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privilege should exist. Routine accounting services are not intended as confidential and do not involve the seeking of legal advice. Yet those matters that are intended to be confidential and do not involve the rendering of professional services should be protected.

Thus, while the recent extension of the *Miranda* warnings to tax investigations is commendable, the courts have generally condoned the Service's inquisitorial investigations and continued to deny the taxpayer constitutional protections generally available in criminal investigations.

MIKE ROLLYSON

VICTIMLESS SEX CRIMES: TO THE DEVIL, NOT THE DUNGEON

[T]here is a sacred realm of privacy for every man . . . where he makes his choice and decisions, fashions his character and directs his desires, a realm of his own essential rights and liberties, including, in the providence of God, liberty to go to the devil, into which the law, generally speaking, must not intrude.

—Archbishop of Canterbury[1]

During its 1973 session the Florida Legislature will consider an entirely new criminal code presently being formulated by the House Committee on Criminal Justice.[2] "Crimes without victims"[3] are of crucial concern to the drafters of the new criminal code.[4] Following recent Florida[5] and United States Supreme Court decisions,[6] the legislature must carefully scrutinize the present criminal statutes regulating acts of sexual conduct between consenting adults.[7] The purpose of this note is to examine the historical bases for laws

1. Archbishop of Canterbury *quoted in* E. CHESSER, LIVE AND LET LIVE 58 (1958). *See also* GREAT BRITAIN HOME OFFICE COMMITTEE ON HOMOSEXUAL OFFENSES AND PROSTITUTION, REPORT ¶61 (1957) [hereinafter cited as WOLFENDEN REPORT] (for a reprint of the full text of the report together with a discussion and criticism *see* C. BERG & C. ALLEN, THE PROBLEM OF HOMOSEXUALITY (1958)).

2. Interview with John F. Harkness, Legal Counsel to the Fla. House Comm. on Criminal Justice, in Gainesville, Fla., Jan. 12, 1972. *See also* Letter from John F. Harkness to Morgan S. Bragg, Jan. 13, 1972.

3. L. FULLER, ANATOMY OF THE LAW 44 (1969). Crimes such as sodomy, fornication, and adultery between consenting adults; gambling; and prostitution are classified as "crimes without victims" or "victimless crimes." *Id.*

4. Interview note 2 *supra.*

5. State v. Barquet, 262 So. 2d 431 (Fla. 1972) (held Florida's abortion statute, FLA. STAT. §797.01 (1971), unconstitutional); Franklin v. State, 257 So. 2d 21 (Fla. 1971) (held Florida's crime against nature statute, FLA. STAT. §800.01 (1971), void for vagueness).

6. Eisenstadt v. Baird, 405 U.S. 438 (1972). A Massachusetts criminal statute prohibiting distribution of contraceptives to unmarried individuals was held to violate the equal protection clause of the fourteenth amendment. *Id.* at 455.

7. *E.g.*, FLA. STAT §§798.01 (adultery), .03 (fornication), 800.1 (crime against nature—sodomy) (1971).

criminalizing specified sexual acts, the controversy that presently surrounds the area of victimless sex crimes, the liberalization of sex laws in other jurisdictions, and the social costs and constitutional questions created by morals legislation. Finally, recommendations will be advanced for the modernization of existing Florida sex laws in accordance with views of contemporary sociological, psychological, and legal authorities.

Recent publicity[8] afforded Florida's abortion[9] and "crime against nature"[10] statutes has focused the attention of the public and the courts on this state's nineteenth century criminal statutes dealing with sexual conduct.[11] In declaring both the abortion and sodomy statutes unconstitutional,[12] the Florida supreme court has served notice on the legislature that only criminal statutes drafted according to twentieth century standards will serve the needs of a twentieth century society:[13]

> [J]ustice should [not] be blind to the facts of life and of the times in which it functions; for the law, to be vibrant, must be a living thing, responsive to the society which it serves . . . .
>
> [I]f today's world is to have brought home to it what it is that . . . statute[s] prohibit, it must be set forth in language which is relevant to today's society . . . .

Recognizing that such reform is essentially a legislative function, the court has urged the legislature to act:[14]

> Legislative action is long past due in this area and related fields of personal relationships . . . and with great restraint [we] have left to its proper place in the Legislature the correction which is so sorely needed.

Florida's court is not unique in recognizing the need for reform. Within the last fifteen years a number of states have enacted revised penal codes with special consideration directed toward a liberalization of existing sex laws.[15] Moreover, the American Law Institute has recommended in the Model Penal Code that criminal sanctions be removed from all forms of sexual conduct between consenting adults.[16]

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8. *See, e.g.*, Franklin v. State, 257 So. 2d 21 (Fla. 1971); Walsingham v. State, 250 So. 2d 857 (Fla. 1971).
9. FLA. STAT. §797.01 (1971).
10. FLA. STAT. §800.01 (1971).
11. FLA. STAT. §798.01 (1971) (adultery) (enacted in 1874); FLA. STAT. §798.02 (1971) (lewd and lascivious behavior) (enacted in 1868); FLA. STAT. §798.03 (1971) (fornication) (enacted in 1868); FLA. STAT. §800.01 (1971) (crime against nature) (enacted in 1868).
12. State v. Barquet, 262 So. 2d 431 (Fla. 1972); Franklin v. State, 257 So. 2d 21 (Fla. 1971).
13. Franklin v. State, 257 So. 2d 21, 23 (Fla. 1971).
14. *Id.* at 24.
15. *E.g.*, COLO. REV. STAT. ch. 40 (Supp. 1971); CONN. GEN. STAT. ANN. §§53a-65 to -80 (1971); ILL. ANN. STAT. ch. 38, §11 (Smith-Hurd 1964); N.Y. PENAL LAW art. 130 (McKinney 1967); ORE. REV. STAT. chs. 163, 167 (1971).
16. *See generally* MODEL PENAL CODE §207 (Tent. Draft No. 4, 1955).

Proposals like that of the American Law Institute, however, have met with substantial and successful resistance from politically powerful religious groups.[17] Although sex is undoubtedly now discussed more openly than it was in nineteenth century America,[18] many legislators nevertheless fear that a vote for repeal or liberalization of sex laws will be branded as a vote for immorality.[19] Unfortunately, even in the 1970's this fear is not unfounded.[20] Despite such fears, however, reform is essential.

Origins of Criminal Sanction

Definitions of criminal conduct are not based on unchanging standards universally accepted by all cultures at all stages of development,[21] nor are they so accepted within the confines of a single culture.[22] Assuming that definitions of criminal conduct universally operate within strict boundaries, many commentators argue that law deals with crimes while morality deals with sins.[23] Although it might not be the *duty* of the law to deal with morality,[24] the law has never confined itself exclusively to activities that offend against public order or expose a citizen to injury. Every law is in fact the fruit of a decision about good and evil, right and wrong.[25]

Since some concept of morality underlies all law, the distinction between acts *mala prohibita* and acts *mala in se*[26] may become illusory. Acts once classified because of Biblical influence, as *mala in se*, are now not considered inherently immoral. Sunday closing laws illustrate this evolution. While these laws were originally enacted to enforce religious proscriptions[27] and thus reflected the moral values of their drafters, they have developed a secular purpose bearing no relationship to the establishment of religion.[28] Such secular

17. *See, e.g.*, Note, *Deviate Sexual Behavior: The Desirability of Legislative Proscription*, 30 Albany L. Rev. 291, 293 (1966).

18. *See, e.g.*, A. Kinsey, W. Pomeroy & C. Martin, Sexual Behavior in the Human Male (1948); W. Masters & V. Johnson, Human Sexual Response (1965).

19. Ploscowe, *The Place of Law in Medico-Moral Problems: A Legal View* (pt. 2), 31 N.Y.U.L. Rev. 1238 (1956).

20. In response to one Florida state senator's unsuccessful attempt to exempt acts of sodomy committed by consenting adults from criminal proscription, another state senator stated: "It would mean putting the stamp of approval on something that's not moral and not good." Gainesville (Fla.) Sun, Feb. 17, 1972, §B at 8, col. 1.

21. Fox, *What Is a Crime?*, 16 U. Fla. L. Rev. 147, 153-55 (1963). *See also* Harris v. State, 457 P.2d 638 (Alas. 1969). "Man is a creature of nature, yet he engages in conduct which is approved in some cultures and disapproved in others." *Id.* at 645. *See generally* Ford, *Sex Offenses: An Anthropological Perspective*, 25 Law & Contemp. Prob. 225 (1960).

