."⁵¹ The Court concluded that it was unlikely that the first sentence of the challenged jury instruction, although erroneous, had misled the jury as to the requirements of the felony murder rule, saying:

A reasonable juror would have understood that for the felony-murder rule and the special circumstance to apply, the defendant must have been attempting to rape the victim at the time of the killing; it would not suffice, if, after the killing, defendant acquired the intent to have intercourse with the dead body. The second sentence of the challenged instruction, which clearly was intended to explain the first,

48. *Kelly*, 1 Cal. 4th at 524, 3 Cal. Rptr. 2d at 691, 822 P.2d at 399.

49. *Id.*

50. *Id.*, quoting *People v. Sellers*, 203 Cal. App. 3d 1042, 1050, 250 Cal. Rptr. 345, 350 (1988) (footnote omitted); see also *People v. Davis*, 10 Cal. 4th 463, 521 n.20, 41 Cal. Rptr. 2d 826, 858 n.20, 896 P.2d 119, 151 n.20 (1995) ("As a matter of law, a rape or sodomy cannot occur if the victim is deceased."); *People v. Stanworth*, 11 Cal. 3d 588, 604 n.15, 114 Cal. Rptr. 250, 262 n.15, 522 P.2d 1058, 1070 n.15 (1974) ("It is manifest that the 'feelings' of a female cannot be offended nor does the victim suffer 'outrage' where she is dead when sexual penetration has occurred. Thus it appears that a female must be alive at the moment of penetration in order to support a conviction of rape under section 261.") (dictum).

51. *Kelly*, 1 Cal. 4th at 525, 3 Cal. Rptr. 2d at 692, 822 P.2d at 400. Accord, *People v. Stanworth*, 11 Cal. 3d 588, 604 n.15, 114 Cal. Rptr. 250, 262 n.15, 522 P.2d 1058, 1070 n.15; *People v. Goodridge*, 70 Cal. 2d 824, 838, 76 Cal. Rptr. 421, 429, 452 P.2d 637, 645 (1969); *People v. Quicke*, 61 Cal. 2d 155, 158, 37 Cal. Rptr. 617, 619, 390 P.2d 393, 395 (1964).

correctly stated the rule.⁵²

In so holding, the Court distinguished *People v. Sellers*,⁵³ in which the defendant's conviction for felony murder was reversed where the defendant killed the victim and left her apartment, but returned to the scene after an hour or two and had intercourse with the victim's dead body.⁵⁴

Analogizing to the cases interpreting the rape statute, the California Supreme Court has also held that a defendant cannot be convicted of sodomy unless the victim is alive at the time of penetration.⁵⁵

One year after *Kelly*, in *People v. Thompson*,⁵⁶ the Court of Appeal considered whether "the doctrine of legal impossibility precludes a conviction for attempted rape where the victim is not alive at the time of the attempt."⁵⁷ In *Thompson*, the defendant testified at trial that after he finished stabbing the victim, he picked her up from the floor and placed her on the bed, and while he did not know if she was alive or dead, he decided to rape her anyway.⁵⁸ On appeal, the *Thompson* court concluded that "there is no requirement that the victim be alive for purposes of an attempted rape."⁵⁹ The court explained:

52. *Kelly*, 1 Cal. 4th at 526, 3 Cal. Rptr. 2d at 692, 822 P.2d at 400; see also *id.* at 527 n.8, 3 Cal. Rptr. 2d at 693 n.8, 822 P.2d at 401 n.8 ("Defense counsel argued that no sexual intent arose until after death (which, if believed, would have avoided the felony-murder rule and the special circumstance) . . .").

53. 203 Cal. App. 3d 1042, 250 Cal. Rptr. 345 (1988).

54. *Kelly*, 1 Cal. 4th at 527, 3 Cal. Rptr. 2d at 693, 822 P.2d at 401.

55. *People v. Ramirez*, 50 Cal. 3d 1158, 1176, 270 Cal. Rptr. 286, 297, 791 P.2d 965, 976 (1990):

Although we have found no case that discusses the question of whether the offense of sodomy requires that the victim be alive at the time of penetration, with respect to the analogous crime of rape, the California authorities uniformly hold that the victim 'must be alive at the moment of penetration in order to support a conviction of rape. . . .'

. . . Because the sodomy statute, like the rape statute, defines the crime as sexual contact with another 'person' rather than with a 'body,' we conclude that the offense of sodomy requires that the victim be alive at the time of penetration.

See also *People v. Davis*, 10 Cal. 4th 463, 521 n.20, 41 Cal. Rptr. 2d 826, 858 n.20, 896 P.2d 119, 151 n.20 (1995):

If you should find that no anal penetration occurred until after death, the defendant cannot be found guilty of forcible sodomy, but could be found guilty of the lesser included offense of attempted sodomy if the evidence shows, beyond a reasonable doubt, that the defendant attempted an act of forcible sodomy while the victim was still alive.

56. 12 Cal. App. 4th 195, 15 Cal. Rptr. 2d 333 (1993).

57. *Id.* at 201, 15 Cal. Rptr. 2d at 336.

58. *Id.* at 200-01, 15 Cal. Rptr. 2d at 336.

59. *Id.* at 201, 15 Cal. Rptr. 2d at 336.

It is undisputed that the crime of rape requires a live victim, because it requires non-consensual sexual intercourse. [*People v. Kelly*, 822 P.2d at 385.] It is also clear that in order to be guilty of attempted rape, a defendant must intend to rape a live victim. [*Id.*] If defendant intends at all times to have sexual intercourse with a dead body, the defendant can be guilty of neither rape nor attempted rape. The question remains as to whether a defendant may be guilty of attempted rape when the defendant intends to have non-consensual sexual intercourse with a live victim but unbeknownst to the defendant, the victim is dead.

. . . .
. . . If an individual attempts to rape a victim, reasonably believing the victim is alive, the act as intended and envisaged by the actor constitutes the substantive crime of rape. Accordingly, if unbeknownst to the individual the victim is not in fact alive, the individual is nevertheless guilty of attempted rape. On the other hand, if an individual intends to have sexual intercourse with a dead body, the acts as envisaged do not constitute the substantive crime of rape and the individual cannot be guilty of attempted rape.⁶⁰

Thus, under *Kelly* and *Thompson*, whether defendant can be charged with attempted rape depends on whether the defendant believed the victim was alive at the time he initially attempted to have intercourse with the victim. If the defendant believed the victim was alive at that time, the defendant may be guilty of attempted rape. On the other hand, "[i]f defendant intends at all times to have sexual intercourse with a dead body, the defendant can be guilty of neither rape nor attempted rape."⁶¹ In such a case, the defendant would not be held criminally liable at all for his sexual acts with the dead body of the victim. This apparent injustice is even more offensive where, as in the Forest Lawn incident,⁶² the individuals who engage in acts of necrophilia are not responsible for the death of the person whose body is violated, leaving them liable only for any incidental property crimes such as burglary and trespassing.

The fact that involvement in the death of the victim is necessary in order for the defendant to be criminally liable for acts of necrophilia demonstrates a need for separate criminal liability for the necrophilic acts themselves.⁶³ It is therefore appropriate to consider the criminal

60. *Id.* at 201-03, 15 Cal. Rptr. 2d at 336-37.

61. *Thompson*, 12 Cal. App. 4th at 201-02, 15 Cal. Rptr. 2d at 336.

62. See notes 1-3 and accompanying text.

63. One prosecutor interviewed by the authors, however, suggested the argument could

treatment of necrophilia in other states.

B. CRIMINAL LIABILITY IN OTHER STATES

Other states take a variety of approaches to the issue of criminal liability for acts of necrophilia, which may be grouped into three categories: (1) judicial interpretation of rape and sodomy statutes to include intercourse with dead bodies;⁶⁴ (2) judicial interpretation of abuse of corpse statutes to include intercourse with dead bodies;⁶⁵ and (3) express statutory bans on intercourse with dead bodies.⁶⁶ Each of these approaches will be discussed in turn.

1. Rape and Sodomy

As noted above, California courts have held that intercourse with a dead body does not constitute the crime of rape, and that it constitutes the crime of attempted rape only if the perpetrator was unaware at the time that the victim was dead.⁶⁷ Courts in other jurisdictions have split on the issue of whether the crime of rape includes intercourse with a dead body.⁶⁸

Michigan is typical of those jurisdictions that have held that sexual intercourse with a dead body is not prohibited under a general rape statute. In *People v. Hutner*,⁶⁹ the Michigan Court of Appeals vacated the defendant's felony-murder conviction, holding that "the crime of criminal sexual conduct requires a live victim at the time of penetration."⁷⁰ The court explained:

Our statute . . . defines third-degree criminal sexual conduct as engaging in nonconsensual sexual penetration with another "person." Furthermore, a "victim" is a "person alleging to have been subjected to criminal sexual conduct." A dead body is not a person. It cannot allege anything. A dead body has no will to overcome. It does not

be made that intercourse with a dead body could be viewed as a victimless crime (i.e., a dead body is not a victim) and therefore the lack of criminal liability is appropriate, not erroneous. Interview with Randall J. Baron, Deputy District Attorney, Los Angeles County District Attorney's Office, in Los Angeles (Oct. 23, 1995).

64. See notes 67-114 and accompanying text.

65. See notes 115-132 and accompanying text.

66. See notes 133-156 and accompanying text.

67. See notes 42-62 and accompanying text.

68. See generally John E. Theuman, Annotation, *Fact that Murder-Rape Victim was Dead at Time of Penetration as Affecting Conviction for Rape*, 76 A.L.R.4th 1147 (1990).

69. 530 N.W.2d 174 (Mich. Ct. App. 1995).

70. *Id.* at 176.

have the same potential to suffer physically or mentally as a live or even an unconscious or dying victim.⁷¹

The court noted that "murdering a person in order to sexually assault that person's dead body" might support a conviction of first-degree premeditated murder,⁷² and that "[a] felony murder conviction may also be sustained where the victim dies during the attempt to perpetrate the underlying crime,"⁷³ but it held that the evidence in the record was "simply insufficient to conclude that defendant killed the victim in the course of an attempt to rape her."⁷⁴ Nonetheless, the court affirmed the trial court's conviction on the lesser-included offense of second-degree murder and remanded the case for re-sentencing.⁷⁵ The court also invited the Legislature to correct the problem by enacting a statute prohibiting necrophilia.⁷⁶

Other jurisdictions holding that the crime of rape requires that the victim be alive at the time of intercourse include Alabama,⁷⁷ Kansas,⁷⁸ Kentucky,⁷⁹ Oklahoma,⁸⁰ Nevada,⁸¹ Pennsylvania,⁸² Wiscon-

71. *Id.*

72. *Id.* at 176-77.

73. *Id.* at 177.

74. *Id.*

75. *Id.*

76. *Id.* at 176 n.1 ("This state appears to have no statute that specifically proscribes necrophilia. This is an issue that our Legislature may wish to address.")

77. *See Padgett v. State*, 668 So. 2d 78, 84 (Ala. Crim. App. 1995)

If the intent to have sexual intercourse arose after the victim was already dead, there could be no forcible compulsion of the victim to engage in sexual intercourse, thus, although the appellant's act was offensive and repugnant, it could not be rape. We could find no Alabama authority for this holding, however, courts in other jurisdictions have held that a corpse cannot be raped.

