RIGHT OF PRIVACY CHALLENGES TO PROSTITUTION STATUTES

INTRODUCTION

The abortion cases, *Roe v. Wade*[1] and *Doe v. Bolton*,[2] led legal commentators and feminists to speculate that prostitution statutes violate the right of privacy recognized in those decisions.[3] Although initially successful in some cases, the right to privacy argument ultimately has not prevailed in litigation challenging prostitution statutes. Other challenges to the constitutionality of prostitution statutes have also been only marginally successful. Courts have recently considered whether prostitution statutes are impermissibly vague,[4] violate equal protec-

1. 410 U.S. 113 (1973).

2. 410 U.S. 197 (1973).

3. *See* W. BARNETT, SEXUAL FREEDOM AND THE CONSTITUTION (1973); J. JAMES, J. WITHERS, M. HAFT, S. THEISS & M. OWEN, THE POLITICS OF PROSTITUTION (2d ed. 1977) [hereinafter cited as J. JAMES]; Rosenbleet & Pariente, *The Prostitution of the Criminal Law*, 11 AM. CRIM. L. REV. 373 (1973).

4. "[A] statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law." Lanzetta v. New Jersey, 306 U.S. 451, 453 (1939) (quoting Connally v. General Construction Co., 269 U.S. 385, 391 (1926)). *See generally*, Collings, *Unconstitutional Uncertainty—An Appraisal*, 40 CORNELL L.Q. 195 (1955); Note, *The Void-for-Vagueness Doctrine in the Supreme Court*, 109 U. PA. L. REV. 67 (1960); 62 HARV. L. REV. 77 (1948).

Although vagueness challenges to prostitution statutes have generally been unsuccessful, litigants almost always raise the issue. Vagueness challenges have been most successful against ordinances and statutes prohibiting loitering for the purpose of prostitution. *See* Morgan v. City of Detroit, 389 F. Supp. 922 (E.D. Mich. 1975) (city ordinance provision prohibiting accosting and soliciting for "lewd" and "immoral" purposes is unconstitutionally vague and severe; provision prohibiting accosting and soliciting for prostitution is not unconstitutionally vague); Kirkwood v. Loeb, 323 F. Supp. 611 (W.D. Tenn. 1971) (city disorderly conduct and loafing ordinances are vague and overbroad); State v. Lopez, 98 Idaho 581, 570 P.2d 259 (1977) (statute that fails adequately to define "prostitution" and "sexual activity" is facially void for vagueness); City of Detroit v. Sanchez, 18 Mich. App. 399, 171 N.W.2d 452 (1969) (city ordinance prohibiting lewdly following any person is void for vagueness); City of Detroit v. Bowden, 6 Mich. App. 514, 149 N.W.2d 771 (1967) (city ordinance prohibiting "known prostitute" from attempting to stop pedestrian or motor vehicle is void for vagueness). The following cases rejected vagueness challenges: People v. Superior Court, 19 Cal. 3d 338, 562 P.2d 1315, 138 Cal. Rptr. 66 (1977) (soliciting for lewd act); Langley v. United States, 264 A.2d 503 (D.C. 1970) (procuring for purposes of "debauchery or any other immoral act"); Tatzel v. State, 356 So. 2d 787 (Fla. 1978) ("licentious sexual intercourse"); Commonwealth v. King, — Mass. —, 372 N.E.2d 196 (1977) (common night-walking); State v. Armstrong, 282 Minn. 39, 162 N.W.2d 357 (1968) (loitering with intent to solicit for prostitution); Dinitz v. Christensen, 94 Nev. 230, 577 P.2d 873 (1978) (any person who solicits any act of prostitution is a vagrant); People v. Smith, 89 Misc. 2d 754, 393 N.Y.S.2d 239 (App. Term

tion,[5] infringe upon freedom of speech,[6] or impose cruel and unusual

1977), *aff'd*, 44 N.Y.2d 613, 378 N.E.2d 1032, 407 N.Y.S.2d 462 (1978) (loitering for purposes of prostitution); State *ex rel.* Juvenile Dep't v. D, 27 Or. App. 861, 557 P.2d 687 (1976), *appeal dismissed*, 434 U.S. 914 (1977) (loitering "in a manner and under circumstances manifesting the purpose . . . of prostitution"); Hensley v. City of Norfolk, 216 Va. 369, 218 S.E.2d 735 (1975) (soliciting "to commit any act which is lewd, lascivious, indecent or prostitute"); City of Seattle v. Jones, 79 Wash. 2d 626, 488 P.2d 750 (1971) (loitering for purposes of prostitution). *See* Note, *Anti-Prostitution Laws: New Conflicts in the Fight Against the World's Oldest Profession*, 43 ALB. L. REV. 360, 363-79 (1979) [hereinafter cited as *Anti-Prostitution Laws*]; 6 FORDHAM URB. L.J. 159 (1977).

5. The fourteenth amendment's equal protection clause prohibits arbitrary statutory classifications that do not promote valid legislative goals. *See generally* Dixon, *The Supreme Court and Equality: Legislative Classifications, Desegregation, and Reverse Discrimination*, 62 CORNELL L. REV. 494 (1977); Gunther, *The Supreme Court, 1971 Term—Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1 (1972); Karst, *The Supreme Court, 1976 Term—Foreword: Equal Citizenship Under the Fourteenth Amendment*, 91 HARV. L. REV. (1977); *Developments in the Law—Equal Protection*, 82 HARV. L. REV. 1065 (1969). Because most people prosecuted for prostitution offenses are women, *see* U.S. DEP'T OF JUSTICE, CRIME IN THE UNITED STATES 1977, at 183 (Released Oct. 18, 1978), many defendants have challenged prostitution statutes on equal protection grounds. *See generally* Rosenbleet & Pariente, *supra* note 3, at 381-411; *Anti-Prostitution Laws* at 382-85, *supra* note 4; Note, *The Victim as Criminal: A Consideration of California's Prostitution Law*, 64 CAL. L. REV. 1235, 1278-83 (1976) [hereinafter cited as *Victim as Criminal*]. Courts have upheld prostitution statutes that by their terms apply only to women, deferring to the legislative judgment that only female prostitution presents a significant social problem. Sumpter v. State, 261 Ind. 471, 306 N.E.2d 95 (1974) (federal constitution); Wilson v. State, 258 Ind. 3, 278 N.E.2d 569 (state constitution), *cert. denied*, 408 U.S. 928 (1972); State v. Devall, 302 So. 2d 909, 912 (La. 1974) (federal constitution); State v. Mertes, 60 Wis. 2d 414, 210 N.W.2d 741 (1973) (state constitution). Courts have also upheld statutes that are facially gender neutral but apply only to the sellers of sex. Blake v. State, 344 A.2d 260 (Del. Super. Ct. 1975), *aff'd sub nom.* Hicks v. State, 373 A.2d 205 (1977); United States v. Moses, 339 A.2d 46 (D.C. 1975); United States v. Wilson, 342 A.2d 27 (D.C. 1975); Commonwealth v. King, — Mass. —, 372 N.E.2d 196 (1977). If gender neutral and nondiscriminatory statutes are applied in a discriminatory fashion, however, they violate the equal protection clause. Yick Wo v. Hopkins, 118 U.S. 356 (1886). *See Developments in the Law—Equal Protection, supra*. Although some lower courts have found discriminatory application of facially gender-neutral prostitution statutes, these findings generally have been reversed by higher courts. *See* Morgan v. City of Detroit, 389 F. Supp. 922 (E.D. Mich. 1975); People v. Superior Court, 19 Cal. 3d 338, 562 P.2d 1315, 138 Cal. Rptr. 66 (1977); United States v. Wilson, 342 A.2d 27 (D.C. 1975); United States v. Moses, 339 A.2d 46 (D.C. 1975).

