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## Swingers: Morality Legislation & The Limits of State Police Power

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# SWINGERS: MORALITY LEGISLATION AND THE LIMITS OF STATE POLICE POWER

RAYMOND KU\*

## I. INTRODUCTION

At the beginning of this century, Justice Louis Brandeis defined the constitutional right to privacy as “the right to be let alone—the most comprehensive of rights and the right most valued by civilized men.”<sup>1</sup> The eloquence of Justice Brandeis’ statement, however, belies the difficulty society and courts have had in defining this most “comprehensive of rights.” From abortion<sup>2</sup> to sodomy,<sup>3</sup> we have struggled with the limits of governmental power to intrude into our personal lives, activities and decision-making. Nowhere is this struggle clearer than in issues involving human sexuality. Laws criminalizing fornication, sodomy, adultery and prostitution have drawn the fire of activists,<sup>4</sup> litigants<sup>5</sup> and academics.<sup>6</sup>

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1. *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting).

2. *See Roe v. Wade*, 410 U.S. 113, 164 (1973) (holding that a statute prohibiting abortion except when necessary to save the mother’s life was unconstitutional); *see also* *Planned Parenthood of S.E. Pa. v. Casey*, 505 U.S. 833 (1992) (finding that statute placing limitations on abortion is constitutional so long as it does not unduly interfere with a woman’s right to have an abortion).

3. *See, e.g., Bowers v. Hardwick*, 478 U.S. 186, 191 (1986) (holding that homosexuals do not have a fundamental right to engage in sodomy); *Powell v. State*, 510 S.E.2d 18, 25 (Ga. 1999) (concluding that Georgia’s sodomy statute violated the right of privacy conferred by the state constitution).

4. Laws criminalizing conduct such as sodomy and fornication have been repealed or struck down in over half the states. *See* NATIONAL LAWYERS GUILD, *SEXUAL ORIENTATION AND THE LAW* §11.01(2) at 11-8 (1992); *see also* RICHARD A. POSNER & KATHERINE B. SILBAUGH, *A GUIDE TO AMERICA’S SEX LAWS* 98-102 (1996).

5. *See, e.g., People v. Onofre*, 415 N.E.2d 936, 938-39 (N.Y. 1980) (striking down a sodomy and deviant sexual intercourse statute); *Commonwealth v. Bonadio*, 415 A.2d 47, 49-50 (Pa. 1980) (striking down a law prohibiting voluntary deviate sexual intercourse); *Gryczan v. State*, 942 P.2d 112 (Mont. 1997) (striking down laws prohibiting deviate sexual conduct); *Powell v. State*, 510 S.E.2d 18 (Ga. 1998) (striking down Georgia’s sodomy statute).

Unfortunately, at the end of this century and the dawn of a new millennium, we are no closer to understanding the limits of governmental power or the boundaries of the right to be let alone. Instead, despite "[m]uch judicial and scholarly ink [that] has been spilt in the task of expounding this paradoxical right,"<sup>7</sup> what has emerged is a hodgepodge of rules and fact specific inquiries.<sup>8</sup>

The struggle over privacy and human sexuality came to the fore, once again, when in the early morning hours of February 1999, the Florida, Broward County Sheriff's Office (BSO) raided Trapeze II, a member only, on-premise swingers' club.<sup>9</sup> Apparently, the BSO received a tip that prostitution was occurring at the club.<sup>10</sup> However, the initial undercover officers, who entered the club representing that they desired to be members, did not find prostitution; instead, they found couples engaging in sexual intercourse.<sup>11</sup> Trapeze II, which includes a bar, buffet, dance floor and game room, also provides separate back rooms in which the officers observed married couples having sex with their own spouses in view of other club members. Despite finding no evidence of prostitution, the police returned in force and arrested twenty-four patrons and employees, charging them with criminal lewdness.<sup>12</sup> The club owners and employees were also charged with operating an establishment for the purposes of lewdness.<sup>13</sup>

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6. See generally David A.J. Richards, *Sexual Autonomy and the Constitutional Right to Privacy: A Case Study in Human Rights and the Unwritten Constitution*, 30 HAST. L.J. 957 (1979); see also Kenneth L. Karst, *The Freedom of Intimate Association*, 89 YALE L.J. 624 (1979-80); Note, *Constitutional Barriers to Civil and Criminal Restrictions on Pre- and Extramarital Sex*, 104 HARV. L. REV. 1660 (1991); Michael E. Malamut, *Proposal for Revision of Archaic Statutes Implicating Private Consensual Noncommercial Adult Sexual Conduct*, 3 LAW & SEX 45 (1993).

7. LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* §15-1 (2d. ed. 1988).

8. Under the U.S. Supreme Court's current test, the right to privacy protects only those personal rights that are deemed "fundamental" or "implicit in the concept of ordered liberty." *Paris Adult Theater I v. Slaton*, 413 U.S. 49, 65 (1973) (citing *Roe v. Wade*, 410 U.S. 113, 152 (1973)). Correspondingly, efforts have been made to demonstrate how particular sexual conduct or decisions can be considered fundamental in light of the specific traditions surrounding the act in question. See *Bowers v. Hardwick*, 478 U.S. 186, 196 (1986) (concluding that there is no fundamental right to engage in same sex sodomy).

9. See Paul Brinkley-Rogers, *Raiding Sex Clubs Not a Priority, Broward Says*, MIAMI HERALD, Feb. 19, 1999, at 3B; see also Paul Brinkley-Rogers, *Swingers Club Members Told to Appear in Court*, MIAMI HERALD, March 15, 1999; *Swingers Clubs Defend Right to Share it All: The Proliferation of the Spouse-Swapping Establishments has Led to 55 Lewd-Activity Arrests in Broward County*, ORLANDO SENTINEL, Feb. 22, 1999, at B4; Paul Brinkley-Rogers, *Broward & Gomorrah*, MIAMI HERALD, Aug. 1, 1999, at 1M.

10. See Paul Brinkley - Rogers, *Raiding Sex Clubs*, *supra* note 9.

11. See *id.*

12. See *id.*

13. See *id.*

These arrests followed a prior BSO raid of a swingers' club, Athena's Forum, three weeks earlier.<sup>14</sup> Following these two raids, Broward Sheriff Ken Jenne stated that "I do not want us to cultivate the image of being the morality police. We're not . . . but we still need to send a message out there."<sup>15</sup> The message could not be clearer. Because no one was being harmed by the swingers' conduct and that conduct did not intrude upon the rights of any third parties, the swingers were being prosecuted solely because their conduct was considered immoral.

This article examines whether Florida can legitimately convict the swingers pursuant to the Florida Constitution specifically, and principles of constitutional law in general, and concludes that it cannot. In so doing, this article does not attempt to define privacy or to provide a taxonomy of activities that fall within its reach, which has been done quite thoroughly by others.<sup>16</sup> The swingers' conduct clearly falls within what scholars have characterized as the right to sexual autonomy, personhood and freedom of association.<sup>17</sup> However, rather than simply reiterating what those authors have said and applying it to the novel facts of this case, this article asks the preliminary and more fundamental question of whether the state and U.S. constitutions give the government the power to regulate the swingers' conduct in particular and sexual morality in general. Hofeldian corollaries aside,<sup>18</sup> there is a subtle but important difference between the questions: Does the government have the power to criminalize X? And do I have the right to do X?<sup>19</sup> In addition to refocusing the terms of the debate, focusing on whether government has been given the power is required by what I have argued elsewhere are the first principles underlying American Constitutionalism: 1) a constitution represents the will of the people as a whole, and 2) powers granted by a constitution must, therefore, either command the actual unanimous support of the people or be adopted through mechanisms designed to approximate the will of the people as a whole.<sup>20</sup> Asking whether a consensus exists for the principle that a particular act or right is fundamental or implicit in the concept of ordered liberty and therefore, should be free from a particular exercise of

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14. *See id.*

15. *Id.*

16. *See supra* note 6; *see also* LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 15-1 (2d ed. 1988).

17. *See supra* note 6.

18. *See generally* Wesley Newcomb Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 *YALE L.J.* 16 (1913-14).

19. *See id.*

20. *See* Raymond Ku, *Consensus of the Governed: The Legitimacy of Constitutional Change*, 64 *FORDHAM L. REV.* 535, 565-69 (1995).

governmental power presupposes that a consensus exists giving government the power in the first place. As this article demonstrates, that assumption is not only unwarranted, but is unconstitutional as well.

Part II of this article examines whether Florida's laws against committing lewdness apply to the swingers in this case. While the Florida Supreme Court has always limited the punishment of lewd acts to circumstances in which the persons engaged in the conduct under consideration invade the rights of third persons, recent lower court decisions have moved in the direction of eliminating any requirement of injury to third parties. If the lower courts' interpretations are applied to the swingers, it would represent an effort to criminalize behavior solely to uphold a particular moral view. Part III concludes that government does not have the power to regulate individual conduct under those circumstances unless the people as a whole have granted that power to the government. Lastly, part IV examines whether the regulation of sexual conduct is justified under the states' police power and concludes that in the absence of an invasion of the rights of others, the states do not have the power to regulate the swingers. As demonstrated below, this conclusion is consistent with the doctrinal limits of the police powers of the states under both federal and state constitutional law.

## II. THE OFFENSE OF LEWDNESS

Florida, like many states,<sup>21</sup> punishes individuals for lewd and lascivious behavior pursuant to numerous statutory provisions and under a variety of circumstances.<sup>22</sup> For example, section 798.02 of the Florida statutes provides, in pertinent part, that "if any man or woman, married or unmarried, engages in open and gross lewdness and lascivious behavior, they shall be guilty of a misdemeanor of the second degree."<sup>23</sup> What constitutes "lewd and lascivious behavior," however, is not defined by statute. The courts, therefore, are required to give those terms content. Prior to the prosecution of the swingers in this case, the Florida Supreme Court consistently interpreted "lewd and lascivious behavior" to mean "an intentional act of sexual indulgence or public indecency, when such act

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21. See generally *Minor v. State*, 501 S.E.2d 576 (Ga. Ct. App. 1998); *People v. Darryl M.*, 475 N.Y.S.2d 704 (N.Y. Crim. Ct. 1984); *People v. Rylaarsdam*, 181 Cal. Rptr. 723 (Cal. App. Dep't Super. Ct. 1982); *Smith v. City of Huntsville*, 515 So. 2d 72 (Ala. Crim. App. 1986); *People v. Jones*, 676 N.E.2d 646 (Ill. 1997).

22. See, e.g., FLA. STAT. ch. 796.07(2)(e) (1999) (making it unlawful "[t]o offer to commit, or to commit, or to engage in, prostitution, lewdness or assignation"); FLA. STAT. ch. 798.02 (1999) (criminalizing open and gross lewdness under certain circumstances).

23. FLA. STAT. ch. 798.02 (1999).

causes offense to one or more persons viewing it or otherwise intrudes upon the rights of others."<sup>24</sup> In contrast, more recent lower court decisions appear to eliminate this requirement.<sup>25</sup> As the following demonstrates, the swingers could only be sanctioned for lewdness as defined by the lower courts, and it is that potentially new definition that raises constitutional concerns.