22. *Compare* Fla. Stat. §800.01 (1969), *with* Ill. Ann. Stat. ch. 38, §11-9 (Smith-Hurd 1964).

23. *E.g.*, Sheedy, *Law and Morals*, 43 Chi. B. Record 373 (1962).

24. *See, e.g.*, Wolfenden Report, *supra* note 1, ¶257.

25. Fletcher, *Sex Offenses: An Ethical View*, 25 Law & Contemp. Prob. 244, 245 (1960).

26. Acts *mala prohibita* are criminal only because they are so defined by statute, while acts *mala in se* embrace those acts that are immoral or wrong in themselves. Coleman v. State *ex rel.* Carver, 119 Fla. 653, 654, 161 So. 89, 90 (1935).

27. McGowan v. Maryland, 366 U.S. 420, 446 (1961).

28. *Id.* at 444.

purposes, however, are themselves based upon moral considerations. Legislatures have deemed it desirable to designate Sunday as a day of rest to provide periodic cessation from labor.[29] Decisions based upon moral considerations, however, are not limited to the legislature. The judiciary is also likely to apply moral standards in legal proceedings.[30]

Recognizing that criminal codes reflect moral standards, Professor Lon L. Fuller envisions a moral scale on which all human activities are positioned.[31] Activities that society *requires* to be performed occupy the lower portion of the scale and are defined as the "morality of duty." Only these activities are subject to criminal sanctions. At the upper levels of the scale are all other human activities that are free from legal sanctions. These comprise the "morality of aspiration" and are enforced solely by social sanctions. Separating the two moralities is a fluctuating pointer that at any given time indicates what activities are controlled by the force of law. Fuller envisions a continuous struggle between competing groups in our society to either increase or or reduce the area of conduct subject to legal controls.

Florida statutes prohibiting certain sexual acts[32] are based upon religious laws traceable through Judeo-Christian history to Biblical origins.[33] While these sexual acts were not considered criminal under English common law, they were subject to sanctions imposed by ecclesiastical courts.[34] Our society's "morality of duty" includes sexual conduct between consenting adults. These moral decisions are based upon Biblical laws, filtered through ecclesiastical courts and the Puritan values of nineteenth century America. Thus, our sex laws are not based on twentieth century developments in the sociological and psychological sciences, but on a traditional code of ethics and morals that is open to question and deserves careful investigation.[35]

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29. *Id.* at 436.

30. Cohen, *Judicial Ethics*, 12 OHIO ST. L.J. 3 (1961). "It is a pretty safe rule that whenever a judge says, 'This is a court of law,' and then goes on to say that he cannot be guided by moral or theological considerations, he is actually being guided by moral or theological considerations without knowing it." *Id.* at 10.

31. L. FULLER, THE MORALITY OF LAW 9-13 (rev. 3d. 1969).

32. FLA. STAT. chs. 797 (prostitution), 798 (adultery and fornication), 800 (crime against nature – sodomy) (1971).

33. *See, e.g.*, Harris v. State, 457 P.2d 638, 648 (Alas. 1969). *Leviticus* 19:29, *Deuteronomy* 23:17 (prostitution); *Exodus* 20:14, *Leviticus* 18:20, 20:10 (adultery); 1 *Corinthians* 10:8 (fornication); *Leviticus* 18:22-23, 20:13, 15-16, *Exodus* 22:19 (sodomy). *Compare* FLA. STAT. §800.01 (1971), *with Leviticus* 18:22.

34. Ploscowe, *Sex Offenses: The American Legal Context*, 25 LAW & CONTEMP. PROB. 217, 218 (1960). Fornication was punished as a common law offense only if committed openly and notoriously as to constitute a nuisance. Anderson v. Commonwealth, 26 Va. (5 Rand.) 627 (1826); 2 F. POLLOCK & F. MAITLAND, THE HISTORY OF ENGLISH LAW 543 (reissued 2d ed. 1968). Adultery, however, was proscribed only by the church. *Ex parte* Rocha, 30 F.2d 823 (S.D. Tex. 1929); 2 F. POLLACK & F. MAITLAND *supra*. Oral genital contact was also not contemplated by the common law. The original English sodomy statute of 1533 described the prohibited acts only as "the detestable and abominable vice of buggery, committed with mankind or beast." 25 Hen. 8, c. 6 (1533). This did not include oral copulation. Rex v. Jacobs, 168 Eng. Rep. 830 (1817).

35. Ford, *supra* note 21, at 241.

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42. H. HART, LAW, LIB

43. *Id.* at 73.

44. Nation v. State, 15
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Suggested Limits to Legislative Prohibitions

Religious laws should not become integral parts of our legal system unless they serve independent secular purposes.[36] Having been properly urged by the Florida supreme court to initiate long overdue reform in sex legislation,[37] the legislature must now decide what secular purposes are served by modern sex laws and if the value of these laws justifies the legislation of sexual morality.

Lord Patrick Devlin contends a shared morality is necessary to mold a society from a collection of individuals.[38] In his view any deviation from moral norms threatens the existence of the society. Since the purpose of the law is to protect society, all forms of morality must be enforced with the power of law.[39] Therefore, Devlin contends criminal statutes proscribing private acts of sexual immorality are properly subject to legal sanctions imposed by society.[40]

Devlin's view that the law does not discharge its function to protect society by merely protecting the individual from injury, corruption, and exploitation is not unchallenged. John Stuart Mill contemplated a more limited role for the law:[41]

> The only purpose for which power can rightfully be 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 opinion of others to do so would be wise or even right.

A more moderate approach is taken by Professor H. L. A. Hart who contends that although some shared morality is essential for the continued existence of society,[42] laws governing sexual morality fall outside the scope of any universally shared morality.[43]

It appears that Lord Devlin's view has been applied in most American jurisdictions. Courts have recognized that the legislature has the power, within constitutional limitations, to denounce any act as criminal, fix the grade of the offense, and establish the punishment for its commission.[44] This police power may be exercised in areas that "relate to the . . . morals . . . of the

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36. McGowan v. Maryland, 366 U.S. 420, 445 (1961). *See also* text accompanying notes 142-151 *infra*.

37. *See* Franklin v. State, 257 So. 2d 21, 24 (Fla. 1971).

38. P. Devlin, The Enforcement of Morals 8-22 (1965).

39. *Id.* at 13.

40. *Id.* at 8-22.

41. J. Mill, On Liberty 73 (Everyman ed. 1859).

42. H. Hart, Law, Liberty and Morality 70 (1963).

43. *Id.* at 73.

44. Nation v. State, 154 Fla. 337, 17 So. 2d 521 (1944). *See also* United States v. Martell, 335 F.2d 764 (4th Cir. 1964); Perkins v. State, 234 F. Supp. 333, 337 (W.D.N.C. 1964).

public."[45] Nevertheless, courts have consistently sought additional justification for upholding statutes proscribing "victimless" criminal activity.[46]

A common morality is, nonetheless, a powerful source of substantive law. On many subjects there is widespread agreement concerning the propriety of legal control over human behavior.[47] It would be wrong, however, to accept without question Devlin's philosophy that the morality of some groups is, without more, entitled to legal enforcement. To accept this philosophy in the area of sexual conduct between consenting adults would result in an adoption of laws premised on divine revelation not subject to rational analysis.[48] If such laws are to be enforced on all of society they should "so far as possible be those that human beings in the mass are able to comply with, without excessive repression and frustration and without overmuch need for the actual working of the legal machine."[49]

The central issue in the current debate over statutory regulation of sexual conduct seems not to be the age-old dialectic between natural law[50] and positivism,[51] but rather the question of enforcing the religious belief of some upon all of society.[52] Among the important events engendering this debate was the 1955 proposal by the American Law Institute. The Institute's Model Penal Code recommended that sexual practices should be statutorily proscribed only if they involve force, adult corruption of minors, or are committed in public.[53] This debate increased in intensity with the 1957 sugges-

45. Lochner v. New York, 198 U.S. 45, 53 (1905).

46. *See* L'Hote v. New Orleans, 177 U.S. 587, 596 (1900) (restricting prostitutes prevents vice from spreading); Petit v. Minnesota, 177 U.S. 164, 165 (1900) (Blue Law essential for physical wellbeing); Douglas v. Kentucky, 168 U.S. 488, 496 (1897) (lotteries "plundered the ignorant and simple"); Reynolds v. United States, 98 U.S. 145, 165-66 (1878) ("polygamy leads to the patriarchial principal, and . . . so fetters the people in stationary despotism"); State v. Nelson, 126 Conn. 412, 426, 11 A.2d 856, 862 (1940) (anti-contraception statute promotes well-being of the family discouraging extra-marital relations and promotes "a maintenance and increase of population"); State v. Brown, 236 La. 562, 563, 108 So. 2d 233, 234 (1959) (miscegenation causes "propagation of children who are burdened . . . with a feeling of inferiority"). Significantly, the two last cited cases have been overruled by subsequent cases reflecting the changing social norms. *See* Eisenstadt v. Baird, 405 U.S. 438 (1972); Loving v. Virginia, 388 U.S. 1 (1967); Griswold v. Connecticut, 381 U.S. 479 (1965); McLaughlin v. Florida, 379 U.S. 184 (1964).