6. Several cases have challenged statutes that prohibit solicitation for prostitution on first amendment, free speech grounds. Most courts have rejected these challenges, reasoning that because solicitation for prostitution is commercial advertising or may lead to the commission of a crime, it is unprotected by the first amendment. *See* Morgan v. City of Detroit, 389 F. Supp. 922 (E.D. Mich. 1975); United States v. Moses, 339 A.2d 46 (D.C. 1975); People v. Johnson, 60 Ill. App. 3d 183, 376 N.E.2d 381 (1978); Cherry v. State, 18 Md. App. 252, 306 A.2d 634 (1973). *See generally* Rosenbleet & Pariente, *supra* note 3, at 378-79. For a discussion of the commercial speech doctrine, see notes 203-09 *infra* and accompanying text. As long as prostitution is illegal, states may constitutionally forbid advertising of prostitutes' services. *See* Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations, 413 U.S. 376, 388 (1973).

punishment.[7] This Note considers only the right to privacy challenge. Section I briefly reviews the history of attempts to regulate prostitution and details current legal treatment of prostitution in the United States. Section II discusses a trial court decision that was later reversed, holding that prostitution statutes violate a constitutionally protected right of privacy. Section III traces the development of the Supreme Court's concept of a constitutionally protected right to privacy. Section IV analyzes the argument that the right to privacy, as adumbrated by the Supreme Court, encompasses private, noncommercial sexual activity between consenting adults. Section IV also considers the impact of prostitution's commercial aspects on the right of privacy argument. Section V then examines recent state court treatment of the right to privacy argument—including the reversal of the previously discussed trial court decision—and concludes that it is unlikely that the right to privacy doctrine provides a feasible avenue of attack on the constitutionality of prostitution statutes.

I. CURRENT LEGAL TREATMENT OF PROSTITUTION

In recent years political groups[8] and legal commentators[9] have called for the repeal of prostitution statutes and other sexually repressive laws.[10] The National Organization for Women (NOW)[11] and Call Off

7. The Supreme Court in Robinson v. California, 370 U.S. 660 (1962), declared unconstitutional, under the eighth amendment's protection against cruel and unusual punishment, a statute that criminalized the status of narcotics addiction. For an argument analogizing the *Robinson* statute to prostitution statutes, see Rosenbleet & Pariente *supra* note 3, at 379. Sumpter v. State, 261 Ind. 471, 306 N.E.2d 95 (1974) held that a statute defining prostitute to include any female who lives in a house of ill fame did not punish the status of being a prostitute. *Id.* at 476, 306 N.E.2d at 100.

8. The National Organization for Women (NOW), the American Civil Liberties Union (ACLU), and the National Task Force on Prostitution are working for legislative change. J. JAMES, *supra* note 3, at 69-72. *See also* Nossa, *Prostitution: Who is Hustling Whom?*, 3 WOMEN: J. LIBERATION 26 (1972).

9. *See* W. BARNETT, *supra* note 3; J. JAMES, *supra* note 3; H. PACKER, THE LIMITS OF THE CRIMINAL SANCTION 328-31 (1968); Kaplan, *The Edward G. Donley Memorial Lecture: Non-Victim Crime and the Regulation of Prostitution*, 79 W. VA. L. REV. 593 (1977); Rosenbleet & Pariente, *supra* note 3; *Victim as Criminal, supra* note 5; Note, *Criminal Law—The Principle of Harm and its Application to Laws Criminalizing Prostitution*, 51 DEN. L.J. 235 (1974) [hereinafter cited as *Principle of Harm*]; Comment, *Decriminalization of Prostitution: The Limits of the Criminal Law*, 55 OR. L. REV. 553 (1976). *See also* Henkin, *Privacy and Autonomy*, 74 COLUM. L. REV. 1410 (1974); Packer, *The Aims of the Criminal Law Revisited: A Plea for a New Look at "Substantive Due Process,"* 44 S. CAL. L. REV. 490 (1971).

10. Today, most states do not attach criminal penalties to private, noncommercial sexual intercourse (fornication) between consenting adults. *See* Appendix. *But see, e.g.,* FLA. STAT.

Your Old Tired Ethics (COYOTE)[12] contend that the state's criminalization of prostitution is an inappropriate use of governmental resources[13] and that criminal sanctions should be applied to only those activities that cause harm to others.[14] They have argued that criminalization will not eliminate prostitution because punishing the prostitute does not eliminate the demand for commercialized sex.[15]

ANN. § 798.03 (West 1976); NEB. REV. STAT. § 28-928 (1975). Some states have repealed their statutes prohibiting consensual sodomy (generally defined as oral-genital or anal-genital sexual contact). *See, e.g.,* ALASKA STAT. tit. 11 (1978) (sodomy is not a criminal offense); CONN. GEN. STAT. tit. 53a (1979) (sodomy is not included in penal code). *But see, e.g.,* ALA. CODE tit. 13A, § 13A-6-65 (Supp. 1978); ARIZ. REV. STAT. ANN. § 13-1411 (1978). Several states, however, have retained a criminal sanction for sodomy between persons of the same sex but do not prohibit heterosexual sodomy. *See* Appendix; *e.g.,* KAN. CRIM. CODE ANN. § 21-3505 (Vernon 1971); KY. REV. STAT. § 510.100 (1975); MO. REV. STAT. § 566.090 (1978); TEX. PENAL CODE ANN. tit. 5, § 21.06 (Vernon 1974).

11. *See* note 8 *supra.*

12. COYOTE is a national prostitute's guild founded in San Francisco. Prostitutes also have organized to work for decriminalization in Seattle, New York, Honolulu, Los Angeles, Sacramento, Boston, and Ft. Lauderdale. J. JAMES, *supra* note 3, at 72-76.

13. *See* J. JAMES, *supra* note 3, at 22-23; H. PACKER, *supra* note 9, at 328-31; 63 IOWA L. REV. 248, 261-62 (1977).

14. *See* H. PACKER, *supra* note 9, at 266-67; W. BARNETT, *supra* note 3, at 1-20; *Principle of Harm, supra* note 9. *See also* Henkin, *Morals and the Constitution: The Sin of Obscenity*, 63 COLUM. L. REV. 391 (1963). *Accord,* THE WOLFENDEN REPORT 23-24 (1963). This argument has its basis in "one very simple principle":

> [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. That the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others. His own good, either physical or moral, is not a sufficient warrant.

J. MILL, ON LIBERTY 13 (1951). *Accord,* H.L.A. HART, LAW, LIBERTY AND MORALITY (1963). *Contra,* P. DEVLIN, THE ENFORCEMENT OF MORALS (1965). *See generally* Richards, *Commercial Sex and the Rights of the Person: A Moral Argument for the Decriminalization of Prostitution*, 126 U. PA. L. REV. 1195 (1979).