(citations omitted). The court's reference to the time the "intent" was formed should not be read as indicating agreement with the Georgia view that the victim need only be alive at the time the assault commenced, and not at the time of penetration. Instead, it should be read in conjunction with the court's holding that the defendant could be found guilty of capital murder if the killing occurred during the commission of an *attempted* rape. *See id.* ("Similarly, if the jury found that the victim formed the intent to rape the victim while he was killing her, and then had sex with her even though she was dead, he is still guilty of murder while committing the underlying offense."). The Alabama statute defines "during" as "in the course of or in connection with the commission of . . . the underlying felony or *attempt thereof*." Ala. Code § 13A-5-39(2) (1975) (emphasis added).

78. *See State v. Perkins*, 811 P.2d 1142, 1150 (Kan. 1991) ("Rape can only be committed against a living person.")

79. *See Smith v. Commonwealth*, 722 S.W.2d 892, 893-94 (Ky. 1987) ("The 1974 Commentary to Chapter 510 of the Kentucky Revised Statutes states that sexual intercourse with a dead body is not penalized as rape, but the offense is prohibited by the abuse of corpse statute, KRS 525.120.") (dictum); *Sanborn v. Commonwealth*, 754 S.W.2d 534, 549-550 (Ky. 1988) (holding that if there was any substantial evidence on retrial that the victim

sin,⁸³ and federal cases interpreting Texas law⁸⁴ and the Uniform Code of Military Justice.⁸⁵ This view, however, does not exclude the possibility that the defendant may be convicted of attempted rape if he was unaware that the victim was dead.⁸⁶

Four states have held that the victim need only be alive at the time the assault commenced, and that the defendant may be convicted of rape (and not merely attempted rape) even if penetration occurred after death. The leading case for this view is *Lipham v. State*,⁸⁷ in which

was dead at the time of the alleged rape and sodomy, defendant was entitled to a jury instruction on the lesser charge of abuse of corpse). Given the subsequent opinion in *Sanborn*, the court's additional statement in *Smith* that "[t]he Commonwealth does not bear the burden of proving that a rape victim was alive when penetration occurred," 722 S.W.2d at 894, should be read to mean either that death of the victim is an affirmative defense to rape, or that such proof was unnecessary because of the court's holding that the defendant had failed to preserve the issue for appeal.

80. See *Rogers v. State*, 890 P.2d 959, 969 (Okla. Crim. App. 1995) ("the jury was informed that rape required a living person."); *id.* at 969 n. 13 ("The State did erroneously argue that Rogers raped Lauffenburger after she was dead.").

81. See *Doyle v. State*, 921 P.2d 901, 914 (Nev. 1996) ("Although Nevada's sexual assault statute provides little guidance in this regard, we conclude that the better reasoned interpretation is that the legislature intended "person" in the rape statute to mean a living human being."); *accord*, *Atkins v. State*, 923 P.2d 1119, 1122-23 (Nev. 1996).

82. *Commonwealth v. Sudler*, 436 A.2d 1376, 1379 (Pa. 1981) (holding that "penetration after a victim's death is not within the definition of rape."). Three justices dissented, expressing the view that intercourse committed immediately after a murder was sufficient to support a conviction for rape. *Id.* at 1381-83 (dissenting opinions of Nix, joined by Kaufman, and Larsen, joined by Kaufman). The majority, however, believed that the enactment of an abuse of corpse statute based on the Model Penal Code (see notes 115-119 and accompanying text) indicated that "the Legislature intended the crime of rape to encompass only indignities to the living." *Id.* at 1379.

83. *State v. Holt*, 382 N.W.2d 679, 685 (Wis. 1985) ("The state agrees that sexual intercourse with a dead body does not violate Wisconsin's sexual assault laws," but concluding that "in a rape-murder case where the exact sequence of events cannot be proved, the jury may reasonably infer . . . that the victim was alive during the sexual assault, at least in the absence of evidence of necrophilic tendencies on the part of the accused.").

84. See *United States v. Anderson*, 36 M.J. 963, 979 (A.F.C.M.A. 1993) ("Trial counsel noted that rape of a spouse is no crime under either the UCMJ or Texas law, and the government adds on appeal that neither is necrophilia.") (dictum).

85. See *Anderson*, *supra* note 84; *United States v. Thomas*, 13 C.M.A. 278, 281, 286, 32 C.M.R. 278, 281, 286 (1962) (approving instruction that to find the accused guilty of rape, "it must be shown beyond a reasonable doubt that the victim was alive at the time of the alleged acts.").

86. See *Thomas*, 13 C.M.A. at 281, 286, 32 C.M.R. at 281, 286 (approving instruction under Uniform Code of Military Justice that there is no requirement that the victim be alive to find the accused guilty of attempted rape). In *Thomas*, two servicemen were convicted of attempting to rape a woman whom they believed to be unconscious from intoxication, but who was in fact already dead. *Id.* at 280, 32 C.M.R. at 280.

87. 364 S.E.2d 840 (Ga. 1988).

the Georgia Supreme Court said:

There is nothing in this code section which precludes a finding of rape if the victim is not alive at the moment of penetration. . . .

. . . If the element of force is satisfied where the victim has used less than deadly force to overcome the victim's resistance so as to allow him to have carnal knowledge of the victim, the element of force is surely no less satisfied when the defendant has used deadly force to accomplish his aim.

. . . .

As for the remaining element, "against her will" has been interpreted to mean "without her consent," and has been satisfied in cases in which the victim was drugged, asleep, unconscious, or in a coma. We see no reason why it should be any less applicable in a case in which the defendant has rendered the victim permanently unconscious by killing her.⁸⁸

Unlike many jurisdictions, Georgia has a statute specifically prohibiting necrophilia.⁸⁹ The *Lipham* court, however, distinguished rape of a murder victim from acts of necrophilia committed by one who was not responsible for the death of the victim:

The facts here differ fundamentally from a case in which one happens upon a corpse of a female and engages in sexual intercourse with it. The use of force in the former and the absence of force in the latter is the difference. One is rape and the other necrophilia, made a crime under OCGA § 16-6-7.⁹⁰

Massachusetts, Ohio, and Tennessee have also adopted the view that rape does not require a live victim when a killer sexually assaults the victim after her death.⁹¹ In so holding, the Tennessee Supreme Court

88. *Id.* at 842-43 (citations omitted). In so ruling, the decision in *Lipham* superseded a previous federal district court opinion that suggested in dicta that rape required a live victim under Georgia law. *See Gibson v. Jackson*, 443 F. Supp. 239, 247 (M.D. Ga. 1977) ("For the petitioner to be guilty of rape, the victim must have been a person, a living human being; if dead before the act[,] as terrible and disgusting as it may be[,] the act is not rape.").

89. GA. CODE ANN. § 16-6-7 (1992) ("A person commits the offense of necrophilia when he performs any sexual act with a dead human body involving the sex organs of the one and the mouth, anus, penis, or vagina of the other."). Georgia's is the only state statute which uses the term "necrophilia" in defining the offense.

90. 364 S.E.2d at 843.

91. *Commonwealth v. Waters*, 649 N.E.2d 724, 726 (Mass. 1995) ("In the circumstances of one continuous event, it does not matter whether the victim's death preceded or followed the sexual attack."); *State v. Collins*, 585 N.E.2d 532, 536 (Ohio Ct. App. 1990) ("We conclude that . . . the fact that the victim may have been dead when the sexual conduct occurred does not, in itself, lessen defendant's culpability herein, nor does the state have to prove in this case, as an element of the offense of rape, that the victim was alive when

said:

We are likewise unable to embrace the notion that the fortuitous circumstance, for the rapist, that death may have preceded penetration by an instant, negates commission of the crime of aggravated rape and reduces it to a relatively minor offense associated with erotic attraction to dead bodies. Reading the "live only" requirement into the statute encourages rapists to kill their victims, in our opinion.⁹²

This rationale was expressly rejected by the Nevada Supreme Court, which noted that a rapist who kills his victim is still subject to punishment for attempted rape and felony murder.⁹³

Two other jurisdictions, Florida and Louisiana, have expressed conflicting views on whether a defendant may be convicted of rape when the victim is dead.

In 1988, the Florida Supreme Court assumed without deciding that rape requires a live victim.⁹⁴ Seven years later, in *Owen v. State*,⁹⁵ the Court suggested in dicta that it would adopt the Georgia view that the victim need only be alive at the time the assault commenced, but not at the time penetration occurred.⁹⁶ Two years later, in *Jones v. State*,⁹⁷ the Court seemed to reverse positions again, invalidating a defendant's conviction for sexual battery on the ground that "[t]he

sexual conduct occurred."); *State v. Whitsell*, 591 N.E.2d 265, 278 (Ohio Ct. App. 1990) (following *Collins*); *State v. Irick*, 762 S.W.2d 121; 127 (Tenn. 1989) ("the aggravated rape statute does not require a finding that the victim be alive at the moment of penetration."); *State v. Brobeck*, 751 S.W.2d 828, 832 (Tenn. 1988) (discussed below).

92. *Brobeck*, 751 S.W.2d at 832.

93. *Doyle v. State*, 921 P.2d 901, 914 (Nev. 1996). See notes 149-152 and accompanying text.

94. *McCrae v. Wainwright*, 439 So. 2d 868, 871 (Fla. 1983) ("The fact that a rape *may* not have occurred because the intended victim was dead at the time of the actual penetration would not have changed the attacker's intent, which was properly inferable from the evidence.") (emphasis added) (upholding petitioner's conviction for felony murder based on attempted rape).

95. 560 So. 2d 207 (Fla. 1990).

96. *Id.* at 212:

We are satisfied that under the legislative definition a victim must be alive at the time the offense commences. Sexual union with a previously deceased person, as in a morgue, would not meet the definition of sexual battery. However, we do not believe that the legislature intended that a person who is alive at the commencement of the attack must be alive at the end of the attack. Here, we need not decide this precise issue because the jury was instructed regarding the distinction between sexual battery on a live person and attempted sexual battery on a victim killed in the course of the crime before sexual union is achieved. The verdict of guilt on the sexual battery count resolves this question of fact.

97. 569 So. 2d 1234 (Fla. 1990).

evidence here clearly establishes that the acts constituting sexual battery occurred after the victim's death."⁹⁸ However, the *Jones* opinion cited *Owen* with approval,⁹⁹ leaving its views on the issue unclear.

The conflicting opinions in *Jones* and *Owen* can be explained in four ways. First, the *Jones* court may have misread *Owen* to mean that the victim must be alive at the time penetration occurs. Second, the *Jones* court may have concluded that the defendant must have believed the victim was alive at the time penetration occurred. Third, the *Jones* court may have been of the opinion that the defendant in *Jones* had not formed the intent to have sexual intercourse until after he killed the victim. Fourth, the *Jones* court may have concluded that the conviction for sexual battery could be upheld only if the victim died while the defendant was attempting to rape her, and not if the victim was intentionally killed before any attempt was made. The authors are of the opinion that the fourth option is most consistent with the cryptic language in *Jones*, but the definitive resolution of this issue under Florida law will have to await another case.

