The Right to Decide—Individual Liberty Versus State Police Powers

Michael A. Lamson

The power of government to interfere with individual liberty is inherently limited in the United States. On the federal level, the government may act only pursuant to its powers specifically enumerated in the Constitution.[1] State governments, on the other hand, may act pursuant to the broad general police power so long as the matter has not been entrusted to the exclusive control of the federal government by the Constitution.[2] The state police power is not unlimited, however, being operative only to promote or protect the public health, safety, welfare, or morals.[3] On its face, then, the police power enables a state to proscribe private conduct only when a public detriment can thereby be avoided.[4] Despite these apparent limitations on legislative activity, there presently exist a plethora of laws on both the state[5] and

1. U.S. CONST. art. I, § 8. In addition to its specifically enumerated powers, Congress may make laws "necessary and proper" for carrying into execution the enumerated federal powers. *Id.*

2. *See, e.g.*, Goldblatt v. Town of Hempstead, 369 U.S. 590, 594-95 (1962); Liggett Co. v. Baldridge, 278 U.S. 105, 111-12 (1928); Jacobson v. Massachusetts, 197 U.S. 11, 24-25 (1905); Lawton v. Steele, 152 U.S. 133, 137 (1894); Campbell v. Superior Court, 106 Ariz. 542, 546, 479 P.2d 685, 689 (1971); State v. Pelosi, 68 Ariz. 51, 61, 199 P.2d 125, 131-32 (1948).

3. *See, e.g.*, Mugler v. Kansas, 123 U.S. 623, 659 (1887); Chicago Park Dist. v. Canfield, 370 Ill. 447, 451, 19 N.E.2d 376, 378 (1939); Toms River Publishing Co. v. Borough of Manasquan, 127 N.J. Super. 176, 181, 316 A.2d 719, 722 (Super. Ct. 1974).

4. The tenth amendment to the United States Constitution specifies that powers not delegated to the federal government or prohibited to the states "are reserved to the States respectively, or to the people." Additionally, the ninth amendment states: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." It seems clear, therefore, that the Constitution was not seen as simply dividing between state and federal governments all possible power which a government might exercise. Rights and powers of the people were viewed as a limit on the power of any government.

5. *See, e.g.*, ARIZ. REV. STAT. ANN. §§ 13-431, -532, -651 (Supp. Pamphlet 1973) (gambling, obscenity, sodomy); CAL. PENAL CODE §§ 266(e), 286, 311.2 (West 1970) (purchase of prostitute, sodomy, possession of obscene material); N.Y. PENAL LAW §§ 220.00-.45, 225.00-.40, 230.00-.40, 235.00-.22 (McKinney Supp. 1974-75) (dangerous drugs, gambling, prostitution, obscenity).

federal[6] levels proscribing conduct that demonstrably affects only the consenting parties involved.[7]

Pursuant to its role as protector of the public interest, the state evaluates individual conduct in terms of whether or not it is deemed harmful to the public.[8] Inherent in the state's power to proscribe individual conduct is the right to make this factual determination of harm. The potential for abuse, however, is obvious since states may base their determinations upon belief rather than fact. By virtue of this position, the state can restrain individual liberty by merely asserting a public interest rather than making a factual showing of public harm.[9]

This Note will analyze legislation aimed at private consensual behavior to determine whether such legislation is first, desirable, and secondly, constitutional. The permissible scope of the police power will be analyzed initially to evaluate the legitimacy of criminalizing individual conduct arguably threatening no measurable, direct public harm. The much debated question of whether public morality may justify prohibition of conduct, in the absence of any demonstrable tangible harm to others, will then be addressed from a philosophical standpoint. Although a great divergence in judicial and philosophical opinion exists in this area, it will be suggested that a demonstrable showing of direct public harm should be a necessary prerequisite for proscribing individual conduct. Finally, constitutional challenges to state laws not comporting with this thesis will be explored. Laws prohibiting the private use and possession of marijuana will be specifically examined as representative of government abuse of the police power.

SCOPE OF THE STATE POLICE POWER

The state police power is founded on and justified by the notion of public necessity.[10] Determining the public necessity entails weighing

6. *See, e.g.*, 18 U.S.C. §§ 1401-1406 (heroin) (1970); *id.* §§ 1461-1465 (obscenity); *id.* §§ 2421-2424 (interstate traffic of prostitution).

7. The activities prohibited by such laws—prostitution, sodomy, gambling, and drug use—may be labeled consensual crimes in that the parties involved act voluntarily, directly harming no one else. *See, e.g.*, Kaplan, *The Role of the Law in Drug Control*, 1971 DUKE L.J. 1065, 1075-76 (1971); Note, *The Principle of Harm and Its Application to Laws Criminalizing Prostitution*, 51 DENVER L.J. 235, 240-43 (1974); Comment, *Private Consensual Adult Behavior: The Requirement of Harm to Others in the Enforcement of Morality*, 14 U.C.L.A.L. REV. 581, 587-89 (1967).

8. *See* Goldblatt v. Town of Hempstead, 369 U.S. 590, 594-95 (1962); Lawton v. Steele, 152 U.S. 133, 137 (1890); Chicago Park Dist. v. Canfield, 370 Ill. 447, 451, 19 N.E.2d 376, 378 (1939).

9. States often enact laws which do not designate what public harm is addressed, specifying only a vague category labeled "public morals." *See* ARIZ. REV. STAT. ANN. § 13-331(A)(5) (1956) (unlawful for two or more persons to conspire to commit an act injurious to public morals); *id.* § 13-1004 (unlawful to carry flag or sign "derogatory to public morals").

10. *See, e.g.*, Fireman's Fund Ins. Co. v. Arizona Ins. Guar. Ass'n, 22 Ariz. App.

the extent to which private rights are impaired against the public benefit derived.[11] Basically, exercise of the police power is commensurate with the public need for safety, health, security, and the promotion of the general welfare.[12] The classic general statement of the parameters of the power was made by the United States Supreme Court in *Lawton v. Steele*:[13]

> To 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 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.[14]

A necessary prerequisite to proper use of the state's police power is the public nature of the interest promoted or protected. In the civil context, this element requires that the police power be used to promote the public interest and the general welfare.[15] General welfare implies that the particular law must promote the welfare of the general public, as contrasted with that of a small percentage of the citizenry.[16] Thus, the interests sought to be promoted must be of general concern, rather than of any persuasive minority segment in the society. The concept of general welfare in the civil context is flexible and often broadly construed by courts, which may simply defer to the legislature's judgment

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453, 461, 528 P.2d 839, 847 (1974); McCoy v. Sanders, 113 Ga. App. 565, 567, 148 S.E.2d 902, 903 (1966); Jefco, Inc. v. Lewis, 520 S.W.2d 915, 922 (Tex. Civ. App. 1975).

11. Edwards v. State Bd. of Barber Examiners, 72 Ariz. 108, 114, 231 P.2d 450, 452 (1951); State v. Oklahoma Gas & Elec. Co., 536 P.2d 887, 891 (Okla. 1975).

12. *See, e.g.*, McCoy v. Sanders, 113 Ga. App. 565, 568, 148 S.E.2d 902, 904 (1966); Toms River Publishing Co. v. Borough of Manasquan, 127 N.J. Super. 176, 181, 316 A.2d 719, 722 (Super. Ct. 1974); Jefco, Inc. v. Lewis, 520 S.W.2d 915, 922 (Tex. Civ. App. 1975); Perry, *Abortion, The Public Morals, and the Police Power: The Ethical Function of Substantive Due Process*, 23 U.C.L.A.L. REV. 689, 694 (1976).

The police power has often been described as promoting the public morals, along with the public health, safety, and welfare. This aspect of the police power is rarely relied upon currently in support of state regulations, *see generally* McCarthy v. City of Manhattan Beach, 41 Cal. 2d 879, 890, 264 P.2d 932, 938 (1953), *cert. denied*, 348 U.S. 817 (1954), and should be given limited applicability. See text accompanying notes 53-80 *infra*.

13. 152 U.S. 133 (1894).

14. *Id.* at 137. Although this general statement of the scope of the police power is old, it has been repeatedly cited and adopted in more recent cases. *See, e.g.*, Goldblatt v. Town of Hempstead, 369 U.S. 590, 594-95 (1962); Sweeney v. Murphy, 39 App. Div. 2d 306, 308, 334 N.Y.S.2d 239, 241 (1972); Commonwealth v. Harmon Coal Co., 452 Pa. 77, 93, 306 A.2d 308, 317 (1973).

15. *See, e.g.*, Fireman's Fund Ins. Co. v. Arizona Ins. Guar. Ass'n, 22 Ariz. App. 453, 528 P.2d 839 (1974); South Burlington County NAACP v. Township of Mt. Laurel, 67 N.J. 151, 336 A.2d 713, *cert. denied*, 423 U.S. 808 (1975); Kraus v. City of Cleveland, 163 Ohio St. 559, 127 N.E.2d 609 (1955), *appeal dismissed*, 351 U.S. 935 (1956).

16. Edwards v. State Bd. of Barber Examiners, 72 Ariz. 108, 113, 231 P.2d 450, 452 (1951); South Burlington County NAACP v. Township of Mt. Laurel, 67 N.J. 151, 336 A.2d 713, *cert. denied*, 423 U.S. 808 (1975).

that the enactment is supported by a proper public purpose.[17] For example, courts have been unanimous in upholding state and city legislative decisions to order fluoridation of the public water system.[18] There is a public purpose behind such legislative decisions since fluoridation is of substantial benefit to the public health, and at the same time, it is basically innocuous to the individual.[19]

In addition to the requirement of a public purpose or interest, in the criminal sphere the state police power must be used only to prevent public harm.[20] This is a more restrictive requirement than that operating in the civil context—as indeed it must be because of the critical liberty interests at stake[21]—since the concept of public harm remains fairly constant, while the concept of general welfare is necessarily broad and changes to meet the fluctuating needs of society.[22] The harm which the criminal law seeks to avoid must be general in effect and public in nature.[23] Specifically excluded from this concept is self-harm supposedly flowing to the individual from his own actions.[24] The dichotomy between public and self interests and their role in the criminal law is demonstrated by the laws requiring motorcyclists to wear helmets.[25] Those courts upholding the motorcycle helmet laws have found a broad public interest in protecting users of the highway.[26]

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17. *See* Jacobson v. Massachusetts, 197 U.S. 11, 31 (1905); Jefco, Inc. v. Lewis, 520 S.W.2d 915, 922 (Tex. Civ. App. 1975).