#### A. THE FLORIDA SUPREME COURT

From the beginning, the Florida Supreme Court has carefully limited the scope of laws punishing lewdness.<sup>26</sup> As demonstrated by the following discussion of three relevant Florida Supreme Court decisions, "[a]cts are neither 'lewd' nor 'lascivious' unless they substantially intrude upon the rights of others."<sup>27</sup> In *Pitchford v. State*,<sup>28</sup> the court's earliest reported decision interpreting the statutory prohibition against lewd conduct, the defendants were prosecuted for engaging in sexual intercourse for a period expanding for more than two years.<sup>29</sup> The defendants, Pitchford, a married white man, and Clerk, an unmarried black woman occasionally employed as a field worker by Pitchford, were found in a state of undress in Clerk's bedroom by members of the sheriff's office.<sup>30</sup> In reversing their convictions, the court defined the crime of "open and gross lewdness and lascivious behavior" as "such conduct as would bring upon a husband and wife the penalty of the statute. *It must be 'open and gross lewdness and lascivious behavior,' extremely indecent, immoral, and offensive.*"<sup>31</sup> While the court found the defendants' conduct to be "reprehensible," either because it was adulterous, unmarried or interracial, it was not the type of conduct prohibited by the statute.<sup>32</sup> In reaching this conclusion, the court relied heavily on the fact that the prosecution's principal witness testified that "no one could see into the room through the windows without going very close and peering in," and that he could not observe the defendants

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24. *Schmitt v. State*, 590 So. 2d 404, 410 (Fla. 1991) (holding that acts are lewd or lascivious only when they intrude upon the rights of others); *see also Rhodes v. State*, 283 So. 2d 351 (Fla. 1973) (stating that the lascivious acts need not be performed in "public," but rather only in the presence of one or more persons) (quoting *Chesebrough v. State*, 255 So. 2d 675, 678 (Fla. 1971)); 50 AM. JUR. 2D *Lewdness, Indecency, etc.* § 1 (1995); *infra* Part II.A.

25. *See infra* Part II.B.

26. *See* FLA. STAT. ch. 798.02 (1999).

27. *Schmitt*, 590 So. 2d at 410.

28. 65 Fla. 147 (Fla. 1913).

29. *See Pitchford v. State*, 65 Fla. 147, 147 (Fla. 1913).

30. *See id.* at 148.

31. *Id.* at 147-48 (emphasis added).

32. *See id.* at 149.

until he entered Clerk's bedroom.<sup>33</sup> The court also concluded that, although people saw Pitchford visit Clerk's house in broad daylight, that fact was insufficient to sustain the conviction.<sup>34</sup> Accordingly, *Pitchford* stands for the proposition that, at the very least to sustain a conviction for lewd conduct, the state must demonstrate that the defendants engaged in extremely indecent, immoral and offensive conduct that was actually observed by outsiders. The fact that outsiders might know what is going on behind closed doors and disapprove is insufficient.

The Florida Supreme Court further clarified the definition of "lewd and lascivious" in *Chesebrough v. State*.<sup>35</sup> The court affirmed the convictions of a husband and a wife for engaging in sexual intercourse in the presence of their minor child for the purpose of demonstrating procreation.<sup>36</sup> Initially, the court noted that the words lewd and lascivious are synonymous with an "unlawful indulgence of lust, signifying that form of immorality which has a relation to sexual impurity . . . gross indecency with respect to sexual relations."<sup>37</sup> The obvious circularity of this initial definition aside, the Court's opinion goes on to further clarify the scope of the offense. According to the Court, the predecessor of the statutes punishing lewdness was the common law offense of open and public indecency.<sup>38</sup> The statutes modified the common law by making it "no longer necessary that such act be committed in a public place or in the presence of many people."<sup>39</sup> Instead, it broadened the offense to include acts "offensive to one or more persons present."<sup>40</sup> Additionally, in rejecting constitutional challenges based upon overbreadth and the right to privacy, the court explained that individuals are not at liberty to engage "in sexual intercourse at such times and places as the parties may desire and in the presence of others."<sup>41</sup> Accordingly, while there was no evidence that the defendants' child was offended by the conduct of his parents, the state could certainly act in the interest of protecting the child as *parens patriae*.<sup>42</sup> As the court has recognized elsewhere, "it is evident beyond all doubt that any type of sexual conduct involving a child constitutes an intrusion upon the rights of that child, whether or not the child consents and whether or not

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33. *Id.*

34. *See id.*

35. 255 So. 2d 675 (Fla. 1971).

36. *See Chesebrough v. State*, 255 So. 2d 675, 679 (Fla. 1971).

37. *Id.* at 677.

38. *See id.* at 678.

39. *Id.*

40. *Id.*

41. *Id.* at 679.

42. *See Chesebrough*, 255 So. 2d 677-79.

that conduct originates from a parent.”<sup>43</sup>

Despite the court’s recognition that the statute expanded the common law prohibition, the limited nature of that expansion is made clear by the disagreement between the majority and the dissent in *Chesebrough*. While the dissent agreed that the statute was facially constitutional, Justice Ervin disagreed that it could be constitutionally applied to the parents in question.<sup>44</sup> According to Justice Ervin, “I don’t believe the statute was intended to invade the privacy of a family and a private home, as here, and criminalize the acts of the mother and father.”<sup>45</sup> For the dissent, therefore, regardless of the wisdom of the parents’ actions, the fact that they took place in their home and not in a public place placed the conduct beyond the reach of the state.<sup>46</sup> In light of the dissent, the court’s opinion is best understood as recognizing the diminished importance of where the conduct occurred, focusing instead on whether the conduct invades the rights of any third parties that may be present.

The diminished importance of where the conduct occurs and the increased focus on whether the rights of others are being intruded upon is also apparent in *Campbell v. State*.<sup>47</sup> Campbell was a waiter at Robbie’s Yum Yum Tree Lounge, an establishment frequented by gay men.<sup>48</sup> At approximately 2:00 a.m. on the weekend of July 4, 1974, undercover police who were aware that a gay gathering was occurring in the area observed Campbell fondle a fully clothed patron in the public area of the Yum Yum Tree.<sup>49</sup> In reversing Campbell’s conviction, the court reiterated the “extremely indecent” requirement articulated in *Pitchford* and concluded that whatever that term means, it requires more than fondling a member of the same sex.<sup>50</sup> Moreover, the court questioned “who in the dark and crowded recesses of the Yum Yum Tree at 2:00 a.m. on July 6, 1974, was ‘offended’?”<sup>51</sup> As such, it concluded that no reasonable person could have concluded that the defendant’s conduct “at the time and place and under the circumstances it occurred constituted” criminal lewdness.<sup>52</sup>

Under the decisions of the Florida Supreme Court, it would appear

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43. *Schmitt*, 590 So. 2d at 410-11.

44. *See Chesebrough*, 255 So. 2d at 679 (Ervin, J., dissenting).

45. *Id.*

46. *See id.*

47. 331 So. 2d 289 (Fla. 1976).

48. *See Campbell v. State*, 331 So. 2d 289, 289 (Fla. 1976).

49. *See id.*

50. *See id.* at 289-90.

51. *Id.*

52. *Id.*



that the Florida courts are unable to convict the swingers of lewdness. First and foremost, there is absolutely no evidence that the swingers' sexual acts offended anyone present or, as there appears to be no claim that mentally incompetent individuals or children were present, otherwise intruded upon the rights of third parties. *Chesebrough* is, therefore, clearly distinguishable from this case. Moreover, as in *Pitchford*, the fact that members of the community may have observed people entering and leaving the club and suspected that sex was occurring therein does not constitute an invasion of protected rights.<sup>53</sup> Similarly, *Campbell* demonstrates that whether or not the undercover officers may have been offended is irrelevant.<sup>54</sup> In that case, the question was whether anyone else at the Yum Yum Tree was offended, not whether the police were offended.<sup>55</sup> With respect to Trapeze II, who was offended by the conduct of the club members in the early morning hours of February 7, 1999? Given that the members of such organizations join specifically because they share a common belief in the swinging lifestyle, it would be hard to argue that anyone was offended.<sup>56</sup>

Furthermore, the acts in question took place in the confines of a private room in a private club otherwise hidden from non-club members.<sup>57</sup> As in *Pitchford*, there was simply no way to be exposed to the sexual conduct in question short of actively seeking it out. For example, in order to even observe the activities in question, the undercover officers of BSO 1) represented that they desired to be members of the club, 2) represented that they were not offended by nudity or sexual activity, 3) left the main rooms of the club to enter the private rooms, 4) undressed in a locker room, and 5) entered the restricted areas of the club.<sup>58</sup> The degree to which the general public was protected from unintentional viewing of these activities would suggest that the swingers' argument, that no reasonable person could conclude that their conduct "at the time and place and under the circumstances it occurred" constituted criminal lewdness, is even more

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53. See *Pitchford*, 65 Fla. at 149.

54. See *Campbell v. State*, 331 So. 2d 289, 290 (Fla. 1976). Moreover, leaving the determination of whether a particular act can be considered lewd to the subjective sensibilities of individual police officers is an impermissible delegation of power. See *Chicago v. Morales*, 119 S. Ct. 1849 (1999) (striking down an Illinois law against loitering as unconstitutionally vague).

55. See *Campbell*, 331 So. 2d 290.

56. This is not to say that there are no circumstances under which members of Athena's Forum or Trapeze II could be offended by activities occurring between other members. Individuals who share a belief in exhibitionism, nudism and "swapping" could well be offended by acts of bestiality, violence, or mutilation.

57. See Paul Brinkley-Rogers, *Steamy Testimony Court Hears Tales of Sex at Adult Club*, MIAMI HERALD, Sep. 11, 1999, at 1B.

58. See *id.*

persuasive than the defendant's in *Campbell*, where the conduct occurred in the public area of a restaurant/bar in which members of the general public easily could have inadvertently observed the sexual contact. Consequently, under Florida Supreme Court precedent, it would appear that Florida will not be able to establish the required intrusion upon the rights of others.<sup>59</sup>

#### B. THE FLORIDA DISTRICT COURTS OF APPEAL

In light of the Florida Supreme Court's interpretation of the crime of lewdness, on what basis were the charges brought against the swingers in the first place? It would appear that the Broward County prosecutors are relying upon lower court interpretations of lewdness in the context of soliciting, engaging or committing prostitution.<sup>60</sup> As the following discussion demonstrates, it is possible to interpret these cases as punishing conduct that does not intrude upon the rights of others.

