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The Rough Sex Defense

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COMMENT

THE "ROUGH SEX" DEFENSE

I. INTRODUCTION

A. USE OF THE "ROUGH SEX" DEFENSE

For decades, prosecuting attorneys seeking to convict criminal defendants in rape cases have been battling the defendants' dubious claims that the victim "asked for it," implying that the defendant should be exonerated of all blame for the physical attack. For the same number of years, the "she asked for it" defense has persuaded juries to focus more on the conduct and reputation of the victim than on the defendant's crime. As a result, the defendant has escaped most if not all of the blame for the crime and avoided punishment.

With the growing awareness of the women's movement, the "she asked for it" defense has become more notorious in the eyes of the public and less palatable for juries and the justice system as a whole.[1] However, when a technique has proven particularly effective, defense attorneys only reluctantly relinquish it. The "rough sex" defense in murder cases has displayed the potential to become both the updated 1990s' version of the "she asked for it" defense and a formidable obstacle to prosecutors trying to secure a murder conviction in a homicide involving a male offender and a female victim.[2]

The "rough sex" defense was popularized in New York's celebrated "Preppie Murder" case in which Robert Chambers was

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[1] *See, e.g.*, Lacayo, *The Rough-Sex Defense*, TIME, May 23, 1988, at 55, 55 (quoting Harvard University Law Professor Alan Dershowitz as saying that "the 'she asked for it' defense doesn't work anymore"); Lynch, *Insult to Injury*, THE NEW REPUBLIC, April 4, 1988, at 17, 17 (noting the reversal of the rule of evidence which had previously permitted a rape defendant to elicit evidence of the promiscuity of the complaining witness as indicative of the growing dissatisfaction with the "she asked for it" defense).

[2] Nassau County Prosecutor Kenneth Littman, who prosecuted the Joseph Porto "rough sex" homicide, has been quoted as saying that " '[r]ough sex' is the defense du jour." Lacayo, *supra* note 1, at 55.

charged with the murder of Jennifer Levin.[3] Chambers and Levin ranked among New York City's most privileged and affluent youths, spending most of their free evenings frequenting the city's trendy nightspots.[4] Levin had been introduced to Chambers by mutual friends and they had dated casually.[5] On the night of August 26, 1986, they met in one of their favorite pubs and, after a brief argument, they left together to take a walk in Central Park.[6] Less than two hours later police found Levin's body, bruised and strangled.[7] Chambers was apprehended and later indicted on two separate counts of murder.[8] Chambers originally denied involvement in Levin's death; however, at trial the defense contended that Levin's death resulted from a mishap during an episode of rough sex.[9] The "rough sex" element of Chambers' defense confused the jury to the extent that the prosecution was compelled to plea bargain with Chambers resulting in a reduced sentence.[10]

The "rough sex" defense is in fact a new twist on the old "she asked for it" defense. The "rough sex" defense to the charge of murder asserts that the victim literally "asked for" the conduct that led to the homicide and that the homicide was the result of sexual practices to which the victim consented, and may have even demanded.[11] These "blame the victim" tactics have drawn strong criticism from victims' rights groups and others who feel that "the criminal-justice system is harder on the victim . . . than it is on the defendant."[12]

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[3] For an in depth account of Robert Chambers' trial for the murder of Jennifer Levin, see Stone, *East Side Story*, NEW YORK, Nov. 10, 1986, at 43; B. TAUBMAN, THE PREPPY MURDER TRIAL (1988); Wolfe, *The People Versus Robert Chambers*, NEW YORK, Oct. 26, 1987, at 92.

[4] *See, e.g.*, Block, *The Preppy Murder Case*, GOOD HOUSEKEEPING, July 1988, at 113, 158 (outlining the permissive social scene in which many affluent New York youths live); Stone, *supra* note 3, at 44.

[5] Stone, *supra* note 3, at 44.

[6] *Id.*

[7] *Id.*

[8] *See id.* at 43; Wolfe, *supra* note 3, at 92-93.

[9] *See* B. TAUBMAN, *supra* note 3, at 2.

[10] *See* Block, *supra* note 4, at 158; Clifford, *DA, Fearing Mistrial, Listened to Defense Offer*, NEWSDAY, Mar. 26, 1988, at 11 (Long Island, N.Y.); Kunen, *Blaming His Victim, A Killer Cops A Plea*, PEOPLE WEEKLY, April 11, 1988, at 24; Linden, *The Preppie Killer Cops a Plea*, TIME, April 4, 1988, at 22. Each article indicates that the length of the jury's deliberations and the resultant fear of a hung jury or a mistrial compelled the prosecution to plea bargain with Chambers.

[11] Conceivably, the "rough sex" defense may also be employed by a female defendant as a defense to the charge of murder of a male victim; however, as of this writing, the defense has not been employed in such a manner.

[12] Hackett, *When the Victim Goes on Trial*, NEWSWEEK, Jan. 18, 1988, at 31; *see also*, Glynn, *Sex and Death in Manhattan*, MACLEANS, Jan. 25, 1988, at 46 (citing the creation of

The "rough sex" defense has been successfully employed in a more refined and more pure sense in two other instances.[13] The "rough sex" defense was, perhaps, first used in the Missouri murder trial of Dennis Bulloch.[14] Bulloch, facing the death penalty for the murder of his wife, claimed that he had choked his wife to death accidentally during an episode of sexual bondage.[15] The body of Bulloch's wife was discovered in the charred remains of the Bulloch garage. She was bound with electrical tape and there were rags stuffed in her mouth.[16] Bulloch admitted to starting the garage ablaze after he had committed the killing.[17] Bulloch escaped the murder charge and was convicted on the lesser charge of manslaughter which resulted in a sentence of only seven years in prison.[18]

In the second instance, another New York case, Joseph Porto killed his girlfriend Kathleen Holland by strangulation, but escaped a murder conviction by claiming that Holland's death had resulted from sexual practices to which Holland had not only consented, but which she had demanded of Porto.[19] Upon his arrest, Porto said in a videotaped confession that he had strangled Holland until his hands got tired and then used his high school graduation tassel to complete the killing.[20] Porto also related this story to a prosecution psychiatrist, claiming that he had killed Holland in a jealous rage after she told him she wanted to date other boys.[21] At trial, however, Porto's story changed significantly. Porto testified that Holland had begged him to wrap a rope tightly around her neck during sex in order to induce a condition of near suffocation called erotic asphyxiation that heightens sexual pleasure.[22] Porto claimed that

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a movement called Justice for Jennifer by the National Organization for Women who view the Chambers case as "a flagrant example of sexist laws that deny the rights of women"); Lynch, *supra* note 1, at 17 (noting that the "rough sex" defense has "generated a storm of public hostility" and has led protesters to conclude that "Chambers, his lawyers, and the court system . . . are perverting the judicial process . . . .").

13 "More refined and more pure" in the sense that, in the two other cases employing the defense, the homicide resulted from sexual practices that were by design rough sex (e.g., erotic asphyxiation and bondage); whereas, in the Chambers case, the homicide resulted from conventional sexual practices that became too physical. Thus the term "rough sex" took on a more literal sense in the other cases.

14 Lacayo, *The Rough-Sex Defense*, *supra* note 1, at 55.

15 *Id.*

16 *Id.*

17 *Id.*

18 *Id.*

19 *Id.*

20 *Id.*

21 *Id.*

22 *Id.*

he simply pulled the rope too tightly in the heat of passion and accidentally strangled Holland.[23] This tale of "rough sex" swayed the jury and Porto was convicted of criminally negligent homicide rather than murder.[24] Porto received a sentence of not more than four years in prison for Holland's death.[25]

B. OBSTACLES PRESENTED BY THE "ROUGH SEX" DEFENSE

As evidenced by the three cases that have successfully employed the "rough sex" defense, a defendant's claim that a homicide occurred inadvertently during an episode of rough sex can raise a most difficult obstacle for a prosecuting attorney to overcome in order to obtain a murder conviction. Two mechanisms operate within the "rough sex" defense to raise mitigating inferences in the minds of the jury members thus precluding a conviction for murder. The first mechanism, implicit in the "rough sex" defense, is the notion that the victim consented to the sexual activities that caused the resultant homicide and that this consent should relieve the defendant of most or all of the culpability for the killing. The second mechanism, which is most troublesome, concerns the defendant's claim that the homicide occurred inadvertently during an episode of rough sex. This mechanism precludes a finding that the defendant possessed the intent to kill, a requisite element for a conviction of murder. Under existing statutory law, a defendant employing the "rough sex" defense can be, at most, convicted of involuntary manslaughter.