18. *See, e.g.*, Alkire v. Cashman, 350 F. Supp. 360 (E.D. Ohio 1972); Minnesota State Bd. of Health v. City of Brainerd, — Minn. —, 241 N.W.2d 624 (1976); Kraus v. City of Cleveland, 163 Ohio St. 559, 127 N.E.2d 609 (1955), *appeal dismissed*, 351 U.S. 935 (1956).

19. Minnesota State Bd. of Health v. City of Brainerd, — Minn. —, —, 241 N.W.2d 624, 632 (1976).

20. Ravin v. State, 537 P.2d 494, 509 (Alas. 1975); *see* Garaci v. City of Memphis, 379 F. Supp. 1393, 1399 (W.D. Tenn. 1974).

21. Such interests relate to not only the potential loss of physical liberty, but also the resulting stigma and loss of civil liberties.

22. *See, e.g.*, Berman v. Parker, 348 U.S. 26, 33 (1954); Transamerica Title Ins. Co. v. City of Tucson, 23 Ariz. App. 385, 387-88, 533 P.2d 693, 695-96 (1975); Yonkers Community Dev. Agency v. Morris, 37 N.Y.2d 478, 483, 335 N.E.2d 327, 332, 373 N.Y.S.2d 112, 117 (1975).

23. *See, e.g.*, Ravin v. State, 537 P.2d 494, 509 (Alas. 1975); American Motorcycle Ass'n v. Davids, 11 Mich. App. 351, 358, 158 N.W.2d 72, 76 (1968); State v. Betts, 21 Ohio Misc. 175, 183, 252 N.E.2d 866, 870 (1969).

24. *See, e.g.*, State v. Lee, 51 Hawaii 516, 527-28, 465 P.2d 573, 579-80 (1970) (Abe, J., dissenting); People v. Fries, 42 Ill. 2d 446, 450, 250 N.E.2d 149, 151 (1969); American Motorcycle Ass'n v. Davids, 11 Mich. App. 351, 358, 158 N.W.2d 72, 76 (1968). "[O]ur system of government, based upon the individuality and intelligence of the citizen, does not claim to control him, except as to his conduct to others, leaving him the sole judge as to all that only affects himself." Mugler v. Kansas, 123 U.S. 623, 660 (1887).

25. *See*, N.Y. VEH. & TRAF. LAW § 381(6) (McKinney 1970); WIS. STAT. ANN. § 347.485(1) (1971).

Arizona recently amended its motorcycle helmet law to require only those motorcycle operators or passengers under the age of 18 years to wear a helmet. ARIZ. REV. STAT. ANN. § 28-964(A) (Supp. Pamphlet 1973), *as amended*, ch. 57, § 2 [1976] Ariz. Sess. Laws 204.

26. *See, e.g.*, State v. Also, 11 Ariz. App. 227, 229, 463 P.2d 122, 124 (1969)

Other courts, however, have held such laws unconstitutional, reasoning that the state police power does not extend to dictating to individuals what actions are in their best interests.[27] Despite the inconsistencies in the ultimate holdings of the cases, both sides consistently recognized the requirement of public harm to sustain the criminal provisions. The dichotomy in results is attributable to differences in the courts' findings on the issue of public harm.

The concept of harm seemingly arose as the decisive factor in delineating the limits of the criminal law because the purpose of that body of law is to prevent ascertainable results rather than mere probabilities.[28] The principle of harm adds concrete dimension to the actions punishable by the law; it provides a basis for differentiation of punishments, and it provides an essential organizational construct to connect conduct with causation.[29] To comport with these principles, before society labels conduct criminal, it should distinguish the judgment that the conduct threatens or causes a result harmful to other people from the abstract ethical proposition that the conduct is wrong in and of itself.[30] This removes the arbitrary character of the societal judgment and consequently gives a potential offender notice that his actions are subject to constraint when he harms another. Accordingly, courts may resolve potential violations of the law in the same way as any other question of fact, by determining if there is a demonstrable, tangible effect upon other individuals.[31]

The difficulty with this approach lies in the fact that harm is an elusive concept with various connotations. Accordingly, the case law reflects a basic dichotomy in views as to the legal boundaries of the concept of harm.[32] One group of courts has adhered to the position that where an individual's conduct does not threaten a direct, tangible harm to others, such conduct may not be proscribed by the criminal law.[33] Under this approach, courts have found certain criminal laws,

(danger to others averted by helmet laws); State v. Lee, 51 Hawaii 516, 521, 465 P.2d 573, 577 (1970) (consequential physical injury widespread enough to require regulation); Everhardt v. New Orleans, 253 La. 285, 294, 217 So. 2d 400, 403 (1969) (highway use a privilege which may be regulated); Bisenius v. Karns, 42 Wis. 2d 42, 50, 165 N.W.2d 377, 381 (1969) (laws protective of other users of the highways).

27. *E.g.*, People v. Fries, 42 Ill. 2d 446, 449, 250 N.E.2d 149, 150 (1969); American Motorcycle Ass'n v. Davids, 11 Mich. App. 351, 358, 158 N.W.2d 72, 76 (1968); State v. Betts, 21 Ohio Misc. 175, 184, 252 N.E.2d 866, 870 (1969).

28. Robinson, *A Theory of Justification: Societal Harm as a Prerequisite for Criminal Liability*, 23 U.C.L.A.L. REV. 266, 269 (1975).

29. *See* J. HALL, GENERAL PRINCIPLES OF CRIMINAL LAW 221-22 (1960).

30. *Id.* at 221.

31. *See* Robinson, *supra* note 28, at 271.

32. *Compare* Doe v. Commonwealth's Attorney, 403 F. Supp. 1199, 1202 (E.D. Va. 1975), *aff'd*, 425 U.S. 901 (1976) (state may enforce laws which promote morality and decency), *with* Ravin v. State, 537 P.2d 494, 509 (Alas. 1975) (state may not enforce moral dictates against the individual.)

33. *See, e.g.*, State v. Lee, 51 Hawaii 516, 521, 465 P.2d 573, 577 (1970);

such as those punishing the failure of motorcyclists and passengers to wear helmets[34] and those proscribing private sexual relations between consenting adults,[35] invalid for lack of any showing of harm to persons other than the actors themselves. In contrast, other courts have upheld the right of the state to prohibit any acts which threaten general community standards of morality, as discerned by the legislature, even though such acts pose no threat of measurable and tangible harm to other individuals.[36] These courts accordingly have sustained laws proscribing acts of socially condemned sexual conduct as being within the state's rightful concern for the moral welfare of its people.[37] This split in the cases is indicative of the divergence in basic philosophical thought within the courts themselves as to whether conduct may be proscribed solely for reasons of protecting public morality, without any allegation or showing of direct tangible harm to others arising from the conduct.

PHILOSOPHICAL RESTRICTIONS UPON THE LEGAL ENFORCEMENT OF MORALS

The divergence in judicial viewpoints on the public harm concept reflects the bipolar positions that have evolved in an attempt to identify the philosophical foundation of the Anglo-American legal system, particularly as it relates to the legal enforcement of morality. One school maintains that society, as the protector of all its members, may not interfere with a person's conduct unless others are prejudicially affected thereby.[38] The proponent of this theory, John Stuart Mill, argued that the greater good of individual freedom far outweighs any governmental interest in proscribing conduct that affects only the actor himself.[39] So-

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Commonwealth v. Campbell, 133 Ky. 50, 58, 117 S.W. 383, 385 (1909); State v. Elliott, 88 N.M. 187, 194, 539 P.2d 207, 214 (1975). "The state cannot impose its own notions of morality, propriety, or fashion on individuals when the public has no legitimate interest in the affairs of those individuals." Ravin v. State, 537 P.2d 494, 509 (Alas. 1975).

34. *See, e.g.*, People v. Fries, 42 Ill. 2d 446, 250 N.E.2d 149 (1969); American Motorcycle Ass'n v. Davids, 11 Mich. App. 351, 158 N.W.2d 72 (1968); State v. Betts, 21 Ohio Misc. 175, 252 N.E.2d 866 (1969).

35. State v. Elliott, 88 N.M. 187, 539 P.2d 207 (1975).

36. *See, e.g.*, Doe v. Commonwealth's Attorney, 403 F. Supp. 1199, 1202 (E.D. Va. 1975), *aff'd*, 425 U.S. 901 (1976); Garaci v. City of Memphis, 379 F. Supp. 1393, 1399 (W.D. Tenn. 1974); State v. Bateman, 113 Ariz. 107, 111, 547 P.2d 6, 10 (1976).

37. *See* Doe v. Commonwealth's Attorney, 403 F. Supp. 1199, 1202 (E.D. Va. 1975), *aff'd*, 425 U.S. 901 (1976); State v. Bateman, 113 Ariz. 107, 111, 547 P.2d 6, 10 (1976).

38. J. MILL, ON LIBERTY 13, 93, 97 (Shields ed. 1956).

39. [T]he only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harms to others. His own good, either physical or moral, is not sufficient warrant . . . . The only part of the conduct of anyone for which he is amenable to society is that which concerns others. In the part which merely concerns himself, his inde-

ciety's interest in the individual's behavior, absent demonstrable public harm, is de minimis in comparison to the personal freedom embodied in decisions concerning one's own actions.[40]

A more limited version of Mill's theories has been articulated relatively recently by H.L.A. Hart,[41] who would limit their applicability to the area of legally enforced morality.[42] Believing that individuals generally do not have sufficient information to make important decisions relating to their physical well-being,[43] Hart could envision a role for government in this area.[44] However, he agreed with Mill that legal sanctions should not be used to enforce a society's moral code,[45] viewing conformity to majoritarian moral dictates as insufficient justification for interference with individual liberty.[46]

The contrary position, espoused primarily by Lord Patrick Devlin and James Fitzjames Stephen, views the state as empowered to impose any laws it deems necessary to preserve its moral values.[47] In support of this theory, Devlin equated the preservation of morality with the continued existence of society.[48] He argued that the loosening of moral bonds is the first step toward social disintegration.[49] Accord-

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pendence is, of right, absolute. Over himself, over his own body and mind, the individual is sovereign.