Like Florida, the Louisiana Supreme Court has expressed conflicting opinions on the issue. In 1927, the Louisiana Supreme Court stated in dicta that "[s]exual intercourse with the dead body of a human being, however shocking it may be, had not been made a crime."¹⁰⁰ That statement was cast into doubt by the subsequent opinion of the Louisiana Supreme Court in *State v. Eaton*.¹⁰¹ In *Eaton*, the defendant objected to the admission of evidence of aggravated rape in his trial for murder as a circumstance warranting the death penalty.¹⁰² The court rejected the argument, and added:

The only real question about the rape might have been whether defendant had intercourse with the victim while she was still alive or whether it occurred after her death. Nevertheless, the definition of rape as intercourse with a "person" . . . committed without that "person's" lawful consent would seem broad enough to encompass both situations. . . . In any event, the pathologist's testimony clearly established that the victim was still alive at the time defendant had

98. *Id.* at 1237.

99. *Id.* ("Jones's third point on appeal is that the conviction for sexual battery must be reversed because a victim of sexual battery must have been alive at the time of the assault to support the elements of the crime. We agree. See *Owen v. State*, 560 So. 2d 207, 212 (Fla. 1990) (the victim must be alive at the time the offense commences).").

100. *State v. Schmidt*, 112 So. 400, 401 (La. 1927).

101. 524 So. 2d 1194 (La. 1988).

102. *Id.* at 1212.

intercourse with her.¹⁰³

In a recent case, the Louisiana Supreme Court noted the conflict between *Schmidt* and *Eaton*, but found it unnecessary to resolve the issue.¹⁰⁴

Only three states other than California have addressed the issue of whether acts of necrophilia may be punished under a general sodomy statute. In *Sanborn v. Commonwealth*,¹⁰⁵ the Kentucky Supreme Court held that if there was any substantial evidence on retrial to support the defendant's theory that the victim was already dead at the time of the alleged sodomy, then the defendant was entitled to a jury instruction on the lesser offense of abuse of a corpse.¹⁰⁶ Kansas has also held that "criminal sodomy . . . may not be committed on a dead body,"¹⁰⁷ and one Florida case has stated in dicta that "the abominable and detestable crime against nature" does not include sexual intercourse with a corpse.¹⁰⁸ Prior to 1967, Minnesota defined "sodomy" to include "sexual intercourse with a dead body."¹⁰⁹ In that year, however, Minnesota removed necrophilia and bestiality from the definition of sodomy and enacted a new section combining the two and reducing the

103. *Id.* at 1212 n.6.

104. *See* *State v. Maxie*, 653 So. 2d 526, 533 n.10 (La. 1995):

Although we find it unnecessary to decide whether La.R.S. 14:42A(1) requires the victim to be alive at the time of the intercourse, we note that this court has previously opined, albeit in dicta, that the definition of rape, contained in La.R.S. 14:41, would seem broad enough to encompass situations where the intercourse took place while the victim was alive or dead. *State v. Eaton*, 525 So. 2d 1194, 1212 n.6 (La. 1988).

But see, *State v. Schmidt*, 112 So. 400 (La. 1927).

105. 754 S.W.2d 534 (Ky. 1988).

106. *Id.* at 549-550.

107. *State v. William*, 807 P.2d 1292, 1302 (Kan. 1991). *Accord*, *State v. Perkins*, 811 P.2d 1142, 1150 (Kan. 1991).

108. *See* *McCrae v. Wainwright*, 439 So. 2d 868, 871 (Fla. 1983) (emphasis added):

We therefore conclude that there was no possibility of confusion caused by the reference to "the abominable and detestable crime against nature" in the felony murder instruction. Petitioner's suggestion that the jury might have ascribed to those words a definition which they have never been given by the law is based upon speculation of the most fanciful kind.

See also *Locke v. State*, 501 S.W.2d 826, 829 (Tenn. Ct. App. 1973) (dissenting opinion) (dissenting from conclusion that "crime against nature" includes cunnilingus, reasoning that even necrophilia, "the most loathsome, degrading and vile sexual activity imaginable," has not yet been legislated against in Tennessee).

109. *See* former Minn. Stat. Ann. § 617.14, quoted in *State v. Schwartz*, 10 N.W.2d 370, 371 (Minn. 1943); *see also* Advisory Committee Comment to Minn. Stat. Ann. § 609.293 (West 1987).

penalty for both offenses.¹¹⁰

It should be noted that regardless of which approach is taken on the issue of whether it is possible to rape a dead body, states have unanimously concluded that a person who kills the victim in the course of attempting to rape her may be convicted of both attempted rape and felony murder, regardless of whether the victim died before actual penetration occurred.¹¹¹ Some courts have also held that acts of necrophilia may be used as aggravating circumstances in a murder case warranting the imposition of the death penalty.¹¹² Because punishment for

110. See MINN. STAT. ANN. § 609.294 (West 1987):

Whoever carnally knows a dead body or an animal or bird is guilty of bestiality, which is a misdemeanor. If knowingly done in the presence of another the person may be sentenced to imprisonment for not more than one year or to payment of a fine of not more than \$3000 or both.

The Advisory Committee Note explained:

There has been a substantial reduction in the penalty imposed. [Former] Minn.St. § 617.14 authorizes imprisonment to a maximum of 20 years. The excessive penalty is believed to be more the product of revulsion to this type of crime than to the social harm in fact committed. . . . The recommended section increases the penalty where the act occurs in the presence of another. This, it is believed, meets more directly the purpose of the criminal law in penalizing these reprehensible acts.

Advisory Committee Note to MINN. STAT. ANN. § 609.294 (West 1987).

111. *State v. Gallegos*, 870 P.2d 1097, 1105 (Ariz. 1994) (holding that sufficient evidence existed that penetration occurred while the victim was alive, but rejecting the argument that defendant's mistaken belief that the victim was dead constituted a defense); *State v. Owen*, 560 So. 2d 207, 212 (Fla. 1990) ("Here we need not decide this precise issue because the jury was instructed regarding the distinction between sexual battery on a live person and attempted sexual battery on a victim killed in the course of the crime before sexual union is achieved."); *West v. State*, 553 So. 2d 8, 13 (Miss. 1989) (holding that a killing during the commission of an attempted rape may be punished as felony murder even if "the actual moment of the victim's death preceded consummation of the underlying felony."); *Hines v. State*, 473 A.2d 1335, 1349 (Md. Ct. App. 1984) ("It is not necessary that the circumstances exclude the possibility that the victim was dead before any sexual touching or attempted rape occurred. . . . An attempted rape occurs when the perpetrator forms an intent to rape and takes any action to carry out that intention."); *McCrae v. Wainwright*, 439 So. 2d 868, 871 (Fla. 1983) ("The overt act of sexual violation, whether the victim was alive or dead, together with the intent inferable from the circumstances, were sufficient to prove the crime of attempted rape if in fact the jury believed that the victim was dead."); *Commonwealth v. Tarver*, 345 N.E.2d 671, 680 (Mass. 1975) ("it is inconsequential whether the victim was alive or dead at the time of the sexual molestation, so long as the rape, or attempted rape, and the murder were parts of a continuous transaction."); *State v. Knight*, 115 A. 569, 572 (N.J. 1921) ("an attempt to commit a rape does not begin with the act of penetration, but with the primary attack upon a woman made for the purpose of carrying out the intent, and that this intent may be formed at the very moment of the attack. The suggestion that, when the victim dies from shock directly resulting from the attack upon her, and the death precedes attempted penetration, the party committing the assault does not come within the condemnation of the statute, is entirely too unsubstantial to justify extended discussion.").

112. See *State v. Brewer*, 826 P.2d 783, 799 (Ariz. 1992) ("Without question, defendant's

murder may be imposed where the victim was killed for sexual gratification, the debate regarding whether the perpetrator may also be convicted of rape, rather than only attempted rape, has little practical consequence when sexual contact occurs in the context of a killing.¹¹³ Moreover, even those jurisdictions that have held that a dead body may be raped have limited the rule to instances where the person committing the sexual intercourse was responsible for the victim's death.¹¹⁴ Consequently, in order to punish acts of necrophilia alone, such as those committed at Forest Lawn, it is clear a more specific statute is needed.

2. *Abuse of Corpse*

The Model Penal Code has a provision that makes any abuse of a corpse a misdemeanor. Section 250.10 of the Model Penal Code provides: "Except as authorized by law, a person who treats a corpse in a way that he knows would outrage ordinary family sensibilities commits a misdemeanor."¹¹⁵ The official Comments to the Model Penal Code explain that this provision includes, but is not limited to, sexual intercourse with dead bodies.¹¹⁶ This approach has the advantage of avoiding piecemeal legislation with regard to various types of corpse desecration.¹¹⁷

act of necrophilia inflicted gratuitous violence on the victim."); *State v. Gallegos*, 870 P.2d 1097, 1111 (Ariz. 1994) (same). *But see* *Padgett v. State*, 668 So. 2d 78, 84 (Ala. Crim. App. 1995) ("if . . . the jury finds that the appellant did not have the intent to rape the victim at the time of the murder, and the sexual intercourse took place after her death, he could not be convicted of capital murder, only the lesser included offense of murder.").

113. Some states, however, have drawn a distinction between a killing committed during the course of an attempted rape, and sexual intercourse with a corpse, where the intent to have intercourse was formed only after the victim was dead. *See, e.g., Padgett v. State*, 668 So. 2d 78, 83 (Ala. Crim. App. 1995) ("An accused is not guilty of a capital offense where the intent to commit the accompanying felony, in this case rape, was formed only after the victim was killed.").

114. *See* notes 87-92 and accompanying text.

115. MODEL PENAL CODE § 250.10 (1962).

116. *See* REVISED COMMENT TO MODEL PENAL CODE § 250.10 (1980):

This phrasing includes sexual indecency but is not so limited. It also reaches physical abuse, mutilation, gross neglect, or any other sort of outrageous treatment of a corpse. The overarching purpose is to protect against outrage to the feelings of friends and family of the deceased. For that reason the offense is stated here rather than in the article on sexual offenses.

117. *See* REVISED COMMENT TO MODEL PENAL CODE § 250.10 (1980).

The distinguishing features of the Model Code offense are the generality and comprehensiveness with which the proscribed conduct is defined. Section 250.10 covers

Fourteen states have adopted general abuse of corpse statutes that are similar to¹¹⁸ or are closely modeled after the Model Penal Code.¹¹⁹ Legislative commentary in Arkansas,¹²⁰ Kentucky¹²¹ and Ohio¹²² expressly indicates that sexual abuse of a corpse is prohibited.

any conduct that would "outrage ordinary family sensibilities." This formulation is sufficiently broad to preclude gaps in coverage and yet sufficiently precise in its statement of the ultimate question to provide a meaningful standard of decision.