The nature of the events leading up to a "rough sex" homicide coupled with the inferences that the defense raises in the minds of the jury members makes the "rough sex" defense, whether legitimate or not, a particularly formidable defense to a conviction of murder. Obviously, whether the "rough sex" defense is in fact a legitimate defense to a homicide is a factual question for the jury. However, it will most likely be difficult for the prosecution to obtain sufficiently persuasive evidence to disprove the defendant's claim. Because of the intimate nature of the events leading up to the homicide, it is very likely that the only two people who know exactly what happened are the defendant and the victim. It is also unlikely that inferences could be drawn from outside sources to fill in the evidentiary gaps because very few aspects of an individual's life are as private and personal as his or her sexual habits. Furthermore, the

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[23] *Id.*
[24] *Id.*
[25] *Id.*

inferences raised by the "rough sex" defense will be especially difficult for the prosecution to overcome if the defendant appears or can be presented in a light that will make him or her sympathetic to the members of the jury.[26] The concept of a sympathetic defendant leads the defense to try to prove its case by attacking the victim's reputation and essentially putting the victim on trial rather than the defendant.[27]

In many "rough sex" homicide cases, even forensic evidence will not shed much light on the events that led up to the homicide.[28] In such cases, forensic evidence will conclusively determine that sexual relations were in fact involved in the homicide only when such evidence shows the presence of spermatozoa in the victim. However, many of the sexual practices most likely to be involved in the events leading up to a "rough sex" homicide do not involve traditional forms of intercourse and consequently may not involve the presence of spermatozoa. The consensual nature of the supposed sexual relations will also make the absence of any internal injuries that may be incident to typical sexual assaults inconclusive in determining whether rough sex was involved in the homicide.

When evidence as conclusive as the presence of spermatozoa is lacking, the value of expert testimony in determining how the homicide occurred is questionable and may in fact confuse rather than enlighten the jury. Counsel on both sides can quickly and easily find medical experts to give testimony favorable to just about any version of the facts that the attorney desires.[29] The demand for expert testimony is so prevalent in trial proceedings today that many medical experts derive a large portion of their income from the fees charged for such testimony.[30] Medical experts become part of the adversarial process and, because of the frequent "gray areas" in medical opinion, can come to radically different conclusions when considering identical sets of facts depending on which version of the facts the expert advocates.[31] Faced with two conflicting scientific or medical opinions, the jury will most likely not have enough familiar-

26 It has been suggested that a "sympathetic" defendant is essential to a successful "rough sex" defense. *Id.*

27 The fact that the "rough sex" defense has the effect of putting the victim on trial has been one of the main criticisms of the defense by victims' rights groups and women's organizations. *See, e.g.*, Lacayo, *supra* note 1, at 55; *A Surprise Finish to the 'Preppie Trial'*, NEWSWEEK, April 4, 1988, at 27 [hereinafter *Surprise Finish*]; Lynch, *supra* note 1, at 17.

28 In the Chambers case, conflicting medical testimony as to how Jennifer Levin died became the central focus of the case and a primary source of confusion for the jury. *Surprise Finish*, *supra* note 27, at 27; *see also*, B. TAUBMAN, *supra* note 3, at 257-76.

29 Graham, *Expert Testimony*, 1986 U. ILL. L. REV. 43, 45.

30 *Id.* at 44.

31 *See* Marcus, *Medicine in the Courtroom: How Much Objectivity?*, 36 DEF. L.J. 529 (1987)

ity with the subject matter of the testimony to make an educated choice between the two opposing positions.[32] As one commentator has stated, "When the evidence relates to highly technical matters and each side has shopped for experts favorable to its position, it is naive to expect the jury to be capable of assessing the validity of diametrically opposed testimony."[33] Cross-examination of expert witnesses offers little help, as these witnesses, through their frequent appearances in court, have become "exceptionally proficient in the art of expert witness advocacy."[34]

Furthermore, the defendants in the "rough sex" cases to date have displayed the ability to survive successfully the prosecution's cross-examination of their testimony regarding the "rough sex" defense. For example, the prosecutor did not successfully rebut Joseph Porto's testimony despite the fact that his testimony at trial describing the events leading up to the homicide was completely different from what he had originally told police.[35] Robert Chambers did not testify at his trial, so prosecutors could not cross-examine him.[36]

This Comment analyzes the two distinct mitigating inferences that the "rough sex" defense raises on behalf of the defendant and proposes a strict liability approach to "rough sex" homicides. This strict liability approach would, in effect, abolish the "rough sex" defense and thereby remedy possible perjured reliance on the "rough sex" defense in order to preclude a conviction of murder. Section II of this Comment considers the first inference raised by the defense in relation to public policy considerations and the governing principles of the criminal law doctrine of consent. The analysis concludes that the mitigating inference raised by the victim's consent is contrary to accepted principles of criminal law. Section III discusses the "rough sex" defense's function of disproving that the defendant possesses the intent necessary for a murder conviction and proposes a strict liability rule for homicides that occur as a result of participation in rough sex. Such a rule would effectively regulate rough sexual activity and serve to eliminate illegitimate reliance on the "rough

(outlining how the variability of medical science, as well as other factors, effects the content of expert testimony).

32 Graham, *supra* note 29, at 47. It is not likely that the judge will be much help in sorting through the mass of conflicting expert testimony as he probably has no more insight than the jury into technical factual areas. Note, *Expert Legal Testimony*, 97 HARV. L. REV. 797, 809 (1984).

33 3 WEINSTEIN, EVIDENCE § 706[01], at 706-07 (1985).

34 Graham, *supra* note 29, at 74.

35 *See supra* text accompanying notes 20-25.

36 *See, e.g., Surprise Finish, supra* note 27, at 27.

sex" defense. A rule of this nature would withstand constitutional challenges that are based on the abridgement of certain fundamental individual rights.

II. The Issue of Consent

Criminal law and civil law have many doctrines in common. However, the aims of each force a different application of many of these similar principles. The doctrine of consent falls into this category.

The overriding principle behind compensation in tort law is to create a desirable social balance between the individual who has suffered the injury and the individual who has caused the injury. Social concepts of fairness and equity dictate that the tortfeasor bear the burden of the innocent injured party's suffering. The law of torts compensates victims in order to achieve a result that best relieves the innocent party's burden caused by the misconduct of the tortfeasor.[37]

The criminal law, in contrast, is less concerned with compensating the individual harmed by a crime than with punishing the individual who committed the crime. The crime is regarded as a harm against the public in general and must be punished to prevent the particular type of harm from causing further injury to the general public. Thus, a particular form of conduct that does not result in a personal injury and is not punishable under tort law may nevertheless be punishable under the criminal law if the conduct is so socially detrimental that the state must discourage it.[38]

The consent of the victim to particular conduct that results in injury conjures the notions that such conduct is justifiable regardless of the resultant harm and that such consent bars the imposition of criminal liability.[39] When a victim consents to a particular kind of sexual behavior and death instead of pleasure results, support for these notions erodes. In granting such consent, the victim agrees to a particular sexual behavior, but not to his or her resultant death.[40] Inherent in the concept of consent is the idea that the victim consented to a certain result—a result that the victim considered in the deliberation process to determine whether in fact to grant consent. It is questionable whether consent to conduct that results in an unintentional death should be considered when determining criminal

37 W. LaFave & A. Scott, Criminal Law § 3 (3d ed. 1972).

38 *Id.*

39 *Id.* at § 8.

40 For a discussion of the question of just what the victim consents to when consent is granted, see Beale, *Consent in the Criminal Law*, 8 Harv. L. Rev. 317 (1895).

liability. Nevertheless, the criminal law considers the effectiveness of the defense of consent as a question of degree.