Id. at 13.

40. *Id.* at 93-101.

41. H.L.A. HART, LAW, LIBERTY AND MORALITY (1963).

42. *Id.* at 5.

43. *Id.* at 32.

44. *Id.* at 31.

45. *Id.* at 33; J. MILL, *supra* note 38, at 101-02.

46. "[W]here there is no harm to be prevented and no potential victim to be protected, . . . it is difficult to understand the assertion that conformity, even if motivated merely by fear of the law's punishment, is a value worth pursuing, notwithstanding the misery and sacrifice of freedom which it involves." H.L.A. HART, *supra* note 41, at 57.

47. *See, e.g.*, P. DEVLIN, THE ENFORCEMENT OF MORALS 9-13 (1965); J. STEPHEN, LIBERTY, EQUALITY, FRATERNITY 154-55 (2d ed. 1967); Dworkin, *Lord Devlin and the Enforcement of Morals*, 75 YALE L.J. 986, 989 (1966).

Stephen's work was written in the latter part of the 19th century as a refutation of Mill's *On Liberty*. Its main thesis is that, in order to ensure that the predominant moral view of society prevails, there must be a recognized power for society to punish those individuals who act contrary to common practice and morality. J. STEPHEN, *supra* at 146-55. Stephen argued that vice must be suppressed by restraining individuals from participating in any socially condemned activities. *Id.* at 143. However, Stephen recognized certain limitations upon the useful interference by society with an individual's morals—legislation should respect privacy and not punish activities that the common practice of society does not "strenuously and unequivocally condemn." *Id.* at 159-60. This limitation upon the power of society to enforce morals underlies the fundamental difference between Stephen and Devlin. Devlin argued that it is not possible to set "theoretical limits to the power of the State to legislate against morality." P. DEVLIN, *supra* at 14.

48. [S]ociety is not something that is kept together physically; it is held by the invisible bonds of common thought. If the bonds were too far relaxed the members would drift apart. A common morality is part of the bondage. The bondage is part of the price of society; and mankind, which needs society, must pay its price.

P. DEVLIN, *supra* note 47, at 10. *But see* H.L.A. HART, *supra* note 41, at 51.

49. P. DEVLIN, *supra* note 47, at 13. Devlin apparently felt that the quality of

ingly, "society may use the law to preserve morality in the same way as it uses it to safeguard anything else that is essential to its existence."[50]

In light of these conflicting theories, any examination and analysis of a society's right to use the legal system to enforce its moral code must address two distinct, but interlocking questions. First, should the arm of the law be used to enforce society's moral judgments?[51] Additionally, if legal sanctions are used, should the severity of the sanction vary with the type of moral judgment made?[52]

Legal Enforcement of Social Moral Judgments

To ensure its continuation, a society must make moral judgments concerning the propriety of any member's conduct which may threaten its existence or promote anarchy.[53] Any government action based on such determinations, however, must be for the common good.[54] By proscribing or restricting individual behavior, a society in effect dictates how its members should behave and govern their lives. Individuals agree to submit to these moral dictates in exchange for security of their person and property, thereby creating a form of compact between the state and the individual.[55]

The exact scope of this compact and its effect upon the enforcement of social moral judgments, however, have been subject to the differences in viewpoint exemplified by the Hart-Devlin debate.[56] The major point of contention centers on whether such judgments may be adequately enforced through social sanctions alone,[57] or whether legal coercion may be applied as well. It is generally agreed that both forms

morality is irrelevant. *See id.* at 114. What is important is the belief in a common morality and the consequential power of this cohesiveness. Hart, *Social Solidarity and the Enforcement of Morality*, 35 U. CHI. L. REV. 1, 2-3 (1967). Equating common morality with the continued existence of society appears to be only an a priori assumption on the part of Devlin, unsubstantiated by empirical fact. *See* H.L.A. HART, *supra* note 41, at 50.

50. P. DEVLIN, *supra* note 47, at 11.

51. *See id.* at 8.

52. *Cf. id.*

53. T. HOBBES, LEVIATHAN 232-37 (Macpherson ed. 1968); *cf.* J. ROUSSEAU, THE SOCIAL CONTRACT 69-72 (Cranston ed. 1968). Social moral judgments encompass a broader scope of activity than that included in the concept of morality discussed elsewhere. Social moral judgments relate to all values adjudged worth preserving for the security of the individual and his property. This concept may include those societal judgments concerning morality—individual beliefs and actions not affecting others—but they are not mutually inclusive.

54. *See* J. ROUSSEAU, *supra* note 53, at 69.

55. See T. HOBBES, *supra* note 53, at 226-28; J. LOCKE, THE SECOND TREATISE OF GOVERNMENT 15 (Peardon ed. 1954).

56. *Compare* text & notes 41-46 *supra with* text & notes 47-50 *supra.*

57. Such sanctions include advice, persuasion, instruction, and ostracism, and are effectively promoted by educational and religious institutions. J. MILL, *supra* note 38, at 114.

of enforcement are necessary to secure the person and property of individuals,[58] but disagreement arises as to the limitations, if any, upon the legal enforcement of morals.

The theory espoused by Devlin and Stephen is based on a view of the compact as self-perpetuating. The only guarantee a society has for its continued existence is a well-enforced moral code restricting all deviant individual behavior.[59] Only society may determine morality, without regard to individual liberty,[60] since individuals are deemed to have surrendered their rights to make such decisions when they agreed to be governed under the compact.[61] Thus, individual freedom exists only to the extent that society has chosen not to act—it does not exist independently.[62] Society accordingly may use legal sanctions to prohibit any acts that the society deems morally objectionable, regardless of whether the activity has any effect on other individuals besides the actor.[63] The alternative approach to the broad social compact theory views individuals as having surrendered only that amount of freedom necessary to secure their well-being.[64] This limitation is a natural outgrowth of the desire to protect the individual from the arbitrary actions and tyranny of political rulers.[65] Accordingly, society is allowed to interfere with individual conduct only to the extent necessary to protect other members' interests.[66] This view is consistent with the principles of natural law which formed the foundation of American constitutional government.[67]

58. "All that makes existence valuable to anyone depends on the enforcement of restraints upon the actions of other people. Some rules of conduct, therefore, must be imposed—by law in the first place, and by opinion on many things which are not fit subjects for the operation of law." *Id.* at 8; *see* P. DEVLIN, *supra* note 47, at 5, 11.

59. *See* text & notes 47-50 *supra.*

60. J. STEPHEN, *supra* note 47, at 155, 162-69.

61. T. HOBBES, *supra* note 53, at 261-66. Devlin and Stephen appear to have derived their theories from the basic principles of Hobbes' *Leviathan. Compare* text accompanying note 53 *supra with* text & notes 47-50 *supra.*

62. "[P]ower precedes liberty—that liberty, from the very nature of things, is dependent upon power; and that it is only under the protection of a powerful, well-organized, and intelligent government that any liberty can exist at all." J. STEPHEN, *supra* note 47, at 166; *see* T. HOBBES, *supra* note 53, at 264, 266.

63. *See* P. DEVLIN, *supra* note 47, at 11-14; J. STEPHEN, *supra* note 47, at 67-73, 154-55.

64. J. LOCKE, *supra* note 55, at 72; *accord,* Commonwealth v. Campbell, 133 Ky. 50, 58, 117 S.W. 383, 385 (1909). Locke's analysis of the scope of the societal compact underscores the theories of both Mill and Hart. See text & notes 38-46 *supra.*

65. J. MILL, *supra* note 38, at 3. Underlying the theory that the government that governs best governs least is the basic assumption that man is good and will strive for harmony in his relationships with others, requiring a minimal amount of supervision. *See* J. ROUSSEAU, *supra* note 53, at 53-58. The contrary position embodied in the theory that the social compact preempts individual rights views man in his natural state as tending toward a condition of war with others. Therefore, maximum governmental control is needed. T. HOBBES, *supra* note 53, at 189-91. See text & notes 59-63 *supra.*

66. "[T]he sole end for which mankind are warranted, individually or collectively, in interfering with the liberty of action of any of their number is self-protection." J. MILL, *supra* note 38, at 13.

67. *See* Rochin v. California, 342 U.S. 165, 170-71, 173 (1951); Powell v. Alabama,

The framers were profoundly influenced in their drafting of the Constitution and the Declaration of Independence by the "natural rights" political theory of John Locke,[68] which recognizes an inalienable right of liberty.[69] Certain fundamental and inherent rights of man flowing from this right of liberty were recognized as limitations upon the power of the state by the early American patriots.[70] Thus, natural rights establish the foundation of civil rights.[71] The omission of a bill of rights from the body of the Constitution was grounded on the founding fathers' concern that it would in fact curtail these inalienable rights and afford a colorable pretext for the government to claim more power than was actually granted.[72] Recently, this argument has been utilized to substantiate the inclusion of the ninth amendment into the Bill of Rights.[73] The broad language of the ninth amendment,[74] coupled with the natural rights philosophy underlying the American form of government, leads to the conclusion that there are additional fundamental rights which exist alongside the fundamental rights specifically mentioned in the first eight amendments.[75]

Consistent with the doctrine of enumerated powers[76] and the existence of fundamental natural rights, the power of the American government to interfere with individual liberty is inherently restrained. The scope of this restraint is apparent from the fundamental concept underlying the natural rights theory—individuals surrender only those

287 U.S. 45, 67-68 (1932); Yick Wo v. Hopkins, 118 U.S. 356, 370 (1885); E. CORWIN, THE HIGHER LAW BACKGROUND OF AMERICAN CONSTITUTIONAL LAW 74-80 (1961); E. GERHART, AMERICAN LIBERTY AND "NATURAL LAW" 65-66 (1953); Moore, *The Ninth Amendment—Its Origin and Meaning*, 7 NEW ENGLAND L. REV. 215, 220 (1972).