47. *E.g.*, FLA. STAT. ch. 782 (1971) (homicide).

48. *See* Harris v. State, 457 P.2d 638, 645-46 (Alas. 1969). *See also* text accompanying notes 32-33 *supra*.

49. G. WILLIAMS, THE SANCTITY OF LIFE AND THE CRIMINAL LAW 232 (1957).

50. "The natural law concept found in many of the judicial authorities on this subject implicitly refers to the idea of a settled rule, derivable by reason and cognizable to all persons of common understanding." Harris v. State, 457 P.2d 638, 645 (Alas. 1969); *see* note 21 *supra* and accompanying text. The question then arises: Which form of conduct actually represents the pattern of nature? For a critical view of the natural law concept *see* Holmes, *Natural Law*, 32 HARV. L. REV. 40 (1918).

51. Positivism is based on the theory that law is only what is "actually and specifically enacted or adopted by proper authority for the government of an organized jural society." BLACK'S LAW DICTIONARY 1324 (rev. 4th ed. 1968).

52. Harris v. State, 457 P.2d 638, 646 (Alas. 1969).

53. MODEL PENAL CODE §207.5, Comment (Tent. Draft No. 4, 1955). This recommen-

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56. Sheedy, *supra* note 2

57. A. KINSEY, W. POME

58. *Id.*

59. *Id.*

60. *Id.*

61. *Id.*

62. *Id.*

tion of the Wolfenden Report concerning homosexual offenses and prostitution:[54]

> Unless a deliberate attempt is to be made by society, acting through an agency of the law, to equate the sphere of crime with that of sin, there must remain a realm of private morality and immorality which is, in brief and crude terms, not the law's business.

Both Devlin and Hart agree that practices that lead to a breakdown of external order may be statutorily proscribed. They differ, however, in deciding what practices may lead to this breakdown.[55] It has been suggested that beneficial morals legislation "closes the door" to those activities that threaten the continued existence of society.[56] Applying this maxim to legislation governing sexual conduct, two basic questions must be answered: (1) whether legislation prevents commission of the prohibited acts and (2) whether prohibition of these acts adds to social order.

Doctors Kinsey, Pomeroy, and Martin concluded that ninety-five per cent of the American male population have committed some sexual act that violates a criminal statute.[57] Eighty-five per cent have had premarital intercourse,[58] seventy per cent have had relations with prostitutes,[59] fifty-nine per cent have had some experience in oral-genital contact,[60] seventeen per cent of those growing up on farms have experienced sexual intercourse with animals,[61] and thirty to forty-five per cent of the married males have engaged in extra-marital intercourse.[62] In a companion study published four years later, this same team assisted by Dr. Gebhard concluded that twenty-eight per cent of all American females and fifty per cent of all males have engaged in a

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dation was based on the grounds, among others, that: "No harm to the secular interests of the community is involved in atypical sex practices in private between consenting adult partners. This area of private morals is the distinct concern of spiritual authorities." *Id.* at 277.

54. WOLFENDEN REPORT note 1 *supra*. It was, in fact, this report that initiated the series of exchanges between Lord Devlin and Professor Hart. It should be noted that Devlin's position that the state should enforce Judeo-Christian morality, based on divine revelation, has lost ground even in Great Britain, which has an established church. The Anglican Church itself came out for abolition of criminal prohibitions on homosexual behavior between consenting adults. Note, *The Crimes Against Nature*, 16 J. PUB. L. 159, 187 n.148 (1967).

55. The Devlin-Hart conflict can be better understood by examining Bodenheimer, *The Case Against Natural Law Reassessed*, 17 STAN. L. REV. 39 (1964); Devlin, *Mill on Liberty in Morals*, 32 U. CHI. L. REV. 215 (1965); Dworkin, *Lord Devlin and the Enforcement of Morals*, 75 YALE L.J. 986 (1966); Hart, *Social Solidarity and the Enforcement of Morality*, 35 U. CHI. L. REV. 1 (1967).

56. Sheedy, *supra* note 23, at 375.

57. A. KINSEY, W. POMEROY & C. MARTIN, *supra* note 18, at 392.

58. *Id.*

59. *Id.*

60. *Id.*

61. *Id.*

62. *Id.*

homosexual act at least once in their lives.[63] These figures indicate that existing statutory proscriptions of sexual activity do not reflect any "shared morality" of our society. Nor do ostensible criminal sanctions appear to discourage many persons from participating in these activities.

Kinsey's figures, however, have not been immune from criticism. Perhaps the most valid complaint is that they are based on the erroneous presumption that all states proscribe the same acts.[64] Allowing for jurisdictional variations, however, it is still evident that a significant percentage of the population engages in unlawful sexual conduct.[65]

It is equally apparent that few violators are ever charged or convicted. One study estimated that less than one per cent of all male violators are ever charged with a crime, with still fewer convicted.[66] The reasons for this seem clear. The ordinary act of fornication, adultery, or deviant homosexual or heterosexual behavior is conducted in private without a victim to make a complaint.[67] Thus, existing criminal statutes clearly fail to prevent the commission of these prohibited acts.

Despite Kinsey's evidence, however, some commentators claim that a legalization of illicit sexual conduct would imply social approval of the acts and foster their spread.[68] Empirical evidence does not support this view. The repeal of laws penalizing consensual acts in Sweden[69] and other European countries[70] has produced no noticeable increase in such conduct. In addition, it is arguable that community, religious, and family disapproval effectively discourage such conduct. The effects of such social pressures would not be weakened by a removal of criminal sanctions,[71] especially if repeal were ac-

63. A. KINSEY, W. POMEROY, C. MARTIN & P. GEBHARD, SEXUAL BEHAVIOR OF THE HUMAN FEMALE 474 (1953).

64. M. PLOSCOWE, SEX AND THE LAW 130 (rev. ed. 1962). This was clearly not the case in 1948 nor is it today. Bensing, *A Comparative Study of American Sex Statutes*, 42 J. CRIM. L.C. &. P.C. 57 (1951); *see* text accompanying notes 83-109 *infra*. Another common criticism is that Kinsey selected his subjects from a limited geographical area. This restricted sample combined with earlier studies demonstrating a geographical variation in in attitudes toward sex allegedly caused inaccuracies in the final totals. It is suggested that modern communications, transportation, and resulting population mobility have sufficiently destroyed sectional diversity to minimize resulting differences in attitudes. *See* Ploscowe, *Sex Offenses: The American Legal Context*, 25 LAW & CONTEMP. PROB. 217, 221 (1960).

65. Note, *Post-Kinsey: Voluntary Sex Relations as Criminal Offenses*, 17 U. CHI. L. REV. 162, 169-70 (1949).

66. Bowman & Engle, *A Psychiatric Evaluation of Laws of Homosexuality*, 29 TEMP. L.Q. 273, 307 (1956). Another study estimated that 6 million acts of sodomy, fellatio, and mutual masturbation take place each year for every 20 convictions obtained. M. PLOSCOWE, *supra* note 64, at 209.

67. Ploscowe, *Sex Offenses: The American Legal Context*, 25 LAW & CONTEMP. PRIB. 217, 221 (1960).

68. *E.g.*, P. DEVLIN, *supra* note 38, at 18-19.