In *State v. Conforti*,<sup>61</sup> the defendant was convicted of lewdness for dancing, masturbating and performing cunnilingus upon another woman.<sup>62</sup> An undercover police officer entered Studio XXX and paid for a "two female entertainment package," and upon entering a private room, he left a tip of \$120 for the dancers who then began their performance.<sup>63</sup> In rejecting a First Amendment vagueness and overbreadth challenge, the court relied upon *Schmitt* and *Chesebrough* for the proposition that lewdness has a "sufficiently narrow meaning" under Florida law.<sup>64</sup> The court then went on to reject the defendant's privacy argument by concluding that he could have no legitimate expectation of privacy because there "can be no right to patronize a commercial establishment to buy a live, lewd performance."<sup>65</sup>

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59. Additionally, from what little information is contained in the public record, it would also appear that the conduct the swingers were actually engaged in could not be characterized as "extremely indecent" in the absence of any invasion of the rights of others. As stated in *Pitchford*, the conduct must be such that it would subject a husband and wife to criminal sanction. See *Pitchford v. State*, 65 Fla. 146, 147-48 (1913). It would appear that the only sexual activity observed by BSO was "conventional" sexual intercourse between individuals with their own spouses. Whatever "extremely indecent" means, it must require more than demonstrated in the swingers' case.

60. See FLA. STAT. ch. 796.07(1)(b), (3)(a) (1985) (defining lewdness as "any indecent or obscene act" and making it unlawful "[t]o offer to commit, or to commit, or to engage in, prostitution, lewdness, or assignation").

61. 688 So. 2d 350 (Fla. Dist. Ct. App. 1997).

62. See *State v. Conforti*, 688 So. 2d 350, 353 (Fla. Dist. Ct. App. 1997).

63. See *id.*

64. *Id.* at 357.

65. *Id.* at 358.

Similarly, in *State v. Davis*,<sup>66</sup> the court rejected a first amendment challenge to a lewdness conviction for lapdancing.<sup>67</sup> As in *Conforti*, the defendant in *Davis* performed sexual acts, danced topless, encouraged the officer to masturbate and allowed the officer to place his hand on her inner thigh.<sup>68</sup> Once again, all these acts occurred in a private room where members of the general public could not observe what was occurring.<sup>69</sup> Accordingly, these cases stand for the proposition that some acts of lewdness are punishable, even in the absence of both offense and intrusion upon rights of those present.

Obviously, because these cases involve commercial transactions, they are immediately distinguishable from the swingers' case. In both *Davis* and *Conforti*, the defendants engaged in the underlying acts in exchange for money, and both courts relied upon the commercial nature of the transaction to reject the "as applied" challenges.<sup>70</sup> As the *Conforti* court noted, "the right to privacy applies to personal matters, and not to commercial ventures or transactions."<sup>71</sup> In contrast, the swingers' acts were in no way related to a commercial venture or transaction. There is no evidence of any financial *quid pro quo* arrangement for sex, either among the members or between the club owners and the various members. Consequently, it would appear that the prostitution line of cases simply does not apply to the swingers. Despite this obvious difference, Florida's case law in this area is muddled, with the commercial cases constantly cross-referencing the non-commercial lewdness cases, and most recently, also intermingling prosecution of nude dancers under the non-commercial provision.<sup>72</sup>

It would appear, therefore, that the prosecutor in the swingers' cases would argue for an expansive interpretation of these lower court decisions involving dancers. Ignoring the commercial nature of the acts in those cases, the decisions do not require that the act intrude upon the rights of

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66. 623 So. 2d 622 (Fla. Dist. Ct. App. 1993).

67. See *State v. Davis*, 623 So. 2d 622, 623-24 (Fla. Dist. Ct. App. 1993); see also *State v. Waller*, 621 So. 2d 499, 500, 502 (Fla. Dist. Ct. App. 1993).

68. See *Davis*, 623 So. 2d at 623.

69. See *id.*

70. See *id.* at 624; see also *State v. Conforti*, 688 So. 2d 350, 358 (Fla. Dist. Ct. App. 1997) (en banc).

71. *Conforti*, 688 So. 2d at 358; see also *Davis*, 623 So. 2d at 624 ("[T]he claimed unconstitutionality of section 796.07(3) as violating the right of privacy is at odds with the state's compelling interest in outlawing prostitution, assignation and lewd behavior, particularly where such conduct involves the sale of services in a commercial enterprise.").

72. See *State v. Coyle*, 718 So. 2d 218, 219-20 (Fla. Dist. Ct. App. 1998) (holding that section 798.02 was not unconstitutionally vague as applied to two adult performers who performed their own unique form of entertainment at a club in Tampa).

third persons who are present. As discussed earlier, the elimination of this requirement is a necessary predicate to the successful prosecution of the swingers. If that is the argument, the BSO and the prosecutor are not alone in their belief that this prosecution is appropriate. In his concurring opinion in *Barnes v. Glen Theatre, Inc.*, Justice Scalia criticized the dissenters for arguing that the sole purpose of a restriction upon nudity in public places is to protect non-consenting parties from offense.<sup>73</sup> Justice Scalia argued that:

Perhaps the dissenters believe that 'offense to others' *ought* to be the only reason for restricting nudity in public places generally, but there is no basis for thinking that our society has ever shared that Thoreavian 'you-may-do-what-you-like-so-long-as-it-does-not-injure-someone-else' beau ideal—much less for thinking that it was written into the Constitution. The purpose of Indiana's nudity law would be violated, I think, if 60,000 fully consenting adults crowded into the Hoosier Dome to display their genitals to one another, even if there were not an offended innocent in the crowd.<sup>74</sup>

According to Justice Scalia, this is because "[o]ur society prohibits, and all human societies have prohibited, certain activities not because they harm others but because they are considered, in the traditional phrase, '*contra bonos mores*,' i.e., immoral."<sup>75</sup> Under those circumstances, "absent specific constitutional protection for the conduct involved, the Constitution does not prohibit them simply because they regulate 'morality.'"<sup>76</sup> As the preceding demonstrates, Justice Scalia is confident that the states have the power to enforce morality in all its forms, even in the absence of the need to protect others. Justice Scalia's confidence aside, while the states have assuredly attempted to exercise that power in the past, that practice begs the question as to whether or not they legitimately had, and/or continue to have, the power to prohibit sexual conduct when there is no harm to others solely because the conduct is deemed by some to be immoral. As the remainder of this article demonstrates, at least in the context of non-commercial sexual lifestyles, the states do not have that power.

### III. THE LEGITIMACY OF ENFORCING SEXUAL MORALITY

Whether a state can coerce individuals to conform to certain sexual norms is a long-standing issue of great debate.<sup>77</sup> In the United States, the

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73. See *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 574-75 (1991) (Scalia, J., concurring).

74. *Id.*

75. *Id.* at 575.

76. *Id.*

77. See *Harris v. State*, 457 P.2d 638, 645-47 (Alaska 1969) (summarizing the general debate).

more recent focus of that debate has been whether a zone of privacy exists either in certain places, such as the sanctity of the home or the bedroom,<sup>78</sup> or with respect to certain intimate and personal decisions.<sup>79</sup> Rather than arguing that the swingers have a right to do what they do, this section attempts to refocus the debate on the antecedent inquiry of whether government has the power to regulate their conduct in the first instance. This section begins by examining the limits of democratic governance in general, as articulated by John Stuart Mill and H. L. A. Hart, and goes on to respond to the argument of the defenders of governmental power to punish individuals for acts that violate morality alone. It then examines how that debate fits into the uniquely American theory of constitutional governance, in which the constitutional distribution of powers represents the will of the people as a whole.

#### A. MILL & HART ON LIBERTY

The modern debate on whether government can legitimately enforce morality in and of itself begins with John Stuart Mill's essay, *On Liberty*.<sup>80</sup> In that essay, Mill argues that:

[t]he only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others. His own good, either physical or moral, is not a sufficient warrant. He cannot rightfully be compelled to do or forbear because it will be better for him to do so, because it will make him happier, because, in the opinions of others, to do so would be wise, or even right.<sup>81</sup>

This, he argues, is the essence of liberty in a free society. "The only freedom which deserves the name, is that of pursuing our own good in our own way, so long as we do not attempt to deprive others of theirs, or impede their efforts to obtain it."<sup>82</sup> In other words, in the absence of the

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78. See, e.g., *Stanley v. Georgia*, 394 U.S. 557, 568 (1969) (holding that states could not punish the mere possession of obscenity in the privacy of one's own home); *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 67 (1973) ("Conduct or depictions of conduct that the state police power can prohibit on a public street do not become automatically protected by the Constitution merely because the conduct is moved to a bar or a 'live' theater stage."); *Stall v. State*, 570 So. 2d 257, 260 (Fla. 1990) ("Although one may possess obscene material in one's home, there is no legitimate reasonable expectation of privacy in being able to patronize retail establishments for the purpose of purchasing such material.")

79. See, e.g., *Griswold v. Connecticut*, 381 U.S. 479, 483-86 (1965); *Eisenstadt v. Baird*, 405 U.S. 438, 453-55 (1972); see also *supra* notes 6 and 8.

80. JOHN STUART MILL, *On Liberty* in *THREE ESSAYS* (Oxford Univ. Press 1933).

81. *Id.* at 15.

82. *Id.* at 18.

countervailing justification of preventing harm to others, the government should not have the power to punish individuals simply because others believe that their behavior is wrong or immoral. This does not mean that others should or must sit idly by in silence if they disagree with the conduct. As Mill stresses, “[h]uman beings owe to each other help to distinguish the better from the worse, and encouragement to choose the former and avoid the latter.”<sup>83</sup> We can do so by “remonstrating with him, or reasoning with him, persuading him, or entreating him.”<sup>84</sup> It simply means that it is inconsistent with the principles of individual liberty to use government to coerce the individual because “a person’s taste is as much his own peculiar concern as his opinion or his purse[,]”<sup>85</sup> and over one’s body and mind, the individual is the absolute sovereign.<sup>86</sup> Before society can punish an individual through imprisonment, inflicting physical pain or even death, deprive her of property, deny her the right to associate with family and friends or coerce her to change her behavior through the threat of punishment, a compelling justification is needed.<sup>87</sup> Any society that does not respect this basic doctrine of liberty is not free.<sup>88</sup>

This liberty, however, is not absolute. There are limited circumstances in which coercion is appropriate. According to Mill, “this doctrine is meant to apply only to human beings in the maturity of their faculties. We are not speaking of children, or of young persons.”<sup>89</sup> In other words, “[t]hose who are still in a state to require being taken care of by others, must be protected against their own actions as well as against external injury.”<sup>90</sup> As Mill’s argument is premised on the belief that it is best left to individuals to decide for themselves what is best, the individual must have the capacity to make such decisions. Mill, therefore, recognized that some degree of paternalism and coercion is necessary when an individual is not fully capable of making decisions for him or herself. While Mill did not write this doctrine into our constitution, the principles of liberty he articulated are deeply embedded in our constitutional jurisprudence and culture.<sup>91</sup>

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83. *Id.* at 93.

84. *Id.* at 15.

85. *Id.* at 103.

86. See JOHN STUART MILL, *supra* note 80, at 15.

87. See H.L.A. HART, LAW, LIBERTY, AND MORALITY 21 (1963).

88. See JOHN STUART MILL, *supra* note 80, at 18.

89. *Id.* at 15.