The criminal law recognizes two classes of bodily invasions.[41] The doctrine of consent operates differently in each class. The first class of invasions involves purely personal invasions such as offensive, but not harmful, touching or trespass. The law recognizes the interest of the individual in remaining free from the apprehension of, or the actual act of, a purely personal invasion. However, in this class of invasions, because the affront does not involve an interest of the state, the law protects such interests only against unpermitted, nonconsensual invasions. Thus, the victim's consent acts as an absolute defense to a purely personal invasion, which, without the consent of the victim, would have offended but not harmed the victim.[42]

The second class of invasions include those invasions of the person that can be considered breaches of the peace, resulting in harm or serious injury to the victim. In this class of invasions, the state has a compelling interest to punish such conduct because it violates the state's own interests. For an invasion to qualify as a breach of the peace, it must create a disturbance in the public order or threaten a member of the citizenry with an injury so severe that the conduct is viewed as detrimental to the state.[43] Because the state's interest in punishing those invasions that constitute breaches of the peace is so closely related to the preservation of its own well-being, the victim's personal consent is irrelevant:

> It is only where the battery threatens serious injury or where it is done under circumstances which involve a present disturbance of the public order or tend to provoke a future disturbance thereof, that the State has any interest in punishing it, notwithstanding the consent of the

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41 Bohlen, *Consent As Affecting Civil Liability for Breaches of the Peace*, 24 COLUM. L. REV. 819 (1924); *see* Commonwealth v. Burke, 390 Mass. 480, 482-83, 457 N.E.2d 622, 624 (1983) (The court recognized two classes of batteries: 1) those batteries that are physically harmful, and 2) those batteries that are offensive to the individual.). The *Burke* court stated:

> [A] physically harmful touching is so regardless of consent. But an offensive touching is so only because of lack of consent. The affront to the victim's personal integrity is what makes the touching offensive. A consensual, offensive touching is a contradiction in terms. Hence, consent is always at issue, and evidence thereof is material, when the alleged battery is not of the physically harmful type.

Id.; *see also*, Taylor v. State, 214 Md. 156, 158, 133 A.2d 414, 415 (1957) (The court noted two classes of batteries: 1) those batteries that breach the peace and which are treated as crimes against the public generally, thus rendering the victim's consent immaterial, and 2) those batteries that are not accompanied by a threat of serious injury or breach of the peace and that are treated as crimes against only the person, thus making the victim's consent a valid defense.).

42 Bohlen, *supra* note 41, at 819.

43 *Id.*

individual upon whom it is inflicted.[44]

The individual cannot subordinate the interests of the state by granting consent to conduct that is harmful to the state. "There are three parties [to a battery that breaches the peace], one being the State, which, for its own good, does not suffer the others to deal on the basis of contract with the public peace."[45]

These common law principles are embodied in modern statutory law[46] and in most modern case law.[47] For example, in *State v. Fransua*,[48] after an argument in a bar, the defendant stated that if he had a gun he would shoot the victim.[49] The victim left the bar and returned with a gun that he placed on the table.[50] He instructed the defendant to go ahead and shoot him if he wanted.[51] The defendant subsequently shot the victim in the head injuring him severely.[52] On trial for aggravated battery, the defendant claimed that the victim's consent to the shooting constituted an effective defense to the charge.[53] The court disagreed, citing the state's compelling interest in protecting its citizens and preventing breaches of the peace as the basis for punishing violent crimes regardless of the consent of the victim.[54] In rejecting the defendant's claim, the court declared, "Whether or not the victims of crimes have so little regard for their

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44 *Id.* at 820 n.1.

45 T. COOLEY, A TREATISE ON THE LAW OF TORTS 187-88 (3d ed. 1906).

46 *See, e.g.*, COLO. REV. STAT. § 18-1-505(2) (1973); DEL. CODE ANN. tit. 11, § 452 (1974); IOWA CODE ANN. § 708.1 (West 1978); MO. ANN. STAT. § 565.080 (Vernon 1979); N.J. STAT. ANN. § 2C:2-10 (West 1979); TEX. PENAL CODE ANN. § 22.06 (Vernon 1974); MODEL PENAL CODE § 2.11(2) (1985).

47 For additional cases supporting these principles, see State v. Mace, 86 Ariz. 85, 340 P.2d 994 (1959) (rejecting the idea that the consent of the parties implied by mutual combat provides a defense to assault and battery constituting a breach of the peace); Lyons v. State, 437 So. 2d 711 (Fla. Dist. Ct. App. 1983) (holding that the consent of the victim was not a defense to criminal aggravated battery, citing the public's interest in preventing such acts); Taylor v. State, 214 Md. 156, 133 A.2d 414 (1957) (holding that criminal assault which tends to bring about a breach of the peace is treated as a crime against the public generally, and the victim cannot consent to such an act); Commonwealth v. Farrell, 322 Mass. 606, 78 N.E.2d 697 (1948) (ruling that the victim's consent to a battery committed with such violence that bodily harm is likely to result is immaterial); State v. Hatfield, 218 Neb. 470, 356 N.W.2d 872 (1984) (stating that the victim could not consent to physical violence that amounted to a breach of the peace); People v. Lenti, 44 Misc. 2d 118, 253 N.Y.S.2d 9 (N.Y. Civ. Ct. 1964) (endorsing the view that the victim could not consent to an assault that was injurious to the public as well as to himself).

48 85 N.M. 173, 510 P.2d 106 (1973).

49 *Id.* at 174, 510 P.2d at 107.

50 *Id.*

51 *Id.*

52 *Id.*

53 *Id.*

54 *Id.*

own safety as to request injury, the public has a stronger and overriding interest in preventing and prohibiting acts such as these."[55]

The same approach was taken in *State v. Brown*.[56] In *Brown*, the victim, a recovering alcoholic, told her husband, the defendant, that if she indulged in any alcohol, he was to beat her as punishment.[57] The defendant beat her severely and claimed that the victim's consent to the beating operated as a defense to a charge of atrocious assault and battery.[58] In rejecting this claim, the court noted:

> a victim cannot consent to a wrong that is committed against the public peace because these [violent] acts, even if done in private, have an impingement (whether direct or indirect) upon the community at large in that the very doing of them may tend to encourage their repetition and so to undermine public morals.[59]

These principles have also been applied to nullify the effectiveness of the consent of a participant in a consensual sexual encounter that became too rough and to impose criminal liability on the defendant. In *Commonwealth v. Appleby*,[60] the defendant was accused of assault and battery for severely whipping the victim, who worked for the defendant as a servant. Allegedly, the whippings were part of the sex play that the victim and the defendant engaged in as part of a consensual sadomasochistic homosexual relationship.[61] The defendant claimed that the victim had begged him repeatedly to administer the whippings and that the victim's consent to the whippings should be a defense to conviction.[62] In holding that consent to sadomasochistic behavior is not a defense to a charge of assault and battery, the court considered whether the state can regulate, by the law of assault and battery, violent behavior which occurs in private, consensual sexual relationships. The court stated:

> Any right to sexual privacy that citizens enjoy, and we do not here decide what the basis for such a right would be if it exists, would be outweighed in the constitutional balancing scheme by the State's interest in preventing violence by the use of dangerous weapons upon its citizens under the claimed cloak of privacy in sexual relations.
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> [The statute prohibiting assault and battery] is not aimed at regu-

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55 *Id.*

56 143 N.J. Super. 571, 364 A.2d 27 (N.J. Super. Ct. L. Div. 1976).

57 *Id.* at 572, 364 A.2d at 28.

58 *Id.*

59 *Id.* at 575, 364 A.2d at 29. The court also noted that in very few instances is the consent of the victim a defense in a case that does not involve an invasion of a sexual nature. The exception includes situations that involve "physical blows incident to sports such as football, boxing, and wrestling." *Id.* at 576, 364 A.2d at 30.

60 380 Mass. 296, 402 N.E.2d 1051 (1980).

61 *Id.* at 300, 402 N.E.2d at 1055.