15. THE WOLFENDEN REPORT, *supra* note 14, at 132; Esselstyn, *Prostitution in the United States*, 1968 ANNALS 123, 129.

Most recent demands for legislative reform of prostitution statutes call for decriminalization rather than legalization. Decriminalization would remove all criminal sanctions from acts of prostitution involving adults and could provide for regulation by civil code as with other businesses. *See* J. JAMES, *supra* note 3, at 102-12; Kaplan, *supra* note 9, at 598-606. Reform groups propose brothel licensing only as an interim measure, because it confers the benefit of legality on the licenseholder without providing protections for the worker—the prostitute.

The legislative response to these demands has been to modernize the prostitution statutes; the criminal sanctions remain. The most significant changes have been in response to equal protection arguments. Most states have reworded their prostitution statutes to make them facially gender neutral. *Compare, e.g.,* ALASKA STAT. § 11.40.210 (1970) ("Prostitution includes the giving or receiving of the body by a female for sexual intercourse for hire.") (repealed 1978) *with* ALASKA STAT. § 11.66.100 (1978) ("A person commits the crime of prostitution if he engages in or agrees

Increasingly, states are leaving decisions concerning sexual activity to the participants, as long as the individuals are adults and capable of making sexual decisions of their own volition.[16] The wide scale repeal of fornication laws[17] and the increasingly frequent abolition of laws prohibiting consensual sodomy[18] confirm this attitude. Those states that retain fornication and sodomy statutes usually do not enforce these laws unless the acts involve nonconsenting participants or observers.[19]

English common law considered prostitution a spiritual concern with which the secular law should not be involved.[20] American society did not regard prostitution as a significant[21] social problem until the post-Civil War forces of industrialization, immigration, and urbanization combined to lead large numbers of women into the profession.[22] Early

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or offers to engage in sexual conduct in return for a fee."); LA. REV. STAT. ANN. § 14:82 (West 1974) ("Prostitution is the practice by a female of indiscriminate sexual intercourse with males for compensation.") (Amended by Acts 1977, No. 49 § 1) *with* LA. REV. STAT. ANN. § 14:82 (West Supp. 1980) ("Prostitution is: (a) The practice by a person of indiscriminate sexual intercourse with others for compensation.").

In 1973 only nine states prohibited patronizing a prostitute, *see* Rosenbleet & Pariente, *supra* note 3, 422-26 app.; today that number has risen to 20. *See* Appendix.

16. States that do not prohibit fornication and sodomy have retained criminal sanctions for acts involving minors, force, and persons who are incapable of consenting. *See, e.g.,* HAWAII REV. STAT. § 707 note at 359-61 (1976) ("[The statute] deals only with sexual behavior which involves (1) forcible compulsion, (2) imposition on a youth or other person incapable of giving meaningful consent, or (3) offensive conduct."); ILL. ANN. STAT. ch. 11 note at 369-70 (Smith-Hurd 1972) ("[P]rotection of everyone from aggression, protection of children from abuse of their immaturity, and the protection of the public from open affronts to generally accepted standards of behavior provide the basis adopted for framing the code provisions."). As used in this Note, "consensual" sexual activity refers to sexual conduct that does not involve minors, force, or persons incapable of consenting.

17. *See* note 10 *supra*.

18. *Id.*

19. MODEL PENAL CODE § 207.1, Comment at 205-07 (Tent. Draft No. 4, 1953); H. PACKER, *supra* note 9, at 301-12. *But see* Doe v. Commonwealth's Attorney, 403 F. Supp. 1199 (E.D. Va. 1975), *aff'd mem.*, 425 U.S. 901 (1976) (defendants, state prosecuting officials, did not contest allegation that they would prosecute plaintiff homosexuals for private sodomitic acts between consenting adults). *See* note 16 *supra*.

20. Prostitution was classified as an ecclesiastical offense and could not be punished in the common-law courts. Rosenbleet & Pariente, *supra* note 3, at 373 n.4 (citing statute of Circumspecte agatis, 13 Edw. I, Stat. 4 (1285)). Today prostitution is not illegal in England, although its public aspects are prohibited. THE WOLFENDEN REPORT, *supra* note 14, at 132.

21. Prostitution has existed from the earliest days of American colonization, but was not widespread. V. BULLOUGH & B. BULLOUGH, PROSTITUTION: AN ILLUSTRATED SOCIAL HISTORY 197-200 (1978) [hereinafter cited as BULLOUGH, ILLUSTRATED HISTORY].

22. *See generally* V. BULLOUGH, THE HISTORY OF PROSTITUTION 187-93 (1964); BULLOUGH, ILLUSTRATED HISTORY, *supra* note 21, at 200-07; D. PIVAR, PURITY CRUSADE 18-25 (1973).

In the nineteenth century, concerns about the increased incidence of venereal disease led many

American case law broadly defined prostitution as the act of a woman offering her body for sexual intercourse for hire or for indiscriminate sexual intercourse without hire.[23] Today, all states and the District of Columbia prohibit prostitution in some manner.[24] Most states prohibit the private act of engaging in sex for money,[25] the frequently public act of offering to engage in sex for money,[26] and the prostitution related business activities of persons other than prostitutes.[27]

Most states outlaw the actual act of prostitution.[28] A statute that prohibits only the private sex act and not any of its public aspects is extremely difficult to enforce because conviction usually requires the testimony of a participant in the sex act.[29] To avoid this enforcement

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doctors and law enforcement officials to urge states and cities to adopt reglementation—licensing and regulation systems similar to those in effect at that time in Europe and England. St. Louis was the only city to follow this suggestion. From 1870 to 1874, St. Louis licensed houses of prostitution and required women to submit to periodic health checks. Other cities adopted informal—and illegal—segregation measures, confining brothels to one section of the city. BULLOUGH, ILLUSTRATED HISTORY, *supra* note 21, at 207. These measures were vehemently opposed by the "new abolitionists"—women's groups working to eradicate prostitution. This early feminist movement was at least partially responsible for the characterization of the prostitute as a "fallen woman." *See generally* D. PIVAR, *supra*. Ironically, today's feminists are a major force working to change this image and decriminalize prostitution. *See* J. JAMES, *supra* note 3, at 68-71.

23. *E.g.,* United States v. Bitty, 208 U.S. 393, 401 (1908) ("It refers to women who for hire or without hire offer their bodies to indiscriminate intercourse with men."); State v. Clark, 78 Iowa 492, 494, 43 N.W. 273, 273 (1889) ("[I]f a woman submits to indiscriminate sexual intercourse, which she invites or solicits by word or act, or any device, she is a prostitute."); State v. Thuna, 59 Wash. 689, 690, 109 P. 331, 331 ("A woman who submits herself to indiscriminate sexual intercourse with men, without hire, is certainly as much a common prostitute as one who does so solely for hire.") *aff'd*, 59 Wash. 692, 111 P. 768 (1910). *Contra,* MODEL PENAL CODE § 251.2 (Proposed Official Draft, 1962) ("A person is guilty of prostitution . . . if he or she: (a) is an inmate of a house of prostitution or otherwise engages in sexual activity as a business."). *See id.* Comment at 236 ("[The code] no longer purports to reach every engagement in sexual activity for hire."). *Cf.* People v. Johnson, 60 Ill. App. 3d 183, 187, 376 N.E.2d 381, 384 (1978) ("[A]n offer or agreement to receive money, rather than, for example, a fur coat or a night at the opera for sexual favors is essential to a prostitution conviction.").