Id. The Comment also cites existing statutes which "detail more specifically the kind of conduct that may be punished," and remarks: "Even a cumulation of such provisions, however, is likely to leave gaps that could be avoided by following the Model Code approach of a more generalized statement of the offense." *Id.*

118. See ARK. CODE ANN. § 5-60-101 (Michie 1987) ("Physically mistreats a corpse in a manner offensive to a person of reasonable sensibilities"); MONT. CODE ANN. § 44-3-404 (1995) ("purposely touches, removes, or disturbs a corpse"); OR. REV. STAT. § 166.085 (1995) ("abuse of corpse" includes treatment of a corpse by any person in any manner not recognized by generally accepted standards of the community"); S.C. CODE ANN. § 16-17-600 (Law Co-op. 1995) ("desecrate human remains"); TENN. CODE ANN. § 39-17-312 (1996) ("Physically mistreats a corpse in a manner offensive to the sensibilities of an ordinary person."); TEX. PEN. CODE ANN. § 42.08 (West 1997) ("treats in a seriously offensive manner a human corpse."); VA. CODE ANN. § 18.2-126 (Michie 1996) ("willfully and intentionally physically defiles a dead human body").

119. See ALA. CODE § 13A-11-13 (1996) ("knowingly treats a human corpse in a way that would outrage ordinary family sensibilities"); COLO. REV. STAT. ANN. § 18-13-101 (West 1997) ("Treats the body or remains of any person in a way that would outrage normal family sensibilities."); DEL. CODE ANN. tit. 11, § 1332 (1996) ("treats a corpse in a way that a reasonable person knows would outrage ordinary family sensibilities."); HAW. REV. STAT. ANN. § 711-1108 (Michie 1988) ("treats a human corpse in a way that the person knows would outrage ordinary family sensibilities."); KY. REV. STAT. ANN. § 525.120 (Banks-Baldwin 1995) ("intentionally treats a corpse in a way that would outrage ordinary family sensibilities."); OHIO REV. CODE ANN. § 2927.01 (Banks-Baldwin 1995) ("treat a human corpse in a way that the person knows would outrage reasonable family sensibilities . . . [or] reasonable community sensibilities."); 18 PA. CONS. STAT. ANN. § 5510 (West 1997) ("treats a corpse in a way that he knows would outrage ordinary family sensibilities.").

120. See *Dougan v. State*, 912 S.W.2d 400, 405 (Ark. 1995) ("This section is designed to cover not only sexual assaults on dead human bodies but also lesser forms of mishandling, abuse, or even neglect.") (quoting Commentary to former ARK. STAT. ANN. § 41-2920 (1977)). In *Dougan*, the Arkansas Supreme Court held that the current statute [ARK. CODE ANN. § 5-60-101 (Michie 1987)] should be construed in accordance with the Commentary to its predecessor statute. *Id.*

121. See Commentary to KY. REV. STAT. ANN. § 525.120 (Banks-Baldwin 1995):

The provision prohibits any sort of outrageous treatment of a human corpse. The section is included here rather than in the chapter relating to sexual offenses because it is primarily concerned with outrage to the feelings of surviving kin rather than with preventing physical aggression. The prohibition is not limited to sexual relations with corpses. It is intended to include any form of sexual contact, sexual abuse, physical abuse, gross neglect or mutilation.

122. See Commentary to OHIO REV. CODE ANN. § 2927.01 (Banks-Baldwin 1995) ("This section . . . also includes other kinds of conduct, such as copulating with or otherwise mistreating a corpse.").

New Mexico punishes indecent treatment of a corpse as a common-law crime.¹²³ Six other states, including California, have statutes that prohibit "mutilation" of a corpse;¹²⁴ however, the Commentary to the Model Penal Code strongly suggests that necrophilia does not fall within the ordinary definition of "mutilation,"¹²⁵ and as noted above, the majority of cases that have defined the term are in accord.¹²⁶ Thirteen states have statutes that expressly prohibit acts of necrophilia,¹²⁷ while seventeen states¹²⁸ and the District of Columbia do not have any statute that could reasonably be construed to prohibit sexual contact with dead bodies.

Perhaps because of their relative clarity, abuse of corpse statutes appear only infrequently in the case law with respect to acts of necrophilia.¹²⁹ As noted above, however, some states have held or suggest-

123. See *State v. Hartzler*, 433 P.2d 231, 235 (N.M. 1967):

The offense, which was and is punishable at common law, is that of indecency in the treatment or handling of a dead human body. That which outrages or shocks the public sense of decency and morals, or that which contravenes the established and known public standards of decency and morals, relative to the care, treatment or disposition of a dead human body, is punishable as an act of indecency.

See also N.M. STAT. ANN. § 30-1-3 (Michie 1996) ("In criminal cases where no provision of this code is applicable, the common law, as recognized by the United States and the several states of the Union, shall govern.").

124. See ARIZ. REV. STAT. ANN. § 36-861 (West 1996); CAL. HEALTH & SAFETY CODE § 7052 (West Supp. 1997); LA. REV. STAT. ANN. § 654 (West 1996); ME. REV. STAT. ANN. tit. 17-A, § 508 (West 1996); MICH. COMP. LAWS ANN. § 750.160 (West 1996); WYO. STAT. ANN. § 6-4-502 (Michie 1996). See also 9 GUAM CODE ANN. § 61.50 (1995); P.R. LAWS ANN. tit. 33, § 4221 (1994); V.I. CODE ANN. tit. 14, § 2021 (1995).

125. In describing early American statutes, the Comment states: "Some of these statutes apparently reached only the sorts of misconduct mentioned above [including mutilation], while others dealt explicitly with sexual indecency with a corpse." COMMENT TO MODEL PENAL CODE § 250.10 (1980). In addition, in describing statutes existing in 1980, the Comment cites California Health & Safety Code § 7052 as prohibiting removal of a body from a grave without authorization and mutilation of a corpse, and concludes: "Even a cumulation of such provisions, however, is likely to leave gaps. . . ." *Id.*

126. See notes 34-37 and accompanying text.

127. See *infra* note 133.

128. Idaho, Illinois, Kansas, Maryland, Massachusetts, Mississippi, Missouri, New Hampshire, North Carolina, Nebraska, New Jersey, Oklahoma, Rhode Island, South Dakota, Vermont, West Virginia, and Wisconsin.

Five states have a statute that prohibits mutilation of a corpse, but only in limited circumstances that would not apply to most acts of necrophilia. See IDAHO CODE § 18-1506A (1996) (mutilation of a human corpse "in the presence of a child as part of a ceremony, rite or similar observance"); 720 ILL. COMP. STAT. ANN. 5/12-33 (West 1996) (same); MONT. CODE ANN. § 45-5-627 (same); NEB. REV. STAT. § 71-1006 (1996) (mutilation of a body by an officer, agent or employee of the state or any county or municipal subdivision); WIS. STAT. ANN. § 940.11 (West 1996) (mutilation of a corpse "with intent to conceal a crime or to avoid apprehension, prosecution or conviction for a crime").

129. See *Padgett v. State*, 668 So. 2d 78, 85 (Ala. Crim. App. 1995) ("If the intent to

ed that an abuse of corpse statute should not be construed to include sexual intercourse with a victim killed by the perpetrator, but that such acts should be prosecuted as rape or sodomy.¹³⁰ Other states, however, have reached the opposite conclusion.¹³¹ In Kentucky, for example, legislative commentary makes it clear that acts of necrophilia are punished as abuse of corpse, and not rape.¹³²

3. *Express Statutory Bans*

Thirteen states have statutes that expressly prohibit sexual conduct with dead bodies.¹³³ Of these states, the history of necrophilia legisla-

have sexual intercourse arose after the victim's death, the crime committed would be abuse of corpse.".)

130. *See* State v. Whitsell, 591 N.E.2d 265, 278 (Ohio Ct. App. 1990):

By defining a separate offense with a lesser penalty, the legislature obviously intended for the abuse of a corpse statute . . . to cover acts that are distinct from those which cause the death of the individual. Moreover, the intent or state of mind needed to prove an abuse of a corpse is vastly different from that which is needed to show felonious sexual penetration.

See also State v. Collins, 585 N.E.2d 532, 536 (Ohio Ct. App. 1990) ("Even though the victim died during the incident in the present case, defendant's conduct, when viewed in its entirety, involved 'indignities to the living,' unlike the conduct that [OHIO REV. CODE § 2927.01] contemplates."). *Cf.* State v. Brobeck, 751 S.W.2d 828, 832 (Tenn. 1988) (reaching the same conclusion without citing Tennessee's abuse of corpse statute).

131. Padgett v. State, 668 So. 2d 78, 84 (Ala. Crim. App. 1995) (holding that sexual intercourse occurring after the victim's death constitutes either abuse of corpse or attempted rape, rather than rape); Commonwealth v. Sudler, 436 A.2d 1376, 1379 (Pa. 1981) (holding that the enactment of an abuse of corpse statute indicated that "the Legislature intended the crime of rape to encompass only indignities to the living.").

132. *See* Commentary to KY. REV. STAT. ANN. § 510 (Banks-Baldwin 1995) ("This chapter does not penalize sexual intercourse or deviate sexual intercourse with [a] . . . dead human body. . . . If a prosecution for this sort of activity is necessary, it can be brought under abuse of a corpse."). *See also* Sanborn v. Commonwealth, 754 S.W.2d 534, 549 (Ky. 1988) (quoting Commentary to Chapter 510); Smith v. Commonwealth, 722 S.W.2d 892, 893-94 (Ky. 1987) (paraphrasing Commentary to Chapter 510).

133. *See* ALASKA STAT. § 11.61.130 (Michie 1995) ("A person commits the crime of misconduct involving a corpse if . . . the person engages in sexual penetration of a corpse"); CONN. GEN. STAT. § 53a-73a (West 1994) ("A person is guilty of sexual assault in the fourth degree when . . . such person engages in sexual contact with an animal or dead body"); FLA. STAT. ANN. § 872.06 (West 1997) ("A person who mutilates, commits sexual abuse upon, or otherwise grossly abuses a dead human body commits a felony"); GA. CODE ANN. § 16-6-7 (1995) ("A person commits the offense of necrophilia when he performs any sexual act with a dead human body involving the sex organs of the one and the mouth, anus, penis or vagina of the other."); IND. CODE ANN. § 35-45-11-2 (West Supp. 1995) ("A person who knowingly or intentionally . . . has sexual intercourse or sexual deviate conduct with the corpse commits abuse of a corpse"); IOWA CODE ANN. § 709.18 (West 1997) ("A person commits abuse of a human corpse if the person knowingly and intentionally engages in a sex act . . . with a human corpse."); MINN. STAT. ANN. § 609.294 (West 1987)

tion in Washington best demonstrates how an incident similar to the Forest Lawn break-in can influence public policy.

Prior to 1976, Washington had a statute which prohibited sexual intercourse with a dead body.¹³⁴ The Washington law was repealed in 1976,¹³⁵ together with laws which made consensual sodomy a crime.¹³⁶ The current statute¹³⁷ was enacted in 1994 as a result of public outcry over the case of Ronald Shawn Ryan.