62 *Id.*

> lating sexual conduct. . . . Rather, [it is] a statute that implies, as a matter of public policy, that one may not consent to become a victim of an assault and battery with a dangerous weapon.
>
> The fact that violence may be related to sexual activity (or may even be sexual activity to the person inflicting pain on another) does not prevent the State from protecting its citizens against physical harm. The invalidity of the victim's consent to a battery by means of a dangerous weapon would be the same, however, whether or not the battery was related to sexual activity. The general rule is: 'It is settled that to commit a battery upon a person with such violence that bodily harm is likely to result is unlawful, and consent thereto is immaterial.'[63]

The comments made in *Appleby* were adopted by the court in *State v. Collier*.[64] In *Collier*, the defendant was accused of severely beating the victim after he had tied her to a bed allegedly as part of their sexual activities.[65] The defendant asserted as his defense that the victim had requested him to engage in this bondage and the other sadomasochistic activity in order to help her fulfill one of her sexual fantasies.[66] He claimed that the victim's willing participation in such "social activity"[67] and the fact that she was fully aware of the risks involved dictated that the consent doctrine operated to bar a finding of criminal liability.[68] In rejecting these claims, the court cited the above quoted language from *Commonwealth v. Appleby*[69] and supplemented it by saying:

> Whatever rights the defendant may enjoy regarding private sexual activity, when such activity results in the whipping or beating of another resulting in bodily injury, such rights are outweighed by the State's interest in protecting its citizens' health, safety, and moral welfare. A state unquestionably has the power to protect its vital interest in the preservation of public peace and tranquility, and may prohibit such conduct when it poses a threat thereto. . . . There can be little doubt that the sadomasochistic activities involved in this case expose persons

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63 *Id.* at 310-11, 402 N.E.2d at 1060 (citations omitted) (citing Commonwealth v. Farrell, 322 Mass. 606, 620, 78 N.E.2d 697, 705 (1948)).

64 372 N.W.2d 303 (Iowa Ct. App. 1985).

65 *Id.* at 304.

66 *Id.*

67 *Id.* at 305. In addition to the defense of the victim's willing consent, the defendant contended that consensual sadomasochistic behavior was a social activity within the scope of IOWA CODE § 708.1 (1979) which states:

> Provided, that where the person doing any of the above enumerated acts, and such other person, are voluntary participants in a sport, social or other activity, not in itself criminal, and such act is a reasonably foreseeable incident of such sport or activity, and does not create an unreasonable risk of serious injury or breach of the peace, the act shall not be an assault.

Collier, 372 N.W.2d at 305.

68 *Id.* at 304.

69 380 Mass. 296, 310-11, 402 N.E.2d 1051, 1060 (1980).

to the very type of injury deemed unacceptable by the legislature.[70]

The *Collier* court, by reasserting the *Appleby* court's subordination of an individual's right to sexual privacy to the state's interest "in preventing violence by the use of dangerous weapons upon its citizens under the claimed cloak of privacy in sexual relations,"[71] joined the *Appleby* court in rejecting the notion that consent to sexual relations mitigates in even the slightest way the blame for any serious injury that results from those relations.

The holdings of *Fransua*[72] and *Brown*[73] show the established rule that the state is unquestionably authorized to protect its interests by punishing the perpetrators of those batteries that constitute breaches of the peace, despite the fact that the victim consented to the conduct that caused the injury. Thus, these cases stand for the proposition that the victim's consent is completely irrelevant to the determination of criminal liability where the victim has been seriously injured. The decisions in *Appleby* and *Collier* establish that this unquestionable state right encompasses episodes of consensual sexual activity when the nature of the sexual activity results in a serious injury. The *Appleby* and *Collier* courts in fact flatly rejected, as against both public policy and the state's compelling interest in protecting its citizens, the defendants' claims that their criminal liability should be excused because the victims' injuries occurred during consensual rough sex. In short, these courts rejected the mitigating inference of the "rough sex" defense that the consent of the victim renders the defendant less blameworthy or completely blameless in cases involving assault and battery. If this inference is appropriately rejected as against public policy in cases involving assault and battery, then, most certainly, this inference as well as any benefits it may bestow upon a defendant are unjustified in cases involving homicide.

III. A Strict Liability Approach to a "Rough Sex" Homicide

A. Intent and Strict Liability

The second objective of the "rough sex" defense is to eliminate the possibility that the defendant possessed the intent to kill, proof of which is necessary to gain a conviction of murder. Because the penalty for murder involves an extensive loss of personal liberty and, in some jurisdictions, capital punishment, the prosecution in a murder must prove beyond a reasonable doubt that the defendant

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[70] *Collier*, 372 N.W.2d at 307.

[71] *Id.* at 306; *Appleby*, 380 Mass. at 310, 402 N.E.2d at 1060.

[72] State v. Fransua, 85 N.M. 173, 510 P.2d 106 (1973).

[73] State v. Brown, 143 N.J. Super. 571, 364 A.2d 27 (N.J. Super. Ct. L. Div. 1976).

intended to take the life of his victim.[74] However, a defendant relying on the "rough sex" defense is claiming that the death occurred inadvertently as a consequence of the rough sexual activity. These circumstances force the conclusion that the defendant lacked the requisite intent to kill the victim, thus making a conviction of murder an impossibility.

Early common law viewed defendants who committed homicides in the perpetration of felonies as worthy of the punishment for murder, even though these defendants lacked the intent to kill necessary for a murder conviction. The common law dealt with this problem by creating a class of homicides called felony-murders that provided for a murder conviction even though the defendant may have lacked the intent to kill at the time of the homicide. A similar approach should be used in homicides committed during episodes of rough sex. Under such a strict liability approach, the defendant, who by his or her conduct caused the death of his or her partner through rough sexual practices, would be found guilty of murder even though the defendant may have lacked the intent to kill. In effect, the "rough sex" defense would be abolished. Such abolition would end the evidentiary problems that the defense presents for the prosecution and would eliminate the great potential for abuse of the defense through perjured reliance on the mitigating inferences that necessarily follow from a claim of homicide by "rough sex."

B. LEGISLATION

The enactment of a strict liability approach to "rough sex" homicides could be achieved through legislative action. The legislation must be drafted carefully in order to ensure that only those homicides that result from unjustifiably risky sexual relations, according to existing societal standards, will fall under its scope. This requires a precise definition of the types of sexual relations that constitute "rough sex."

One possibility is to define "rough sex" in terms of the types of sexual activity that the statute is designed to include. Sexual practices such as erotic asphyxiation,[75] sadomasochism, bondage, and other sexual practices which involve a high degree of physicality may be expressly included under the definition of "rough sex." However, a definition of this nature suffers from the same type of evidentiary problems presented by the "rough sex" defense itself.

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74 C. McCORMICK, EVIDENCE § 341 (3d ed. 1984).

75 Erotic asphyxiation has been described as "often-fatal." Herceg v. Hustler Magazine, Inc., 814 F.2d 1017, 1018 (5th Cir. 1987).

If "rough sex" is defined in terms of certain types of sexual activities, all a defendant need do is claim that the resultant homicide occurred in a form of sexual activity not covered by the statute. As discussed earlier, it is very difficult for the prosecution to refute such a claim.

Perhaps a better way to define "rough sex" is to look at the cause of the victim's death. If the victim of a homicide that is claimed to be the inadvertent result of sexual activity died because of a physical injury such as a broken neck, strangulation, choking, or a severe beating, the homicide would fall under the scope of the "rough sex" statute and would be subject to strict liability treatment. This would take out of the realm of the "rough sex" statute truly remote causes of sexually related death such as heart failure or other physiological causes that may be regarded as natural.

Judicial treatment of statutes embodying governmental regulation of the private affairs of individuals is well documented. Courts have not denied the state's power to regulate aspects of an individual's private life provided that the state has a compelling interest to do so and that the statute designed to regulate such conduct is drafted to function precisely to achieve the legitimate state interest. This point is well illustrated by the Supreme Court's reasoning in *Griswold v. Connecticut*.[76] In holding unconstitutional a Connecticut statute that prohibited the distribution of contraceptive devices for the purpose of preventing conception, the Court saw the primary evil of the statute being that it conflicted with the common principle that "a governmental purpose to control or prevent activities constitutionally subject to state regulation may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms."[77] Other statutes, while professing to address legitimate and concrete state interests such as public health, in reality only address the state legislature's perception of society's proper moral stance, a statutory basis that has met with a cool reception in the courts.[78]

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[76] 381 U.S. 479 (1965).