68. *See* C. BECKER, THE DECLARATION OF INDEPENDENCE 27 (1966); E. GERHART, *supra* note 67, at 65-66; Moore, *supra* note 67, at 237.

69. J. LOCKE, *supra* note 55, at 15. This right of liberty is tempered to the extent that no one in a state of nature may impair the preservation of the life, limb, liberty, health, or goods of another. *Id.* at 6.

70. *See* THE DECLARATION OF INDEPENDENCE; VIRGINIA DECLARATION OF RIGHTS, § I (1776).

71. T. PAINE, RIGHTS OF MAN 90 (Penguin ed. 1969). Natural rights are those that appertain to man in right of his existence, which are not injurious to the natural rights of others. Civil rights appertain to man in right of his being a member of society, and include those rights relating to security and protection. *Id.*

72. THE FEDERALIST No. 84, at 513 (J. Cooke ed. 1961) (A. Hamilton).

73. *See* Doe v. Bolton, 410 U.S. 179, 210-11 (Douglas, J., concurring) (1973); Griswold v. Connecticut, 381 U.S. 479, 488-89 (Goldberg, J., concurring) (1964).

74. "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." U.S. CONST. amend. IX. See discussion note 4 *supra*.

75. *See* Griswold v. Connecticut, 381 U.S. 479, 488-89 (1964) (Goldberg, J., concurring); Moore, *supra* note 67, at 247. "While the Bill of Rights declares it secures inherent rights, it does not create them." City of Pineville v. Marshall, 222 Ky. 4, 8, 299 S.W. 1072, 1074 (1927). Rights to travel and to privacy, for instance, receive widespread judicial recognition though not enumerated in the Constitution. *See, e.g.*, Roe v. Wade, 410 U.S. 113 (1973); Dunn v. Blumstein, 405 U.S. 330 (1972); Shapiro v. Thompson, 394 U.S. 618 (1969); Note, *Municipal Self-Determination: Must Local Control of Growth Yield to Travel Rights?*, 17 ARIZ. L. REV. 145, 148-68 (1975).

76. *See* THE FEDERALIST No. 84, at 513 (J. Cooke ed. 1961) (A. Hamilton); text & note 99 *infra*.

liberties necessary to secure their person and property.[77] Thus, to preserve those fundamental liberties not surrendered, the government may only proscribe individual conduct which threatens or causes harm to the security interests of others.[78] Included within this limited power is the right of the government to proscribe those acts which demonstrably threaten harm to the society itself,[79] since any disruption of important governmental functions threatens the security of those individuals who rely upon the power of society for protection. Society's self-protective power under the American system, however, should be limited to preservation of legitimate governmental entities and functions necessary to carry out the compact. The scope of the American criminal law system thus extends to the proscription of all acts which may demonstrably be proven to be harmful to the individual or society's protective function under the compact.[80]

Despite these limitations imposed by the constitution and its philosophical antecedents, many laws presently exist which proscribe individual conduct without showing of harm. The purpose of such laws appears to be the establishment of a uniform moral code such as that defended by Devlin and Stephen, the presumption apparently being that punishment for acting contrary to society's moral dictates is justified because the act is wrong in and of itself.[81] In addition to its divergence from American constitutional theory, this approach suffers from the basic fallacy of dispensing punishment according to the alleged wickedness of the crime rather than its results. One of the purposes for promulgating criminal laws is to provide the public with a means of retribution against the wrongdoer.[82] However, where neither society nor an ascertainable individual has been demonstrably harmed, as in the case of purely private conduct, there is nothing to be revenged and the underlying theory of retributive justice becomes vacuous.

Even when it is agreed that legal enforcement of morality should be used only where there is a showing of public harm, a potential danger still exists that government will interpret the harm-to-others test

77. *See* authorities cited note 64 *supra*.

78. H.L.A. HART, *supra* note 41, at 57; J. LOCKE, *supra* note 55, at 49-50. "When a person's conduct affects the interests of no persons besides himself, . . . there should be perfect freedom, legal and social, to do the action and stand the consequences." J. MILL, *supra* note 38, at 92.

79. Examples of such acts which may justifiably be proscribed are treason, obstruction of justice, perjury, and tax fraud.

80. *See* J. HALL, *supra* note 29, at 223.

81. *Cf.* J. STEPHEN, *supra* note 47, at 105-22. This rationale also presupposes that individuals will not recognize or avoid evil unless legally coerced. *See* P. DEVLIN, *supra* note 47, at 106-10. There is no empirical evidence that morality is best taught through fear of legal sanction. H.L.A. HART, *supra* note 41, at 57.

82. J. STEPHEN, *supra* note 47, at 137-38.

too broadly. When the state alleges a harm of inconsequential effect to sustain an infringement upon the fundamental liberty of one of its subjects, it has usurped power not delegated to it under the social compact. To prevent this abuse of governmental discretion, a distinction must be drawn between direct injury, which is easily identifiable and can be legally proscribed, and constructive injury, which is more often than not purely speculative.[83] Direct injury is a demonstrable tangible harm to the public which interferes or threatens imminent interference with the security of possessions or protection from physical harm, or to public functions in relation thereto.[84] Constructive injury, on the other hand, is indirect harm to society caused "by conduct which neither violates any specific duty to the public, nor occasions perceptible hurt to any assignable individual except [the actor] . . . ."[85] Under the limited social compact theory,[86] upon which the American system of government is based,[87] the state should be permitted to proscribe only that conduct causing direct injury to others.[88] Society's enforcement of its moral judgments, therefore, should yield to individual freedom of choice whenever individual activity causes no direct tangible harm to others.[89]

83. Such a distinction will give courts a standard by which to measure whether the state has demonstrated sufficient harm to sustain the infringement upon an individual's liberty.

84. J. MILL, *supra* note 38, at 91-92, 100. Direct injury has been equated with malum in se crimes since the activities so defined destroy the rights which society has compacted to protect or cause great public outrage. P. DEVLIN, *supra* note 47, at 30-33. Examples of such types of conduct are murder, robbery, assault, and battery. Also included within this concept are those acts which demonstrably affect the function of the society itself. See text & note 79 *supra*.

85. J. MILL, *supra* note 38, at 100. Constructive harm, being indirect in nature, is not easily demonstrable through proof. It is presumed to occur from the alleged activities. The problem with adopting legislation alleging such harm is attempting to determine how and when the injury occurs. A related legal concept is malum prohibitum, defined as proscribed activity that carries no strong moral connotations. P. DEVLIN, *supra* note 47, at 30-33. The reason such activities are outlawed is not because they are considered morally wrong, but because the particular society disapproves of such activity. *Id.* at 27-38.

86. *See* text & notes 64-67 *supra*.

87. *See* text & notes 68-71 *supra*.

88. J. MILL, *supra* note 38, at 103. Devlin argued that the public harm limitation upon legal enforcement of morals is superfluous since acts believed to be evil by a majority of the populace are as evil as any act can be and, thus, are properly subject to state restriction. P. DEVLIN, *supra* note 47, at 89. However, basing a system of laws upon majority dictates would not provide a consistent theory of what is evil; instead, the legal system would be exposed to the subjective whims and caprices of the majority populace. Without consistency, the legal system would promote dissent and fail one of its primary objectives—to induce social stability.

89. A contrary philosophical approach seemingly allows individuals to be legally, as well as socially, coerced into obeying a society's moral code regardless of any demonstrable harm to others. P. DEVLIN, *supra* note 47, at 11, 121-23. Any weakening of the moral fiber of society is to be prevented at all cost in order to ensure the society's continued existence. *Id.* at 121-23. Under this approach, even though no one is actually harmed by the immoral conduct, the breach of a moral principle is an offense against society in and of itself, and legal coercion may be used to preserve morality. *Id.* at 11. However, as pointed out by Hart, morality may and often does change direction

Restriction on Enforcement of Societal Dictates

A government's acceptance of the direct public harm limitation unfortunately does not end the problem of government overintrusiveness. The use of legal sanctions, even in cases of direct public harm, can result in placing restrictions on individual liberty far greater than necessary to achieve the desired ends. A second dilemma presented by the legal enforcement of morality, therefore, is whether the severity of the legal sanctions should vary according to the type of moral judgment made.[90]

Public harm is basically a question of fact to be determined by legislators, who necessarily follow the majority opinions of their constituency.[91] As a result, criminal laws reflect majoritarian moral judgments.[92] When the punishment applied to violators is disproportionate to the amount of harm caused by the violation, the obvious inequity will cause that minority of the public which disagrees with the prohibition of the activity to lose respect for the legal system.[93] The disrespect thus generated in turn undermines the criminal law system, which depends upon each individual's obedience to the laws. This policy consideration provides support for limitation of the governmental restriction in each case to the least onerous necessary for public protection, and may call for regulation rather than prohibition of some activities.

Proscription, of course, is inherently of more limited applicability than regulation as it may be used only in relation to activities within the scope of the compact creating the state and outside the realm of the individual's guaranteed freedoms.[94] Under the limited social compact theory, the commonwealth retains only the power to punish actual transgressions against the property or person of one of its members.[95]

without causing the predicted social disintegration. H.L.A. HART, *supra* note 41, at 51-52.

Another argument offered as support for the use of legal sanctions to enforce morality is based on the belief that such coercion is a good in and of itself. J. STEPHEN, *supra* note 47, at 154-55. In other words, if society has deemed certain conduct evil, it has a right to prevent the vice and promote virtue. *Id.* at 155. The weakness of this position is the resultant institutionalization of whatever morality happens to be dominant at a particular point in time. H.L.A. HART, *supra* at 72; J. MILL, *supra* note 38, at 77, 102. A developing society instead must be allowed room to change and grow, both morally and politically. Otherwise the culture may become stagnant or erupt from growing inner dissent. *See* J. MILL, *supra* at 40-43; Comment, *supra* note 7, at 587. Moreover, it is questionable that legal enforcement of morality can ever be a good in and of itself. To accept this proposition would require that government act only according to majoritarian tastes and dictates, raising such opinion to a position of infalliability—one very short step from tyranny. J. MILL, *supra* at 64-67.