In *State v. Ryan*,¹³⁸ the defendant broke into the same funeral home twice within six days and damaged property, stole items, and made sexual contact with several corpses.¹³⁹ He was convicted of two

("Whoever carnally knows a dead body or an animal or bird is guilty of bestiality"); NEV. REV. STAT. § 201.450 (1995) ("A person who commits sexual penetration on the dead body of human being shall be punished" by imprisonment or a fine or both); N.Y. PENAL LAW § 130.20 (McKinney 1994) ("A person is guilty of sexual misconduct when . . . he engages in sexual conduct with an animal or dead human body."); N.D. CENT. CODE § 12.1-20-12 (1995) ("A person who performs a deviate sexual act with the intent to arouse or gratify his sexual desire is guilty of a class A misdemeanor."); N.D. CENT. CODE § 12.1-20-02 (1995) ('Deviate sexual act' means any form of sexual contact with an animal, bird or dead person."); OR. REV. STAT. § 166.087 (1993) ("A person commits the crime of abuse of corpse in the first degree if the person . . . [e]ngages in sexual activity with a corpse or involving a corpse"); UTAH CODE ANN. § 76-9-704 (1995) ("A person is guilty of abuse or desecration of a dead human body if the person intentionally and unlawfully . . . commits, or attempts to commit upon any dead body sexual penetration or intercourse, object rape, sodomy, or object sodomy"); WASH. REV. CODE ANN. § 9A.44.105 (West Supp. 1995) ("Any person who has sexual intercourse or sexual contact with a dead human body is guilty of a class C felony.").

A Hawaii statute defines "deviate sexual intercourse" as "any act of sexual gratification between a person and an animal or corpse, involving the sex organs of one and the mouth, anus, or sex organs of the other." HAW. REV. STAT. ANN. § 707-700 (Michie 1996). However, the only statute that currently prohibits "deviate sexual intercourse" is Hawaii's prostitution statute, which applies only to acts engaged in for a fee. HAW. REV. STAT. ANN. § 712-1200 (Michie 1996). Other acts of necrophilia are now punished under Hawaii's abuse of corpse statute. HAW. REV. STAT. ANN. § 711-1108 (Michie 1996).

134. Former WASH. REV. CODE ANN. § 9A.92.010 (repealed 1976).

135. *Id.*

136. See Hal Spencer, *House Bill Would Recriminalize Sex With Dead*, MORNING NEWS TRIBUNE (Tacoma), February 10, 1993, at B5 ("Sexual activity with corpses 'used to be illegal, but it was decriminalized along with a whole bunch of sodomy laws' some years back") (quoting Rep. Rob Johnson (D-Mount Vernon)).

137. WASH. REV. CODE ANN. § 9A.44.105 (West Supp. 1995).

138. 899 P.2d 825 (Wash. Ct. App. 1995).

139. *Id.* at 826, The facts of the case were set forth in more detail in an unpublished portion of the decision:

The first time, Ryan smashed a glass section of a door and climbed through the opening. He stole several items and caused more than \$1,500 damage to pictures, furniture, and office equipment. Ryan also made sexual contact with the corpses of three elderly women, which are labeled victims 1, 2, and 3 for identification. [Footnote omitted]. Victim 1 had been embalmed prior to the burglary. After the

counts of second degree burglary and one count of first degree malicious mischief.¹⁴⁰ The court found that the second break-in was sexually motivated¹⁴¹ and imposed an exceptional sentence of 120 months for each burglary count.¹⁴² The Washington Court of Appeal upheld the trial court's imposition of an exceptional sentence, despite the defendant's argument that the sentencing court improperly considered his sexual contact with the corpses.¹⁴³ Ryan could not, however, be charged with necrophilia because "Ryan's contact with the corpses was apparently not a crime at the time he broke into the funeral home."¹⁴⁴

Shortly after Ryan's initial arrest, a bill was introduced in the state legislature making necrophilia illegal.¹⁴⁵ As enacted the following

burglary, victim 1 had postmortem cuts on her leg and buttock as well as some skin slippage. Victim 2 had been completely prepared for a funeral. After the burglary, victim 2 was only partially clothed; her skirt and jacket were unbuttoned and left open, and her bra was pulled down. Cotton that had been packed in victim 2's vagina for embalming had been removed and postmortem abrasions were evident in the crease of her groin. Victim 3, who had been embalmed and left on a gurney, was discovered on the floor of the embalming room. A vaginal swab taken from victim 3 revealed the presence of sperm.

Ryan returned to the funeral home 6 days later. He entered by smashing the glass section of a different door and stole several items. After the burglary, a corpse that had been fully prepared for viewing was found with her underwear at the foot of the coffin. The underwear was soiled with feces that had not come from the corpse. The medical examiner identified postmortem abrasions on the corpse's knee and foot as well as tears in the vaginal wall, which indicated that something had been inserted into the vagina. A vaginal swab tested positive for the presence of sperm.

Five days later, the funeral home's silent alarm was activated. Police encountered Ryan outside the funeral home and arrested him, although there was no evidence of a break-in at that time. Ryan confessed to the earlier burglaries but denied any sexual activity with the corpses.

State v. Ryan, Nos. 33607-0-1, 35017-0-1 and 34293 -2-1, at *827-28 (Wash. Ct. App. July 31, 1995) [hereinafter cited as "unpublished disposition"] (on file with the law review office). The full opinion was originally published in the advance sheets of West's Pacific Reporter, but the portion at pages 827-30 was withdrawn from the bound volume.

140. Ryan, 899 P.2d at 826. "The trial court ruled that the funeral home, not the corpses, was the victim of the burglaries." *Id.* at *828 n.2 (unpublished decision).

141. See WASH. REV. CODE ANN. § 9.94A.127 (West 1995) (defining sexual motivation).

142. Ryan, 899 P.2d at *828.

143. *Id.* at *829. Ryan contended that his sexual contact with the corpses constituted the additional uncharged crimes of mutilating a corpse and grave robbing. The court assumed without deciding that the facts established additional uncharged crimes, but held that their admission was not error, because "the close connection between the sexual contact and the facts underlying the burglary charges allowed the trial court to consider Ryan's contact with the corpses." *Id.*

144. *Id.* at *829 n.5.

145. See Chuck Shepherd, *Man, 22, is Arrested in Funeral Parlor Break-ins*, STAR-TRIBUNE (Minneapolis-St. Paul), Apr. 29, 1993, at 07E. See also Hal Spencer, *House Bill Would*

year, it reads:

(1) Any person who has sexual intercourse or sexual contact with a dead human body is guilty of a class C felony.

(2) As used in this section:

(a) "Sexual intercourse" (i) has its ordinary meaning and occurs upon any penetration, however slight; and (ii) also means any penetration of the vagina or anus however slight, by an object, when committed on a dead human body, except when such penetration is accomplished as part of a procedure authorized or required under chapter 68.50 RCW or other law; and (iii) also means any act of sexual contact between the sex organs of a person and the mouth or anus of a dead human body.

(b) "Sexual contact" means any touching by a person of the sexual or other intimate parts of a dead human body done for the purpose of gratifying the sexual desires of the person.¹⁴⁶

The rapid response of the Washington Legislature to the crimes committed by the defendant in *State v. Ryan* demonstrates that public revulsion and outrage over acts of necrophilia remains high. Similar incidents in other states have provoked similar responses by their legislatures.¹⁴⁷ By failing to react to the break-in at Forest Lawn (despite the coverage given to the incident in newspapers, radio and television), the California Legislature may have missed an ideal opportunity to pass similar corrective legislation.

Recriminalize Sex With Dead, MORNING NEWS TRIBUNE (Tacoma), Feb. 10, 1993, at B5:

The burglary of a funeral home in Edmonds last month in which the bodies of elderly women were disturbed demonstrates the need to make necrophilia illegal, Rep. Rob Johnson said Tuesday.

Johnson (D-Mount Vernon) said he foresees no opposition to such a measure, and he intends to introduce one soon pending a review of draft legislation by state prosecutors. . . .

House Judiciary Chairman Marlin Applewick (D-Seattle) said the issue arose after a funeral home owned by former Republican Rep. John Beck was burglarized in January.

"There was concern that the bodies might have been violated, but when Mr. Beck asked what could be done about it, he was told 'nothing.' It isn't against the law," Applewick said. "Rob is willing to carry the bill to change that."

146. WASH. REV. CODE ANN. § 9A.44.105 (West Supp. 1995).

147. See, e.g., *Doyle v. State*, 921 P.2d 901, 917 (Nev. 1996) (dissenting opinion):

The necrophilia statute [NEV. REV. STAT. § 201.450 (1993)] was enacted in Nevada as a result of the body of a dead child being stolen from the mortuary and sexually assaulted by the perpetrator, who thereafter deposited the body in a garbage can. . . . The outrage prompting enactment of the statute was specifically designed to secure the conviction of individuals who seek out dead bodies for their sexual pleasure.

Like abuse of corpse statutes, necrophilia statutes have only infrequently been the subject of appellate opinions discussing their applicability. The only significant question has been whether a necrophilia statute applies when the perpetrator kills his victim before assaulting her. As discussed above, the Georgia Supreme Court holds that a killer who assaults his victim is guilty of rape, and that the necrophilia statute applies only to one who "happens upon" a dead body and has sexual intercourse with it.¹⁴⁸ In *Doyle v. State*,¹⁴⁹ however, the Nevada Supreme Court reached the opposite conclusion in reversing the defendant's conviction for sexual assault:

Although Nevada's sexual assault statute provides little guidance in this regard, we conclude that the better reasoned interpretation is that the legislature intended "person" in the rape statute to mean a living human being. We believe that the indignities inflicted upon a corpse, although contemptible in their own right, are distinguishable from those inflicted upon the living, and we further believe that the legislature intended to recognize this distinction when it enacted Nevada's necrophilia statute with its more flexible sentencing guidelines.¹⁵⁰

The dissenting opinion in *Doyle* labeled the necrophilia statute "clearly inapplicable," because "the perpetrators in this case, including Doyle, were not necrophiles who had perverted interests in having sexual intercourse with corpses."¹⁵¹ The majority responded:

We also do not believe that NRS 201.450—which is popularly known as the "necrophilia" statute, although that term appears nowhere in the text of the statute—is intended only to apply to medically classifiable "necrophiles." The plain meaning of the statute is to punish the act of sexual penetration of a dead human body, regardless of motive.¹⁵²

Of the various state statutes that criminalize acts of necrophilia, several define the offense broadly to include all sexual conduct, contact or activity,¹⁵³ while others are limited to sexual "penetration"¹⁵⁴ or

148. *Lipham v. State*, 364 S.E.2d 840, 843 (1988). See notes 87-90 and accompanying text.

149. 921 P.2d 901 (Nev. 1996).

150. *Id.* at 914. *Accord*, *Atkins v. State*, 923 P.2d 1119, 1122 (Nev. 1996).

151. *Doyle*, 921 P.2d at 919 (dissenting opinion).

152. *Id.* at 914 n.8.

153. See, e.g., CONN. GEN. STAT. ANN. § 53a-73a (West 1994) ("sexual contact with an animal or dead body"); N.Y. PENAL LAW § 130.20 (McKinney 1994) ("sexual conduct with an animal or dead human body."); N.D. CENT. CODE § 12.1-20-02 (1995) ("Deviate sexual act' means any form of sexual contact with an animal, bird or dead person."); OR. REV.

attempt to specify the precise acts that are prohibited.¹⁵⁵ The authors believe that the former approach is preferable. Attempting to specify the acts that are prohibited may result in loopholes. For example, Georgia's statute does not appear to prohibit digital penetration of a corpse,¹⁵⁶ while statutes that are limited to penetration would not include masturbation on the outside of a dead body.