[77] *Id.* at 485 (citing NAACP v. Alabama, 377 U.S. 288, 307 (1964)). This view is reinforced by the comments made by Justice Goldberg in his concurring opinion:

> [I]t is clear that the state interest in safeguarding marital fidelity can be served by a more discriminately tailored statute, which does not, like the present one, sweep unnecessarily broadly, reaching far beyond the evil sought to be dealt with and intruding upon the privacy of all married couples. Here, as elsewhere, precision of regulation must be the touchstone in an area so closely touching our most precious freedoms.

Id. at 498 (Goldberg, J., concurring).

[78] *See, e.g.*, Eisenstadt v. Baird, 405 U.S. 438 (1971) (A Massachusetts statute that stringently regulated distribution of contraceptive materials had no relation whatsoever

In drafting a "rough sex" homicide statute both of these pitfalls should be reasonably easy to avoid. Although a "rough sex" homicide statute would be sweeping in its application, it would not be designed to protect individuals or prohibit activity in a certain class and should not be drafted as such. A society-wide application of the statute is conducive to its effective application, and this realization should preclude it from being deemed overbroad. Also, because a "rough sex" homicide statute is in fact directed toward a readily identifiable state interest rather than being covertly geared toward subjective ideas of social morality, precise drafting to achieve its purpose should be possible.

C. STRICT LIABILITY RATIONALE

Because a strict liability approach ignores claims of mistake or inadvertence and refuses to consider any excuse for various forms of conduct,[79] this doctrine has been employed only in instances when the goals of the criminal law can best be achieved by its use. For instance, it has been suggested that the felony-murder rule evolved to reflect the societal judgment that a felony that causes a death should be punished more as a murder than merely as the underlying felony.[80] Further, in *United States v. Dotterweich*,[81] the Supreme Court considered whether a corporate president could be prosecuted under the Food, Drug and Cosmetic Act as a "person" who had shipped tainted products in interstate commerce, regardless of the fact that he had nothing to do with the shipment.[82] The Court recognized the regulatory utility of employing a strict liability approach in such a case in the interest of the public good:

> [This] prosecution . . . is based on a now familiar type of legislation whereby penalties serve as effective means of regulation. Such legislation dispenses with the conventional requirement of criminal conduct—awareness of some wrongdoing. In the interest of the larger good [the statute] puts the burden of acting at hazard upon a person otherwise innocent but standing in responsible relation to a public danger.[83]

Other examples of the criminal law employing a strict liability

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to the state's professed objectives of deterring premarital sex and regulating the distribution of potentially harmful contraceptive devices. Rather, the statute could more appropriately be viewed as a prohibition on contraception per se.).

79 H. PACKER, THE LIMITS OF THE CRIMINAL SANCTION 123 (1968).

80 Crump & Crump, *In Defense of the Felony Murder Doctrine*, 8 HARV. J.L. & PUB. POL'Y 359, 363 (1985).

81 320 U.S. 277 (1943).

82 *Id.* at 281.

83 *Id.* at 280-81.

approach in response to a specific goal, and closely related to a strict liability approach to "rough sex" homicides, are statutes that proscribe the mere possession of narcotics or certain types of weapons regardless of whether the defendant intended to use them.[84] Even though mere possession is not in itself dangerous, it has been suggested that the criminal law ignores the actual intent of the defendant because "[t]he denial of harmful intent in such a situation is too facile. Sources of contrary evidence persuasive beyond a reasonable doubt are likely to be absent even if the defensive theory is perjurious."[85]

The application of a strict liability approach to instances of mere possession of dangerous instruments without regard for the defendant's intent to use those instruments acknowledges the impossibility of proving the defendant's intent. Both disproving the defendant's claim that he had no intention to use the instrument he possessed and refuting a defendant's claim that a homicide occurred during rough sex involve similar evidentiary problems. Namely, in each instance, no source of reliable evidence is available to disavow the defendant's claim.

The claim of a homicide caused by rough sex and the mitigating inferences that it raises regarding the consent of the victim and the absence of an intent to kill are, in most cases, almost certain to raise at least a reasonable doubt in the minds of the jury as to the defendant's guilt. Due to the extremely private nature of sexual relations and the improbability of there being any witnesses to the events that led up to the homicide, the prosecution will most likely not be able to acquire sufficiently persuasive evidence to erase the reasonable doubts created by the "rough sex" defense.[86] Many times, forensic evidence, rather than helping the jury to determine exactly what happened, will serve further to confuse the jury through conflicting expert medical testimony.[87] Also, in the "rough sex" homicide cases to date, cross-examination has not been effective in clarifying the issues for the jury.[88] A reasonable doubt in the minds of the jury members is all that it takes to preclude a finding that the de-

84 *See* People v. Satchell, 6 Cal. 3d 28, 42, 489 P.2d 1361, 1371, 98 Cal. Rptr. 33, 43 (1971) (Concerning statutes that prohibit mere possession of a potentially dangerous instrument, the court stated, "rather than simply proscribing the use of such instruments, the Legislature has sought to prevent such use by proscribing their mere possession. In order to insure the intended prophylactic effect, the intent or propensity for violence of the possessor has been rendered irrelevant.").

85 Crump & Crump, *supra* note 80, at 376.

86 *See supra* section I.B.

87 *See supra* text accompanying notes 28-34.

88 *See supra* text accompanying notes 35-36.

fendant is guilty of murder.[89]

As a result, it is very possible that a defendant employing the "rough sex" defense negates the possibility that he or she will be found guilty of murder whether or not there was in fact any rough sex involved in the homicide. The claim of "rough sex" offers the defendant a convenient way to preclude a conviction of murder even if the claim of "rough sex" is not legitimate.

The criminal law recognizes society's interest in disallowing the potentially dangerous offense of possession of drugs or weapons to be vitiated by an inability to prove the intent to use beyond a reasonable doubt. It also realizes the potential for perjury if proof of intent to use were required. Based on these insights, the criminal law has responded to the problem by punishing possession of such drugs or weapons as if the intent to use was present.

In light of the public interest in not allowing a defendant to escape a murder conviction by employing an easily perjured defense because its legitimacy can most likely not be refuted by criminal prosecutors, a strict liability approach that would in effect preclude the use of the "rough sex" defense seems appropriate to remedy the problems presented by its use. This strict liability approach would prevent defendants from literally getting away with murder through reliance on a possibly perjured "rough sex" defense. Such an approach would also nullify the illegitimate benefit that the defendant derives from the operation of the first mitigating inference raised by the defense—the consent of the victim—which is not justifiable under the principles of the criminal law.[90]

In addition to the policy of avoiding incentives or rewards for perjury, other policies that have been cited as justifications for the continuing and widespread existence of the felony-murder rule also add support for a strict liability approach to homicides that occur as a result of rough sex.[91] The strict liability approach to "rough sex" homicides may act to deter an individual who would kill intentionally if he or she had the benefit of claiming that it was an accident under the "rough sex" defense. This strict liability approach, like the felony-murder rule, is the sort of "simple, commonsense, readily enforceable, and widely known principle that is likely to result in

89 C. McCormick, *supra* note 74, at § 341.

90 *See supra* Section II.

91 *See* Crump & Crump, *supra* note 80 (authors note that, despite scholarly criticism, the felony-murder doctrine has been retained in most jurisdictions; authors further offer a series of policy considerations which support the doctrine).

deterrence."[92] There is a growing body of evidence that suggests that serious crime may be deterred if the consequences of the act are adequately communicated.[93]

A strict liability approach to "rough sex" homicides would also prevent defendants from escaping murder convictions under what much of the public views as the suspect contentions of the "rough sex" defense.[94] Punishments perceived as lenient for crimes that take human life give the appearance that the criminal justice system does not condemn the activity and has come to devalue human life.[95] Punishing these crimes as it seems they should be punished reasserts the fairness of the criminal justice system in the eyes of the public.