69. *See* WOLFENDEN REPORT, *supra* note 1, ¶59.

70. *See* Sturup, *Sex Offenses: The Scandinavian Experience*, 25 LAW & CONTEMP. PROB. 361 (1960).

71. *See* Ephraim v. State, 82 Fla. 93, 95, 89 So. 344, 345 (1921); Bowman & Engle, *supra* note 66, at 304.

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73. *See, e.g.*, Note, *supra* r

74. Ludwig, *Control of th* Book Review, 96 U. PA. L. RE

75. *Id. But see* P. DEVLIN,

76. Katz, *Christ and Law*,

77. Puxon, *Not as Other* *Homosexual Behavior: The C*

78. WOLFENDEN REPORT no

79. Blum & Kalven, *Th* *Emerging Science*, 24 U. CHI. F.2d 152 (2d Cir. 1947); A. I HUMAN MALE at 389-93 (1948).

80. *See, e.g.*, MODEL PENAI *An Ethical View*, 25 LAW & *Hague: Suggested Revisions o* *Family*, 50 CORNELL L.Q. 425 (

81. *See* Gainesville (Fla.) *Behavior: The Desirability of*

companied by a legislative disclaimer of approval.[72]

Despite the Kinsey studies the vast majority of persons view illicit sex as morally wrong.[73] Thus, in support of sex laws many claim that the criminal law should correspond to these "behavioral ideals" and enforce the moral judgments of the community.[74] The question remains whether the criminal law is the correct vehicle for such moral education.[75] Attempts to enforce a community's publicly expressed sexual standards on every individual may foster rebellion[76] or create the impression that "the individual's part is limited to the evasion of detection."[77] Society and the law should place their emphasis on the individual's freedom of choice in matters of private morality; to do so is "to emphasize the personal and private responsibility of the individual for his own actions."[78]

Existing sex laws do not deter violators, nor would their relaxation lead to a destruction of public order. Hence, narrower limits to legislative proscriptions should be examined lest lawyers, legislators, and judges be accused of imposing their own standards of sexual behavior on the balance of the community.[79] Narrower limits have been suggested,[80] but legislators have been reluctant to act.[81]

Sex legislation should reflect the state's interest in protecting the individual from forcible attack; protecting the young, immature, and incompetent from the sexual advances of the more mature who seek to prey on their victim's youth, ignorance, or incompetence; and the protection of the public in general from conduct that disturbs the peace or *openly* flouts ac-

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72. If such acts are made lawful, the law can still withhold certain benefits. Sheedy, *Law and Morals*, 43 CHI. B. RECORD 373, 376 (1962); *see* Inman v. City of Miami, 197 So. 2d 50 (3d D.C.A. Fla.), *cert. denied*, 201 So. 2d 895 (1967), *cert. denied*, 389 U.S. 1048 (1968) (upheld city ordinance prohibiting liquor licensees from knowingly employing or serving homosexual persons); Raider v. The Dixie Inn, 198 Ky. 152, 248 S.W. 229 (1923) (requirement that innkeeper admit all travelers held not applicable to prostitutes); Upfill v. Wright, 1 K.B. 506 (1911) (landlord who lets flat for fornication or adultery may not recover his rent).

73. *See, e.g.*, Note, *supra* note 65, at 175-76.

74. Ludwig, *Control of the Sex Criminal*, 25 ST. JOHN'S L. REV. 203, 209 (1951); Schwartz, Book Review, 96 U. PA. L. REV. 914, 915 (1948).

75. *Id. But see* P. DEVLIN, *supra* note 38, at 8.

76. Katz, *Christ and Law*, 12 ORLA. L. REV. 57, 64 (1959).

77. Puxon, *Not as Other Men*, 101 SOL. J. 735 (1957), *quoted in* Note, *Private Consensual Homosexual Behavior: The Crime and Its Enforcement*, 70 YALE L.J. 623, 626-27 (1961).

78. WOLFENDEN REPORT note 1 *supra*.

79. Blum & Kalven, *The Art of Opinion Research: A Lawyer's Appraisal of an Emerging Science*, 24 U. CHI. L. REV. 1, 5-12 (1956); *see* Repoville v. United States, 165 F.2d 152 (2d Cir. 1947); A. KINSEY, W. POMEROY & C. MARTIN, SEXUAL BEHAVIOR IN THE HUMAN MALE at 389-93 (1948).

80. *See, e.g.*, MODEL PENAL CODE §207 (Tent. Draft No. 4, 1955); Fletcher, *Sex Offenses: An Ethical View*, 25 LAW & CONTEMP. PROB. 244, 257 (1960); Ploscowe, *Report to The Hague: Suggested Revisions of Penal Law Relating to Sex Crimes and Crimes Against the Family*, 50 CORNELL L.Q. 425 (1965).

81. *See* Gainesville (Fla.) Sun., Feb. 17, 1972, §B at 8, col. 1; Note, *Deviate Sexual Behavior: The Desirability of Legislative Proscription*, 30 ALBANY L. REV. 291, 293 (1966).

cepted standards of morality in the community.[82] Laws prohibiting all sexual activity between consenting adults except that performed on the conjugal bed appear unnecessarily broad to accomplish these three objectives. A comparison of Florida's sodomy, adultery, and fornication statutes with those of other jurisdictions that have initiated reform in accordance with the three suggested limits will reveal whether additional protections are needed.

Florida Sex Statutes: Successful Liberalization Possible?

Proposed and existing Florida sex laws[83] clearly fulfill the three suggested legislative purposes. However, they appear deficient in their overbreadth and unnecessary repetition of prohibitions outlined in other statutes.

In response to judicial suggestion,[84] the Florida Legislature drafted a new definition of sodomy setting forth with sufficient particularity the nature of all prohibited acts.[85] The proposed definition is in accord with those of other jurisdictions that have recently enacted liberalized sex laws.[86] In assigning criminal penalties to these acts, however, the Florida proposal prohibits all

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82. Authorities cited note 80 *supra*. *See generally* Wolfenden Report, *supra* note 1, ¶72; Williams, *Sex Offenses: The British Experience*, 25 Law & Contemp. Prob. 334-60 (1960).

83. Fla. Stat. §§794.01, .05-.06, 798.01, .03, 800.02-.03, 801.011-.251 (1971). In December 1971 the Florida supreme court declared the state's "crime against nature" statute, Fla. Stat. §800.01 (1971) void for vagueness. Franklin v. State, 257 So. 2d 21 (Fla. 1971). Identical proposals for a new sodomy statute were prefiled in both the Florida Senate and House of Representatives. Fla. S. 289 (1972); Fla. H. 2879 (1972) [hereinafter cited as Proposal]. Neither bill was enacted into law. Hence, the common law crime of sodomy is presently in effect. Fla. Stat. §775.01 (1971); *see* text accompanying note 34 *supra*. Yet in holding the crime against nature statute unconstitutional the supreme court noted: "[P]ending further legislation in the matter, society will continue to be protected from this sort of reprehensible act under Section 800.02, Florida Statutes . . . which provide: 'Unnatural and lascivious act.–Whoever commits any unnatural and lascivious act with another person shall be punished by fine not exceeding five hundred dollars, or by imprisonment not exceeding six months.'" Arguably, this statute is itself as vague as the one the court envisions it temporarily replaces. In view of the court's statement, however, should there be a prosecution for oral-genital relations, an offense unknown to the common law, it would probably result in a conviction under this statute. Franklin v. State, 257 So. 2d 21, 24 (Fla. 1971).

84. *See* Franklin v. State, 257 So. 2d 21 (Fla. 1971). *See also* text accompanying notes 12-14 *supra*.

85. Proposal note 83 *supra*. "Sodomy" is defined as "carnally knowing any person by the anus or by or with the mouth." *Id.* §1 (1). Anticipating that the revised criminal code will include a similar, if not identical, statute the definition and penalty provisions of this proposal will be discussed in this section.

86. Illinois uses the term "deviate sexual conduct" to define "any act of sexual gratification involving the sex organs of one person and the mouth or anus of another." Ill. Ann. Stat. ch. 38, §11-2 (Smith-Hurd 1964). In Connecticut the term employed is "deviate sexual intercourse" and is defined as "(a) sexual contact between persons not married to each other consisting of contact between the penis and the anus, the mouth and the penis, or the mouth and the vulva, or (b) any form of sexual conduct with an animal or dead body." Conn. Gen. Stat. Ann. §53a-65 (2) (1971). Oregon and Colorado use similar definitions.