90. *Id.*

91. See *Planned Parenthood of S.E. Pa. v. Casey*, 505 U.S. 833, 851 (1992) (“At the heart of liberty is the right to define one’s own concept of existence, of meaning, of the universe, and of the mystery of human life.”); see also *Olmstead v. United States*, 277 U.S. 438, 478 (1928)

Mill's doctrine was certainly not without its challengers.<sup>92</sup> As demonstrated by Professor Hart, the arguments for the enforcement of morality can be summarized in three general categories.<sup>93</sup> First, proponents of government enforcement rely upon examples of moral crimes, which we supposedly would all agree should be punishable. If punishment based on morality is permissible in those circumstances, then why not in others? Second, the argument is made that the enforcement of morality is necessary to preserve society. Lastly, it is argued that regardless of any instrumental values served, the enforcement of morality is a good in and of itself. As demonstrated by Professor Hart over thirty years ago, however, none of these arguments sufficiently justify punishing an individual for immorality alone.

### 1. History and Examples

To support the punishment of immorality, advocates of the enforcement of moral crimes, from Lord Devlin to Justice Scalia, rely on history and current practice to provide us with a list of offenses ostensibly justified simply because they are immoral.<sup>94</sup> This argument has two possible interpretations. First, it can stand for the proposition that punishment is permissible because we have in the past, and presently continue, to inflict such punishment. Alternatively, the examples are held out as crimes based solely upon an immorality that we should all agree are desirable, and if we can punish morality in those circumstances, why not others? As the following demonstrates, the first argument is woefully inadequate, and the second does not withstand detailed scrutiny.

In challenging the principle that government can only punish individuals in order to protect others, proponents of the state's power to

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(Brandeis, J., dissenting) ("The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings and of his intellect . . . They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations."); *State v. Leone*, 118 So. 2d 781, 785 (Fla. 1960) ("[O]ne, if not the principal, reason for the existence of a democratic form of government is to guarantee to the individual freedom of action in those pursuits which do not harm his neighbors."); *Pavesich v. New England Life Ins. Co.*, 122 Ga. 190, 194-97 (1904); *Commonwealth v. Bonadio*, 415 A.2d 47, 49-51 (Pa. 1980); *Gryczan v. State*, 942 P.2d 112, 120-21, 125 (Mont. 1997); see generally Note, *Limiting the State's Police Power: Judicial Reaction to John Stuart Mill*, 37 U. CHI. L. REV. 605 (1969-70).

92. See generally HON. SIR PATRICK DEVLIN, *THE ENFORCEMENT OF MORALS* (1959); Lord Devlin, *Law, Democracy, and Morality*, 110 U. PA. L. REV. 635 (1962); JAMES F. STEPHEN, *LIBERTY, EQUALITY, FRATERNITY* (1967).

93. See H.L.A. HART, *supra* note 87, at 53-60 (1963).

94. See *supra* notes 73-76.

punish for immorality alone point to the existence of laws punishing cockfighting, bestiality, suicide, drug use, prostitution, sodomy, bigamy, etc.<sup>95</sup> One interpretation of the use of these examples is simply that, because governments have and do punish immorality, it is proper for them to do so. In fact, Justice Scalia suggests as much when he argued that “[o]ur society prohibits, and all human societies have prohibited, certain activities not because they harm others but because they are considered . . . immoral.”<sup>96</sup> The existence of such a practice, however, does not of its own force cast doubt upon Mill’s thesis. In conducting this examination, we are employing what Hart referred to as critical morality or “general moral principles used in the criticism of actual social institutions,” including the morality actually accepted and shared by a given social group.<sup>97</sup> In other words, we are asking not whether such practices exist, but the normative question of whether they should continue to exist—if they are morally justified.<sup>98</sup> As Justice Holmes once wrote:

[i]t is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past.<sup>99</sup>

The fact that states, such as Florida, may, in fact, have laws punishing immorality alone is no more a justification for that punishment than the argument that slavery is legitimate because it is recognized in the text of the U.S. Constitution or that it is permissible to discriminate based upon race and gender because society and governments have a long history of such discrimination. Therefore some other justification is necessary.

These examples can also be interpreted as a demonstration of the practical conclusions of history and experience.<sup>100</sup> They are offered to demonstrate our acceptance that punishment of such offenses is socially valuable. This argument, however, depends upon whether the examples offered are crimes justified by immorality alone. It cannot be justified by other principles. Leaving aside crimes based solely upon private sexual immorality, Professor Hart’s essay on *Law, Liberty, and Morality* carefully demonstrates that the other examples, often used for this purpose, can in fact be justified by principles other than morality.<sup>101</sup> For example, laws

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95. See *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 575 (1991) (Scalia, J., concurring).

96. *Id.*

97. H.L.A. HART, *supra* note 87, at 20.

98. See *id.* at 20, 27-28.

99. Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 469 (1897).

100. See H.L.A. HART, *supra* note 87, at 28-29.

101. See *id.* at 25-48.



against drug use, euthanasia and suicide may be justified by reference to paternalism—the protection of people against themselves. No matter how strong our commitment to liberty may be, we may nonetheless believe that there are certain circumstances in which individuals exercising free choice may not be doing so:

without adequate reflection or appreciation of the consequences; or in pursuit of merely transitory desires; or in various predicaments when the judgment is likely to be clouded; or under inner psychological compulsion; or under pressure by others of a kind too subtle to be susceptible of proof in a law court.<sup>102</sup>

While Mill himself may cringe at expanding the range of circumstances justifying paternalism, he did recognize that paternalism is, nonetheless, essential in a free society for those not capable of making decisions for themselves.<sup>103</sup> Similarly, laws prohibiting bestiality or cockfighting can be justified based upon a desire to prevent the suffering of, or harm to, animals as opposed to the immorality of torture.<sup>104</sup>

More importantly, prohibitions against bigamy, prostitution and public indecency can be justified under nuisance principles. According to Hart, "in a country where deep religious significance is attached to monogamous marriage and to the act of solemnizing it, the law against bigamy should be accepted as an attempt to protect religious feelings from offence by a public act desecrating the ceremony."<sup>105</sup> Under those circumstances, the bigamist is punished because of the "offensiveness to others of his public conduct, not with the immorality of his private conduct."<sup>106</sup> The same can be said for public indecency laws. Even if people personally believe in nudity and sodomy, they may still wish to avoid being subjected to the nudity or sexual acts of others without their consent.<sup>107</sup> This alternative justification for regulating indecent acts as public nuisances was recognized by the U.S. Supreme Court in *Renton v. Playtime Theatres, Inc.*,<sup>108</sup> in which the Court upheld a zoning ordinance restricting the location of theaters exhibiting indecent speech, not because such speech was immoral, but because of the harmful secondary effects, such as increased criminal activity associated with those theaters.<sup>109</sup>

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102. *Id.* at 33.

103. *See id.* at 14.

104. *See id.* at 34.

105. *Id.* at 41.

106. H.L.A. HART, *supra* note 87, at 41.

107. *See id.* at 45 ("Sexual intercourse between husband and wife is not immoral, but if it takes place in public it is an affront to public decency.")

108. 475 U.S. 41 (1986).

109. *See Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 54 (1986); *see also* *Young v.*

Likewise, England does not prohibit prostitution as a crime against morality but prohibits public soliciting because it is considered an offensive public nuisance to ordinary citizens.<sup>110</sup>

The conclusion that there are alternative justifications for punishing these offenses does not mean that the punishment of any of these offenses is necessarily justified. We may, in fact, debate the appropriateness of these principles in general, or as applied to specific situations. These explanations, however, do demonstrate that there are alternative justifications for punishing the list of "horribles" beyond the enforcement of morality. Consequently, the examples do not demonstrate that history and experience necessarily demonstrate the desirability of punishing individuals for purely immoral behavior.

## 2. The Enforcement of Morality is Necessary to Preserve Society

Another argument raised in defense of punishing conduct solely because it may be deemed immoral is that the enforcement of morality is necessary to preserve society. According to Lord Devlin, "a recognized morality is as necessary to society as, say, a recognized government."<sup>111</sup> Under this view, the breach of a moral principle is simply an offense "against society as a whole."<sup>112</sup> Consequently, even when there is no need to protect others, "the suppression of vice is as much the law's business as the suppression of subversive activities."<sup>113</sup> As Professor Hart once again demonstrates, there are two critical flaws to what Lord Devlin calls the moderate thesis.<sup>114</sup>

First, the claim that the punishment of moral transgressions is necessary to preserve society is susceptible to proof. If the enforcement of morality is instrumental in preserving society, then there would be concrete historical examples in which this occurred. However, aside from the simple assertion that "the loosening of moral bonds is often the first stage of disintegration,"<sup>115</sup> neither Lord Devlin nor any "reputable historian has

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American Mini Theatres, Inc., 427 U.S. 50, 71 (1976) (recognizing the legislative finding that the concentration of adult theaters causes deterioration of neighborhoods and increases in crime); *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 584-85 (1991) (Souter, J., concurring) (holding that the regulation of nude dancing in a private establishment is permissible to avoid secondary effects, such as prostitution, sexual assaults and other criminal activity).

110. See H.L.A. HART, *supra* note 87, at 13.

111. HON. SIR PATRICK DEVLIN, *THE ENFORCEMENT OF MORALS* 11 (1959).

112. *Id.* at 6-7.

113. *Id.* at 13-14.

114. See H.L.A. HART, *supra* note 87, at 50-52.

115. DEVLIN, *supra* note 111, at 13.

maintained this thesis, and there is indeed much evidence against it."<sup>116</sup> For example, various European nations no longer punish acts of homosexuality, and one cannot say that their societies have fallen into ruin.<sup>117</sup> The same can be said for those states in the United States that have eliminated the archaic sexual laws prohibiting acts such as sodomy.<sup>118</sup> The loosening of those moral norms did not destroy those states. Accordingly, those arguing that the enforcement of morality is necessary should be required to bring forward evidence to support that claim. Otherwise, the moderate thesis fails to justify the enforcement of morality as such, and we are asked to accept its conclusion on faith alone.

More importantly, the moderate thesis is based upon a questionable conception of society. Initially, even if the moderate thesis is accurate, we may ask whether the current society is worth preserving.

If a society were mainly devoted to the cruel persecution of a racial or religious minority, or if the steps to be taken [to preserve morality] included hideous tortures, it is arguable that what Lord Devlin terms the "disintegration" of such a society would be morally better than its continued existence, and steps ought not to be taken to preserve it.<sup>119</sup>

As our own history demonstrates, our society once demanded the subjugation of blacks, permitted the virtual extermination of Native Americans, required the subordination of women and coerced the separation of races, all in the name of morality. Yet, few today would try to defend those social orders, let alone seek to punish the "immoral" actions taken to aid in their disintegration.