D. CONSTITUTIONAL CHALLENGES

A strict liability approach to "rough sex" homicide is immediately open to attack on the constitutional ground of abridging fundamental individual rights. Primarily, such an approach is likely to be contested as an unconstitutional encroachment on the individual's right to privacy on the basis that it constitutes an inappropriate restraint on private, consensual sexual relations. Additionally, the prospect of imposing a penalty for murder without considering whether the defendant possessed the requisite intent to kill may also bring about constitutional challenges on the ground that such a practice is cruel and unusual punishment in violation of the eighth amendment.

As the following discussion will illustrate, statutes regulating certain aspects of what has been deemed to be an individual's private life, such as conduct within the marital relationship and private, consensual sexual conduct, have been held to be unconstitutional infringements of the individual's right to privacy.[96] However, a statute dealing with "rough sex" homicide will prove to be constitution-

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92 *Id.* at 370-71 (authors use the quoted language in describing the deterrent qualities of the felony-murder rule).

93 *Id.* at 370 (citing E. VAN DEN HAAG, PUNISHING CRIMINALS 113 (1975); J. WILSON, THINKING ABOUT CRIME ch. 8 (1977); Greenwood, *Controlling the Crime Rate Through Imprisonment*, in CRIME AND PUBLIC POLICY ch. 14 (J. Q. Wilson ed. 1983)).

94 *See, e.g.*, Kunen, *supra* note 10, at 24 (stating that many feel that Robert Chambers received only a "slap on the wrist" for killing Jennifer Levin).

95 Crump & Crump, *supra* note 80, at 367-68.

96 *See, e.g.*, Griswold v. Connecticut, 381 U.S. 479 (1965) (holding that a Connecticut statute prohibiting the distribution of contraceptives is an impermissible encroachment on the protected zone of privacy within the marital relationship); Commonwealth v. Bonadio, 490 Pa. 91, 415 A.2d 47 (1980) (holding two Pennsylvania statutes that criminalized private, consensual sexual conduct to be a violation of the participants' right to privacy).

ally sound. In addition, the following analysis will show that a strict liability approach to homicides that occur during rough sex is not likely to be held violative of the eighth amendment's prohibition against cruel and unusual punishment.

1. The Right to Privacy

The concept of a legally protected right to privacy was first presented in a famous law review article by Samuel Warren and Louis Brandeis.[97] However, the possibility of such a legal right was not addressed by the Supreme Court until Justice Brandeis, in his dissenting opinion in *Olmstead v. United States*,[98] suggested that the Constitution conferred on the people the highly valued right "to be let alone" by the government.[99] Gradually, the Supreme Court has recognized and advanced a right to privacy primarily as a liberty guaranteed under the fourteenth amendment's due process protection,[100] and also under equal protection arguments[101] and the provisions of the ninth amendment.[102]

In *Griswold v. Connecticut*,[103] the Supreme Court, by holding a Connecticut statute that prohibited the distribution of contraceptive devices for the purpose of preventing conception unconstitutional, expressly recognized for the first time a constitutional right of privacy under the penumbra of the specific guarantees of the Bill of Rights.[104] The Court held that the statute had overstepped its permissible bounds as it had the effect of regulating conduct within the marital relationship, a constitutionally protected zone of privacy.[105] Three years later, in *Eisenstadt v. Baird*,[106] the Court held a Massa-

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97 Warren & Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890).

98 277 U.S. 438 (1928).

99 *Id.* at 478 (Brandeis, J., dissenting).

100 *See* Roe v. Wade, 410 U.S. 113, 153 (1973) (holding that a woman's right to choose to terminate her pregnancy is part of the fundamental right to privacy protected by the due process clause of the fourteenth amendment); *Griswold*, 381 U.S. at 500 (Harlan, J., concurring) (arguing that the privacy rights of married individuals are guaranteed by the due process clause).

101 *See, e.g.*, Eisenstadt v. Baird, 405 U.S. 438, 453 (1972) (employing the equal protection clause of the fourteenth amendment to hold a Massachusetts statute that criminalized the distribution of contraceptives as violative of single person's constitutionally protected right to privacy); Skinner v. Oklahoma, 316 U.S. 535, 540 (1942) (recognizing privacy in procreation through the use of an equal protection analysis).

102 *See, e.g.*, *Griswold*, 381 U.S. at 487 (Goldberg, J., concurring) (asserting that the privacy rights of married individuals are derived from the words of the ninth amendment).

103 381 U.S. at 479.

104 *Id.* at 485.

105 *Id.*

106 405 U.S. 438 (1972).

chusetts statute criminalizing the distribution of contraceptives unconstitutional as violative of single person's privacy rights under the equal protection clause of the fourteenth amendment.[107] In doing so, the Court arguably extended the right of privacy to non-married couples by stating "[i]f the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child."[108] In addition, *Roe v. Wade*[109] extended the right of privacy to include a woman's fundamental right to have an abortion under the due process clause of the fourteenth amendment.[110]

The logical extension of this line of cases is to consider whether private, consensual sexual relations fall within the scope of the constitutionally protected right of privacy that has been established. This has been achieved primarily through constitutional challenges to statutes that prohibit private, consensual sodomy.[111] About one half of the states have declared their sodomy statutes as violative of constitutionally protected rights[112] and have reformed them accordingly.[113] However, the Supreme Court, in upholding the constitutionality of a Georgia statute which prohibited private, consensual sodomy, expressly refused to include homosexual relations in the scope of the constitutionally protected right of privacy, and left it to the states to determine whether to prohibit such activity.[114]

However, like the other fundamental rights delineated in the Constitution, the fundamental right to privacy shaped by the preceding series of cases is not absolute. The standard set forth by John Stuart Mill in his essay *On Liberty* regarding the relationship between governmental power and the liberty of its citizens is at the root of judicial treatment of that issue in this country.[115] Mill stated that "the only purpose for which power can be rightfully exercised

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107 *Id.* at 453.

108 *Id.*

109 413 U.S. 113 (1973).

110 *Id.* at 152-53.

111 These statutes can be seen as embodying governmental regulation of private, consensual sexual behavior. For a discussion of constitutional challenges to statutes prohibiting private, consensual sodomy, see Note, *Voluntary Deviate Sexual Intercourse—A Comparative Analysis*, 43 U. PITT. L. REV. 253 (1981).

112 *See, e.g.*, People v. Onofre, 72 A.D.2d 268, 424 N.Y.S.2d 566 (1980); Commonwealth v. Bonadio, 490 Pa. 91, 415 A.2d 47 (1980).

113 "Reformed" is a more appropriate term than "repealed" as the states have retained the sections of the sodomy statutes dealing with sexual relations 1) by force, 2) with children, and 3) with incompetents. Note, *supra* note 111, at 255.

114 Bowers v. Hardwick, 478 U.S. 186 (1986).

115 *See Bonadio*, 490 Pa. at 96-98, 415 A.2d at 50-51; H. PACKER, *supra* note 79, at 266.

over any member of a civilized community, against his will, is to prevent harm to others," and that, in order to justify compelling an individual to a course of action against his free will, "the conduct from which it is desired to deter him must be calculated to produce evil to someone else."[116] Mill's philosophy summed up the libertarian view of the legitimate aims of government that pervaded political thought in colonial America.[117] Of liberty and government, the libertarians wrote, "it is foolish to say, that Government is concerned to meddle with the private Thoughts and Actions of Men, while they injure neither the Society, nor any of its Members."[118] The libertarians saw government as "being intended to protect Men from the injuries of one another, and not direct them in their own Affairs, in which no one is interested but themselves . . . ."[119]

The views of Mill and the libertarians illustrate that, while an individual should be able to realize his personal liberty through the free exercise of his fundamental rights, conduct which can be shown to be injurious to others is subject to legitimate governmental restraint. The test of whether governmental restraint on individual behavior is in fact justified has been described as the "harm factor."[120] In order to justify abridging an individual's fundamental rights the state must empirically prove first that the individual's conduct has caused harm in the past or will do so in the future. The state must also ultimately prove that society or an individual has in fact been injured. Scrutinizing a particular behavior's "harm factor" to determine whether it is subject to governmental regulation "depicts a strong mutuality of respect between the citizen's personal autonomy and the majoritarian interest . . . and has been subsequently incorporated within [the American] jurisprudential system."[121]

The "harm factor" has most obviously been applied in a series of cases involving constitutional challenges to state statutes which prohibit private, consensual sodomy—cases that were spawned by the Supreme Court's delineation of a constitutional right to privacy. The cases of *Commonwealth v. Bonadio*[122] and *People v. Onofre*[123] are representative of such application.