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except conjugal acts.[87] Individuals are protected from forcible assault;[88] youth and incompetents are protected;[89] and with consensual acts between adults prohibited, the public is certainly protected from any offensive conduct.[90] In addition, however, minors under the age of fourteen are protected by the Child Molester Act,[91] as is the public under existing indecent exposure statutes.[92]

Statutory duplication to protect the public interest by prohibiting consensual conduct succeeds only in protecting the psyche of those who might be offended by knowing that such conduct was legal. Both the Illinois and Connecticut Legislatures felt such expansive protection was unnecessary. In both states consensual acts performed in private between adults are not prohibited by statute.[93] These statutes have apparently accepted the recommendations of the Model Penal Code.[94] The Illinois experience is especially significant for its code has now been in effect for more than ten years[95] and the liberal provisions have apparently engendered no public outcry for a return to the absolute proscriptions of the earlier statute.

The New York Legislature attempted to reform its sodomy statute, following an approach similar to that of Illinois.[96] Resulting political pressure, however, forced the passage of a compromise statute,[97] similar to the Florida proposal, describing adult consensual sodomy as a class B misdemeanor punishable by a term not to exceed three months.[98] This compromise prompted Professor Ploscowe to comment that the enacted legislation was "unquestionably . . . an ineffective moral gesture on the part of the legislature, which should have had more sophistication and sense."[99] Hence, if Florida seeks a model, the Illinois statute appears to offer the most enlightened approach.

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87. PROPOSAL, *supra* note 83, §§1 (4)-(5).

88. PROPOSAL, *supra* note 83, §1 (2) (aggravated sodomy).

89. PROPOSAL, *supra* note 83, §§1 (2)-(3) (mental incompetents and those misled, drunk, or drugged); *Id.* §1 (4) (a) (youth under 14); *Id.* §1 (4) (b) (youth under 18).

90. PROPOSAL, *supra* note 83, §1 5).

91. FLA. STAT. §§801.011-.251 (1971). While this duplication of protection is not seriously criticized, it is pointed out to illustrate the legislature's effort to insure that all acts of sodomy are definitely described and prohibited.

92. *See* FLA. STAT. §800.02-.03 (1971).

93. *See* CONN. GEN. STAT. ANN. §53a-67 (1971) (consent an affirmative defense); ILL. ANN. STAT. ch. 38, §§11-3 to -6 (Smith-Hurd 1964) (prohibited act must be committed by force or with a youth under the age of 18). *See also* COLO. REV. STAT. §§40-3-403 to -412 (Supp. 1971); ORE. REV. STAT. §§163.385-.455 (1971).

94. *See* MODEL PENAL CODE §207 (Tent. Draft No. 4, 1955).

95. The Illinois Criminal Code became effective Jan. 1, 1962. *See* C. SOWLE, A CONCISE EXPLANATION OF THE ILLINOIS CRIMINAL CODE OF 1961 III (1961).

96. The proposed draft of the revised New York Penal Code eliminated the offense of consensual sodomy. Note, *The Proposed Penal Law of New York*, 64 COLUM. L. REV. 1469, 1545 (1964).

97. The Catholic Welfare Committee, an unofficial voice of the Roman Catholic Church, had perhaps the most influence in the rejection of this legislative proposal. Note, *supra* note 81, at 293.

98. N.Y. PENAL LAW §130.38 (McKinney 1967).

99. Ploscowe, *Sex Offenses in the New Penal Code*, 32 BROOK. L. REV. 274, 284 (1966).

Florida's fornication statute[100] is not specifically concerned with protecting individuals or the public from forcible sexual attack or with protecting youth. Such protection is afforded by existing rape[101] and indecent exposure[102] statutes and the Child Molester Act.[103] Recognizing that fornication statutes offer no additional protection, at least seventeen states have no such prohibitions.[104]

Similarly, at least four states do not assign criminal penalties to adultery.[105] Illinois retained its adultery statute in an effort to protect the institution of the family.[106] The question remains, however, whether the threat of criminal sanctions actually discourages adulterous conduct and protects the family unit. Florida's existing statute punishes only open and notorious adultery,[107] not isolated indiscretions of one spouse.[108] It would appear that if one spouse is living in open and notorious adultery the family unit is already hopelessly broken. Thus, the statutory proscription of such activity seems not to serve its avowed social purpose.

If legislative proscriptions are deemed necessary, a scheme based on the Arizona adultery statute[109] seems most reasonable. Arizona requires the adulterer's spouse to file a written complaint before prosecution will be initiated. Additionally, the adulterer and his spouse must be cohabitating as man and wife. Such a requirement would limit the scope of the adultery law to situations where a family unit in fact exists.

At least four states do not impose criminal sanctions on adulterous conduct, seventeen do not proscribe fornication and four impose no penalty for consensual sodomy. While these states obviously reflect a minority view, they do agree with what many believe to be realistic standards for today's society. Moreover, their experience indicates that liberalization is workably possible.

Social Costs of Existing Legislation

Since the only legal sex activity outside of marriage is an act of private masturbation, existing Florida sex laws make potential criminals of most of the state's adolescent and adult population.[110] Should these laws be rigidly enforced, courts and penal institutions would be unable to handle the

100. Fla. Stat. §798.02 (1971).

101. Fla. Stat. §§794.01 (forcible rape), 794.05 (rape of unmarried person under eighteen years of age), §794.06 (rape of unmarried female idiot) (1971).

102. Fla. Stat. §800.02-.03 (1971).

103. Fla. Stat. §801.041 (1971).

104. California, Colorado, Connecticut, Delaware, Iowa, Kansas, Louisiana, Maryland, Michigan, New Mexico, New York, Oklahoma, Oregon, South Dakota, Tennessee, Vermont, and Washington.

105. Louisiana, New Mexico, Oregon, and Tennessee.

106. *See* C. Sowle, *supra* note 95, at 15-16. *See also* Wexler, *Sex Offenses Under the New Criminal Code* 51 Ill. B.J. 152-54 (1962).

107. Fla. Stat. §798.01 (1971).

108. Braswell v. State, 88 Fla. 183, 101 So. 232 (1924); Grice v. State, 75 Fla. 751, 78 So. 984 (1918); Brevaldo v. State, 21 Fla. 789 (1886).

109. Ariz. Rev. Stat. Ann. §13-221 (1966).

110. *See* text accompanying notes 57-63 *supra*.

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number of violators. Law enforcement officials admit they are applied only to acts that involve minors, unwilling victims, or are performed in public.[111] The failure of the state to prosecute, however, does not justify the existence of the statutes. So long as these statutes remain available to the state "the threat of prosecution . . . is a real and substantial one."[112]

If sex laws are not enforced[113] or if such laws are unenforceable[114] they should be repealed. Judge Learned Hand stated that a law not enforced is worse than no law at all.[115] Lack of enforcement of many such laws may be responsible at least in part for a general loss of respect for all law.[116] An individual charged with a consensual sexual violation is unlikely to respect the law that treats him with severity while the majority of the population goes unpunished for similarly prohibited acts.

Perhaps more serious than the problem of nonenforcement is that of discriminatory enforcement. In a recent ten-year period the only three cases of female homosexual sodomy in New York City were dismissed while "tens of thousands" of male defendants were arrested and convicted.[117] If such a discrepancy were found in convictions of different races, the defense of discrimination might be successfully asserted. This obvious social injustice may well reinforce existing hostility toward the law.

Dead letter laws dealing with adultery and fornication are likewise subject to discriminatory enforcement. They have been used to prosecute partners of different races,[118] and to publicly embarass political opponents.[119] In fact, the American Law Institute reports that prosecutions rarely occur except

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111. *See, e.g.*, Buchanan v. Batchelor, 308 F. Supp. 729, 733 (N.D. Tex. 1970), *vacated*, 401 U.S. 989 (1971). This allegation was made when the defendant chief of police questioned whether a married couple had standing to seek an injunction for the enforcement of a Texas statute that prohibited acts of sodomy even between married couples.