C. PUNISHMENT

Currently, the paraphilias that are legislatively-defined sex offenses, such as necrophilia, are predominantly treated with penal incarceration.¹⁵⁷ The defendant in *State v. Ryan*,¹⁵⁸ for example, was sentenced to incarceration for ten years,¹⁵⁹ and ordered to pay restitution of more than \$19,000.¹⁶⁰ On appeal, Ryan's sentence was affirmed,

STAT. § 166.087 (1993) ("sexual activity with a corpse or involving a corpse").

154. See ALASKA STAT. § 11.61.130 (Michie 1995) ("sexual penetration of a corpse"); NEV. REV. STAT. § 201.450 (1995) ("sexual penetration on the dead body of a human being"); UTAH CODE ANN. § 76-9-704 (1995) ("sexual penetration or intercourse, object rape, sodomy, or object sodomy").

155. See FLA. STAT. ANN. § 872.06 (West 1997) (defining "sexual abuse"); GA. CODE ANN. § 16-6-7 (1995); WASH. REV. CODE ANN. § 9A.44.105 (West Supp. 1995) (defining "sexual intercourse"). Although Washington also prohibits "sexual contact," that term is defined as "touching by a person of the sexual or other intimate parts of a dead human body done for the purpose of gratifying the sexual desire of the person." WASH. REV. CODE ANN. § 9A.44.105(2)(b) (West Supp. 1995). In order for the word "intimate" not to be redundant, it must be construed to limit the parts of the body with which contact is prohibited.

156. See GA. CODE ANN. § 16-6-7 (1995) ("A person commits the offense of necrophilia when he performs any sexual act with a dead human body involving the sex organs of the one and the mouth, anus, penis or vagina of the other.").

157. See MONEY, *supra* note 13, at 450-51.

The rationale for defining paraphilias as crimes instead of illnesses derives from the philosophy of the Inquisition and demon possession, for which offenders were burned at the stake. Degeneracy [where attributed to the influence of pornography] . . . allows the paraphilic offender to be held responsible for his condition, and for his offense, since he is held to be responsible for having exposed himself to the explicit sexual depictions of pornography. In consequence, punishment as a treatment is held justified.

. . . Despite the lack of outcome studies, castration treatment [suggested] that sex offenders might be treated by other than penal methods. Drug treatments have also been attempted with varying results, including eliminating the tyrannical, addictive quality of the paraphilic fantasy.

Id.

158. 899 P.2d 825 (Wash. Ct. App. 1995).

159. *Id.* at *828, (unpublished disposition). This portion of the decision was withdrawn from the bound volume. See *supra* note 139.

160. *Id.* at 826.

despite its exceptional length, because Ryan's funeral-home burglaries were sexually motivated,¹⁶¹ but the restitution order was reduced to less than \$9,000 because of a procedural error.¹⁶²

In states in which acts of necrophilia are not specifically prohibited, Washington's approach of permitting an enhanced sentence for other crimes committed during the necrophilic incident is appropriate.¹⁶³ In crafting necrophilia statutes, however, California and other states without existing provisions should consider appropriate sentencing at the outset to avoid any perception of bias in the imposition of exceptional sentences in the future.

The Model Penal Code treats abuse of corpse as a misdemeanor.¹⁶⁴ The official Comment explains that "[g]reater penalties seem plainly excessive in light of the fact that the harm involved is only outrage to sensibility."¹⁶⁵ Of the fourteen states that have general abuse of corpse statutes, eight follow the recommendation of the Model Penal Code,¹⁶⁶ while six impose felony punishment.¹⁶⁷ The states that specifically prohibit necrophilia are also split: eight punish necrophilia as a felony,¹⁶⁸ while five treat it as a misdemeanor.¹⁶⁹ In those states that treat the offense as a felony, punishment can be quite severe; both Georgia and South Carolina require prison terms of not less than one year and not more than ten years,¹⁷⁰ while Nevada provides punishment ranging from a \$20,000 fine to a life sentence with the possi-

161. *Id.* at *829-30 (unpublished disposition) ("We find it difficult to believe that the Legislature anticipated the crime of second degree burglary to include breaking into a funeral home and stealing objects, destroying property, and committing sexual acts with corpses. These circumstances certainly distinguish Ryan's crimes from other second degree burglaries.").

162. *Id.* at 827. The funeral home had sought to recover its attorneys fees relating to Ryan's criminal prosecution, civil actions brought against the funeral home after his arrest, and media coverage of his crimes. *Id.* at 826. Ryan objected to the amount of fees for the latter two categories, and his objection was sustained on appeal because the order was entered after the deadline established by statute. *Id.* at 827.

163. In Washington, "the sentencing court may go outside the presumptive range when . . . it finds that substantial and compelling reasons exist to justify an exceptional sentence." *Id.* at *829 (unpublished decision) (citing WASH. REV. CODE § 9.94A.120(2) (1995)).

164. See MODEL PENAL CODE § 250.10.

165. *Id.*

166. Alabama, Colorado, Delaware, Hawaii, Kentucky, Montana, Pennsylvania, and Texas.

167. Arkansas, Ohio, Oregon, Tennessee, South Carolina, and Virginia.

168. Florida, Georgia, Indiana, Iowa, Nevada, Oregon, Utah, and Washington.

169. Alaska, Connecticut, Minnesota, New York, and North Dakota.

170. See GA. CODE ANN. § 16-6-7 (1995); S.C. CODE ANN. § 16-17-600 (Law Co-op. 1995).

bility of parole after five years.¹⁷¹

If necrophilia is a blatant psychosis, as suggested by some experts,¹⁷² then perhaps the sanity of the defendant accused of engaging in acts of necrophilia should be taken into consideration when determining both guilt and an appropriate sentence.¹⁷³

IV. EVIDENTIARY USE OF NECROPHILIA

The principal evidentiary issue involving necrophilia is whether it is error to identify the defendant in a criminal case as a necrophile, or to introduce evidence of the defendant's commission of acts of necrophilia, when sexual contact with a dead body does not constitute an essential element of the crimes charged.

To be admissible, evidence of necrophilia must be relevant to a material fact.¹⁷⁴ Evidence that is not relevant to a material fact is not admissible.¹⁷⁵ In *West v. State*,¹⁷⁶ for example, the Mississippi Supreme Court held that it was error to permit the prosecution's expert witness to introduce "a free floating lecture on a psychosexual disorder he labeled necrophilia."¹⁷⁷ In *West*, Dr. Galvez was called to testify concerning his autopsy of the victim, and to establish that the victim had been sexually assaulted. The prosecution then asked Dr. Galvez "whether or not there is a term for people who seek out or enjoy sex with people that are dead."¹⁷⁸ After a defense objection was overruled, Dr. Galvez was permitted to describe mild and severe forms of necrophilia, and to explain that "the desire to control" was character-

171. See NEV. REV. STAT. § 201.450 (1995).

172. See note 17 and accompanying text.

173. It is beyond the scope of this article to discuss all potential defenses to necrophilia, including the insanity defense and the policy issues raised by its use. Nevertheless, insanity as a potential defense should be considered as another necessary hurdle to jump when prosecuting defendants accused of sexually assaulting corpses. Cf. *People v. Clark*, 3 Cal. 4th 41, 153, 10 Cal. Rptr. 2d 554, 617, 833 P.2d 561, 624 (1992) (evidence that defendant suffered from necrophilia "did not prevent him from understanding what he was doing; he intended to commit the killings, and he knew that killing was wrong."); *Robinson v. State*, 238 A.2d 875, 889-90 (Md. 1968) (evidence that defendant suffered from necrophilia did not establish insanity under the M'Naghten test).

174. FED. R. EVID. 402; CAL. EVID. CODE § 351 (West 1995). Throughout this section, the authors have cited to both the Federal Rules of Evidence and the California Evidence Code. Most states have adopted one or the other as a model for their own evidentiary rules.

175. FED. R. EVID. 402; CAL. EVID. CODE § 350 (West 1995).

176. 553 So. 2d 8 (Miss. 1989).

177. *Id.* at 10.

178. *Id.* at 14.

istic of both necrophilia and other forms of sexual assault.¹⁷⁹ On appeal, the court held that the testimony was inadmissible on two grounds. First, the court held that the prosecution had “violated its duty to provide West pre-trial discovery of Dr. Galvez’ necrophilia theory,”¹⁸⁰ and that this violation was not cured by granting the defense a half-day recess before cross-examining Dr. Galvez:

Precisely because the prosecution’s necrophilia theory was so central to the question whether West could be exposed to the death penalty, a day’s break in the action was an inadequate antidote for the prosecution’s discovery violation. This is the sort of prosecution theory which, had the defense known of it prior to trial, may well have altered the entire defense strategy. It is the sort of theory which would no doubt have sent the experts scurrying to the books for study and reflection. With all else that must of necessity be considered in a capital murder trial, unreality attends any suggestion that defense counsel can stop in midstream and become sufficiently informed on a subject like necrophilia to cross-examine with competence.¹⁸¹

Second, the court held that the testimony was inadmissible in the absence of testimony that West was suffering from necrophilia and that the disorder reasonably explained or produced his behavior.¹⁸² The court explained that “evidence which only describes the characteristics of the typical offender has no relevance to whether the defendant committed the crime in question.”¹⁸³

Evidence that is otherwise relevant “may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury. . . .”¹⁸⁴ Where the defendant is not (or cannot be) charged with committing specific acts of necrophilia, it seems apparent that identifying a criminal defendant as a necrophile may create a risk of unfair prejudice against the defendant in the minds of the jury. The disgust and outrage that society feels against those who desecrate corpses and against sexual offenders in general combine to create a particular repugnance for those accused of necrophilia.¹⁸⁵ It is not difficult to imagine that evidence of such acts

179. *Id.* at 14-15.

180. *Id.* at 17.

181. *Id.* at 19.

182. *Id.* at 20-21.

183. *Id.* at 21 (quoting *State v. Clements*, 770 P.2d 447, 454 (Kan. 1989)).

184. FED. R. EVID. 403; *see also* CAL. EVID. CODE § 352 (West 1995).

185. *See, e.g., Locke v. State*, 501 S.W.2d 826, 829 (Tenn. Ct. App. 1973) (dissenting opinion) (“I personally consider [necrophilia] the most loathsome, degrading and vile sexual

may cause the jury to decide the case on an emotional basis rather than a rational one.¹⁸⁶

In one case, however, the California Supreme Court rejected the argument that identifying the defendant in a rape case as a necrophile was prejudicial error. In *People v. Kemp*,¹⁸⁷ the defendant was convicted of the murder of one victim, the rape and kidnaping of a second victim, and the rape of a third victim and was sentenced to death.¹⁸⁸ On appeal, the California Supreme Court considered whether it was error to admit the opinion testimony of the State's expert that "I believe that the man does enjoy sexual relations with a dead person[,] necrophilia as we term it."¹⁸⁹ The Court concluded that where the expert's testimony was not deliberately elicited by the prosecution, but came in as a natural response to a question concerning the defendant's ability to form the requisite intent, and was not objected to by the defendant's counsel at trial, allowing the statement to remain in the record was not prejudicial error.¹⁹⁰ The court's rationale, however, left open the possibility that admission of such a statement would be prejudicial error if it was objected to at trial or if it was deliberately elicited by the prosecution or unduly emphasized in argument.