Correspondingly, the claim that the enforcement of morality is necessary to preserve society fails because it conflates society with *status quo* morality. According to Hart, the moderate thesis moves from the acceptable idea that some shared morality is necessary for society "to the unacceptable proposition that a society is identical with its morality as that is at any given moment of its history, so that a change in its morality is tantamount to the destruction of a society."<sup>120</sup>

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116. H.L.A. HART, *supra* note 87, at 50.

117. See ROBERT WINTEMUTE, *SEXUAL ORIENTATION AND HUMAN RIGHTS* 136 (1995).

118. See 1993 Nev. Stat. 515; Commonwealth v. Wasson, 842 S.W.2d 487 (Ky. 1992); Gryczan v. State, 942 P.2d 112 (Mont. 1997); Campbell v. Sundquist, 926 S.W.2d 250 (Tenn. Ct. App. 1996).

119. H.L.A. HART, *supra* note 87, at 19.

120. *Id.* at 51 (citation omitted). In terms of linguistics, this is similar to France's treatment of the French language, which is considered virtually immutable because changes are seen as inconsistent with the idea of French. In contrast, the English language constantly changes while still maintaining its identity as English. See generally SIMON WINCHESTER, *THE PROFESSOR AND MADMAN: A TALE OF MURDER AND INSANITY IN THE MAKING OF THE OXFORD ENGLISH*

For example, if the swingers' conduct in this case is not prohibited, the moderate thesis argues that others may follow their example and engage in sex with partners other than their spouse and/or engage in sex in front of other consenting adults. If enough people follow the swingers, conventional morality might change. Even if enough people decide to join the swingers' lifestyle, leading to a change in conventional morality, is this the end of society? The answer is obviously no. We would still be a nation governed under the U.S. Constitution and the constitutions of the fifty states; we would still be the same pluralist melting pot of racial and ethnic groups; we would still be republicans, democrats and other political groups; we would still be a nation that eats too much junk food, watches too much television and surfs the Internet. The same can be said with respect to laws prohibiting homosexuality. Unless one equates society with the *status quo* morality, such as a Christian morality in which sexual relations are only permissible between a man and woman in the bonds of a Church sanctioned marriage, the only change wrought by permitting swingers to swing or allowing gay men and women to love one another would be a new moral order, not the end of society.<sup>121</sup> As Professor Hart noted, some would see this as "consistent not only with the preservation of a society but with its advance."<sup>122</sup> Consequently, unless there are other justifications for preserving the existing moral order, it cannot be justified by a definitional slight of hand or claiming that changing it will cause the sky to fall.

### 3. The Enforcement of Morality as an Independent Good

The last criticism of Mill's conception of liberty, what Hart describes as the "extreme thesis," is both that the punishment of immorality is a good in and of itself without regard to any instrumental ends, and also that enforcement of moral good is merely of instrumental value.<sup>123</sup> While the following summary hardly does justice to the nuanced discussion provided by Hart, a detailed discussion goes beyond the scope of this paper. Suffice it to say that Hart's argument can be summarized as follows. First, if the purpose of enforcing a particular law is simply to coerce individuals to

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DICTIONARY (1999).

121. See H.L.A. HART, *supra* note 87, at 52.

No doubt it is true that if deviations from conventional sexual morality are tolerated by the law and come to be known, the conventional morality might change in a permissive direction .... But even if the conventional morality did so change, the society in question would not have been destroyed or "subverted."

*Id.*

122. *Id.* at 52.

123. See *id.* at 54-55.

behave in a particular manner against their will when their conduct does not harm others and to force them to conform to some accepted form of behavior, then we are not enforcing morality but taboo. Moral conduct requires voluntary compliance. For example, if chastity is a moral ideal, what is valuable is voluntary restraint, not submission to coercion.<sup>124</sup> Legal enforcement of morality by way of punishment or retribution for immoral behavior makes sense when there is a victim because, under those circumstances, "pain is morally the appropriate or 'fitting' return for moral evil done."<sup>125</sup> When there is no victim, retribution "seems to rest on nothing but the implausible claim that in morality two blacks make a white: that the evil of suffering added to the evil of immorality as its punishment makes a moral good."<sup>126</sup> The extreme thesis has also been justified as the moral majority's right to express its "intolerance, indignation, and disgust."<sup>127</sup> Assuming that there is moral value in the denunciation of immoral behavior, is infliction of pain and suffering necessary when the public statements of disapproval would likewise communicate disapproval? According to Professor Hart, arguments for more emphatic denunciation simply become arguments for more effective means of instilling or strengthening respect for morality. Once that argument is made, however, punishment is no longer a good in and of itself but is merely an instrument utilized in preserving the existing morality.<sup>128</sup> Ultimately then, both the moderate and extreme theses either lose all rational substance or become arguments for preservation of the moral *status quo*. Absent some general principal justifying the preservation of any rule of social morality, *a priori* claims for their preservation are dogmatic and incapable of critical evaluation.<sup>129</sup>

Critics of Mill, however, do not appear to go so far as to argue that the enforcement of morality is justified because of divine commandment. Instead, they argue that it is required by adherence to democratic principles.<sup>130</sup> In other words, they claim it is the majority's right to impose

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124. See *id.* at 57-58.

125. *Id.* at 58-59.

126. *Id.* at 60.

127. DEVLIN, *supra* note 111, at 17 (citation omitted).

128. See H.L.A. HART, *supra* note 87, at 66.

129. This may be acceptable for those who believe that there is no need to justify a particular moral and that it must be accepted without question or explanation. This article, however, is directed to those who believe that it is both possible and necessary to critically evaluate claims about morality.

130. See STEPHEN, *supra* note 76, at 159 ("To be able to punish, a moral majority must be overwhelming."); see also *Lochner v. New York*, 198 U.S. 45, 75-76 (1905) (Holmes, J., dissenting) (arguing that judges should respect "the right of a majority to embody their opinions in law .... [and that] the word liberty . . . is perverted when it is held to prevent the natural

its conception of morality upon the rest of society.<sup>131</sup> However, as Hart recognized, “[t]he central mistake [in this argument] is a failure to distinguish the acceptable principle that political power is best entrusted to the majority from the unacceptable claim that what the majority do with that power is beyond criticism and must never be resisted.”<sup>132</sup> While democratic governments are committed to majority rule, this does not mean that the majority is always right or always justified when it acts.<sup>133</sup> While this assumption is problematic under democratic theory in general, as the following discussion demonstrates, it is particularly inappropriate under a constitutional theory of government.

#### B. CONSENSUS CONSTITUTIONALISM

In addition to the objections arising from democratic theory and moral philosophy, the punishment of conduct based solely on morality raises concerns under our constitutional form of government. Unlike the British tradition that produced Mill, Hart and Devlin, in which parliament is the supreme political authority whose power is limited only by appeals to external principles such as justice or natural law, the governments of the states and of the United States are bound by written constitutions. Both the U.S. Constitution and the constitutions of the states are based upon the following “first principles”: 1) a constitution represents the will of the people as a whole, and 2) powers granted by a constitution must, therefore, either command the actual unanimous support of the people or be recognized through mechanisms designed to approximate that consensus.<sup>134</sup> The argument, therefore, that a majority of the population can impose its morality upon the rest of the nation or a state is only tenable if the enforcement of morality is a power delegated to government by the people as a whole.

These first principles flow from the uniquely American conception of

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outcome of a dominant opinion”); *Bowers v. Hardwick*, 478 U.S. 186, 196 (1986) (upholding a prohibition of private homosexual sodomy enacted solely on “the presumed belief of a majority of the electorate in [the jurisdiction] that homosexual sodomy is immoral and unacceptable.”).

131. See *Gryczan v. State*, 942 P.2d 112, 124 (Mont. 1997) (“The State contends that ‘societal notions’ of appropriate sexual conduct provide rational grounds for [the statute], and that this is simply one of many areas of the law where legislative majorities have made moral choices contrary to the desire of minorities.”); see also Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 28-29 (1971) (arguing that a political majority “surely has as much control over the moral and aesthetic environment as it does over the physical, for such matters may even more severely impinge upon [the majority’s] gratifications”).

132. H.L.A. HART, *supra* note 87, at 79.

133. See *id.* at 80-81.

134. See generally *Ku*, *supra* note 20.

popular sovereignty.<sup>135</sup> As part of the evolution of popular sovereignty in Anglo-American law,<sup>136</sup> the Founders flipped “the classic conception of sovereignty on its head.”<sup>137</sup> No longer was government, be it King or Parliament, the supreme power; rather, “the people are the only legitimate fountain of power.”<sup>138</sup> The American conception of popular sovereignty represented more than mere rhetoric, and steps were taken to turn the fiction of popular sovereignty into practical reality.<sup>139</sup>

The understanding that a constitution represents the written embodiment of the people’s will<sup>140</sup> led to the requirement that constitutions be adopted by the people rather than by the legislatures, which is originally what had occurred in most states. For example, South Carolinians argued that “we have no such thing as a Constitution”; the document of 1778 was ‘a mere cobweb,’ since ‘the principles of the Constitution are, at present established no otherwise than by a simple Act of the Legislature.’<sup>141</sup> Having differentiated between what Bruce Ackerman characterizes as “higher lawmaking” and “normal lawmaking,”<sup>142</sup> Americans during the founding era realized that the origins of these documents did not entitle them to the status of a constitution. A constitution only gains the status of fundamental law when it is adopted and alterable by the people themselves and not some subset of them; as noted by Justice Haymond of the West Virginia Supreme Court, “[u]nlike ordinary legislation, a constitution is enacted by the people themselves.”<sup>143</sup> The history and development of constitutional governance during the founding period make it clear that a constitution does not derive its power and legitimacy from its title.<sup>144</sup> “It is not enough for the government or a group of citizens to simply call a document or certain laws a constitution.”<sup>145</sup> “It is not the name, but the authority which renders an act obligatory.”<sup>146</sup> “A constitution derives its

135. For a more detailed discussion of this theory see Ku, *supra* note 20, at 547-74.

136. See EDMUND S. MORGAN, *INVENTING THE PEOPLE: THE RISE OF POPULAR SOVEREIGNTY IN ENGLAND AND AMERICA* 13-15 (1988).

137. Ku, *supra* note 20, at 549.

138. THE FEDERALIST No. 49 (James Madison).

139. See MORGAN, *supra* note 136, at 13-15 (describing popular sovereignty as a fiction in both England and the American colonies).

140. See Ku, *supra* note 20, at 550-51.

141. GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC 1776-1787* 279, 289 (1969).

142. See BRUCE ACKERMAN, *WE THE PEOPLE* 1 FOUNDATIONS 6 (1991).

143. *Lance v. Board of Educ. of the County of Roane*, 170 S.E.2d 783, 793 (W. Va. 1969) (Haymond, J., dissenting).