112. Dombrowski v. Pfister, 380 U.S. 479, 494 (1965). The constitutional questions posed by existing statutes governing consensual sexual conduct is discussed *infra*. Explaining the social costs of these statutes necessitates reference to cases that were decided on constitutional grounds.

113. *See* Buchanan v. Batchelor, 308 F. Supp. 729, 733 (N.D. Tex. 1970), *vacated*, 401 U.S. 989 (1971).

114. *See, e.g.*, M. PLOSCOWE, SEX AND THE LAW 195 (rev. ed. 1962).

115. Note, *supra* note 81, at 297 (statement before the American Law Institute May 19, 1955). At this American Law Institute meeting article 207 of the Model Penal Code, which recommended repeal of all criminal sanctions of proscribed consensual sexual activity between adults, was adopted. *See generally* MODEL PENAL CODE §207 (Tent. Draft No. 4, 1955).

116. "If the criminal law is to become or remain a respected tool in the maintenance of social order, its retention in a particular instance can only be justified by its reasonable correlation to the subsumed social facts." Note, *Post-Kinsey: Voluntary Sex Relations as Criminal Offenses*, 17 U. CHI. L. REV. 162, 182 (1949).

117. Bowman & Engle, *A Psychiatric Evaluation of Laws of Homosexuality*, 29 TEMP. L.Q. 273, 281 (1956). It was also pointed out by these authors that sex laws were more strictly enforced against homosexuals than against heterosexuals. *Id.* at 279.

118. *See, e.g.*, Hoover v. State, 59 Ala. 57 (1877); People v. Potter, 319 Ill. App. 409, 49 N.E.2d 307 (1943); State v. Fore, 23 N.C. 378 (1841).

119. *See, e.g.*, People v. Bright, 77 Colo. 563, 238 P. 71 (1925).

in blackmail situations.[120] Criminal complaints of adultery, for example, are generally filed as a lever to secure favorable divorce settlements, but almost always abandoned once the divorce is obtained.[121] Despite the recent enactment of Florida's "no-fault" divorce statute,[122] the complaint procedure might still be effective in obtaining a more favorable settlement. To avoid the unfavorable publicity resulting from being charged with adulterous conduct,[123] one spouse is likely to be more agreeable to the other's demands.

Perhaps more disturbing than the use of sex laws by private individuals for personal gain are the instances of such abuse by law enforcement officials. In Massachusetts a local district attorney was convicted of extorting 100,000 dollars from wealthy movie magnates by threatening to indict them on charges of patronizing a house of prostitution.[124] Similar tactics were used in another 50,000 dollar extortion attempt for a stay of prosecution for adultery.[125] Such abuses also extend to sodomy prosecutions. In *Kelly v. United States*[126] the Court of Appeals for the District of Columbia Circuit reversed a conviction noting:[127]

> [A]n accusation of a verbal invitation to sodomy is as terrifying as a threat of accusation of sodomy itself; perhaps more so because even less susceptible of defense . . . .
>
> Any citizen who answers a stranger's inquiry as to direction . . . or . . . a match is liable to be threatened with an accusation of this sort. There is virtually no protection . . . .
>
> It follows that threatened accusation of this offense is the easiest of blackmail methods . . . [which] may impel [one] to comply with a demand for money under such a threat.

While the removal of existing criminal sanctions against consensual sexual activity might not prevent such blackmail or extortion attempts, it would preclude the state from being the blackmailer's "silent partner" and its laws from being tools of the trade.

Apart from blackmail and extortion, sex laws appear to encourage police to engage in illegal enforcement techniques such as entrapment and invasion of privacy.[128] While the fourth amendment expressly prohibits unreasonable

120. *See* MODEL PENAL CODE §207.1, Comment (Tent. Draft No. 4, 1955).

121. *Id.*

122. FLA. STAT. §§61.001-.191 (1971). Concerning enforcement of adultery laws, it is interesting to note that until 1967 the only ground for divorce in New York was adultery. Thousands of people received divorces each year, yet since 1900 there has been no one convicted of the crime. Ploscowe, *supra* note 99, at 283. *See also* Note, *supra* 96, at 1539 n.489.

123. *See* Note *supra* note 96, at 1539.

124. Attorney General v. Tufts, 239 Mass. 458, 501-07, 511-16, 132 N.E. 322, 331-34, 336-38 (1921).

125. Attorney General v. Pelletier, 240 Mass. 264, 280-82, 134 N.E. 47, 427-29 (1922).

126. 194 F.2d 150 (D.C. Cir. 1952).

127. *Id.* at 153-54.

128. While the adultery statute requires open and notorious conduct, both the sodomy proposal and fornication statutes punish single acts, regardless of whether such openness

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searches,[129] this provision is not violated when informers or false friends are employed to acquire incriminating evidence.[130] Yet to induce a suspect to commit a crime should bar prosecution under the doctrine of entrapment.[131]

The defense of entrapment is not available to persistent violators who are predisposed to committing the criminal act.[132] This test, however, was developed in cases involving violent crimes,[133] and appears unsuitable for application to victimless sex offenses.[134] While enforcement of these sex laws may prove to be impossible without the employment of entrapment techniques,[135] any social gain realized in a particular instance appears to be outweighed by the generally disreputable tactics police are encouraged to use and the court time wasted in determining if illegal enforcement procedures have been utilized.[136]

Disregarding the religious and moral convictions of individuals, which seem to lead to emotional controversy over the utility of sex laws, legislative

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and notoriety are present. FLA. STAT. §§798.01 (adultery), 798.03 (fornication) (1971). This sexual conduct is ordinarily conducted in private. *See* text accompanying note 67 *supra*. Thus, to enforce these laws police are required to use illegal procedures. Such procedures, however, seem to be used more often in cases involving homosexual rather than in heterosexual conduct. *See, e.g.*, Kelly v. United States, 194 F.2d 150 (D.C. Cir. 1952); Bieliki v. Superior Court, 57 Cal. 2d 602, 371 P.2d 288, 21 Cal. Rptr. 552 (1962); Rittenour v. District of Columbia, 163 A.2d 558 (D.C. Mun. Ct. App. 1960).

129. U. S. CONST. amend. IV.

130. *See* On Lee v. United States, 343 U.S. 747 (1952) (fourth amendment was not violated when suspect's friend, wired for sound, entered his store and engaged him in incriminating conversation).

131. *See, e.g.*, Rittenour v. District of Columbia, 163 A.2d 558 (D.C. Mun. Ct. App. 1960). This doctrine is intended to prevent inducement into crime and further to prevent law enforcement officials from employing methods that cannot be countenanced. Sherman v. United States, 356 U.S. 369, 378-85 (1958) (concurring opinion); Sorrells v. United States, 287 U.S. 435, 442 (1932). "Surely if the law has its seamy side it is to be found in the area [of victimless sex crimes] where the methods of enforcement become almost as sordid as the activities they are intended to suppress." L. FULLER, ANATOMY OF THE LAW 44 (1969). For examples of such sordid methods *see* Bieliki v. Superior Court, 57 Cal. 2d 602, 371 P.2d 288, 21 Cal. Rptr. 552 (1962); Rittenour v. District of Columbia, 163 A.2d 558 (D.C. Mun. Ct. App. 1960).

132. Sherman v. United States, 356 U.S. 369, 372 (1958).

133. *E.g.*, People v. Molone, 117 Cal. App. 629, 4 P.2d 287 (1931) (burglary); People v. Lanzit, 70 Cal. App. 498, 223 P. 816 (1925) (attempt to commit murder).

134. In dealing with homosexual offenders in particular, some courts have recognized how easily police may "torment and tease weak men beyond their power to resist." Guarro v. United States, 237 F.2d 578, 581 (D.C. Cir. 1956); McDermett v. United States, 98 A.2d 287, 290 (D.C. Mun. Ct. App. 1953).

135. *See* Kelly v. United States, 194 F.2d 150, 154 (D.C. Cir. 1952); Seitner v. United States, 143 A.2d 101 (D.C. Mun. Ct. App.), *aff'd per curiam*, 262 F.2d 710 (D.C. Cir. 1958).