24. *See* Appendix. Nevada is the only state in which one may legally engage in prostitution. Legalized, licensed brothels operate in two rural counties. Prostitution is illegal, even in those counties, if it occurs outside the licensed facilities. NEV. REV. STAT. §§ 207.030, 201.300-430 (1975). *See* J. JAMES, *supra* note 3, at 70.

25. *E.g.,* LA. REV. STAT. ANN. § 82(a) (West 1974); OHIO REV. CODE ANN. § 2907.24 (Page 1975). *See* notes 29-31 *infra*; Appendix.

26. *E.g.,* COLO. REV. STAT. § 18-7-202 (1978); ILL. ANN. STAT. ch. 38, § 11-15 (Smith-Hurd 1979). *See* notes 32-35 *infra*.

27. *See* notes 36-42 *infra* and accompanying text.

28. *See* Appendix.

29. *See* Holloway v. City of Birmingham, 55 Ala. App. 568, 574, 317 So. 2d 535, 540 (1975) (if there is "no bedroom affair, no disrobing, no touching of the bodies, no money paid, and no

problem, modern statutes typically define prostitution to include offering or agreeing to engage in a sex act for money;[30] thus, police may use decoys, as well as participants' testimony, to obtain convictions under these laws. A few statutes define any prostitute as a vagrant.[31]

Solicitation for prostitution is illegal in all jurisdictions in the United States,[32] including those which do not criminalize the actual act of engaging in sex for money.[33] These statutes attempt to strike at the aspects of prostitution that may be most offensive to the public, although they prohibit all negotiations, whether public or private.[34] Police officers typically enforce negotiation statutes by posing as customers, arresting the prostitute when she names a price or a specific act.[35] Because sexual contact is not essential for prosecution, these statutes are the easiest to enforce.

All states prohibit prostitution related business activities. Some statutes include the common-law offenses of pimping,[36] pandering,[37] and

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sexual activity," prostitution has not been committed); State v. Butler, 331 So. 2d 425, 429 (La. 1976) (conviction requires proof of specific act of sexual intercourse). *But see* State v. Lewis, 343 So. 2d 1056, 1058 (La. 1977) ("No act of sexual intercourse is required for proof of prostitution.").

30. *E.g.,* ALASKA STAT. § 11.66.100 (1978); GA. CODE ANN. § 26-2012 (1977); MO. REV. STAT. § 567.010-.020 (1978). *See* Appendix.

31. *E.g.,* MINN. STAT. ANN. § 609.725 (West 1964); NEB. REV. STAT. § 28-1119 (1975); NEV. REV. STAT. § 207.030 (1977). *See* Appendix. *See also* State v. Price, 237 N.W.2d 813 (Iowa 1976); State v. Perry, 249 Or. 76, 436 P.2d 252 (1968).

32. *See* Appendix. *But see* Adams v. Commonwealth, 215 Va. 257, 208 S.E.2d 742 (1974) (construing VA. CODE § 18.2-346 (prohibiting solicitation) to require evidence of attempt to commit act of prostitution).

33. *E.g.,* D.C. CODE ANN. § 22-2701 (1973); *see* Appendix.

34. *See* notes 218-221 *infra* and accompanying text.

Eleven states prohibit loitering for the purpose of prostitution. *See* Appendix. An overt act of solicitation is usually unnecessary to violate these statutes. *E.g.,* ALA. CODE tit. 13A, § 13A-11-9(a)(3) (1975) ("A person commits the crime of loitering if he: . . . (3) Loiters or remains in a public place for the purpose of engaging or soliciting another person to engage in prostitution . . . ."); ARK. STAT. ANN. § 41-2914 (1977) ("A person commits the crime of loitering if he: . . . (e) lingers or remains in a public place for the purpose of engaging or soliciting another person to engage in prostitution."). *Contra,* ARIZ. REV. STAT. ANN. § 13-2905(A)(1) (1978) ("A person commits loitering if such person: . . . solicits another person to engage in any sexual offense.").

35. *See, e.g.,* Dinkins v. United States, 374 A.2d 292 (D.C. 1977); People v. Johnson, 60 Ill. App. 3d 183, 376 N.E.2d 381 (1978). *See also* J. JAMES, *supra* note 3, at 50-52; H. PACKER, *supra* note 9, at 329-31.

36. Pimping usually refers to sharing the earnings of a prostitute and procuring customers for a prostitute. *See, e.g.,* COLO. REV. STAT. § 18-7-206 (1978); IOWA CODE ANN. § 725.2 (West 1979).

37. Pandering refers to arranging for or inducing another person to become a prostitute. *See, e.g.,* COLO. REV. STAT. § 18-7-203 (1978); D.C. CODE ANN. § 22-2705 (1973); IOWA CODE ANN. § 725.3 (West 1979).

other business activities under the term "promoting prostitution," which usually has several degrees ranging from misdemeanors to felonies.[38] Red light abatement acts[39] allow civil nuisance abatement proceedings to be brought against premises used for prostitution.[40] City ordinances,[41] in addition to state statutes, regulate or prohibit massage parlors.[42]

Traditionally, courts and commentators considered the prostitute's customer to be a lesser social evil than the prostitute because the customer's activity was merely occasional, but the prostitute's conduct amounted to a continuous business.[43] Today, however, many states

38. *See, e.g.,* ALASKA STAT. §§ 11.66.110-.130 (1978); HAWAII REV. STAT. §§ 712.1201-04 (1976); IND. CODE ANN. § 35-45-4-4 (Burns 1979).

39. *See, e.g.,* KY. REV. STAT. §§ 233.010, .020 (1975); MO. REV. STAT. § 567.080 (1978); 68 PA. CONS. STAT. ANN. § 467 (Purdon 1973); R.I. GEN. LAWS § 11-30-1 (1970).

40. *See generally* O'Connor, *The Nuisance Abatement Law as a Solution to New York City's Problem of Illegal Sex Related Businesses in the Mid-Town Area*, 46 FORDHAM L. REV. 57 (1977); 1978 DET. C.L. REV. 135.

41. *See* Brown v. Haner, 410 F. Supp. 399, 400 n.3 (W.D. Va. 1976) (citing ROANOKE, VA. ORDINANCES § 15 (1976) (massage by person of opposite sex prohibited)); Brown v. Brannon, 399 F. Supp. 133, 139-46 (M.D.N.C. 1975) (citing DURHAM, N.C. CITY CODE ch. 3, art. V, § 13-31 (1975) (prohibiting genital massage for hire and requiring licensing of all massage businesses)); Morgan v. City of Detroit, 389 F. Supp. 922, 930-31 (E.D. Mich. 1975) (citing DETROIT, MICH., CITY ORDINANCES §§ 34-1-1, -4, -10, 1-1-7 (1965) (prohibiting operation of massage parlor without license and requiring finding of good moral character before license may be issued)); Garaci v. City of Memphis, 379 F. Supp. 1393, 1396 n.2 (W.D. Tenn. 1974) (citing MEMPHIS, TENN., PRIV. ACTS ch. 234, §§ 2, 4, 5 (1961) (requiring licensing of massage parlors contingent on owner's demonstration of good moral character)); Wes Ward Enterprises v. Andrews, 42 Ill. App. 3d 458, 462-63, 355 N.E.2d 131, 134 (1976) (citing PEORIA, ILL., ORDINANCES § 16-164 (1974) (licensing and regulating massage parlors)).