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116 J. S. MILL, ON LIBERTY (1859).

117 *See* Ludd, *The Aftermath of Doe v. Commonwealth's Attorney: In Search of the Right To Be Let Alone*, 10 U. DAYTON L. REV. 705, 706-07 (1985).

118 *Id.* at 707.

119 *Id.*

120 *Id.* at 708.

121 *Id.*

122 490 Pa. 91, 415 A.2d 47 (1980).

123 72 A.D.2d 268, 424 N.Y.S.2d 566 (1980).

In *Bonadio*, the court overturned two Pennsylvania statutes[124] that prohibited voluntary deviate sexual intercourse between unmarried persons on the grounds that the statute discriminated against unmarried persons and thus violated their equal protection rights. The court recognized the state's ability to exercise its police power in order to regulate public health, safety, welfare, and morals, but stated that such police power is not unlimited.[125] In order for the state to be justified in exercising its police authority on behalf of the public, it must appear that the interests of the public in general, as distinguished from those of a particular class, require such interference and that the means employed are reasonably necessary for the accomplishment of the purpose and are not unduly oppressive upon individuals.[126] The court held that the Pennsylvania statutes served none of the states' legitimate roles in regulating public morality,[127] but only served the illegitimate purpose of regulating the conduct of consenting adults. Finally, with regard to the state's ability to regulate morals via its police powers, the court declared that "the police power should properly be exercised to protect each individual's right to be free from interference in defining and pursuing his own morality but not to enforce a majority morality on persons whose conduct *does not harm others*."[128]

A similar stance was taken in *Onofre* where the court held a New York statute prohibiting consensual sodomy to be unconstitutional on equal protection grounds as it only proscribed heterosexual activity between unmarried persons.[129] The court acknowledged the fact that "personal sexual conduct is a fundamental right, protected by the right to privacy because of the transcendental importance of sex to the human condition, the intimacy of the conduct, and its relationship to a person's right to control his or her own body."[130] The court, however, qualified this fundamental right by saying that

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124 18 PA. CONS. STAT. ANN. § 3124 (Purdon Supp. 1980) states in pertinent part that "[a] person who engages in deviate sexual intercourse . . . is guilty of a misdemeanor of the second degree." 18 PA. CONS. STAT. ANN. § 3101 (Purdon Supp. 1980) defines "deviate sexual intercourse" as "[s]exual intercourse per os or per anus between human beings who are not husband and wife, and any form of sexual intercourse with an animal."

125 *Bonadio*, 490 Pa. at 95, 415 A.2d at 49.

126 *Id.* (citing Lawton v. Steele, 152 U.S. 133, 137 (1894)).

127 The court enumerated the state's legitimate roles as 1) protecting the public from inadvertent offensive displays of sexual behavior, 2) preventing people from being forced against their will to submit to sexual contact, 3) protecting minors from being sexually used by adults, and 4) eliminating cruelty to animals. *Id.* at 95, 415 A.2d at 49.

128 *Id.* at 96, 415 A.2d at 50 (emphasis in original).

129 People v. Onofre, 72 A.D.2d 268, 271, 424 N.Y.S.2d 566, 569 (1980).

130 *Id.* at 270, 424 N.Y.S.2d at 568.

the right of privacy is not absolute, and that "to the extent that certain conduct has the potential for working harm, the State may restrict it."[131]

In other constitutional cases involving the right to privacy which do not directly involve the right to engage in a particular form of private, consensual sexual relations, the consideration of the "harm factor" has taken the form of scrutinizing a state's "compelling interest" to regulate a certain form of behavior under the authority of the state's police power. In order for a state to abridge statutorily an individual's fundamental rights, the statute must be intimately related to achieving a compelling state interest.[132] In other words, if the state can establish that a statute is directly related to furthering what has been recognized as a legitimate state interest, such as protecting its citizens from harm, the statute is held to be constitutionally sound even though it conflicts with fundamental individual rights.

The series of Supreme Court cases that set the boundaries of the constitutional right to privacy did so by invalidating state statutes because they lacked the required relation to a compelling state interest. In *Griswold*,[133] a Connecticut statute that prohibited the distribution of contraceptive devices for the purpose of preventing conception was held unconstitutional on the grounds that the contested statute swept "unnecessarily broadly" in seeking "to control or prevent activities constitutionally subject to state regulation . . . ."[134] In *Eisenstadt*,[135] the Court invalidated a Massachusetts statute prohibiting distribution of contraceptives to single persons on equal protection grounds, stating that such a distinction was not reasonably related to the statute's objective of prohibiting sexual relations outside the marital bond.[136] Likewise, in *Roe v. Wade*,[137] the Court invalidated an anti-abortion statute because it was insufficiently related to the state's interest in protecting the potential life and the life of the mother which were not implicated until the third trimester of pregnancy.[138] Presumably, each of these statutes would have been held constitutionally sound, even though they infringe upon an aspect of an individual's privacy right, if the state had been

131 *Id.* at 271, 424 N.Y.S.2d at 568.
132 Note, *Bowers v. Hardwick: Is There a Right to Privacy?*, 37 AM. U.L. REV. 487, 498-99 (1988).
133 Griswold v. Connecticut, 381 U.S. 479 (1965).
134 *Id.* at 485.
135 Eisenstadt v. Baird, 405 U.S. 438 (1972).
136 *Id.* at 449.
137 410 U.S. 113 (1973).
138 *Id.* at 154, 163-64.

able to establish a strong relationship between the statute and a compelling state interest.

The prevention of harm to its citizenry has been recognized continually throughout the history of American jurisprudence as a legitimate exercise of the state's police power. The state may restrict activity that would normally fall within the individual's right of privacy if such activity has the potential to harm another individual.[139] It has been suggested that such restrictions on the rights of the individual are in fact necessary in order to further the liberty of the other members of society—potential victims of the harmful conduct. The effect that a "rough sex" homicide statute would have on the individual's private life—probably reducing the practice of highly physical forms of sexual relations—is clearly in the interest of restricting activity that has a very real potential to harm another individual.

In reality, unlike the traditional sodomy statute, the "rough sex" homicide statute would not criminalize any sort of behavior whatsoever. With such a strict liability rule in operation, those who wish to engage in rough sex are in no way punishable. The only instance where such activity becomes punishable is where such conduct results in a homicide. In effect, it is not the sexual practices that are criminalized or proscribed, but rather the homicide that results from those practices. In fact, the "rough sex" homicide statute would be purely regulatory. By punishing only that sexual behavior that results in a homicide, individuals are not discouraged from engaging in the sexual behavior of their choice, but rather are encouraged to engage in such practices in a manner that is safe for both participants.

The Supreme Court's decision in *Bowers v. Hardwick*[140] has made it unclear to what extent private, consensual sexual relations are protected by the fundamental constitutional right to privacy. In *Bowers*, the Court refused to extend such protection to private, consensual homosexual relations in upholding the constitutionality of a Georgia sodomy statute.[141] This decision left to the states the power to determine whether to regulate this aspect of an individual's private life. It remains to be seen what impact this decision will

[139] The harm need not be committed against a readily identifiable individual. It is rather the probability of harm to another—whether that "other" is readily identifiable or not—that justifies governmental intrusion on an individual's right to engage in a particular form of conduct. H. PACKER, *supra* note 79, at 266-67.

[140] 478 U.S. 186 (1986). For a discussion of the right of privacy in relation to the *Bowers v. Hardwick* decision, see Note, *supra* note 132.

[141] *Bowers*, 478 U.S. at 189.

have on private, consensual heterosexual relations as well as on other areas of the right of privacy, particularly the right to have an abortion established in *Roe v. Wade*.[142] A trend in this direction would make it much easier for states to regulate legitimately aspects of an individual's private life. Such a trend would also serve to strengthen significantly an already very strong case regarding the permissibility of the "rough sex" homicide statute's regulatory function over an individual's private life.