In weighing the probative value of such evidence against its prejudicial effect, however, one must consider the more specific mandate of Rule 404(b) or similar state rules.¹⁹¹ Federal Rule 404(b) provides:

Evidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident¹⁹²

This subsection "has emerged as one of the most cited Rules in the

activity imaginable. . . . [It is] so horrible as to be repugnant to all but the most depraved.").

186. See Advisory Committee Note to FED. R. EVID. 403 (defining unfair prejudice as "an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one.").

187. 55 Cal. 2d 458, 11 Cal. Rptr. 361, 359 P.2d 913 (1961).

188. *Id.* at 462, 11 Cal. Rptr. at 362, 359 P.2d at 914.

189. *Id.* at 473, 11 Cal. Rptr. at 369, 359 P.2d at 921.

190. *Id.*

191. See FED. R. EVID. 404(b); CAL. EVID. CODE § 1101(b) (West 19—); see also Advisory Committee Note to FED. R. EVID. 403 ("The rules which follow in this Article are concrete applications evolved for particular situations. However, they reflect the policies underlying the present rule, which is designed as a guide for the handling of situations for which no specific rules have been formulated.").

192. FED. R. EVID. 404(b).

Rules of Evidence.”¹⁹³ It is also one of the most controversial. Many commentators have pointed out that although Rule 404(b) prohibits the use of evidence of an accused’s general propensity, the use of other acts to prove identity or intent often comprises nothing more than evidence of a highly specific and/or unusual propensity on the part of the accused.¹⁹⁴

Under Section 404(b), evidence of necrophilic acts on the part of the accused typically will be offered to show the accused’s intent or motive to kill (in order to carry out a necrophilic fantasy). For example, evidence that the accused had intercourse with the victim immediately after the killing might tend to show a motive for the killing, which could in turn support a finding of premeditation.¹⁹⁵ Such an inference would not be improper under Rule 404(b), because it concerns conduct directed toward the specific victim rather than the accused’s general propensity to commit such acts.

Evidence of other crimes may also be admitted to rebut the defendant’s claim that he or she was an unwilling participant in the charged crimes.¹⁹⁶ In *State v. Walters*,¹⁹⁷ for example, the defendant

193. Advisory Committee’s Note to 1991 Amendment of FED. R. EVID. 404(b).

194. See generally Edward J. Imwinkelried, *The Use of Evidence of an Accused’s Uncharged Misconduct to Prove Mens Rea: The Doctrines Which Threaten to Engulf the Character Prohibition*, 51 OHIO ST. L.J. 575 (1990); H. Richard Uviller, *Evidence of Character to Prove Conduct: Illusion, Illogic, and Injustice in the Courtroom*, 130 U. PA. L. REV. 845 (1982); Richard B. Kuhns, *The Propensity to Misunderstand the Character of Specific Acts Evidence*, 66 IOWA L. REV. 777 (1981).

195. See *Harris v. Commonwealth*, 793 S.W.2d 802, 806 (Ky. 1990) (evidence that dead woman’s body was subjected to sexual intercourse after she died supported finding that defendant intended to rape victim); cf. *United States v. Bradshaw*, 690 F.2d 704, 708-09 (9th Cir. 1982) (evidence that defendant had homosexual relationship with nine-year-old boy after kidnapping admissible to prove motive). But see *United States v. Anderson*, 36 M.J. 963, 978, 981 (A.F.C.M.R. 1993) (accused’s statement that he attempted to have intercourse with his wife either immediately before, during or immediately after he killed her had no probative value to charge of murder under Mil. R. Evid. 404(b)). The court in *Anderson* held that the admission of the statement was an abuse of discretion, but it concluded that the error was harmless under the circumstances, because “it proved little more than was suggested by the state of the victim’s attire when she was discovered.” *Id.* at 981. However, if one assumes that the victim’s attire and the statement both tended to prove the accused’s intent to have intercourse, it is difficult to understand why the court concluded that the former was admissible but the latter was not.

196. See, e.g., *United States v. Hearst*, 563 F.2d 1331, 1335-37 (9th Cir. 1977) (evidence of subsequent crimes committed by accused admissible to prove voluntary participation in bank robbery and to negate anticipated defense of duress); cf. CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, *EVIDENCE* § 4.23, at 282 (1995) (evidence of other crimes admissible to prove accused’s predisposition to rebut a defense of entrapment). This use of other crimes evidence may be analogized to using other crimes to prove “absence of mistake or accident” which is one of the permissible purposes listed in the Rule. See FED. R. EVID.

was charged with two counts of murder in which one victim's body was repeatedly sexually molested.¹⁹⁸ The prosecution offered evidence that the accused had participated in another murder in a different state in which the victim's body had been sexually molested.¹⁹⁹ On appeal, the court held that evidence of the second murder and associated acts of necrophilia was admissible:

In both the Powe murder and the N. and Phillips murders, the victims were abducted; they were taken by automobile to wooded areas; there was sexual activity with the victims; the victims were killed; there was sexual activity with the dead bodies; and the bodies were disposed of. . . . Presence and participation in the later Powe murder certainly have a bearing on Walters' innocent explanations of her presence and participation at the earlier killings. The probative value of this evidence, to show Walters' continuing association and participation with Willie as it relates to intent, certainly outweighs its concededly prejudicial effect.²⁰⁰

Similarly, evidence that the accused committed other crimes that share a highly distinctive similarity with the crimes at issue ("modus operandi") may also be admissible to prove identity.²⁰¹ When used for this purpose, however, the other crimes must have been committed in such a distinctive manner as to demonstrate a high probability that the same person must have committed both sets of crimes.²⁰²

At common law, evidence of other crimes also could be admitted if they were part of the "res gestae," that is, if they were part of the series of events for which the defendant was being charged.²⁰³ An il-

404(b).

197. 514 So. 2d 257 (La. Ct. App. 1987).

198. *Id.* at 260-61. The victim was an eight-year old girl that was sexually abused for several hours before she was killed. After her death, she was raped anally by Willie, the accused's lover. *Id.* at 260. Another companion, Phillips, then had sexual intercourse with the body. *Id.* Willie then killed Phillips in a quarrel, and Willie and Walters disposed of his body. *Id.* at 261. Finally, before disposing of the eight-year-old's body, "Walters lay across the body and watched while Willie raped the body." *Id.*

199. *Id.* at 261-62 ("Willie killed the hitchhiker with a hammer and had anal intercourse with the dead body. Then Walters had sexual intercourse with the body. They [then] had sexual intercourse with each other lying on the body.").

200. *Id.* at 266.

201. MUELLER & KIRKPATRICK, *supra* note 196, § 4.22, at 278-79.

202. *Id.*; see also MCCORMICK ON EVIDENCE § 190 (4th ed. 1992) ("The pattern and characteristics of the crimes must be so unusual and distinctive as to be like a signature.").

203. See MCCORMICK, *supra* note 202, § 190 (other crimes evidence may be admitted "[t]o complete the story of the crime on trial by placing it in the context of nearby and nearly contemporaneous happenings."). The McCormick treatise cautions, however, that "[t]his rationale should be applied only when reference to other crimes is essential to a coherent

lustration of this principle is found in *State v. Schmidt*,²⁰⁴ in which the defendant was convicted of the murder of his stepdaughter. The young victim was asleep in bed with her mother when the defendant fatally struck her with an axe. The defendant then carried the dead girl into an adjacent room and placed her on a bed, where, in the words of the court, "an act abhorrent and unthinkable was committed by defendant."²⁰⁵ On appeal, the defendant objected to the admission of evidence that he had confessed to having intercourse with the girl's body, arguing that proof of a separate, uncharged crime was irrelevant to the charge of murder.²⁰⁶ The Louisiana Supreme Court held that the confession was admissible, on the ground that the act of intercourse was so closely connected and linked to the murder as to form a component part of the killing.²⁰⁷ The court also noted that it was a mistake to say that a "crime" separate and distinct from the murder was committed by the defendant because "[s]exual intercourse with the dead body of a human being, however shocking it may be, had not been made a crime."²⁰⁸

The result in *Schmidt* is consistent with the analysis that would occur under Federal Rule 404(b). Evidence of other crimes may be admitted if they are "inextricably intertwined" with the crimes for which the accused is on trial, or if necessary to provide background or context for the charged crimes.²⁰⁹ Because Rule 404(b) encompasses evidence of "other crimes, wrongs or acts," however, whether the uncharged misconduct actually constitutes a crime is unimportant; the question is whether the evidence poses the risk of unfair prejudice against the accused.²¹⁰

The most difficult situation occurs when the prosecution seeks to

and intelligible description of the offense at bar."). *Id.*

204. 112 So. 400 (La. 1927). The statement of facts that follows is adapted from the opinion of the court. *Id.* at 400-01.

205. *Id.* at 400.

206. *Id.* at 401.

207. *Id.*

208. *Id.*

209. See MUELLER & KIRKPATRICK, *supra* note 196, § 4.20, at 260-61, § 4.23, at 281-82; cf. *United States v. Anderson*, 36 M.J. 963, 982 (A.F.C.M.R. 1993) (holding that limiting instruction was not required "because the uncharged misconduct is part of the chain of events that leads to the consummation of the crime charged or is part and parcel.") (construing Mil. R. Evid. 404(b)).

210. See *Anderson*, 36 M.J. at 979 (holding that the legality of necrophilia was not dispositive because "the uncharged misconduct rule is not limited to crimes but also includes evidence of other acts, apparently without regard to whether they were criminal or merely reprehensible.") (construing Mil. R. Evid. 404(b)).

introduce evidence of the accused's general necrophilic tendencies. In such a case, the opposing directives of Rule 404(b) are seemingly irreconcilable. On the one hand, evidence of the accused's general propensity toward necrophilia is inadmissible to prove action in conformity therewith. On the other hand, evidence of the accused's propensity toward necrophilia is highly relevant to prove motive, which is listed as a permissible purpose under Rule 404(b).

*People v. Clark*²¹¹ illustrates the inherent tension in Rule 404(b). In *Clark*, the defendant was convicted of the murder of six prostitutes. On appeal, he objected to the admission of evidence of his statement that "he had found a new 'sexual high' in slitting prostitutes throats while engaged in sex, so he could feel their vaginas tighten as they died."²¹² The California Supreme Court held that the statement was admissible because the defendant had failed to make a timely and specific objection to the testimony.²¹³ The Court then added:

In any event, the testimony was admissible under Evidence Code section 1101, subdivision (b), as evidence of motive. Evidence of motive was relevant to the disputed issue of identity.