144. See Ku, *supra* note 20, at 552.

145. *Id.*

146. THOMAS JEFFERSON, *WRITINGS* 249 (The Library of America 1984).

fundamental, 'higher law' status only when it represents the will of the supreme lawmaker—the people acting in their sovereign capacity."<sup>147</sup>

While the preceding discussion on popular sovereignty and constitutionalism is hardly controversial, defining who "We the People" are has been more contentious. It is often suggested that a constitution must reflect the will of the majority.<sup>148</sup> In contrast, as I have argued elsewhere, constitutional theory makes sense only if "We the People" means all of the people to be governed by the constitution, not simply a portion of them.<sup>149</sup> For example, as early as 1776 it was suggested that "'it is absolutely necessary that the whole should be active in the matter, in order to surrender their privileges in this case. . . . ' since it was the society itself that was being constituted."<sup>150</sup> Another example is provided by the Massachusetts Constitution of 1780, which declares itself to be "'a social compact, by which the whole people covenants with each citizen, and each citizen with the whole people, that all shall be governed by certain laws for the common good."<sup>151</sup>

This conclusion is also supported by the Founders' concerns over democratic despotism. As any student of American history or constitutional law knows, having rejected tyranny of the minority in the form of monarchical or parliamentary rule from England, one of the principal concerns of the Founders and purposes of constitutional governance was to prevent democratic despotism.<sup>152</sup> Madison, Wilson and even anti-federalist Jefferson were concerned by a new form of tyranny—tyranny of the majority.<sup>153</sup> According to Madison, the Founders proposed the uniquely American theory of constitutional governance as the remedy to this evil.

If a faction consists of less than a majority, relief is supplied by the republican principle, which enables the majority to defeat its sinister

147. See Ku, *supra* note 20, at 552.

148. See Akhil R. Amar, *The Consent of the Governed: Constitutional Amendment Outside Article V*, 94 COLUM. L. REV. 457, 460 (1994); see also *Lochner v. New York*, 198 U.S. 45, 75-76 (1905) (Holmes, J., dissenting) (arguing that judges should respect the right of the majority to embody their opinions in the law and that "the word liberty . . . is perverted when it is held to prevent the natural outcome of a dominant opinion").

149. See Ku, *supra* note 20, at 557-76.

150. WOOD, *supra* note 141, at 289.

151. *Id.* Similar sentiments were expressed by what has been called the "first proposal in history for a written constitution based on inalienable natural rights." THE CAMBRIDGE HISTORY OF POLITICAL THOUGHT 1450-1700 412 (J.H. Burns ed., 1991). The Leveller movement in 17th century England proposed that every Englishman sign an "Agreement of the People" to "transfer to his representatives the powers specified therein." MORGAN, *supra* note 136, at 72.

152. See Ku, *supra* note 20, at 563-65.

153. See *id.*



views by regular vote . . . . When a majority is included in a faction, the form of popular government, on the other hand, enables it to sacrifice to its ruling passion or interest both the public good and the rights of other citizens. To secure the public good and private rights against the danger of such a faction, and at the same time to preserve the spirit and the form of popular government, is then the great object to which our inquiries are directed.<sup>154</sup>

Because a majority can subvert the public good or invade the rights of other citizens through normal politics, and potentially through higher lawmaking, safeguards against majority tyranny are required in both.<sup>155</sup> However, even if we interpret the safeguards embodied in the U.S. and subsequent state constitutions as limited to controlling the effects of factions during normal lawmaking alone, to argue that those same factions are entitled to that power outright during higher lawmaking is a non-sequitur.

The dangers presented by a group of people invading the rights of others do not disappear in the context of creating or altering a constitution. If anything, those dangers are greater in the absence of external limits, such as those provided by a constitution. If the source of all political power does not lie outside the people or with a portion of them, then it stands to reason that its source is all of the people that are to be governed. "It is *essential* to . . . a [republican] government that it be derived from the great body of the society, not from an inconsiderable proportion, or a favored class of it."<sup>156</sup> This then requires that the powers granted by a constitution actually command the unanimous consent of the people, or as the Founders provided, approximate actual consensus.<sup>157</sup>

The constitutional preconditions for a democratic majority to speak for the minority has been described as part of the moral reading of the Constitution.<sup>158</sup> For example, Ronald Dworkin notes that before a group can claim either that their right to self-determination or that the liberty of the collective people has been infringed by limits upon their power to act over an individual's objection,<sup>159</sup> there must be "some connection between

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154. THE FEDERALIST NO. 10 19-20 (James Madison) (Roy P. Fairfield ed., 2d ed. 1981).

155. See Ku, *supra* note 20, at 565.

156. THE FEDERALIST NO. 39 112 (James Madison) (Roy P. Fairfield ed., 2d ed. 1981).

157. See Ku, *supra* note 20, at 568-69. Perhaps recognizing that actual consensus is impractical, the Founders relied upon various "republican filters" or "auxiliary precautions," such as supermajority rule, representation, deliberation and popular ratification, to approximate consensus in the adoption and amendment of the Constitution. See *id.* at 569-76.

158. See generally RONALD DWORKIN, FREEDOM'S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION (1996); see also Richards, *supra* note 6.

159. The claim must be one involving the rights of groups as opposed to individuals because

an individual and a group that makes it *fair* to treat him—and *sensible* that he treat himself—as responsible for what it does.”<sup>160</sup> This is what Professor Dworkin calls “moral membership.”<sup>161</sup> Moral membership requires, among other things, equal concern for the interests of all members and moral independence.<sup>162</sup> David Richards describes similar requirements, which he refers to as the right to autonomy and moral equality.<sup>163</sup> Autonomy is based on the assumption that all persons have the capacity to determine for themselves the “object [of] one’s life and the way it is lived.”<sup>164</sup> In other words, “autonomy gives to persons the capacity to call their life their own.”<sup>165</sup> Moral equality requires that human institutions and relationships “guarantee to each person equal concern and respect in exercising” their capacity to determine what to do with their lives.<sup>166</sup>

Obviously, the conditions for moral membership must exist during normal and higher lawmaking. In the context of normal lawmaking, there is a presumption that the constitution guarantees these conditions.<sup>167</sup> The presumption is based on the belief that the constitution guarantees those conditions by protecting certain liberties, such as freedom of speech, the right to vote, equal protection and due process, to name a few, from majorities during normal lawmaking.<sup>168</sup> During higher lawmaking, however, nothing guarantees moral membership except strict equal concern and respect for the autonomy of the other potential members of the polity. Strict equal concern and respect for all individuals to determine what is good for themselves necessarily requires unanimous agreement among those individuals.

While at one point in our history it may have been that those who were allowed to constitute society and create constitutions, Christian, European, white men, all believed that Christian morality should be enforced even in issues such as sexuality, no such consensus exists today. When such a consensus existed, if ever, it could reasonably be seen as a desire to give the government the power to keep the individual on what all

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no real argument can be made that a particular individual’s moral freedom is diminished by denying that individual the right to impose his or her values on others. See Steven G. Gey, *Is Moral Relativism a Constitutional Command?*, 70 IND. L.J. 331, 366 (1995).

160. DWORKIN, *supra* note 158, at 23.

161. *Id.*

162. *See id.* at 25.

163. *See* Richards, *supra* note 6, at 964.

164. *Id.* at 965.

165. *Id.*

166. *Id.* at 968, 970-99.

167. *See* DWORKIN, *supra* note 158, at 23-24; *see also* Ku, *supra* note 20, at 559.

168. *See* Ku, *supra* note 20, at 559-60.

agreed was the right moral path.

Enforcement under those circumstances is not contrary to individual liberty. Rather, because the individuals desired and agreed that government should have that power, it supports those individual's wishes, though perhaps not their immediate impulses. However, why would individuals with diverse and even contradictory conceptions of the good life allow others to tell them how to live their own lives? If they would not have allowed others, even overwhelming numbers of others, to force those views upon them in the absence of government, why would they agree to allow those same individuals to do so through the mechanisms and power of government?

This is not to say that individuals can and do have the right to withdraw their consent as they see fit or when it serves their purpose. For example, with the exception of the handful of individuals who believe that government has no rightful place in any society and who may be treated as existing outside of society, it is safe to say that we all agree that the states have, and should have, the power to protect our health and safety. As the enlightenment philosophers argued long ago, protecting ourselves from others is the central purpose and benefit of societies and governments. We exchange our unfettered right to injure others in order to be free from injury ourselves. Similarly, we may even all agree that government should exercise some degree of paternalism because we recognize that we may not always have the capacity, either as a result of age or physiological condition, to properly make decisions for ourselves. Having explicitly or implicitly agreed that government should exercise such powers, short of withdrawing ourselves from society, any one of us could not legitimately claim to exempt him or herself. Why would the other members of society agree to such a result? Just as importantly, we may all agree that, under certain conditions, we will accept the wishes of others, such as when the government exercises the power to protect health and safety. The key, however, is that we all agree to those circumstances and conditions. As recognized by the Supreme Court of Alaska:

[o]n many subjects there is widespread agreement and almost no division of society about the propriety of legal control of human behavior. On other subjects there is such sharp division of opinion that only the pluralistic nature of our democratic system, in which the shared belief in mutual tolerance takes precedence over differences in moral belief, prevents a destructive divisiveness in our social order.<sup>169</sup>

With respect to the regulation of conduct when no one's rights are invaded,

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169. *Harris v. State*, 457 P.2d 638, 645-46.

no such consensus, either in theory or reality, exists.

Consequently, for government to legitimately exercise the power to punish individuals for violations of morality alone, the power must be granted by the consensus of the governed. Regardless, then, of what one thinks of Mill's doctrine, we may question whether a consensus exists delegating to government the power to regulate individual conduct that does not invade the rights of others under the first principles of constitutional law.<sup>170</sup> While that specific power is not expressly delegated to either the states or the federal government, the remaining section examines both whether it falls within the scope of a power that we would all agree should be exercised by the state, namely the police power, and also what role the judiciary should play in making that determination.

#### IV. LIMITS OF THE POLICE POWER OF THE STATE

The issue remains whether the people as a whole delegated to the states the power to regulate conduct that does not invade the rights of others. While the state constitutions are based upon the same theory of governance as the U.S. Constitution, they differ in form.<sup>171</sup> Whereas the U.S. Constitution enumerates the specific powers that the national government can exercise, most state constitutions generally delegate to the legislature the "legislative power."<sup>172</sup> It has been argued that given this delegation, the state legislative power is absolute and limited only by explicit prohibitions in the state and U.S. Constitutions.<sup>173</sup> This understanding, however, has been challenged from the beginning. Justice Chase, in his now famous opinion in *Calder v. Bull*,<sup>174</sup> stated that:

I cannot subscribe to the *omnipotence* of a *State Legislature*, or that it is *absolute and without control*; although its authority should not be *expressly* restrained by the *Constitution*, or *fundamental law*, of the State. *The people of the United States erected their Constitutions, or forms of government, to establish justice, to promote the general welfare, to secure the blessings of liberty; and to protect their persons and property from violence. The purposes for which men enter into society will determine the nature and terms of the social compact; and*

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170. Despite the temptation to do so, it would appear to be unwise to adopt the reductionist position employed by the Supreme Court in *Bowers* and ask the ultimate, specific question of whether a consensus exists for government to punish sodomy.