90. *See* P. DEVLIN, *supra* note 47, at 8, 21-22.
91. *Id.* at 96-100.
92. *Id.* at 94-95.
93. *See* Comment, *supra* note 7, at 587.
94. See text & notes 64-67 *supra.*
95. J. LOCKE, *supra* note 55, at 49-50.

Thus, the state may proscribe only an activity in which the public harm may not be isolated from other consequences of the activity. When public harm may be segregated, the activity must be regulated to prevent only the harm demonstrated, thereby preserving any aspect of the activity which does not threaten or cause harm.[96] American case law has recognized that any legislation must be carefully drafted so as not to stifle fundamental personal liberties when the end can be more narrowly achieved.[97] Accordingly, the appropriateness of the regulation or prohibition of an activity must be determined by the demonstrable public harm in order to insure that the government does not exceed the limited scope of the compact establishing its existence. When society does enact laws proscribing individual conduct without demonstrating public harm commensurate with absolute prohibition, constitutional issues may arise as to the validity of the restrictions upon individual liberty.

SUBSTANTIVE DUE PROCESS AND THE LEGAL ENFORCEMENT OF MORALITY

The American political system was founded upon the ideal of maintaining maximum individual freedom in relation to the power of government.[98] To secure the necessary balance between individual and societal rights, the founders of the United States promulgated both federal and state constitutions recognizing a limited form of government.[99] Despite the framers' intentions that the Constitution be read in light of political theories recognizing natural rights,[100] over the years the view has become prevalent that individual rights are only those extractable from the body of the Constitution.[101] Nonetheless, recent cases have shown a tendency to expand the scope of recognized rights,[102] indicating a continuing belief in the need to protect individ-

96. *See* H.L.A. HART, *supra* note 41, at 37; T. PAINE, *supra* note 71, at 90.

97. *See* Aptheker v. Secretary of State, 378 U.S. 500, 509 (1964); Shelton v. Tucker, 364 U.S. 479, 488 (1960).

98. *See, e.g.*, A. MCLAUGHLIN, A CONSTITUTIONAL HISTORY OF THE UNITED STATES 91-105 (1935); B. MITCHELL & L. MITCHELL, A BIOGRAPHY OF THE CONSTITUTION OF THE UNITED STATES 47-61 (1964); C. PATTERSON, THE CONSTITUTIONAL PRINCIPLES OF THOMAS JEFFERSON 49-54 (1967).

99. *See, e.g.*, U.S. CONST. arts. I-III (enumerated powers of legislature, executive, judiciary); ARIZ. CONST. art. 3 (distribution of powers); CAL. CONST. art. 3 (distribution of powers); N.Y. CONST. arts. 3-5 (enumerated powers of legislature, executive, judiciary).

100. See text & notes 67-75 *supra*.

101. *See* San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1, 33 (1973); Griswold v. Connecticut, 381 U.S. 479, 527 (1965) (Black, J., dissenting).

102. The Supreme Court has interpreted the enumerations to include rights not expressly stated in the amendments. "[S]pecific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance." Griswold v. Connecticut, 381 U.S. 479, 484 (1965). Examples of peripheral rights which have been held to be within the penumbras of the amendments include

uals from unnecessary governmental interference.[103] In general, such expansion has been accomplished by including the right within those areas of liberty protected by the due process clause.[104]

Public Morals and the Rational Basis Approach

To comport with substantive due process, a statutory restriction, at a minimum, must have a rational relationship with a legitimate public interest to be promoted.[105] In other words, courts will sustain a challenged state law only when it can be supported by a rational basis. If the public harm concept is recognized as the underlying rationale for a state's criminalization of conduct, identifying a legitimate public interest for the exercise of the state police power in the criminal area should entail a factual showing of public harm.[106] Thus, to criminalize conduct legitimately pursuant to its police power, a state arguably should be required to demonstrate a cognizable harm to the interests and rights of others from the prohibited conduct.[107] Since courts do not sit as superlegislatures,[108] however, the rational basis due process test generally results in courts' deferring to the state legislature's finding of public harm.[109] Thus, in most instances, if the state demonstrates a legitimate purpose, courts will merely presume the means chosen are equally valid and uphold the legislation.[110]

Although courts admittedly should not second-guess the wisdom or necessity of a legislative enactment, it is distinctly a function of the judiciary to determine whether a state has exceeded the permissible scope of its police power in its lawmaking.[111] That is to say, despite

freedom of association, NAACP v. Alabama, 357 U.S. 449, 462 (1958), freedom of inquiry and freedom of thought, Wieman v. Updegaff, 344 U.S. 183, 195 (1952) (Frankfurter & Douglas, J.J., concurring), the right to distribute and receive printed matter, Martin v. Struthey, 319 U.S. 141, 143 (1943), and the right to privacy. Roe v. Wade, 410 U.S. 113, 152-53 (1973); Griswold v. Connecticut, 381 U.S. 479, 485 (1965).

103. *See, e.g.*, Roe v. Wade, 410 U.S. 113 (1973); Eisenstadt v. Baird, 405 U.S. 438 (1971); Stanley v. Georgia, 394 U.S. 557 (1969). *But see* Paul v. Davis, 424 U.S. 693 (1976).

104. *See, e.g.*, Roe v. Wade, 410 U.S. 113 (1973); Eisenstadt v. Baird, 405 U.S. 438 (1971); Griswold v. Connecticut, 381 U.S. 479 (1965). Under the fourteenth amendment a state may not deprive an individual of life, liberty, or property without due process of law. U.S. CONST. amend. XIV. The federal government is placed under the same restriction by the fifth amendment. *Id.* amend. V.

105. *E.g.*, Williamson v. Lee Optical, Inc., 348 U.S. 483, 488 (1955); Railway Express Agency v. New York, 336 U.S. 106, 110 (1949); Mugler v. Kansas, 123 U.S. 623, 661 (1887).

106. *See* text & notes 20-24 *supra.*

107. *See* text & notes 83-89 *supra.*

108. San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1, 31 (1973); Day-Brite Lighting, Inc. v. Missouri, 342 U.S. 421, 423 (1952).

109. *See* Williamson v. Lee Optical, Inc., 348 U.S. 483, 488 (1955); United States v. Carolene Products Co., 304 U.S. 144, 154 (1938).

110. *See* cases cited note 109 *supra. But see* Weinberger v. Wiesenfeld, 420 U.S. 636 (1975); United States Dep't of Agriculture v. Moreno, 413 U.S. 528 (1973).

111. *See* Perry, *supra* note 12, at 695-709; Robinson, *supra* note 28, at 271; Note,

the tendency of courts to defer to legislative judgments in this area, the question of whether or not a given statute is within the purview of the police powers is a matter of law to be determined by the court.[112] If no public harm is evident from the statute on its face, and the state introduces no evidence of harm, then the statute should be adjudged void *ab initio*;[113] it arguably would lack any legitimate purpose, since it would exceed the permissible scope of the police powers.[114]

Two weaknesses in this type of attack upon a statute proscribing conduct with no demonstrable harm to others are apparent. First, most courts give minimal attention to this initial inquiry of whether a statute is outside the scope of the police powers.[115] Secondly, many courts recognize deviations from public standards of morality as public harm, sufficient to justify the prohibition of such conduct.[116] Thus, even if these courts were to address the initial issue of legitimacy, they probably would not find excessive legislative action and accordingly would uphold the statute. This view, however, is in contravention of the constitutional principles limiting the government's right to interfere with individual conduct not harmful to others or to legitimate government functions.[117] Moreover, the deferential attitude of these courts is contrary to the Supreme Court's apparent current trend toward a more discerning scrutiny under the rational basis test.[118] Thus, challenge to intrusive state laws under the rational basis test should have a greater legitimacy than that heretofore recognized by some lower courts.[119]

The rational basis approach has not been a successful device for overturning dubious statutes such as those prohibiting marijuana use. Most courts which have examined the state interest involved in prohibiting marijuana have upheld these statutes, finding that the alleged harm from its use, though not supported by substantial evidence, is suf-

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supra note 7, at 246 n.44, *quoting* O. SNYDER, AN INTRODUCTION TO CRIMINAL JUSTICE 764 (1953); Note, *Ravin v. State: A Case for Privacy and Possession of Pot*, 5 U.C.L.A.-ALAS. L. REV. 178, 192-93 (1975).

112. *See* Colorado Anti-Discrimination Comm'n v. Case, 151 Colo. 235, 246, 380 P.2d 34, 41 (1962); State v. Betts, 21 Ohio Misc. 175, 180, 252 N.E.2d 866, 868 (1969).

113. *See, e.g.*, Chicago Park Dist. v. Canfield, 370 Ill. 447, 19 N.E.2d 376 (1939); American Motorcycle Ass'n v. Davids, 11 Mich. App. 351, 158 N.W.2d 72 (1968); State v. Betts, 21 Ohio Misc. 175, 252 N.E.2d 866 (1969). This approach can be analogized to the ultra vires doctrine in corporation law, whereby corporate acts beyond the express powers granted the corporation are rendered void. *See* Dodge v. Ford Motor Co., 204 Mich. 459, 170 N.W. 668 (1919); H. HENN, HANDBOOK OF THE LAW OF CORPORATIONS AND OTHER BUSINESS ENTERPRISES § 184 (2d ed. 1970).

114. *See* text & notes 20-24 *supra*.

115. *See* Note, *supra* note 111.

116. *See* text accompanying notes 36-37 *supra*.

117. *See* text & notes 68-80 *supra*.

118. *See* Weinberger v. Wiesenfeld, 420 U.S. 636 (1975); United States Dep't of Agriculture v. Moreno, 413 U.S. 528 (1973); "Judicial Enforcement of Restrictive Covenants Against Children: An Equal Protection Analysis," 17 ARIZ. L. REV. 639, 717, 720-21 (1975).