136. *See* Kelly v. United States, 194 F.2d 150, 152-54 (D.C. Cir. 1952). Police have used various techniques to encourage individuals to violate these laws, which if known to the general public, would arguably be offensive to normal sensitivities. Sorrells v. United States, 287 U.S. 435, 441 (1932) (appeal based on sentiment as old army buddies); United States v. Washington, 20 F.2d 160 (D. Neb. 1927) (pity); Silk v. United States, 16 F.2d 568, 569 (8th Cir. 1926) (appeal based on friendship between police officer and defendant); United States v. Wray, 8 F.2d 429, 430 (N.D. Ga. 1925) (sympathy). *See also* L. FULLER note 131 *supra*.

attention should be focused on elements that may produce rational debate and agreement.[137] Difficulty or impossibility of enforcement reduces or eliminates any possible deterrent effect. Arbitrary and discriminatory enforcement may well breed contempt for all laws; police corruption is encouraged; private blackmail schemes are aided with the force of law; and we demean our police by asking them to be decoys.[138] Moreover, our law enforcement agencies, prosecution resources, and courts are wastefully diverted from the central insecurities of our modern society – rape, robbery, burglary, and assault.

Constitutionality of Victimless Sex Laws

Supporters of morals legislation urge that the state has the constitutional power to impose laws and the exercise of this power in the area of sexual morality has consistently been upheld by the courts.[139] Proponents of liberalizing sex laws have, nonetheless attacked the constitutionality of existing statutes[140] on one or more of four theories: (1) the statutes are unconstitutionally vague in failing to define the prohibited acts with sufficient specificity and in language understandable to the average citizen; (2) they violate the first amendment of the United States Constitution by enforcing what amount to solely religious laws; (3) the statutes themselves constitute a denial of equal protection; and (4) they infringe upon the individual's right to privacy. The first constitutional objection can be easily remedied by legislative "repair" to suspect laws.[141] Because this remedy is so easily administered without reaching the more substantive constitutional questions, it cannot be seriously considered an effective weapon in attacking the basic problems of sex legislation.

Enforcement of Religious Laws

Laws prohibiting sexual activity between unmarried couples stem from Biblical proscriptions.[142] The United States Constitution provides that a state may not establish religion or interfere with the free exercise of religion.[143] It is therefore arguable that a state may not enforce sex laws based on religious proscriptions for to do so would be inconsistent with the doctrine of separation of church and state.

137. Schwartz, *Morals Offenses and the Model Penal Code*, 63 Colum. L. Rev. 669 (1963).

138. Sorrells v. United States, 287 U.S. 435 (1932). "[I]t is well settled that decoys may be used to entrap criminals and to present opportunity to one intending or willing to commit crime." *Id.* at 445. *But see* Rittenour v. District of Columbia, 163 A.2d 558 (D.C. Mun. Ct. App. 1960).

139. *See, e.g.*, Poe v. Ullman, 367 U.S. 497, 545-46 (1961) (Harlan, J., dissenting); Reynolds v. United States, 98 U.S. 145, 164-66 (1879). *See also* text accompanying note 47 *supra*.

140. Henkin, *Morals and the Constitution: The Sin of Obscenity*, 63 Colum. L. Rev. 391 (1963).

141. Following the decision in Franklin v. State, 257 So. 2d 21 (Fla. 1971), which declared Fla. Stat. §800.01 (1971) void for vagueness, the Florida Legislature proposed a new sodomy statute curing this constitutional infirmity. Proposal note 83 *supra*.

142. *E.g.*, *Exodus* 20:14 (adultery).

143. *See* U.S. Const. amend. I.

Justice Harlan claimed that morals laws are a present reality regardless of their source, and that they traditionally enjoy constitutional immunity:[144]

> Yet the very inclusion of the category of morality among state concerns indicates that society is not limited in its objects only to the physical well-being of the community, but has traditionally concerned itself with the moral soundness of its people as well. . . . The laws regulating marriage which provide both when the sexual powers may be used and the legal and societal context in which children are born and brought up, as well as laws forbidding adultery, fornication and homosexual practices . . . form a pattern so deeply pressed into the substance of our social life that any Constitutional doctrine in this area must build upon that basis.

A majority of the Supreme Court, however, has made it clear that history alone is not sufficient authority to uphold laws enforcing religious beliefs. Although the religious prohibitions of the first amendment have only recently been held applicable to the states through the fourteenth amendment,[145] their application is not limited to new laws but extends to those laws predating the Constitution.[146] In a careful reexamination of Sunday Blue Laws,[147] the Court noted that they were originally designed to promote religious observance and reflected the community attitude that working on the Sabbath was immoral.[148] While the Court upheld these laws, it did so despite their history, rather than because of it, implying strongly that laws serving solely religious functions would be forbidden.[149] In assessing the validity of morals legislation, courts have consistently sought to support their decisions with secular purposes served by these statutes.[150] While such justification can be easily found for homicide, theft, and usury, the secular purposes served by prohibitions of sexual conduct between consenting adults are less obvious. Lord Devlin's argument that any immorality threatens society's cohesion appears the most convincing, but the experience of those states with liberalized sex laws reveals no threatened disintegration of society.

The effect, if not the primary purpose of the establishment of religion clause is to bar governmental interference in a realm of personal activities that is of no concern to others. Religiously-based legislation cannot be justified by its historical base alone:[151]

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144. Poe v. Ullman, 367 U.S. 497, 545-46 (1961) (Harlan, J., dissenting).

145. See Murdock v. Pennsylvania, 319 U.S. 105 (1943); Cantwell v. Connecticut, 310 U.S. 296 (1940); Gitlow v. New York, 268 U.S. 652, 666 (1925). The doctrine of separation of church and state has long been recognized. Everson v. Board of Educ., 303 U.S. 1, 16 (1947); Reynolds v. United States, 98 U.S. 145, 164 (1879). The doctrine has only been recently applied, however. Engle v. Vitale, 370 U.S. 421 (1962); *see* Henkin, *supra* note 140, at 408 nn.51-52.

146. *See* text accompanying notes 27-29 *supra*.

147. McGowan v. Maryland, 366 U.S. 420 (1961).

148. *Id.* at 445.

149. *Id.*; *see* Henkin, *supra* note 140, at 408.

150. *See* text accompanying note 46 *supra*.

151. Harris v. State, 457 P.2d 638, 644-45 (Alas. 1969).

> With the expansion of the concept of individual freedom in our society, as exemplified in . . . the trends of our constitutional law, there has been a corresponding decrease of religious beliefs as determinants of social and legal principles. The emphasis today is on religious freedom, not on a tyranny of religious ideas over persons to whom they are unacceptable. Coupled with this there has been the acquisition of . . . vast . . . scientific, statistical, and psychological data about the sexual nature and behavior of man. [As a result a] re-examination of our entire regulation of sexual behavior by the criminal law may well be in order.

Equal Protection and the Right of Privacy[152]

In *Griswold v. Connecticut*[153] the United States Supreme Court invalidated a state statute prohibiting the use of contraceptives as violative of certain "penumbras" of marital privacy created by the first, third, fourth, fifth, and ninth amendments.[154] Carefully limiting the scope of *Griswold* to *marital* privacy, the Court granted this newly protected group the right to engage in parochial acts of sexual intercourse without fear of conceiving unwanted children. Arguably, all private consensual sexual conduct of married couples, having no visible impact on others,[155] would similarly be protected.[156] Post-*Griswold* interpretations of sodomy statutes appear to support this position. In *Cotner v. Henry*[157] the court observed that sodomy statutes that punish acts of married couples might well be unconstitutional after *Griswold*.[158]

In *Buchanan v. Batchelor* a Texas sodomy statute[159] was successfully attacked by a married couple on the ground that it violated their right of marital privacy.[160] The couple intervened in a suit brought by a confessed

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152. The constitutional questions of equal protection and the right of privacy may logically be considered together. It was the right of privacy that extended sexual freedom to married couples. Griswold v. Connecticut, 381 U.S. 479 (1965). This freedom was recently expanded to include unmarried individuals on equal protection grounds. Eisenstadt v. Baird, 405 U.S. 438 (1972).

153. 381 U.S. 479 (1965).

154. *Id.* at 483-84. In his concurring opinion, Justice Harlan reiterated his argument of the impossibility of drawing a line between public behavior and private conduct. *Id.* at 500-02. *See* text accompanying note 149 *supra*.

155. *See* Chesebrough v. State, 255 So. 2d 675 (Fla. 1971) (mother convicted of violating FLA. STAT. §800.04 (1971) (lewd and lascivious act in the presence of a minor under age fourteen) for engaging in sexual intercourse with her husband (son's step-father) in the presence of her minor son in order to demonstrate to him how babies are made).