171. See generally *Ku*, *supra* note 20, at 569-72.

172. See, e.g., FLA. CONST. art. III, § 1; see generally THOMAS M. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE UNITED STATES OF THE AMERICAN UNION (1868).

173. See COOLEY, *supra* note 172, at 70-99.

174. 3 U.S. (1 Dall.) 386 (1798).

as they are the foundation of the legislative power, they will decide what are the proper objects of it: The nature, and ends of legislative power will limit the exercise of it. This fundamental principle flows from the very nature of our free Republican governments. . . . There are acts which the Federal, or State, Legislature cannot do, without exceeding their authority. There are certain vital principles in our free Republican governments, which will determine and over-rule an apparent and flagrant abuse of legislative power . . . . An [act] of the Legislature (for I cannot call it a law) contrary to the great first principles of the social compact, cannot be considered a rightful exercise of legislative authority.<sup>175</sup>

Accordingly, Justice Chase believed that limits on governmental power are inherent in the delegation of power itself and that guidance can be found in the reasons people enter into society, the establishment of justice, promotion of the general welfare, securing liberty and protecting their persons and property from violence.<sup>176</sup>

In addition to explicit limitations imposed by state bills of rights or constitutional amendments, the state's legislative power has, in practice, been considered co-terminus with the police power.<sup>177</sup> Defining the outer limits of legislative power with the police power provides some limit to the power of a state, while simultaneously serving many of the goals recognized by Justice Chase. In its broadest sense, the police power of a State

embraces its whole system of internal regulation, by which the state seeks not only to preserve the public order and to prevent offences against the State, but also to establish for the intercourse of citizens with citizens those rules of good manners and good neighborhood which are calculated to prevent a conflict of rights, and to insure to each the uninterrupted enjoyment of his own so far as is reasonably consistent with a like enjoyment of rights by others.<sup>178</sup>

In other words, the police power of the state "extends to the protection of the lives, limbs, health, comfort, and quiet of all persons, and the protection of all property within the State."<sup>179</sup> As such, the police power appears to be consistent with Mill's doctrine—the power to protect individuals from the invasion of their rights by others.<sup>180</sup> Moreover, as broad as the states' powers are under the police power, the protection of morals alone does not

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175. *Calder v. Bull*, 3 U.S. (1 Dall.) 386, 387-88 (1798) (emphasis added).

176. *See Calder*, 3 U.S. (1 Dall.) at 388.

177. *See Limiting the State's Police Power*, *supra* note 91, at 608.

178. *COOLEY*, *supra* note 172, at 829.

179. *Id.* at 831 (internal quotation omitted).

180. *See infra* notes 184-85.

appear to be included. While the police power has been described in *dicta* as the power to protect public health, safety and morals,<sup>181</sup> this can be interpreted to mean nothing more than the uncontroversial recognition that when laws protect individuals from the invasion of their rights by others, there is a moral component to that protection.<sup>182</sup> As such, the preservation of morals when no one's rights are invaded is not within the state's police power.

#### A. A *LOCHNER* ASIDE

As a preliminary matter, any mention of judicially imposed limits based upon the police power of the state raises the specter of criticism of judicial activism and of *Lochner v. New York*,<sup>183</sup> in which the Court invalidated a state effort to pass laws regulating the working conditions of bakers.<sup>184</sup> For most lawyers, judges and legal scholars, the Supreme Court's decision in *Lochner* and its subsequent rejection is to the legal profession what the Vietnam war is to the U.S. military—a difficult and troubling precedent cautioning future action. Like the Vietnam war, however, it is also a lesson that can be read too broadly. First, regardless of what one thinks about the Court's articulation of the right to freedom of contract, the analytical framework used by the Court, examining whether a particular exercise of legislative authority could be considered police power legislation, was well accepted by even the dissenters and was employed by the state courts as well.<sup>185</sup> Second, the disagreement in *Lochner* was not over what Justice Holmes suggested, whether the Court could force a *laissez-faire* economic theory upon the nation,<sup>186</sup> but over whether

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181. See *Holden v. Hardy*, 169 U.S. 366, 392 (1898) (“While this court has held . . . that the police power cannot be put forward as an excuse for oppressive and unjust legislation, it may be lawfully resorted to for the purpose of preserving the public health, safety or morals.”) (citations omitted).

182. See Gey, *supra* note 159, 331 (“This does not mean that government action may never include a moral component. To some extent, government action will always be based on notions of morality, and it would be foolish to dispute that morality enters into the decision-making processes of political policy makers.”).

183. 198 U.S. 45 (1905).

184. See CASS R. SUNSTEIN, *THE PARTIAL CONSTITUTION* 45 (1993) (“The period is often thought to symbolize an unjustified form of judicial ‘activism’: judicial intrusions into the democratic process without adequate support from the text and history of the Constitution.”).

185. See HOWARD GILLMAN, *THE CONSTITUTION BESIEGED: THE RISE AND DEMISE OF LOCHNER ERA POLICE POWERS JURISPRUDENCE* 129-33 (1993).

186. See *id.* at 131 (“[T]his case is decided upon an economic theory which a large part of the country does not entertain, that is, laissez-faire, and ‘a constitution is not intended to embody a particular economic theory.’”); see also *Lochner*, 198 U.S. at 75-76 (Holmes, J., dissenting).

maximum hour laws actually protected health and safety.<sup>187</sup> In this respect, the Court's conclusion is clearly subject to criticism for ignoring the very real connection between maximum work hour laws and health and safety.<sup>188</sup> Lastly, with respect to the concept of freedom of contract, the *Lochner* era decisions are erroneously based upon *status quo* neutrality or, in other words, "a particular conception of neutrality, one based on existing distribution of wealth and entitlements."<sup>189</sup> Maximum hour and wage laws were considered unconstitutional "class legislation" because they altered existing economic rights, which were seen as natural, in favor of one group at the expense of another.<sup>190</sup> The subsequent rejection of *Lochner* is, therefore, also understood as a recognition that existing property and economic rights are themselves created and maintained by law,<sup>191</sup> and legislatures, therefore, should have greater freedom in reallocating those rights.

While we may disagree with the Supreme Court's health and safety conclusion and the economic premise in *Lochner*, the underlying analytical framework, which examines whether a legislative act falls within the police power as an effort to promote health and safety, has never been rejected. Even in rejecting *Lochner* and its progeny, Justice Stone made clear in the famous *Carolene Products*' footnote 4 that, while the judiciary would defer to the legislature with respect to economic legislation, searching judicial inquiry would be appropriate in other circumstances.<sup>192</sup> As one commentator noted, "the Court did not cut back on *Lochner* by distinguishing between reasonable and arbitrary state regulations... instead, it distinguished in the *Carolene Products* case between economic and noneconomic rights, giving government plenary power to regulate the former and little power over the latter."<sup>193</sup> In fact, the need to examine whether a particular legislative act is within the constitutional grant of power received renewed attention even in the economic realm following the U.S. Supreme Court's decision in *United States v. Lopez*,<sup>194</sup> in which the Court invalidated legislation as beyond the grant of Congress's power

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187. See GILLMAN, *supra* note 185, at 128-34.

188. See *id.* at 128-33.

189. SUNSTEIN, *supra* note 184, at 45.

190. See *id.* at 40; see also GILLMAN, *supra* note 185, at 132-33.

191. See SUNSTEIN, *supra* note 184, at 58 ("We must lay hold of the fact that economic laws are not made by nature. They are made by human beings.")

192. *United States v. Carolene Products Co.*, 304 U.S. 144, 152-53 n.4 (1938).

193. WILLIAM E. NELSON, *THE FOURTEENTH AMENDMENT: FROM POLITICAL PRINCIPLE TO JUDICIAL DOCTRINE* 200 (1988) (internal citation omitted).

194. 514 U.S. 549 (1995).

under the Commerce Clause.<sup>195</sup> Consequently, despite the Court's experience with *Lochner*, determining whether a legislative act is consistent with the protection of public order, health and safety remains, and should remain, a viable and important constitutional inquiry.

## B. DEFINING THE POLICE POWER

### 1. The General Framework

The analytic framework for determining whether a statute is a valid exercise of the police power is well established. In general, for a statute to be a valid exercise of the police power, it must benefit the public generally and not simply a particular segment of the public, and the means must not unduly oppress individual liberty.<sup>196</sup> As stated by the U.S. Supreme Court:

[T]o justify the State in thus interposing its authority in behalf of the public, it must appear, first, that the interests of the public generally, as distinguished from those of a particular class, require such interference; and, second, that the means are reasonably necessary for the accomplishment of the purpose, and not unduly oppressive upon individuals.<sup>197</sup>

The underlying justification for these limits was the Madisonian aversion to allowing government to become the tool of factional or class politics.<sup>198</sup> "The common assumption was that the rights of nonmajorities would be best protected not by having judges divine a set of 'preferred freedoms' and then evaluate whether a state's interest was sufficiently 'compelling,'" but by limiting the proper scope of legislation to generally applicable laws that serve a genuine public purpose.<sup>199</sup> A state's effort to regulate the sexual conduct of individuals when that conduct does not invade the rights of others fails to satisfy these requirements of the police power. In the absence of harm to others, the regulation of individual conduct does not benefit the public generally. Instead, it impermissibly benefits a particular class of citizens at the expense of another. As the following demonstrates, this conclusion is consistent with the decisions of other states as well as with existing Florida privacy law.

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195. See *United States v. Lopez*, 514 U.S. 549, 552, 567 (1995); see also *City of Boerne v. Flores*, 117 S. Ct. 2157, 2164-65 (1997) (examining whether Congress' exercise of power under section five of the Fourteenth Amendment is within the power granted to Congress).

196. *Lawton v. Steele*, 152 U.S. 133, 137 (1894).

197. *Id.*

198. See GILLMAN, *supra* note 185, at 49.

199. *Id.* at 54.



## 2. State Examples

Viewing the regulation of non-commercial sexuality in the absence of harm to others as outside the scope of the police power helps to explain and provide coherence to many state court decisions generally lumped under the right of privacy. The clearest example of this approach is provided by the Supreme Court of Pennsylvania in *Commonwealth v. Bonadio*,<sup>200</sup> which struck down a Pennsylvania law prohibiting deviate sexual intercourse.<sup>201</sup> Deviate sexual intercourse was defined as “*per os or per anus* between human beings who are not husband and wife, and any form of sexual intercourse with an animal.”<sup>202</sup> The Commonwealth argued that the statute was a valid exercise of the police power over defendants who were arrested at an “adult” pornographic theater.<sup>203</sup> Instead of attempting to determine whether deviate sexual intercourse could be considered under some conception of privacy, the court examined whether the regulation of such conduct fell within the police power.<sup>204</sup> Initially, it noted that “the police power is not unlimited,”<sup>205</sup> and that “[t]he threshold question in determining whether the statute in question is a valid exercise of the police power is to decide whether it benefits the public generally.”<sup>206</sup> While the court noted that a public benefit can be found “in protecting the public from inadvertent offensive displays of sexual behavior, in preventing people from being forced against their will to submit to sexual contact, in protecting minors from being sexually used by adults, and in eliminating cruelty to animals,” the same cannot be said for regulating the private conduct of consenting adults.<sup>207</sup> In reaching this conclusion, the court explicitly stated that, with respect to sexual morality, Mill’s doctrine articulates the proper scope of the state’s police power.<sup>208</sup> In response to the moral majority’s right to enforce its moral norms, the court responded that “no sufficient state interest justifies legislation of norms simply because a particular belief is followed by a number of people, or even a majority.”<sup>209</sup> Mere punishment for “what many believe to be abhorrent crimes against nature and perceived sins against God, is not properly in the realm of the temporal police

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200. 415 A.2d 47 (Pa. 1980).