Many city ordinances also prohibit prostitution, solication for prostitution, and loitering for the purposes of prostitution. *See, e.g.,* Morgan v. City of Detroit, 389 F. Supp. 922, 926 (E.D. Mich. 1975) (citing DETROIT, MICH., CITY ORDINANCES § 39-1-52 (1965) (prohibiting accosting and soliciting for prostitution)); State v. Armstrong, 282 Minn. 39, 40, 162 N.W.2d 357, 358-59 (1968) (citing MINNEAPOLIS, MINN., ORDINANCES §§ 870.010, .050 (1968) (prohibiting loitering for purposes of prostitution and lurking for purposes of mischief)); Salt Lake City v. Allred, 20 Utah 2d 298, 302, 437 P.2d 434, 437 (1978) (citing SALT LAKE CITY, UTAH, REV. ORDINANCES § 32-2-1(7) (1965) (prohibiting directing any person to any place or building for purpose of prostitution)); Hensley v. City of Norfolk, 216 Va. 369, 371 n.1, 373-74 nn.3-4, 218 S.E.2d 735, 738 n.1, 739 nn.3-4 (1975) (citing NORFOLK, VA., CITY CODE §§ 31-18, -56, -55 (1958) (prohibiting keeping disorderly house, soliciting for prostitution, frequenting house of ill-fame)); City of Seattle v. Jones, 79 Wash. 2d 626, 627-28, 488 P.2d 750, 751 (1971) (citing SEATTLE, WASH., CITY CODE § 12.49.019 (1968) (prohibiting loitering for purpose of prostitution)).

42. For a discussion of the constitutional aspects of massage parlor regulation, see 24 U. KAN. L. REV. 462 (1976).

43. *See Ex parte* Carey, 57 Cal. App. 297, 306, 207 P. 271, 274 (1922) ("The fact that the fallen woman carries on the business of commercialized vice justifies whatever discriminations may be found in the statute. The act of her partner in vice, while equally as nefarious, is neither

prohibit patronizing a prostitute[44] and some appellate courts have upheld solicitation convictions against patrons of prostitutes.[45]

II. Trial Court Cases Invalidating Prostitution Statutes

A few trial courts have held prostitution statutes unconstitutional on right-to-privacy grounds,[46] but have been reversed by appellate courts.[47] Generally, these trial courts first considered whether a person's constitutionally protected right of privacy encompasses a decision to engage in noncommercial sexual activity. Answering that question affirmatively, these courts then subjected the challenged statutes to strict scrutiny and ruled that the state had failed to show that the statute was necessary to achieve a compelling state interest.

In *In re P.*,[48] a proceeding to determine whether respondent should be declared a delinquent, a New York family court held that the state constitution precluded criminalization of private, commercial sexual activity.[49] The case concerned a female juvenile who offered to per-

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commercialized nor continuous."); Model Penal Code § 207.12, Comment 8 at 180 (Tent. Draft No. 9, 1959) ("Imposition of severe penalties [for the patron] is out of the question, since prosecutors, judges and juries would be likely to regard extra-marital intercourse for males as a necessary evil or even as socially beneficial.").

44. Twenty states presently prohibit patronizing a prostitute. *See* Appendix. Iowa defines the crime of prostitution to include the patron: "Prostitution: A person who sells or offers for sale his or her services as a partner in a sex act, *or who purchases or offers to purchase such services*, commits an aggravated misdemeanor." Iowa Code Ann. § 725.1 (1979) (emphasis added). *Accord,* Or. Rev. Stat. § 167.007(b) (1977); Tex. Penal Code Ann. tit. 9, § 43.02 (Vernon Supp. 1978).

45. Leffel v. Municipal Court, 54 Cal. App. 3d 569, 126 Cal. Rptr. 773 (1976); Williams v. United States, 342 A.2d 367 (D.C. 1975).

46. *E.g.,* United States v. Moses, 41 U.S.L.W. 2298 (Nov. 3, 1972), *rev'd,* 339 A.2d 46 (D.C. 1975), *cert. denied,* 426 U.S. 920 (1976); *In re* P., 92 Misc. 2d 62, 400 N.Y.S.2d 455 (Fam. Ct. 1977), *rev'd,* 68 A.D.2d 719, 418 N.Y.S.2d 597 (1979).

47. *See* cases cited note 46 *supra.*

48. 92 Misc. 2d 62, 400 N.Y.S.2d 455 (Fam. Ct. 1977), *rev'd,* 68 A.D.2d 719, 418 N.Y.S.2d 597 (1979).

49. *Id.* at 82-83, 400 N.Y.S.2d at 469. The court based its decision on the New York state constitution, which, like the federal constitution, contains no textual reference to privacy. The court traced the development of the federal right and held that the reasoning applied equally to the state constitution. *Id.* at 75-76, 400 N.Y.S.2d at 464-65. This reliance on the state constitution was necessary to distinguish Doe v. Commonwealth's Attorney, 430 F. Supp. 1199 (E.D. Va. 1975), *aff'd mem.*, 425 U.S. 901 (1976); *see* notes 161-77 *infra* and accompanying text. *Doe* upheld Virginia's prohibition of private, consensual sodomy. The act of prostitution charged in *In re P* was also sodomy, although the parties, in contrast to *Doe*, were of opposite sexes. 92 Misc. 2d at 76 n.21, 400 N.Y.S.2d at 465 n.21.

The court also found a pattern of "intentional and selective enforcement" against women,

form oral sodomy for an adult male patron in exchange for ten dollars.[50] That act, if committed by an adult, would have violated the state prostitution statute and would, therefore, require a finding of delinquency.[51] The court, however, found that the right of privacy protects "each individual's decision as to whether, when and in what manner he or she will engage in private intimate relations."[52] For purposes of this right, the court drew no distinctions between commercial and noncommercial acts or between "deviate" and "normal" acts.[53]

Applying strict scrutiny to New York's prostitution statute,[54] the court then examined the state's asserted justifications for its interference with the individual's fundamental right to engage in private intimate relations. The court agreed that the state had valid interests in preventing venereal disease, controlling organized and ancillary criminal activity, and protecting the family and morals of society,[55] but found these interests insufficient to support governmental interference with the individual's right of privacy. A complete prohibition of prostitution to eradicate the relatively small incidence of venereal disease attributable to prostitution was unreasonable.[56] The state had not sustained its burden of showing that prostitution leads to other crimes[57] or is associated with organized crime.[58] Nor had the state shown any empirical connection between prostitution and harm to the stability of the

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which violated the state constitution's equal protection clause. *Id.* at 71-72, 400 N.Y.S.2d at 462. In addition, the court held that the state sodomy statute violated the equal protection clause of the state and federal constitutions because it applied only to unmarried persons. *Id.* at 73-74, 400 N.Y.S.2d at 463-64. Even if sodomy were not a crime, however, respondent could have been adjudged delinquent. Performance of an act of "deviate sexual intercourse" in return for a fee violates the prostitution statute. *Id.* at 65-66, 400 N.Y.S.2d at 458.

50. 92 Misc. 2d at 65, 400 N.Y.S.2d at 457. The court noted that the patron, who was the complaining witness in the case, had not been charged with patronizing a prostitute, attempting a statutory rape, or endangering the welfare of a minor. *Id.* at 65 n.3, 71 n.13, 400 N.Y.S.2d at 457 n.3, 462 n.13. The court expressed outrage that an adult male could agree to pay a fourteen year-old girl $10 to engage in oral sodomy and then have the child prosecuted for prostitution. Respondent was also charged with robbery for taking an additional $30 from the complaining witness. *Id.* at 65 n.1, 400 N.Y.S.2d at 457 n.1.