119. *But cf.* cases cited note 125 *infra*.

ficient to support a legitimate legislative purpose in preventing the supposed harm.[120] The courts' reasons for upholding these antimarijuana statutes, however, appear to be based mostly upon medical findings of harm to the individual user.[121] The degree of self-harm caused by the private use of marijuana is, of course, subject to great debate;[122] even recognizing that debatable facts are subject to legislative determination, however, harm to the user alone does not render the activity a proper subject for exercise of the state's police power.[123] Little or no documented evidence exists to substantiate any harm to other persons except perhaps in a constructive sense.[124] Thus, there would appear to

120. *See, e.g.*, United States v. Ward, 387 F.2d 843, 848 (7th Cir. 1967); People v. Aguiar, 257 Cal. App. 2d 597, 602-03, 65 Cal. Rptr. 171, 175-76 (Ct. App. 1968); Commonwealth v. Leis, 355 Mass. 189, 192-93, 243 N.E.2d 898, 902-03 (1969).

121. *See* People v. Aguiar, 257 Cal. App. 2d 597, 602-03, 65 Cal. Rptr. 171, 175-76 (Ct. App. 1968); Commonwealth v. Leis, 355 Mass. 189, 192-93, 243 N.E.2d 898, 902-03 (1969).

122. *See, e.g.*, Ravin v. State, 537 P.2d 494, 509-10 (Alas. 1975); NATIONAL COMM'N ON MARIHUANA AND DRUG ABUSE, MARIHUANA: A SIGNAL OF MISUNDERSTANDING 61 (First Report 1972); Schwartz, *Toward a Medical Understanding of Marijuana*, 14 CAN. PSYCHIATRIC ASS'N J. 591 (1969); Wallenstein, *Marijuana Possession as an Aspect of the Right to Privacy*, 5 CRIM. L. BULL. 59, 61-69 (1969); Comment, *Marijuana and the Law: The Constitutional Challenges to Marijuana Laws in Light of the Social Aspects of Marijuana Use*, 13 VILL. L. REV. 851, 852-53 (1968).

Due to the questionable validity of any allegation of harm associated with the use of marijuana, equal protection arguments have also been raised in some cases. These challenges center around both the classification of marijuana as a hard drug or narcotic, *see* People v. McCabe, 49 Ill. 2d 338, 275 N.E.2d 407 (1971); Commonwealth v. Leis, 355 Mass. 189, 243 N.E.2d 898 (1969), and the unequal legislative treatment of marijuana vis-á-vis alcohol. *See* State v. Kantner, 53 Hawaii 327, 493 P.2d 306, *cert. denied*, 409 U.S. 948 (1972); Commonwealth v. Leis, *supra*. Although some courts have accepted the argument that classifying marijuana with hard drugs is arbitrary and may deprive individuals of equal protection, People v. McCabe, *supra*; People v. Sinclair, 387 Mich. 91, 194 N.W.2d 878 (1972), many courts have refused to accept this argument, since the legislature may find similarities warranting such classifications. *See, e.g.*, United States v. Ward, 387 F.2d 843 (7th Cir. 1967); People v. Aguiar, 257 Cal. App. 2d 597, 65 Cal. Rptr. 171 (Ct. App. 1968); Commonwealth v. Leis, *supra*. The disparity in treatment between alcohol and marijuana, despite the known harm caused by long term use of the former, also has been upheld by some courts on the basis that the two drugs are really in distinct classes, thereby rendering equal protection inapplicable. *See, e.g.*, People v. Aguiar, *supra* at 604-05, 65 Cal. Rptr. at 176; State v. Kantner, *supra* at 331, 493 P.2d at 309; State v. Donovan, 344 A.2d 401 (Me. 1975). Another rationale offered for the rejection of the equal protection argument in marijuana cases is that the lack of sufficient medical opinion to overcome the presumption of rationality, *see* United States v. Carolene Products Co., 304 U.S. 144, 154 (1938), makes it possible for reasonable people to differ as to the rationality of the classification, and thus the classification should be upheld. *See* Bonnie & Whitebread, *The Forbidden Fruit and the Tree of Knowledge: An Inquiry into the Legal History of American Marijuana Prohibition*, 56 VA. L. REV. 971, 1030-32 (1970); Comment, *supra* at 873-75.

123. A persuasive argument has been made that the costs to society of attempting to enforce marijuana laws far exceed any benefits to be gained by attempting to deal with marijuana use through the criminal process. *See generally* A. HELLMAN, LAWS AGAINST MARIJUANA: THE PRICE WE PAY (1975); J. KAPLAN, THE NEW PROHIBITION (1971).

124. "It appears that the use of marijuana, as it is presently used in the United States today, does not constitute a public health problem of any significant dimensions. It is, for instance, far more innocuous in terms of physiological and social damage than alcohol or tobacco." Ravin v. State, 537 P.2d 494, 506 (Alas. 1975). The Alaskan court in *Ravin* did note that the potential danger caused by a person's driving while under the influence of marijuana may create sufficient public harm to necessitate state regulation of marijuana use. *Id.* at 511; *accord*, Belgrade v. State, 543 P.2d 206, 208 (Alas. 1975). It is doubtful, however, whether this harm would support complete

be no legitimate state interest furthered by such laws; yet courts continue to uphold antimarijuana statutes under the rational basis approach.[125] It therefore appears that the minimal scrutiny afforded by the rational basis approach has rendered it an ineffective tool for curbing the activities of overzealous legislatures.

Public Morals and the Strict Scrutiny Approach

When a challenger can demonstrate that a fundamental liberty or property interest is being infringed upon by the state, the presumption of validity under the rational basis test in support of the legislation no longer applies, and courts will scrutinize the state's means more strictly.[126] In such a case the state must show that the statute is based at least on a legitimate,[127] and perhaps a compelling,[128] interest. Additionally, the state must prove that the statute represents the least restrictive means available to promote the government's purpose.[129] Although not as strict as the rigid two-tier equal protection formula, this standard is more rigorous than the rational basis inquiry and focuses more closely upon the reasonableness of the means used to further the state interest.[130]

The key to invoking this strict substantive due process analysis is an allegation that the state has infringed upon an individual's funda-

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prohibition since the state can regulate driving privileges without restricting the private use of marijuana. *See* text accompanying notes 170-72 *infra.*

125. The inadequacy of the rational basis approach for adjudging the constitutionality of state statutes prohibiting conduct threatening no public harm is also exemplified by several Supreme Court opinions. Despite the doubtful legitimacy of state legislation in areas involving purely private consensual conduct, the Supreme Court in the past has upheld laws prohibiting prostitution, L'Hote v. New Orleans, 177 U.S. 587 (1900), the use and possession of alcohol, Crane v. Campbell, 245 U.S. 304 (1917), habit-forming drugs, Whipple v. Martinson, 256 U.S. 41 (1921), and, most recently, acts of sodomy. Doe v. Commonwealth's Attorney, 425 U.S. 901 (1976). Because no fundamental rights are deemed to be involved in pursuing these activities, such conduct falls within the state's regulatory powers to promote the general welfare. *See* Crane v. Campbell, *supra* at 308; DeBianco & Greenstein, *Marijuana Laws—A Crime Against Humanity*, 48 NOTRE DAME LAW. 314, 332 (1972). Thus, an almost insuperable presumption of rationality lies with the state.

126. *See, e.g.*, Roe v. Wade, 410 U.S. 113, 155 (1973); Shapiro v. Thompson, 394 U.S. 618, 634 (1969); Sherbert v. Verner, 374 U.S. 398, 406 (1963).

127. *See* Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 635, 643 (1974); Shelton v. Tucker, 364 U.S. 479, 488 (1960).

128. *See, e.g.*, Roe v. Wade, 410 U.S. 113, 155 (1973); Sherbert v. Verner, 374 U.S. 398, 406 (1963); Bates v. City of Little Rock, 361 U.S. 516, 524 (1960). It is not presently clear whether the government purpose to be promoted must be merely legitimate or of a compelling nature. It is arguable that the interest need not be any greater than the public interest sufficient to sustain the statute initially, and no stricter showing of proof need be made. *See* Friedman, *Legal Regulation of Applied Behavior Analysis in Mental Institutions and Prisons*, 17 ARIZ. L. REV. 39, 69 (1975).

129. *See, e.g.*, Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 635, 644 (1974); Jackson v. Indiana, 406 U.S. 715, 738 (1972); Aptheker v. Secretary of State, 378 U.S. 500, 512-14 (1964); Shelton v. Tucker, 364 U.S. 479, 488 (1960).

130. Note, *supra* note 75, at 171-73.

mental rights.[131] If an individual right is not explicitly set forth in the Constitution, any determination as to its fundamental nature can be made only by assessing the importance of the activity to the individual and society in light of the relevant social and legal history underlying the right.[132] This process often takes the form of a problem of role allocation:[133] the respective interests of the state vis-à-vis those of the individual may be evaluated in terms of who should be allowed to make the ultimate decision to engage in certain activities. The Supreme Court has used this approach, for example, to uphold the individual's right to decide whether or not to bear or beget a child,[134] or to obtain an abortion.[135]

In *Roe v. Wade*[136] the Supreme Court reasoned that, until viability of the fetus,[137] a woman's choice whether or not to have an abortion affects no other individual, and therefore, absent a public harm, the state has no public interest to protect.[138] The Court, in effect, held that due to the lack of a public harm or interest, the decisionmaking role regarding abortions belongs with the individual rather than the state during the first and second trimesters of pregnancy.[139] The Court carefully delineated the grounds of its decision to include only the abortion decision, noting that one does not have an unlimited right to do with one's body as one pleases.[140] Nevertheless, the principle which may be derived from the Court's analysis is that an individual has the fundamental right to make decisions concerning matters which demonstrably affect only himself, without state interference.[141] Rather than an unlimited right to do with one's body as one pleases, the case

131. *See, e.g.*, Roe v. Wade, 410 U.S. 133, 155 (1973); Shapiro v. Thompson, 394 U.S. 618, 634 (1969); Sherbert v. Verner, 374 U.S. 398, 406 (1963).