2. *Cruel and Unusual Punishment*

The second probable constitutional challenge to a strict liability approach to "rough sex" homicides is that such an approach constitutes cruel and unusual punishment. The concept of a prohibition against cruel and unusual punishment originated from a desire to end such barbaric punishments as crucifixion, burning at the stake, and public vivisection.[143] The British Bill of Rights, adopted by Parliament in 1689, contained a provision "prohibiting excessive bail, excessive fines and cruel and unusual punishments,"[144] and these words were adopted verbatim into the eighth amendment of the Constitution. Because these words were taken straight from the British Bill of Rights, there was little debate over the phrasing of the eighth amendment when it was incorporated into the Bill of Rights of the United States.[145] For this reason, there is little to examine to determine what types of punishments are meant to be included under the prohibition against "cruel and unusual punishment."

The Supreme Court first addressed the issue in *Wilkerson v. Utah*[146] and determined that "it is safe to affirm that punishments of torture . . . and all others in the same line of unnecessary cruelty, are forbidden by [the eighth amendment] to the Constitution."[147] This holding both established that the eighth amendment prohibits torture and other such medieval methods of punishment and raised the question as to whether the prohibition against cruel and unusual

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142 Many see the decision in *Bowers v. Hardwick* as the beginning of the end for the rights established in *Roe v. Wade*. Eleanor Smeal of the National Organization for Women has been quoted as saying, "If *Roe* is ever reversed, this is exactly the way the decision will be written." Colson, *What the Sodomy Ruling Really Means*, CHRISTIANITY TODAY, Sept. 19, 1986, at 72; *see also*, Carlin, *Two Doctrines of Privacy*, AMERICA, August 9, 1986, at 50 (predicting that "the Georgia decision . . . portends . . . at least a partial reversal of *Roe v. Wade*.")

143 *See* I. BRANT, THE BILL OF RIGHTS (1965).

144 *Id.* at 166.

145 Weems v. United States, 217 U.S. 349, 368 (1910).

146 99 U.S. 130 (1879).

147 *Id.* at 136.

punishment stopped there or prohibited any form of punishment which society now deems or will come to regard as cruel and unusual. The Supreme Court has rejected the idea that the concept of cruel and unusual punishment is limited strictly to torture and other forms of physically painful punishment[148] and has held that the concept is a dynamic one that "must draw its meaning from evolving standards of decency that mark the progress of a maturing society."[149]

In his dissenting opinion in *O'Neil v. Vermont*,[150] Justice Field addressed the issue of whether the concept of cruel and unusual punishment was a dynamic one, and, in the process, set the foundation for the standard by which punishments would be judged by modern day courts. O'Neil was sentenced to fifty-four years in prison for unlawfully selling liquor in Vermont.[151] The majority refused to discuss the issue of cruel and unusual punishment.[152] Field asserted that while the term "cruel and unusual punishment" was usually applied to the infliction of torture, the prohibition of the eighth amendment also applied to "all punishments which by their excessive length or severity are greatly disproportioned to the offenses charged."[153] This proportionality test was subsequently adopted by the Court in *Weems v. United States*.[154]

Despite this mandate to set aside disproportionately severe sentences as unconstitutional, courts have been reluctant to do so until recently.[155] Courts generally look at three criteria in determining whether a sentence is excessively severe: 1) How does the sentence for this particular crime compare to sentences given for crimes that are considered more severe? 2) Is the sentence severe compared to penalties for the same crime in other jurisdictions? and 3) Is the penalty illogically severe in the state's overall punishment

148 *See, e.g.*, *Weems*, 217 U.S. at 373 (concluding that "a principle to be vital must be capable of wider application than the mischief which gave it birth" and thus "we cannot think that [the prohibition against cruel and unusual punishment] was intended to prohibit only practices like the Stuarts, or to only prevent an exact repetition of history").

149 Trop v. Dulles, 356 U.S. 86, 101 (1958); *see also*, *Weems*, 217 U.S. at 378 (The Court asserts that the standards of cruel and unusual punishment are constantly changing "as public opinion becomes enlightened by a humane justice.").

150 144 U.S. 323 (1892).

151 *Id.* at 330.

152 *Id.* at 331-32.

153 *Id.* at 340 (Field, J., dissenting).

154 217 U.S. 349 (1910).

155 *See, e.g.*, Donaldson v. Wyrick, 393 F. Supp. 1041 (W.D. Mo. 1974) (upholding a 99 year prison sentence for rape); Sills v. State, 472 S.W.2d 119 (Tex. Ct. App. 1971) (upholding a 1000 year sentence for robbery by assault).

scheme?[156] Sentences such as sterilization and denationalization for deserting in times of war have been held to be unconstitutionally excessive.[157] It has been suggested that fines, prison sentences, and capital punishment may be the only punishments that are constitutionally permissible.[158]

A strict liability "rough sex" homicide statute may be contested on the constitutional grounds of cruel and unusual punishment because the statute imposes the penalty for murder without taking into account whether or not the defendant possessed the intent to kill. However, this challenge does not seem to have much validity when weighed against both the criteria outlined above for holding a particular sentence unconstitutional and the judiciary's reluctance to infringe upon the prescribing of sentences, which is generally regarded as an exclusively legislative function.

The concept of a prohibition against cruel and unusual punishment has been held to prohibit those punishments or methods of punishment which are seen as "cruel and unusual" in the eyes of society's evolving standards of decency. This implies that a punishment or method of punishment that is unprecedented and shocking to society's standards of decency is unconstitutional. The very presence of strict liability in other parts of the criminal law illustrates that a strict liability approach is neither unprecedented nor shocking in relation to society's standards of decency. Rather, strict liability is a legitimate and accepted method by which to achieve some of the particularized goals of the criminal law.[159]

Nor is the punishment that would be imposed upon the defendant by the "rough sex" homicide statute disproportionate to the crime or to the penalties imposed for other homicide offenses. The "rough sex" homicide statute would subject the defendant to the penalty for murder instead of the penalty for a lesser homicide offense. These penalties are by nature rationally related, as they concern different degrees of the same offense. If the legislature decides that "rough sex" homicide deserves to be treated more severely than other brands of homicide offenses, the upgrading of the penalty for such an offense would not be so out of character with a state's sentencing scheme, the sentencing schemes of the other

156 J. KLOTTER & J. KANOVITZ, CONSTITUTIONAL LAW FOR POLICE 520 (1977); *see, e.g.*, Downey v. Perini, 518 F.2d 1288 (6th Cir. 1975).

157 Trop v. Dulles, 356 U.S. 86 (1958) (stating that denationalization was a cruelly degrading form of punishment and one which causes acute mental torment and suffering).

158 J. KLOTTER & J. KANOVITZ, *supra* note 156, at 518.

159 *See supra* text accompanying notes 74-95.

states, or the goals of the criminal law to justify the judiciary's usurpation of the legislature's traditional power to prescribe criminal sentences.[160]

IV. CONCLUSION

The "rough sex" defense benefits the defendant by raising two mitigating inferences in the minds of the jury. As has been illustrated, the first of these inferences—that the victim's consent to the sexual activity that resulted in the homicide should be seen as making the defendant less blameworthy for the offense—is without justification under accepted principles of criminal law. Thus, the operation of this inference benefits the defendant illegitimately and should not be permitted.

The second inference—that because the homicide resulted as an inadvertent consequence of rough sexual activity, the defendant lacked the intent to kill at the time of the homicide and cannot be found guilty of murder—is more troublesome. As has been described, the prosecution will most likely have extreme difficulty refuting these inferences. Further, because these inferences are very beneficial to the defendant in a murder trial, it is not difficult to imagine murder defendants taking advantage of this situation through perjured reliance on the "rough sex" defense. A strict liability approach to "rough sex" homicides would eliminate the unjustified benefits given to the defendant by the first inference, would eliminate the need to prove intent to kill, and would preclude the possibility of murder defendants being rewarded through perjured reliance on the "rough sex" defense.

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160 *See* L. BERKSON, THE CONCEPT OF CRUEL AND UNUSUAL PUNISHMENT 71 (1975); Weems v. United States, 217 U.S. 349, 378-79 (1910).