51. 52 Misc. 2d at 65-66, 400 N.Y.S.2d at 458.

52. *Id.* at 75, 400 N.Y.S.2d at 464.

53. *See id.*

54. *Id.* at 76-77, 400 N.Y.S.2d at 464-65.

55. *See id.* at 77, 400 N.Y.S.2d at 466.

56. *Id.* at 77-78, 400 N.Y.S.2d at 466.

57. *Id.* at 78-79, 400 N.Y.S.2d at 466.

58. *Id.* at 79-80, 400 N.Y.S.2d at 467.

traditional family.[59] Finally, the court held that the state could use means less intrusive than complete prohibition of prostitution to achieve its legitimate goal of protecting the public from offensive solicitation.[60]

In re P. demonstrates that the right of privacy challenge to prostitution statutes is not simply academic speculation. The applicability of the right of privacy doctrine to prostitution statutes depends initially on two determinations: (1) that the decision to engage in nonpublic, noncommercial, consensual sexual activity is a "fundamental" right encompassed by the constitutionally protected right of privacy; and (2) that the state either lacks sufficient interests to interfere with this right in any particular manner[61] or could employ means less intrusive than those legislatively chosen to achieve its ends. Once the decision to engage in private, noncommercial, consensual sexual activity is found to be a "fundamental" right, it is then necessary to evaluate whether prostitution's commercial nature affects either conclusion—that is, whether the noncommercial ingredient of sexual activity is a necessary component of the right, or whether the commercial aspect of prostitution enlarges the state's interests to the extent necessary to sustain prostitution statutes. At the crux of the entire analysis, however, is the Supreme Court's concept of a constitutional right of privacy.

III. THE RIGHT OF PRIVACY

The due process clause of the fourteenth amendment[62] "affords not only a procedural guarantee against the deprivation of 'liberty,' but likewise protects substantive aspects of liberty against unconstitutional restrictions by the State."[63] Although the Supreme Court will sustain

59. *Id.* at 80-81, 400 N.Y.S.2d at 468. The court agreed that preservation of the family unit as the "central institution for social cooperation" is a legitimate state goal. Because most patrons are married men, the family might be harmed by the existence of prostitution. The court concluded, however, that the responsibility for any undermining of the family unit attributable to prostitution should be placed on the patron, not on the prostitute who, under present enforcement practices, is the party most frequently arrested. *Id. See* notes 222-26 *infra*. The court also cited studies showing no ill effects on the family unit from legalization of prostitution in other countries or from decriminalization of prostitution in New York. 92 Misc. 2d at 80-81, 400 N.Y.S.2d at 468.

60. *Id.* at 82-83, 400 N.Y.S.2d at 469.

61. *See* McCloskey, *Economic Due Process and the Supreme Court: An Exhumation and Reburial*, 1962 SUP. CT. REV. 34, 36-40.

62. "[N]or shall any State deprive any person of life, liberty, or property, without due process of law." U.S. CONST. amend. XIV.

63. Kelley v. Johnson, 425 U.S. 238, 244 (1976). During the first part of this century in what

state economic regulations if there is any conceivable rational basis for the legislation,[64] the Court subjects legislation infringing on "fundamental" rights[65] to a stricter standard of review. Such legislation must be necessary to achieve a compelling state interest.[66] The Court presently recognizes as "fundamental" the individual's right to freedom of association,[67] electoral participation,[68] interstate travel,[69] procedural fairness in criminal proceedings,[70] and personal privacy. The right of privacy, in the Court's language, protects "the personal intimacies of the home, the family, marriage, motherhood, procreation, and child rearing."[71]

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is now known as the *Lochner* era, an activist Supreme Court used substantive due process to strike down many state economic regulations. *See* Lochner v. New York, 198 U.S. 45 (1905). *See generally* Hetherington, *State Economic Regulation and Substantive Due Process of Law*, 53 NW. U.L. REV. 13 (1958); McCloskey, *supra* note 61. The Court's retreat from that position began in the mid-1930's with Nebbia v. New York, 291 U.S. 502 (1934), and was completed in 1955 with Williamson v. Lee Optical Co., 348 U.S. 483 (1955), which established that the Court not only would defer to the legislative judgment that an economic regulation had a rational relationship to a legitimate state end, but would do so if any conceivable set of facts supported that relationship.

64. *See* McCloskey, *supra* note 61.

65. Rights that are "implicit in the concept of ordered liberty," Palko v. Connecticut, 302 U.S. 319, 325 (1937), *overruled on other grounds*, Benton v. Maryland, 395 U.S. 784, 794 (1969), are fundamental. *See* notes 66-71 *infra* and accompanying text.

66. "Substantive" equal protection analysis uses the same two-tier system of review. *See* Gunther, *supra* note 5; Karst, *supra* note 5, *Developments in the Law—Equal Protection, supra* note 5. To a certain extent the characterization of the interest is outcome-determinative. *See* Note, Roe *and* Paris: *Does Privacy Have a Principle?*, 26 STAN. L. REV. 1161, 1166-67 (1974). "To challenge such lines by the 'compelling state interest' standard is to condemn them all. So far as I am aware, no state law has ever satisfied this seemingly insurmountable standard, and I doubt one ever will." Dunn v. Blumstein, 405 U.S. 330, 363-64 (1972) (Burger, C.J., dissenting). *But see* Roe v. Wade, 410 U.S. 113 (1973) (state interest in potential life of the fetus is compelling at point of fetus' viability).

67. NAACP v. Alabama, 357 U.S. 449, 460-61 (1958) (state order requiring NAACP to disclose membership list may curtail freedom to associate and is thus subject to the closest judicial scrutiny).

68. Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966) (statute requiring payment of poll tax to vote in state elections abridges fundamental right and is subject to strict scrutiny).

69. Shapiro v. Thompson, 394 U.S. 618 (1969) (residency requirement for welfare benefits infringes on potential recipients' right to travel interstate and is thus subject to strict scrutiny).

70. *E.g.*, Bounds v. Smith, 430 U.S. 817 (1977) (right to access to legal materials and courts); Mayer v. City of Chicago, 404 U.S. 189 (1971) (right to transcript in misdemeanor appeals); Douglas v. California, 372 U.S. 353 (1963) (right to counsel in first appeal).