132. *See* Roe v. Wade, 410 U.S. 113, 154-55 (1973); Eisenstadt v. Baird, 405 U.S. 438, 453 (1971).

133. *See* Tribe, *The Supreme Court, 1972 Term, Foreword: Toward a Model of Roles in the Due Process of Life and Law*, 87 HARV. L. REV. 1, 13-15 (1973).

134. Eisenstadt v. Baird, 405 U.S. 438, 453 (1971).

135. Roe v. Wade, 410 U.S. 113, 165 (1973); *see* Tribe, *supra* note 133, at 11-16.

136. 410 U.S. 113 (1973).

137. The Court determined this to be the third trimester of pregnancy. *Id.* at 164-65.

138. *Id.* at 153-56.

139. *Id*; Tribe, *supra* note 133, at 13. However, in the second trimester the state may regulate the abortion procedure in ways reasonably related to maternal health. 410 U.S. at 164.

140. 410 U.S. at 154.

141. *See* 410 U.S. at 153-56; Tribe, *supra* note 133, at 11-13. In *Roe*, a woman's unlimited right to do with her body as she pleased would not be without public effect. A pregnant woman's decision to abort her pregnancy, as enumerated in *Roe*, was tempered by consideration for the life of the developing fetus. As a result, a woman's right to choose in that context is not unlimited, but rather is dependent upon the stage at which the decision is made. This qualification is based on the public harm accruing from the intentional termination of a viable fetus' life. In contrast, the types of conduct considered in this Note are prohibited by the criminal law, even though no such public harm exists. When individual conduct demonstrably affects the interests of none other than the actor, the right to decide to engage in such conduct should be given greater latitude than that granted in *Roe*.

appears to establish a limited right to make decisions concerning one's self when no other person is demonstrably harmed or threatened thereby.

Allocating the respective rights of governments and individuals to make decisions affecting private conduct is one of the specific purposes behind the Constitution.[142] It is in light of this allocation of competences to make decisions that the fundamental right of privacy[143] is perhaps best understood. The right to privacy is not self-defining, but instead should be determined in relation to the legitimate decisionmaking roles of the state vis-à-vis the individual. In other words, the right of privacy arguably exists by virtue of the constitutional protection affording the individual a decisionmaking role.[144]

Although the Supreme Court has recognized only specific zones of privacy,[145] and has indicated an unwillingness to expand the privacy concept,[146] it also has declared that the right to privacy cases "defy categorical description."[147] Recently the Supreme Court has indicated that the right of privacy encompasses an individual's freedom of choice with respect to basic matters of his personal life, such as decisions concerning his personal appearance.[148] Nevertheless, the Supreme Court has retained a generally restrictive viewpoint upon the scope of the right to privacy, claiming that personal rights found in the guarantee of personal privacy must be limited to those which are "fundamental". or "implicit in the concept of ordered liberty".[149]

142. A. BICKEL, THE LEAST DANGEROUS BRANCH 104 (1962); Tribe, *supra* note 133, at 13. "The makers of our Constitution . . . conferred, as against the Government, the right to be alone—the most comprehensive of rights and the right most valued by civilized men." Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting).

143. The right to privacy has been argued to have roots in the first amendment, Stanley v. Georgia, 394 U.S. 557, 564 (1969), the fourth and fifth amendments, *e.g.*, Terry v. Ohio, 392 U.S. 1, 8-9 (1968); Katz v. United States, 389 U.S. 347, 359 (1967); Boyd v. United States, 116 U.S. 616, 630 (1886), the ninth amendment, Griswold v. Connecticut, 381 U.S. 479, 486 (1965) (Goldberg, J., concurring), and the penumbras of the various amendments. *Id.* at 484-85. *See generally* Note, *Protection Following Commitment: Enforcing the Rights of Persons Confined in Arizona Mental Health Facilities*, 17 ARIZ. L. REV. 1090, 1098 n.51 (1975). For the seminal article on the right to privacy, see Brandeis & Warren, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890).

144. *See* discussion note 4 *supra*.

145. *See, e.g.*, Roe v. Wade, 410 U.S. 113, 154 (1973) (abortion decision); Eisenstadt v. Baird, 405 U.S. 438, 453-54 (1971) (contraception); Stanley v. Georgia, 394 U.S. 557, 564-66 (1969) (home); Loving v. Virginia, 388 U.S. 1, 12 (1967) (marriage-related activities); Prince v. Massachusetts, 321 U.S. 158, 166 (1944) (family relationships); Skinner v. Oklahoma, 316 U.S. 535, 541-42 (1942) (procreation); Pierce v. Society of Sisters, 268 U.S. 510, 535 (1925) (child rearing and education).

146. *See* Doe v. Commonwealth's Attorney, 425 U.S. 901 (1976), *aff'g* 403 F. Supp. 1199 (E.D. Va. 1975); Paul v. Davis, 424 U.S. 693 (1976).

147. Paul v. Davis, 424 U.S. 693, 713 (1976).

148. Kelley v. Johnson, 425 U.S. 238, 244 (1976).

149. *See* Roe v. Wade, 410 U.S. 113, 152 (1973), *citing* Palko v. Connecticut, 301 U.S. 319, 325 (1937).

This restrictive reading of the right of privacy by the Supreme Court has curtailed a broader interpretation of the privacy right by lower courts. State and federal courts which have utilized the right to privacy to strike down state interference in such areas as private use of marijuana in the home[150] and private sexual conduct between consenting adults[151] have carefully circumscribed their decisions to fit within a narrow reading of the right to privacy.[152] Other courts have read the federal right to privacy even more restrictively and thus have denied the individual's right to be free of state interference in such matters as private sexual conduct.[153]

Despite these narrow readings of the right of privacy, the concept of liberty implicit in the right arguably includes an individual's freedom to make basic decisions concerning his own lifestyle when the state can show no public harm arising from his decisionmaking role.[154] The zones of privacy thus far decreed by the Court exemplify these considerations.[155] Nonetheless, several courts when recently faced with the question whether the right of privacy encompasses the choice to use marijuana have answered in the negative on the basis that the use of marijuana is not a fundamental right.[156] This analysis appears faulty since it is the freedom to make the choice itself and its context which must be analyzed in terms of defining fundamental rights.

The right of privacy involved in the decision to use marijuana recently was recognized in the Alaska supreme court decision, *Ravin v. State*,[157] which held that the state does not have a sufficiently strong interest to justify invading the sanctity of the home to prosecute marijuana users.[158] Although the Alaskan court placed its emphasis upon

150. Ravin v. State, 537 P.2d 494 (Alas. 1975).
151. State v. Elliott, 88 N.M. 187, 539 P.2d 207 (1975).
152. *See* Ravin v. State, 537 P.2d 494, 502 (Alas. 1975); State v. Elliott, 88 N.M. 187, 193, 539 P.2d 207, 213 (1975).
153. *See, e.g.*, Doe v. Commonwealth's Attorney, 403 F. Supp. 1199, 1202 (E.D. Va. 1975), *aff'd*, 425 U.S. 901 (1976); State v. Bateman, 113 Ariz. 107, 547 P.2d 6 (1976); State v. Saunders, 130 N.J. Super. 234, 326 A.2d 84 (Essex Cty. Ct. 1974).
154. *See, e.g.*, Paris Adult Theatres I v. Slaton, 413 U.S. 49, 73 (1973) (Douglas, J., dissenting); Mugler v. Kansas, 123 U.S. 623, 660 (1887); Ravin v. State, 537 P.2d 494, 500 (Alas. 1975).
155. *See* Roe v. Wade, 410 U.S. 113, 162-63 (1973); Eisenstadt v. Baird, 405 U.S. 438, 453 (1971).
156. *See, e.g.*, People v. Aguiar, 257 Cal. App. 2d 597, 603, 65 Cal. Rptr. 171, 175 (Ct. App. 1968); Boraas v. State, 229 So. 2d 244, 246 (Fla. 1969); Commonwealth v. Leis, 355 Mass. 189, 195, 243 N.E.2d 898, 903 (1969).
157. 537 P.2d 494 (Alas. 1975). The *Ravin* court relied primarily upon the Alaskan state constitutional guarantee of a right to privacy, but its conclusion was substantiated by reasoning from pertinent United States Supreme Court decisions involving the right to privacy. *See* Note, *Ravin v. State: Marijuana Use in the Home Protected by Right of Privacy*, 7 N.C. CENTRAL L.J. 163, 172-73 (1975); Note, *Marijuana Prohibition and the Constitutional Right to Privacy: An Examination of Ravin v. State*, 11 TULSA L.J., 563 (1976).
158. 537 P.2d at 511.

the privacy of the home[159] rather than the right to choose to smoke marijuana,[160] the court implicitly held that the private decision to use marijuana is outside the scope of legitimate public interest.[161] Consequently, the state may not proscribe its use entirely.[162] The *Ravin* case has two important consequences. First, it recognizes the importance of the individual's right to privacy in his home,[163] deeming it to be of such nature as to require constitutional protection from unreasonable government interference.[164] Second, it rejects any allegation that there is public harm or interest involved sufficient to permit states to totally proscribe the use of marijuana.[165]

Even if the right of privacy encompasses an individual's right to decide to engage in conduct involving no demonstrable public harm,

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159. *Id.* at 503-04. The *Ravin* court relied on Stanley v. Georgia, 394 U.S. 557 (1969), where the Supreme Court held that private possession of obscene material in the home cannot be prohibited.

160. 537 P.2d at 502. The *Ravin* court noted that although there is no fundamental right to possess or ingest marijuana, the analysis does not end there but must further be explored in terms of "the relevancy of where the right is exercised." *Id.*

161. *Id.* at 506-09.

162. *Id.* The post-*Ravin* court, however, has upheld the right of the state to proscribe the sale of marijuana. Belgarde v. State, 543 P.2d 206 (Alas. 1975).

163. *See* Stanley v. Georgia, 394 U.S. 557, 564-66 (1969).