201. See *Pennsylvania v. Bonadio*, 415 A.2d 47, 48-50 (Pa. 1980).

202. *Id.* at 48-49 n.1 (emphasis added).

203. See *id.* at 49.

204. See *id.* at 49-52.

205. *Id.* at 49.

206. *Id.*

207. *Bonadio*, 415 A.2d at 49.

208. See *id.* at 50-52.

209. *Id.* at 50.

power.”<sup>210</sup> As recognized by the New York Court of Appeals, this is an issue of private as opposed to public morality.<sup>211</sup>

Similarly, in direct contrast to the U.S. Supreme Court’s decision in *Bowers*, the Supreme Court of Georgia struck down Georgia’s sodomy laws under the state constitution’s Due Process Clause.<sup>212</sup> According to the court, the liberty protected by the due process clause of the state constitution “includes ‘the right to live as one will, so long as that will does not interfere with the rights of another or the public.’”<sup>213</sup> The court found that this principle helped to explain its privacy decisions in areas involving sexuality.

*Implicit in our decisions curtailing the assertion of a right to privacy in sexual assault cases involving sexual activity taking place in public, performed with those legally incapable of giving consent, performed in exchange for money, or performed with force and against the will of a participant, is the determination that the State has a role in shielding the public from inadvertent exposure to the intimacies of others, in protecting minors and others legally incapable of consent from sexual abuse, and in preventing people from being forced to submit to sex acts against their will.*<sup>214</sup>

In contrast, “the sodomy statute’s *raison d’être* can only be to regulate the private sexual conduct of consenting adults,” and “[a]dults who ‘withdraw from public gaze,’ to engage in private unforced sexual behavior are exercising a right ‘embraced within the right of personal liberty.’”<sup>215</sup>

In addition to concluding that the concept of liberty included the right to engage in sexual activity that does not invade the rights of others, the court concluded that the prohibition of such conduct was not within the scope of the state’s police power.<sup>216</sup> While the court recognized that the police power provides the state with the ability to legislate “for the protection of the citizen’s lives, health, and property, and to preserve good order and public morals,” sexual conduct does not fall within the reach of the police power in the absence of harm to others.<sup>217</sup> According to the court, before a state can validly exercise the police power on behalf of the

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210. *Id.*

211. *See also* *People v. Onofre*, 415 N.E.2d 936, 940-41 (N.Y. App. Div. 1980) (concluding that regulation of consensual sodomy is not within the scope of the police power, as there was no threat or harm to the public or even public morality as opposed to private morality).

212. *See Powell v. State*, 510 S.E.2d 18, 21-24, 26 (Ga. 1998).

213. *Id.* at 22 (citations omitted).

214. *Id.* at 24 (quotations omitted) (emphasis added).

215. *Id.* at 24-25.

216. *See id.* at 25.

217. *Id.*

public, the interests of the public generally must require such interference.<sup>218</sup> This requirement is clearly satisfied when an act invades the rights of others, but when "the only possible purpose for the statute is to regulate the private conduct of consenting adults, the public gains no benefit, and the individual is unduly oppressed by the invasion . . . [T]he legislation exceeds the permissible bounds of the police power."<sup>219</sup> Consequently, in the absence of an invasion of the rights of others, the fact that a majority believes that the act is repugnant does not bring it within the state's police power.

Moreover, not only have courts concluded that the police power does not include the power to enforce moral norms upon individuals whose conduct does not harm others, just the opposite is required. Both the Supreme Court of Montana and the Tennessee Court of Appeals have stated that:

[w]ith respect to regulation of morals, 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.<sup>220</sup>

A similar sentiment was expressed by the Supreme Court of Alaska: "[W]e should avoid the fallacy that a rule of morality is necessarily a rule of law, or that the morality of some groups is, without more, entitled to legal enforcement."<sup>221</sup> It is, therefore, incumbent on courts to uphold the limits of governmental power delegated under their constitution. As such, the courts in both cases held that the states did not have the power to regulate non-commercial, consensual adult sexual activity.<sup>222</sup> These decisions clearly demonstrate that the police power of a state does not include the power to enforce the majority's moral norms against individuals unless the conduct engaged in invades the rights of others. In fact, the police power of the state requires courts to ensure that individuals are free from interference in defining and pursuing their own morality.

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218. *Powell*, 510 S.E.2d at 25.

219. *See id.*

220. *Gryczan v. State*, 942 P.2d 112, 125 (Mont. 1997) (quoting *Campbell v. Sundquist*, 926 S.W.2d 250, 265 (Tenn. Ct. App. 1996)); *see also* *Campbell v. Sundquist*, 926 S.W.2d 250, 265 (Tenn. Ct. App. 1996).

221. *Harris v. State*, 457 P.2d 638, 645 (Alaska 1969).

222. *Gryczan*, 942 P.2d at 125-26; *Campbell*, 926 S.W.2d at 266.

## 3. Florida Law

The conclusion that the regulation of sexual activity that does not invade the rights of others is not a valid exercise of the police power is also consistent with Florida law. Consistent with the general limits of the police power articulated by the U.S. Supreme Court in *Lawton*,<sup>223</sup> Florida law provides that, to exercise the police power in a manner detrimental to an individual or class, "it must first be clear that the purpose to be served is not merely desirable but one which will so benefit the public as to justify interference with or destruction of private rights."<sup>224</sup> Additionally, "[t]his means that the interference with or sacrifice of the private rights must be necessary, i.e. must be essential, to the reasonable accomplishment of the desired goal."<sup>225</sup> Accordingly, for Florida to be able to prohibit the swingers' conduct, there must be a benefit to the public generally, and the means employed must be essential to accomplishing the state's goals.

Implicit in the differing conclusions reached in Florida's privacy decisions involving sexuality is the conclusion that the public is only benefited when such prohibitions prevent the invasion of the rights of another. Three cases in particular illustrate this point. In *Jones v. State*,<sup>226</sup> the Supreme Court of Florida upheld a statute prohibiting unlawful carnal intercourse with minors, even when the conduct is consensual.<sup>227</sup> In *B.B. v. State*,<sup>228</sup> the Supreme Court of Florida held that the same statute was unconstitutional when applied with respect to consensual intercourse between two sixteen-year-olds.<sup>229</sup> In contrast, the Supreme Court in *J.A.S. v. State*<sup>230</sup> concluded that the statute could be applied against two fifteen-year-old boys who engaged in consensual sex with two twelve-year-old girls.<sup>231</sup> According to the court in *Jones*, a minor's consent was irrelevant because "any type of sexual conduct involving a child constitutes an intrusion upon the rights of that child, whether or not the child consents . . . [and] [s]ociety [therefore] has a compelling interest in intervening to stop such misconduct."<sup>232</sup> The same was true in *J.A.S.* The state has a compelling interest in protecting younger teenagers, both from

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223. See generally *Lawton v. Steele*, 152 U.S. 133, 136-38 (1894).

224. *State v. Leone*, 118 So. 2d 781, 784 (Fla. 1960).

225. *Id.* at 784-85.

226. 640 So. 2d 1084 (Fla. 1994).

227. See *Jones v. State*, 640 So. 2d 1084, 1086-87 (Fla. 1994).

228. 659 So. 2d 256 (Fla. 1995).

229. See *B.B. v. State*, 659 So. 2d 256, 257-60 (Fla. 1995).

230. 705 So. 2d 1381 (Fla. 1998).

231. See *J.A.S. v. State*, 705 So. 2d 1381, 1382 (Fla. 1998).

232. *Jones*, 640 So. 2d at 1086 (quoting *Shmitt v. State*, 590 So. 2d 404, 410-11 (Fla. 1991)).

older teenagers and also from their own immaturity.<sup>233</sup> However, when consensual sexual activity occurs between teenagers of the same age, the state is not protecting the minors but is instead using the law as a means of punishing the minors.<sup>234</sup> In that situation, the "crux of the State's interest is in protecting the minor from the sexual activity itself," which the court concludes is beyond the state's power.<sup>235</sup> Consequently, even Florida's privacy decisions with respect to the sexual conduct of minors support the conclusion that the state's police power can only be exercised to prevent conduct which invades the rights of others.

With respect to Florida's law on lewdness, it would appear that the invasion of the rights of a third party is not only an element of the law,<sup>236</sup> but is essential to the law's constitutionality. In the absence of injury to third parties, regulation of individual conduct cannot be considered to be for the public benefit, and therefore, Florida does not have the power to enact such legislation. The conclusion is the same regardless of whether or not a defendant can be characterized as having a legitimate or reasonable expectation of privacy. While we may all agree that government should protect individuals from having their rights invaded by others, we have not agreed to give the government the power to act absent that justification. So long as their actions do not invade the rights of others, the swingers can continue to swing.

## V. CONCLUSION

Years ago, H.L.A. Hart noted that "[t]he greatest of dangers . . . [is] not that in fact the majority might use their power to oppress a minority, but that, with the spread of democratic ideas, it might come to be thought unobjectionable that they should do so."<sup>237</sup> Today, this danger can clearly be seen in efforts to enforce particular conceptions of sexual morality upon individuals whose views and practices may be contrary to that morality. While some may question the conclusion that a majority, and even an overwhelming majority, is without the power to impose its particular morality upon the rest of society, it is absolutely consistent with consensus constitutionalism. In constitutional democracies like ours, government can only legitimately exercise the powers that society, as a whole, delegates to it.

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233. See *J.A.S.*, 705 So. 2d at 1386.

234. See *B.B.*, 659 So. 2d at 260.

235. See *id.* at 259.

236. See *supra* Part II.A.

237. H.L.A. HART, *supra* note 87, at 77-78.

In theory, our constitutions represent the consensus agreements of we the people. As this article demonstrates, in such a system, it is incumbent on the judiciary to determine whether the people as a whole have delegated a power to the government before determining whether an exercise of such power conflicts with a recognized right. A negative answer with respect to the former question eliminates the need to address the latter. In contrast, requiring the individual challenging the government action to demonstrate that his or her conduct falls within some category of special rights assumes that government has such a power. While that assumption may be warranted in some circumstances, in the case of the swingers in Florida, it is not.