71. Paris Adult Theater I v. Slaton, 413 U.S. 49, 65 (1973). *See* Zablocki v. Redhail, 434 U.S. 374 (1978) (marriage); Carey v. Population Servs. Int'l, 431 U.S. 678 (1977) (contraception); Moore v. City of East Cleveland, 431 U.S. 494 (1977) (family); Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632 (1974) (procreation); Roe v. Wade, 410 U.S. 113 (1973) (abortion); Boddie v. Connecticut, 401 U.S. 371 (1971) (divorce); Stanley v. Georgia, 394 U.S. 557 (1969) (home); Loving v. Virginia, 388 U.S. 1 (1967) (marriage); Griswold v. Connecticut, 381 U.S. 479 (1965) (contracep-

The Supreme Court first explicitly recognized the right of privacy in *Griswold v. Connecticut*,[72] in which it held unconstitutional a state statute forbidding the use of contraceptives by married couples.[73] Justice Douglas, writing for the Court, derived the right from the zone of privacy emanating from penumbras of the first, third, fourth, and fifth amendments.[74] The Court ruled that Connecticut's statute interfered with a relationship lying within this constitutionally protected zone and, therefore, was unconstitutional.[75] Three other Justices regarded the right of privacy as fundamental and preserved to the public by the ninth amendment.[76] Justice Harlan found the right to be "implicit in the concept of ordered liberty," and so rooted in the traditions of society as to be ranked fundamental.[77] Also concurring separately, Justice White viewed the "liberty" interest of the fourteenth amendment as providing a right "to be free of regulation of the intimacies of the marriage relationship."[78]

In *Griswold* the marital relationship triggered the privacy protection;[79] four years later in Stanley v. Georgia,[80] a place—the home—triggered the same protection for possession of obscene materials.[81] *Ei-*

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tion); Skinner v. Oklahoma, 316 U.S. 535 (1942) (procreation); Pierce v. Society of Sisters, 268 U.S. 510 (1925) (child-rearing); Meyer v. Nebraska, 262 U.S. 390 (1923) (child-rearing).

72. 381 U.S. 479 (1965). Although the right of privacy first gained acceptance by a majority of the Court in *Griswold*, the concept was not new. Justice Harlan had discussed it in his dissenting opinion in Poe v. Ullman, 367 U.S. 497, 539-55 (1961) (Harlan, J., dissenting), referring to an even earlier dissenting opinion by Justice Brandeis in Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting). Justice Brandeis found a "right to be let alone" in the protections of the fourth and fifth amendments, describing it as "the most comprehensive of rights and the right most valued by civilized men." *Id. See also* Warren & Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890) (elaborating private tort concept of privacy rather than a constitutional right). The Court previously had recognized due process rights, "to marry, establish a home and bring up children," Meyer v. Nebraska, 262 U.S. 390 (1922), and to direct the education of one's children, Pierce v. Society of Sisters, 268 U.S. 510 (1924).

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

74. *Id.* at 480-86.

75. *Id.* at 485.

76. *Id.* at 486-99.

77. *Id.* at 500 (Harlan, J., concurring).

78. *Id.* at 502-03 (White, J., concurring).

79. "The present case, then, concerns a *relationship* lying within the zone of privacy created by several fundamental constitutional guarantees." *Id.* at 485 (emphasis added).

80. 394 U.S. 557 (1969).

81. *Id.* at 565. Some commentators suggested that the *Griswold* decision was also based on the sanctity of the place involved. *See* Ely, *The Wages of Crying Wolf: A Comment on* Roe v. Wade, 82 YALE L.J. 920 (1973); 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 (1973); Wilkinson &

senstadt v. Baird[82] subsequently extended the right of privacy beyond the bounds of the marital relationship, holding that Massachusetts' prohibition on the distribution of contraceptives to unmarried persons was constitutionally impermissible.[83] Because the right of privacy established in *Griswold* inhered in the individual rather than in the marital relationship, a statutory classification based on marital status denied unmarried persons the equal protection of the laws.[84] In 1973 the Court, in *Roe v. Wade,*[85] held that the choice of pregnancy termination was a fundamental personal right of the individual woman that fell within the zone of privacy protection.[86] The right of privacy recognized in *Roe* reaffirms *Eisenstadt*'s location of the right in the individual and may be characterized as a right of autonomy[87]—a fundamental right to make certain personal choices free from governmental interference.[88] Subsequent cases have applied the right of privacy to procrea-

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White, *Constitutional Protection for Personal Lifestyles*, 62 CORNELL L. REV. 563 (1977); Note, *supra* note 66. The language supporting this view is in Justice Douglas' opinion: "Would we allow the police to search the sacred precincts of marital bedrooms for telltale signs of the use of contraceptives?" Griswold v. Connecticut, 381 U.S. 479, 485 (1965).

82. 405 U.S. 438 (1972).

83. *Id.* at 453. Thus, the absence of a protected relationship was not dispositive.

> It is true that in Griswold the right of privacy in question inhered in the marital relationship. 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 makeup. If the right of privacy means anything, it is the right of the *individual*, married or single, to be free from governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.

Id. (emphasis in original).

84. *Id.* at 446-47.

85. 410 U.S. 113 (1973).

86. *Id.* at 154. The Court recognized that the right was not unlimited. *See* text accompanying notes 112-116 *infra*.

87. *See* Henkin, *supra* note 9.

88. Roe v. Wade, 410 U.S. 113 (1973). *See* Whalen v. Roe, 429 U.S. 589, 599-600 (1977) ("The cases . . . [recognize] the interest in independence in making certain kinds of important decisions.") (footnotes omitted).

A complete discussion of the Court's rationale and the constitutional reasoning in the development of the right of privacy is beyond the scope of this Note. For thorough analyses of the cases, see generally Craven, *Personhood: The Right To Be Let Alone*, 1976 DUKE L.J. 699; Ely, *supra* note 81; Grey, *Do We Have an Unwritten Constitution?*, 27 STAN. L. REV. 703 (1975); Henkin, *supra* note 9; Heymann & Barzelay, *The Forest and the Trees:* Roe v. Wade *and Its Critics*, 53 B.U.L. REV. 765 (1973); Perry, *Abortion, The Public Morals, and the Police Power: The Ethical Function of Substantive Due Process*, 23 U.C.L.A. L. REV. 689 (1976); Tribe, *supra* note 81; Wilkinson & White, *supra* note 81; Yarbrough, *The Burger Court and Unspecified Rights: On Protecting Fundamental and Not-So-Fundamental "Rights" or "Interests" Through a Flexible Conception of Equal Protection*, 1977 DUKE L.J. 143; Note, *supra* note 66.

tion decisions,[89] marriage,[90] and certain aspects of family life.[91]

Generally, the Court has used a catalogue approach to determine interests protected by the right of privacy. After listing activities and interests included within the right of privacy through its previous decisions, the Court compares the interest litigated in a particular case with the "list."[92] Thus, in *Paris Adult Theater v. Slaton*,[93] the Court found that the right of privacy protects "the personal intimacies of the home, the family, marriage, motherhood, procreation, and child rearing"[94] but does not include the viewing of obscene movies in a public theater.[95]

Under the "list" approach, however, the Court has failed to elaborate the essential characterists of the activities and interests encompassed by the right of privacy. *Stanley* established that the right of privacy includes the right to be free from governmental intrusion into activity within the home.[96] *Griswold* focused not only on a protected place, but also on a protected relationship.[97] *Eisenstadt* and the abortion cases, however, posit a right of privacy that transcends places and relationships—a right that, in essence, amounts to a right of autonomy.[98] *Carey v. Population Services International*[99] conforms to this view of the right of privacy. The *Carey* Court did not find a constitutional right to use contraceptives; rather, it held that access to contraceptives was essential to exercise the "fundamental" right to make the procreation decision.[100]

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89. *See, e.g.*, Carey v. Population Servs. Int'l, 431 U.S. 678 (1977) (contraceptives); Planned Parenthood v. Danforth, 428 U.S. 52 (1976) (abortion).

90. Zablocki v. Redhail, 434 U.S. 374 (1978).

91. Moore v. City of East Cleveland, 431 U.S. 494 (1977).

92. *See* Kelley v. Johnson, 425 U.S. 238 (1976); Dunn v. Blumstein, 405 U.S. 330 (1972); Lindsey v. Normet, 405 U.S. 56 (1972).