164. Ravin v. State, 537 P.2d 494, 503 (Alas. 1975).

165. *Id.* at 511. Aside from the right to privacy, two other arguments alleging infringement of fundamental rights have been raised in relation to the use of marijuana. First amendment arguments have been made based upon an infringement of the free exercise of religion. *See* Leary v. United States, 383 F.2d 851, 857-58, *rev'd on other grounds*, 392 U.S. 403 (1967). The first amendment argument has been successfully used to create an exception to absolute state proscription of the use of peyote. *See* State v. Whittingham, 19 Ariz. App. 27, 504 P.2d 950 (1973), *review denied*, 110 Ariz. 279, 517 P.2d 1275, *cert. denied*, 417 U.S. 946 (1974), *noted in* 16 ARIZ. L. REV. 489, 554 (1974); People v. Woody, 61 Cal. 2d 716, 394 P.2d 813, 40 Cal. Rptr. 69 (1964). The California court in *People v. Woody* held that since peyote played a central role in the ceremony and practice of the Native American Church, it came within the protection of the first amendment. 61 Cal. 2d at 721-22, 394 P.2d at 817-18, 40 Cal. Rptr. at 73-74. Assertion of this argument to justify use of marijuana, however, generally has failed since it is difficult to demonstrate any religious purpose in the use of marijuana. *See* Leary v. United States, *supra*; Bonnie & Whitebread, *supra* note 122, at 1142-45; Wallenstein, *supra* note 122, at 75-76; Weiss & Wizner, *Pot, Prayer, Politics and Privacy: The Right to Cut Your Own Throat in Your Own Way*, 54 IOWA L. REV. 709, 711-18 (1969). *See also* Finer, *Psychedelics and Religious Freedom*, 19 HASTINGS L.J. 667, 714-19 (1968).

Eighth amendment challenges also have been made to statutory penalties levied against individuals for the use or sale of marijuana, on the grounds that such penalties constitute cruel and unusual punishment. *See, e.g.*, United States v. Ward, 387 F.2d 843 (7th Cir. 1967); Gallego v. United States, 276 F.2d 914 (9th Cir. 1960); People v. Lorentzen, 387 Mich. 167, 194 N.W.2d 827 (1972). To sustain a claim of cruel and unusual punishment, it must be demonstrated that the penalty bears no relation to the seriousness of the offense. *See* Robinson v. California, 370 U.S. 660, 676 (1962). *See generally* Note, *In Defense of Behavior Modification for Prisoners: Eighth Amendment Considerations*, 18 ARIZ. L. REV. 110, 136-39 (1976). The vast majority of courts have rejected eighth amendment arguments in this context, apparently deciding that the penalties against the use or sale of marijuana are not excessive. *See, e.g.*, United States v. Ward, *supra*; Gallego v. United States, *supra*; Garcia v. State, 166 Tex. Crim. 482, 316 S.W.2d 734 (1958); Note, *Marijuana Possession and the California Constitutional Prohibition of Cruel and Unusual Punishment*, 21 U.C.L.A.L. REV. 1136 (1974). *But see* People v. Lorentzen, *supra*.

the right is not unlimited. Freedom of choice is limited by the state's legitimate exercise of its police powers when there is a sufficient showing of public harm. State interference in the area of private decision-making, however, is justified only to the extent that public harm is threatened or caused by the individual's choice to pursue the particular activity. A law impeding this freedom of choice, therefore, should represent the least restrictive means necessary to protect the public interest.[166] Instead of proscribing the activity entirely, only those aspects of the activity directly connected to the public harm should be regulated.

Applying the least restrictive alternative concept to the marijuana laws, the state, before totally proscribing the use of marijuana, should be required to demonstrate that the degree of public harm resulting from its use is so great as to outweigh completely the individual's interest in pursuing the conduct. Although the private use of marijuana arguably cannot be completely prohibited due to the lack of demonstrable public harm,[167] the state is not powerless to interfere—it may properly regulate the use of marijuana insofar as a legitimate public interest under its police powers is involved.[168] That is, the state may regulate the use of marijuana to the extent that a public harm can be shown,[169] so long as it does not unduly interfere with those aspects of its use involving purely private interests. Since the state may not totally prohibit conduct merely for the moralistic purpose of dictating to individuals what they must do to promote their best interests,[170] any regulation of private conduct must hinge upon a showing of public harm from the private use of marijuana. The public interest thus might dictate no more than the prohibition of driving while under the influence of marijuana, public intoxication, quality control, and sales to minors.[171] Although each of these aspects may involve sufficient public harm to permit governmental regulation, standing alone none is of such magnitude as to necessitate the total prohibition of marijuana use. Such a prohibition, therefore, should be declared uncon-

166. *See, e.g.*, Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 635, 644 (1974); Jackson v. Indiana, 406 U.S. 715, 738 (1972); Aptheker v. Secretary of State, 378 U.S. 500, 512-14 (1964). "[L]egislative enactments must be narrowly drawn to express only the legitimate state interests at stake." Roe v. Wade, 410 U.S. 113, 155 (1973).

167. See text & notes 122-25 *supra*.

168. See text accompanying notes 10-14 *supra*.

169. *See* text & notes 20-24 *supra*.

170. *See, e.g.*, Paris Adult Theatres I v. Slaton, 413 U.S. 49, 73 (1973) (Douglas, J., dissenting); Mugler v. Kansas, 123 U.S. 623, 660 (1887); State v. Betts, 21 Ohio Misc. 175, 184, 252 N.E.2d 866, 872 (1969).

171. *See* Ravin v. State, 537 P.2d 494, 511 (Alas. 1975); Bonnie & Whitebread, *supra* note 120, at 1178-79. The *Ravin* court found that these types of alleged harms were not sufficient to proscribe private use in the home. 537 P.2d at 511.

stitutional for failing to fulfill the least restrictive means requirement of the stricter substantive due process analysis.[172]

CONCLUSION

The state arguably has no power to prohibit individual conduct or choice absent a demonstration of public harm, a criterion which is not met by conduct causing only self-harm, either moral or physical.[173] However, the Supreme Court has indicated unwillingness to go so far as to hold that the Constitution prohibits state regulation in the area of conduct involving consenting adults.[174] The problem thus remains that many private acts between consenting adults are prohibited instead of being narrowly regulated to proscribe only their harmful aspects.

172. In addition to the proscriptions upon the possession and use of marijuana, there are a host of other laws proscribing individual conduct that evidences no demonstrable harm to others sufficient to sustain a total prohibition. A good example is provided by laws prohibiting private sexual acts between consenting adults. Recent decisions have sustained state statutes proscribing acts of sodomy between consenting partners, Doe v. Commonwealth's Attorney, 403 F. Supp. 1199 (E.D. Va. 1975), *aff'd*, 425 U.S. 901 (1976); State v. Bateman, 113 Ariz. 107, 547 P.2d 6 (1976), although one court has found such a law to be an infringement of an individual's right of privacy. State v. Elliott, 88 N.M. 187, 539 P.2d 207 (1975). It is difficult to ascertain a rationale for sustaining such laws other than the state's right to promote morality and decency. *See* Doe v. Commonwealth's Attorney, *supra* at 1202; State v. Bateman, *supra* at 111, 547 P.2d at 10; *cf.* Perry, *supra* note 12, at 722-23. However, this analysis begs the question which needs to be answered—is the proscription of such acts within the lawful limits of the state police power? The consequences of an act of sodomy between two consenting adults demonstrates no harm to others, except to the extent that one is offended by the knowledge that such conduct exists. The decision to engage in private sexual activities is an intimate personal decision of substantial importance to the well-being of the individuals involved. Doe v. Commonwealth's Attorney, *supra* at 1204 (Merhige, J., dissenting); State v. Elliott, *supra* at 193, 539 P.2d at 213. Since laws proscribing private sexual conduct fail to account for this fundamental right of privacy and no evidence of demonstrable public harm is shown, they would appear clearly outside the police power and thus void *ab initio*.

Laws prohibiting prostitution constitute another area where the proscribed activity does not demonstrate a showing of harm sufficient to sustain a total prohibition. The rationale for the continuance of such laws again appears to be the preservation of a societal moral code. *See* L'Hote v. New Orleans, 177 U.S. 587, 596-97 (1900); Note, *supra* note 7, at 259-62. However, analysis demonstrates no harm to particular individuals from such conduct, although public harm may result from the transmission of venereal disease or the subjection of citizens to offensive solicitation. These factors alone, however, should not sustain a total prohibition of the individual's right to choose. Less restrictive alternative measures are available which would adequately protect the public interest. To curtail the spread of venereal disease, prostitutes might be required to undergo a periodic medical examination before being licensed to ply their trade. As for the problem of offensive solicitation, the crime of solicitation is distinct from the crime of prostitution; therefore the state may enact and enforce laws prohibiting offensive solicitation. *See* Note, *supra* at 258-59. Since these less obtrusive measures are available to meet the public interest, total proscription of prostitution should fail as being broader than necessary to further legitimate state interests. *See* Note, *The Victim as Criminal: A Consideration of California's Prostitution Law*, 64 CALIF. L. REV. 1235 (1976).

These examples demonstrate the type of analysis which courts should use to scrutinize the legitimate use of the state police power vis-á-vis an individual's right to privacy.

173. *See* Stanley v. Georgia, 394 U.S. 557, 565 (1969).

174. "[F]or us to say that our Constitution incorporates the proposition that conduct involving consenting adults only is always beyond state regulation, is a step we are unable to take". Paris Adult Theatres I v. Slaton, 413 U.S. 49, 68 (1973).

Courts should closely scrutinize the reasoning behind state laws totally prohibiting private conduct, balancing the alleged public harm involved against the infringement of the individual's fundamental right to privacy. In many cases it will be found that the state has injected itself into areas of decisionmaking that should be reserved to the individual alone.[175]

175. "Experience should teach us to be most on our guard to protect liberty when the Government's purposes are beneficient . . . . The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding." Olmstead v. United States, 277 U.S. 438, 479 (1928) (Brandeis, J., dissenting).