The murder victims were all prostitutes and, with the exception of Karen Jones, all were found nude, suggesting a sexual motivation. The killer apparently engaged in deviant sexual practices, telling Mindy Cohen he had post mortem sex with Marano and Chandler, and threatening to kill Cohen and then "make love" to her in the same way. Other evidence supported the theory that post mortem sex had taken place in some of the murders. . . . The killer achieved additional sexual gratification from describing his necrophilic acts to Cohen over the telephone. Evidence of defendant's sexual interest in and gratification from necrophilic activities and fantasies constituted a highly distinctive mark of commonality with the killer. . . .

. . . The testimony was highly probative. The description of slitting the throats of prostitutes was presented as a statement of defendant's interests. There was no claim it described an actual killing. There was no abuse of discretion.²¹⁴

If any of the murders in *Clark* had been committed in the manner described in Clark's statement, the statement certainly would have been admissible, either as a confession to one of the charged murders, or at least as evidence of a modus operandi so similar that identity could be

211. 3 Cal. 4th 41, 10 Cal. Rptr. 2d 554, 833 P.2d 561 (1992).

212. *Id.* at 125, 10 Cal. Rptr. 2d at 599, 833 P.2d at 606.

213. *Id.* at 125-26, 10 Cal. Rptr. 2d at 599, 833 P.2d at 606.

214. *Id.* at 127, 10 Cal. Rptr. 2d at 600, 833 P.2d at 607.

inferred. The difficulty with the court's reasoning in *Clark* is the suggestion that the statement was admissible *because* "[t]here was no claim it described an actual killing."²¹⁵ If so, then the probative value of the statement rested solely on the argument that Clark had a propensity for killing and necrophilia. Since the statement was highly prejudicial whether or not it was true, under a strict reading of section 1101(b), the statement would have been inadmissible.²¹⁶ However, courts have consistently given Rule 404(b) and similar state rules a more permissive reading in cases involving deviant sexual behavior.²¹⁷

Perhaps recognizing the difficulty of applying Rule 404(b) in such cases, in 1994 Congress enacted Federal Rules 413,²¹⁸ 414,²¹⁹ and 415,²²⁰ which make prior acts of sexual assault and child molestation admissible in both criminal and civil cases involving those offenses.²²¹ "Sexual assault" is defined to include:

- (1) any conduct proscribed by chapter 109A of title 18, United States Code;
- (2) contact, without consent, between any part of the defendant's

215. *Id.*

216. Cf. MUELLER & KIRKPATRICK, *supra* note 196, § 4.22, at 274 n.6 ("A distinction must be drawn between using evidence of sexual desire to prove motive, where motive is an issue, and using evidence of 'lustful disposition' to prove conduct in accordance with that disposition, a usage prohibited by FRE 404(b).").

217. See MCCORMICK, *supra* note 202, § 190 ("In some jurisdictions, [evidence of other crimes is admissible] to show a passion or propensity for abnormal sexual relations. Initially, proof of other sex crimes was always confined to offenses involving the same parties, but a number of jurisdictions now admit other sex offenses with other persons, at least as to offenses involving sexual aberrations."); David J. Kaloyanides, Note, *The Depraved Sexual Instinct Theory: An Example of Propensity for Aberrant Application of Federal Rule of Evidence 404(b)*, 25 LOY. L.A. L. REV. 1297 (1992); M.C. Slough & J. William Knightly, *Other Vices, Other Crimes*, 41 IOWA L. REV. 325, 332-36 (1956).

218. See FED. R. EVID. 413(a) ("In a criminal case in which the defendant is accused of an offense of sexual assault, evidence of the defendant's commission of another offense or offenses of sexual assault is admissible, and may be considered for its bearing on any matter to which it is relevant.").

219. See FED. R. EVID. 414(a) ("In a criminal case in which the defendant is accused of an offense of child molestation, evidence of the defendant's commission of another offense or offenses of child molestation is admissible, and may be considered for its bearing on any matter to which it is relevant.").

220. See FED. R. EVID. 415(a) ("In a civil case in which a claim for damages or other relief is predicated on a party's alleged commission of conduct constituting an offense of sexual assault or child molestation, evidence of that party's commission of another offense or offenses of sexual assault or child molestation is admissible and may be considered as provided in Rule 413 or Rule 414 of these Rules.").

221. Some states have enacted similar rules. See, e.g., CAL. EVID. CODE § 1108 (West Supp. 1997).

- body or an object and the genitals or anus of another person;
- (3) contact, without consent, between the genitals or anus of the defendant and any part of another person's body;
- (4) deriving sexual pleasure or gratification from the infliction of death, bodily injury, or physical pain on another person; or
- (5) an attempt or conspiracy to engage in conduct described in paragraphs (1)-(4).²²²

It is unclear whether acts of necrophilia would fall within this definition. Although most courts have interpreted "person" to mean a living person,²²³ the phrase "another person's body" in paragraph (3) could be interpreted to include a dead body.

V. CONCLUSION

While the concept of necrophilia may be difficult for the larger part of society to comprehend, the offensive nature of the behavior is easily grasped, especially when the victim of the necrophilic act is a deceased family member, friend, or acquaintance. Suggesting that individuals who engage in acts of necrophilia are typically afflicted with mental disorders hardly brings relief to society or grieving family members. It is therefore important that action be taken to criminalize necrophilia.

Although there is dicta in two California cases suggesting that necrophilia may be punished under the existing provision for "mutilation" of a corpse, other authority strongly suggests that sexual violation of a corpse does not fall within the ordinary definition of "mutilation."²²⁴ Since there is serious doubt whether the existing statute makes necrophilia a criminal offense, the Legislature should clarify the law, either by amending Health & Safety Code section 7052 or by adding a new section to the Penal Code.

On January 4, 1996, less than four months after the break-in at Forest Lawn Memorial Park,²²⁵ a bill was introduced in the California Assembly to criminalize acts of necrophilia.²²⁶ The bill proposed adding a new section to the California Penal Code that would read:

222. FED. R. EVID. 413(d).

223. See notes 68-93 and accompanying text.

224. See notes 34-37 and accompanying text.

225. See notes 1-3 and accompanying text.

226. A.B. 1992, Cal. Assemb. 1995-96 Reg. Sess. (1996) (available in WESTLAW, CAL-BILLS database). The bill was introduced by Assembly Member Juanita McDonald (D-Carson). *Id.*

A person who engages in sexual activity, as defined in subdivision (d) of Section 289.6, with a corpse is guilty of a felony and shall be punished by imprisonment in the state prison not to exceed one year.²²⁷

The bill was referred to the Assembly Committee on Public Safety, but a hearing scheduled for April 9, 1996, was canceled, and the bill was not enacted.²²⁸

The definition of "sexual activity" incorporated by reference in the proposed statute includes sexual intercourse, sodomy,²²⁹ oral copulation,²³⁰ and "[p]enetration, however, slight, of the genital or anal openings of another person by a foreign object, substance, instrument, or device, for the purpose of sexual arousal, gratification, or abuse."²³¹ This definition, however, would not appear to include sexual contact that does not involve the genitals, mouth or anus of the corpse, such as masturbation on another part of the dead body. The authors believe that a more comprehensive definition prohibiting all sexual contact is warranted.²³²

The maximum punishment provided by the proposed statute is the same as that imposed for consensual sexual activity with a minor.²³³ It is less severe, however, than the punishment imposed for mutilation or disinterment of a corpse. The latter offense is a felony,²³⁴ and where punishment is not otherwise specified, the default punishment for felonies is imprisonment for 16 months, or two or three years.²³⁵

227. *Id.* § 1 (setting forth text of proposed CAL. PENAL CODE § 287).

228. *Id.* (California Bill Tracking Summary) (available in WESTLAW, CA-BILLS database).

229. Sodomy is defined as "sexual conduct consisting of contact between the penis of one person and the anus of another person. Any sexual penetration, however slight, is sufficient to complete the crime of sodomy." CAL. PENAL CODE § 286(a) (West Supp. 1997).

230. Oral copulation is defined as "the act of copulating the mouth of one person with the sexual organ or anus of another person." CAL. PENAL CODE § 288a(a).

231. CAL. PENAL CODE § 289.6 (West Supp. 1997).

232. See notes 153-156 and accompanying text.

233. See CAL. PENAL CODE § 261.5(c) (West Supp. 1997) (unlawful sexual intercourse with a minor more than three years younger than the perpetrator); § 286(b)(1) (West Supp. 1997) (sodomy); § 288a(b)(1) (West Supp. 1997) (oral copulation); § 289(h) (West Supp. 1997) (penetration by unknown object). If the perpetrator is over age 21 and the victim is under age 16, the maximum punishment is increased. See CAL. PENAL CODE § 261.5(d) (West Supp. 1997) (four years); § 286(b)(2) (West Supp. 1997) (felony); § 288a(b)(2) (West Supp. 1997) (felony); § 289(i) (West Supp. 1997) (felony). The default punishment for a felony is a maximum of three years. CAL. PENAL CODE § 18 (West 1988). See note 235, *infra*.

234. See CAL. HEALTH & SAFETY CODE § 7052 (West Supp. 1997).

235. Section 18 of the Penal Code provides:

The authors believe that it is inappropriate to provide a lesser punishment for necrophilia. Sexual activity with a corpse is at least as offensive to the family and to the community as is mutilation or disinterment.

In light of this analysis, the authors propose the following alternative statute:

A person who engages or attempts to engage in sexual contact with a corpse is guilty of a felony. For the purposes of this section, "sexual contact" is defined to include any physical contact committed for the purpose of sexual arousal or gratification.

The break-in at Forest Lawn Memorial Park, despite its offensive nature, may have provided the California Legislature with an excellent opportunity to enact legislation outlawing necrophilia. Because our society is generally outraged by the notion of sexual contact with dead bodies, the Legislature should take advantage of the opportunity before more individuals engage in the legal defilement of human remains.

Except in cases where a different punishment is prescribed by any law of this state, every offense declared to be a felony, or to be punishable by imprisonment in a state prison, is punishable by imprisonment in any of the state prisons for 16 months, or two or three years; provided, however, every offense which is prescribed by any law of the state to be a felony punishable by imprisonment in any of the state prisons or by a fine, but without an alternate sentence to the county jail, may be punishable by imprisonment in the county jail not exceeding one year or by a fine, or by both.

CAL. PENAL CODE § 18 (West 1988). It is unclear whether the proviso is limited to felonies which provide a fine as alternative punishment, or whether it provides a county jail alternative for all felonies where such an alternative is not otherwise provided, including those that are punishable by a fine. In 1956, however, the Attorney General declared that the former interpretation was correct. 28 Op. Att'y Gen. 279 (1956). Since the Attorney General's opinion came only three years after the proviso was added to the statute, *see* Historical Note to CAL. PENAL CODE § 18 (West 1988), it should be considered authoritative. The Attorney General's construction is also supported by the 1957 amendment to the statute, which amended the former second paragraph to read, "[t]his section shall not be construed to apply to . . . any offense which is prescribed by any law of this State to be a felony punishable by imprisonment in any of the state prisons, but without alternative of fine." Historical Note to CAL. PENAL CODE § 18 (West 1988). Since the Attorney General's interpretation preceded the enactment of the 1957 amendment, the subsequent deletion of the entire second paragraph in 1976 should not be construed to change the meaning of the proviso.