156. Griswold v. Connecticut, 381 U.S. 479, 483 (1965).

157. 394 F.2d 873 (7th Cir. 1968), *cert. denied*, 393 U.S. 847 (1968) (habeus corpus proceeding).

158. *Id.* at 875. "The import of the *Griswold* decision is that private, consensual, marital relations are protected from regulations by the state through the use of a criminal penalty." *Id. See also* Travers v. Patton, 261 F. Supp. 110 (D. Conn. 1966) where the court also observed that *Griswold* protects "the sanctity of sexual aspects of the marital relationship." *Id.* at 113.

159. TEX. PEN. CODE art. 524 (1970).

160. Buchanan v. Batchelor, 308 F. Supp. 729, 732-33, 735-36 (N.D. Tex. 1970), *vacated*, 401 U.S. 989 (1971). The Supreme Court vacated the district court decision as a violation of the policy against a federal court staying or enjoining prosecution under a state statute

homosexual for a declaratory judgment on the statute's constitutionality, claiming the plaintiff did not adequately protect the interests of married persons.[161] Relying on *Griswold* the court held the statute unconstitutional insofar as it reached the private, consensual acts of married couples.[162] However, since the court felt *Griswold* applied only to married couples, single individuals were not similarly protected.[163]

Without more, therefore, the *Griswold* decision was apparently inapplicable to any state policy against premarital or extramarital sexual conduct, this being "concededly a permissible and legitimate legislative goal."[164] Florida's proposed sodomy statute exempting married couples from sodomy prohibitions[165] accords with this limited interpretation of *Griswold.*

On March 22, 1972, however, a plurality of the Supreme Court announced a startling expansion of *Griswold* rights in matters pertaining to the sexual conduct of single individuals. In *Eisenstadt v. Baird*[166] the Court held unconstitutional a Massachusetts statute prohibiting distribution of birth control devices to single persons.[167] Viewing the statute as a prohibition on contraception per se, the Court held it violated the rights of single persons under the equal protection clause of the fourteenth amendment.[168] Noting that *Griswold* concerned only marital privacy, the Court continued:[169]

> Yet the marital couple is not an independent entity with a mind and heart of its own, but an association of two individuals each with a separate intellectual and emotional make-up. If the right of privacy means anything, it is the right of the *individual,* married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.

Concededly, the holding in *Eisenstadt* is limited to the distribution of contraceptives to single persons. Perhaps because the case dealt only with that issue, the Court, for argument's sake, conceded that a state could fashion appropriate remedies for fornication.[170] A fornication statute was not at issue, however. The Court's concession was made only to reinforce its position that the statute, by its very terms, could not be interpreted as a measure to deter premarital or extra-marital sex.[171] Such dictum does not support the

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pending state court proceedings except under special circumstances, 401 U.S. 989, *citing* Younger v. Harris, 401 U.S. 37 (1971).

161. Buchanan v. Batchelor, 308 F. Supp. 729, 730 (N.D. Tex. 1970).
162. *Id.* at 735.
163. *Id.*
164. Griswold v. Connecticut, 381 U.S. 479, 505 (1965) (White, J., concurring).
165. PROPOSAL note 83 *supra.*
166. 405 U.S. 438 (1972).
167. *Id.* at 455.
168. *Id.*
169. *Id.* at 453.
170. *Id.* at 448.
171. *Id.*

contention that fornication statutes are constitutional. Once the right to own a harmless item of personalty[172] is granted to an individual, he is also granted the right to use this personalty for the purpose for which it is intended.[173] Hence, single adults must have the right to engage in sexual intercourse.

There is admitted difficulty in applying this same reasoning to the crime of adultery. In impinging upon fundamental freedoms, the state may make classifications that are necessary to achieve a compelling state interest.[174] The preservation of the family relationship might be such a compelling state interest.[175] The state, however, may not "broadly stifle fundamental personal liberties when the end can be more narrowly achieved."[176] Certainly if there is no meaningful marital or family relationship to be preserved, there is no compelling state interest.[177] The broad proscription of all open and notorious adulterous conduct therefore appears to violate the due process clause of the fourteenth amendment.[178] A statute that allowed only a spouse to file a complaint against the adulterous partner and further provided that this complaint could only be filed if the couple were still living together as husband and wife would be narrow in scope and yet arguably protect any legitimate compelling state interest.

Following *Eisenstadt*, sodomy statutes may well be held unconstitutional on equal protection grounds. Based on *Griswold* these statutes have in the past been held unconstitutional when applied to married couples.[179] With the expansion of *Griswold* rights to single persons,[180] the constitutional supports for the distinction between married and single persons collapse.[181] To hold otherwise would arguably be a denial of equal protection in violation of the fourteenth amendment:[182]

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172. The *Eisenstadt* court noted with approval the First Circuit Court's comment that most birth control devices are not of such demonstrated danger as to require a medical prescription. *Id.* n.9. *See* Eisenstadt v. Baird, 429 F.2d 1398, 1401 (1st Cir. 1970).

173. *Cf.* Stanley v. Georgia, 394 U.S. 557 (1969). If one may privately possess and use obscene matter that may have been obtained illegally, one should have the right to use birth control devices that were obtained legally. If there is no reasonable, lawful manner for such use the right to own is of no significance.

174. *E.g.*, Shapiro v. Thompson, 394 U.S. 618 (1969).

175. *See* Wexler, *Sex Offenses Under the New Criminal Code*, 61 ILL. B.J. 152-54 (1962).

176. Shelton v. Tucker, 364 U.S. 479, 488-89 (1960).

177. A husband and wife who have separated, but for reasons of their own do not obtain a divorce would be unable to establish meaningful relationships with other partners.

178. *Cf.* Loving v. Virginia, 388 U.S. 1 (1966).

179. *See* Buchanan v. Batchelor, 308 F. Supp. 729 (N.D. Tex. 1970), *vacated*, 401 U.S. 989 (1971).

180. Eisenstadt v. Baird, 405 U.S. 438 (1972).

181. If single persons possess the same right of sexual privacy as married couples, they too should be free to engage in acts of sodomy. *See* Buchanan v. Batchelor, 308 F. Supp. 729, 732-33 (N.D. Tex. 1970).

182. Eisenstadt v. Baird, 405 U.S. 438, 454 (1972), *quoting* Railway Express Agency v. New York, 336 U.S. 106, 112-13 (1949) (Jackson, J., concurring).

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> The framers of the Constitution knew, and we should not forget today, that there is no more effective practical guarantee against arbitrary and unreasonable government than to require that the principles of law which officials would impose upon a minority must be imposed generally. Conversely, nothing opens the door to arbitrary action so effectively as to allow those officials to pick and choose only a few to whom they will apply legislation and thus to escape the political retribution that might be visited upon them if larger numbers were affected. Courts can take no better measure to assure that laws will be just than to require that laws be equal in operation.

CONCLUSION

It has been approximately one hundred years since Florida first enacted sodomy, adultery, and fornication statutes. These original proscriptions properly reflected that society's nineteenth century code of ethics and morals. They do not reflect those of today's society. Sociological and psychological authorities have exposed the inadequacies of these sex prohibitions. The continued cohesion of jurisdictions whose criminal codes do not proscribe consensual, private sexual conduct between adults rebuts any fears that society will degenerate in the absence of such laws. If individuals choose to go to the devil, the "powerful checks of home, school, church and social evaluation do not require as a supplement an unwieldy law enforcement apparatus."[183] Nor do these individuals need a legal escort on their journey to hell. Florida must recognize that there no longer exists any justification for statutory prohibition of sodomy, fornication, or adultery between consenting adults. As "possessed" as those who engage in such conduct may be, America ceased hanging witches in 1692.[184]

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183. Note, *Post-Kinsey: Voluntary Sex Relations as Criminal Offenses*, 17 U. CHI. L. REV. 162, 182 (1949).

184. Witchcraft, or supposed intercourse with evil spirits, was punishable with death until the statute was repealed in 1736. The only prosecution in America occurred in 1692, as a result of which twenty persons were hanged in Salem, Massachusetts. BLACK'S LAW DICTIONARY 1776 (rev. 4th ed. 1968).