93. 413 U.S. 49 (1973).

94. *Id.* at 65.

95. *Id.* at 69. Likewise, in *Roe* the Court stated that the right of privacy "has some extension to activities relating to marriage, . . . procreation, . . . contraception, . . . family relationships, . . . and child rearing and education." Roe v. Wade, 410 U.S. 113, 152-53 (1973).

96. *See* notes 80-81 *supra* and accompanying text.

97. *See* notes 79-81 *supra* and accompanying text.

98. *See* note 88 *supra* and accompanying text.

99. 431 U.S. 678 (1977).

100. *Id.* at 688. *Carey* invalidated three provisions of a New York statute. Justice Brennan wrote for a majority, including Justices Stewart, Marshall, Blackmun, White, Powell, and Stevens, to hold invalid a provision banning distribution of nonprescription contraceptives to adults by anyone other than a licensed pharmacist and a second provision banning advertisement of contraceptives. 431 U.S. at 682-91, 700-02. As to the provision forbidding distribution, except by a

The Supreme Court's failure to elaborate beyond the "list" has provided little guidance for lower courts faced with arguments advocating expansion of the right of privacy.[101] The Court's recent privacy cases concerned activities and interests previously brought within the right[102] and did not broaden privacy protection beyond the contents of the *Paris* "list."[103] In one case[104] the Court observed that the right of privacy "decisions establish that the constitution protects the sanctity of the family precisely because the institution of the family is deeply rooted in this Nation's history and tradition."[105] Yet, this "deeply rooted in history and tradition" test does not explain the abortion

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physician, of all nonmedical contraceptives to persons under the age of 16, however, there was no majority opinion. Justices Brennan, Stewart, Marshall, and Blackmun subjected the statute to strict scrutiny and found that the provision was an impermissible burden on a minor's right to access to contraceptives—a right deemed fundamental. *Id.* at 691-96. Justice White concurred in the judgment because he found the state had not sustained its burden of showing that the prohibition actually achieved its asserted goal of deterring teenage premarital sex. *Id.* at 702-03 (White, J., concurring in the result). Justice Powell also concurred in the judgment, finding that the statute violated the rights of married teenagers between the ages of 14 and 16. New York law permitted marriage at age 14, but the challenged statute applied to married as well as unmarried teenagers. Justice Powell also found that the statute interfered with the rights of parents to raise their teenage children, because it would forbid parental distribution of contraceptives. *Id.* at 703-12 (Powell, J., concurring in the result). Justice Stevens also concurred in the result, finding that the statute attempted to impose pregnancy as punishment for teenage sexual activity and, therefore, denied due process. *Id.* at 712 (Stevens, J., concurring in the judgment). Justices Burger and Rehnquist dissented from all parts of the decision. *Id.* at 702 (Burger, C.J., dissenting); *id.* at 717-19 (Rehnquist, J., dissenting). *See* Note, Carey v. Population Services International: *An Extension of the Right of Privacy*, 5 OHIO N.U.L. REV. 167 (1978); Note, *Carey, Kids and Contraceptives: Privacy's Problem Child*, 32 U. MIAMI L. REV. 750 (1978).

101. *See generally* Ely, *supra* note 81; Note, *supra* note 66. Lower courts have faced arguments advocating extension of the right to various other activities. *See, e.g.*, Williams v. Kleppe, 539 F.2d 803 (1st Cir. 1976) (nude bathing at public beach); Fitzgerald v. Porter Memorial Hosp., 523 F.2d 716 (7th Cir. 1975) (father's presence in delivery room during birth of child); State v. Erickson, 574 P.2d 1 (Alaska 1978) (possession of cocaine in home); Ravin v. State, 537 P.2d 494 (Alaska 1975) (possession of marijuana in home); Locker v. Kirby, 31 Cal. App. 3d 520, 107 Cal. Rptr. 446 (1973) (topless waitress in bar); Oakland County Prosecuting Attorney v. 46th Judicial Dist. Judge, 76 Mich. App. 318, 256 N.W.2d 776 (1977) (gambling); American Motorcycle Ass'n v. Davids, 11 Mich. App. 351, 158 N.W.2d 72 (1968) (motorcycle helmet law).

102. *See, e.g.*, Zablocki v. Redhail, 434 U.S. 374 (1978) (marriage); Beal v. Doe, 432 U.S. 438 (1977) (abortion); Carey v. Population Servs. Int'l, 431 U.S. 678 (1977) (contraception); Moore v. City of East Cleveland, 431 U.S. 494 (1977) (family).

103. *See* note 94 *supra* and accompanying text. *See also* Kelley v. Johnson, 425 U.S. 238 (1976) (city may regulate length of policemen's hair); Village of Belle Terre v. Boraas, 416 U.S. 1 (1974) (city may regulate through zoning number of unrelated individuals who may live together); Lindsey v. Normet, 405 U.S. 56 (1972) (no fundamental right to housing); Dandridge v. Williams, 397 U.S. 471 (1970) (no fundamental right to welfare).

104. Moore v. City of East Cleveland, 431 U.S. 494 (1977).

105. *Id.* at 503.

cases,[106] nor does it explain the invalidity—as an infringement of individuals' right of privacy—of the anti-miscegenation statute in *Loving v. Virginia*.[107] Some commentators suggest that in determining whether a particular interest is within the scope of the right of privacy, the Court measures that interest's impact on the individual's life.[108] Certainly, the decision to marry or to have children significantly affects the life of the decisionmaker, but education[109] and public assistance[110] also substantially influence the course of an individual's life; nevertheless, the Court has not deemed these interests to be within the protection of the right of privacy.[111]

The right of privacy recognized in *Griswold* and the cases following it is not absolute. Once an interest is classified as within the right of privacy, the state may interfere with that interest upon a showing that the interference is necessary to achieve a compelling state end.[112] In *Griswold* the Court rejected the state's claim that its ban on the use of contraceptives by married persons was necessary to deter extramarital sexual activity.[113] Although Connecticut had a valid interest in the morals of its citizens, its statute was not a necessary means to achieve that goal.[114] In *Roe* the Court held that the state interest in maternal

106. Although Justice Blackmun's opinion in *Roe* detailed the history of abortion laws to show their relatively recent origins, 410 U.S. at 119-47, the evidence does not make convincing the argument that the right to abortion is, under the test forumlated in *Moore v. City of East Cleveland*, "deeply rooted in our Nation's history and tradition." *See* 410 U.S. at 119-47.

107. 388 U.S. 1 (1967). The Court overturned a criminal conviction under Virginia's miscegenation statute, ruling the statute unconstitutional. In *Roe*, Justice Blackmun cited *Loving* as a demonstration of the right of privacy's "extension to activities relating to marriage." 410 U.S. at 152. Interracial marriages in the United States have been rare until recent times. *See* Brief for Appellee, at 28, Loving v. Virginia, 388 U.S. 1 (1967).

108. *See* Wilkinson & White, *supra* note 81; Note, *supra* note 81.

109. *See* San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1 (1973) (no fundamental right to equal education under equal protection clause).

110. *See* Dandridge v. Williams, 397 U.S. 471 (1970) (no fundamental right to receive welfare payments).

111. For an argument that the courts should recognize a constitutional right to "certain basic ingredients of individual welfare, such as food, shelter, health care, and education," see Michelman, *Welfare Rights in a Constitutional Democracy*, 1979 WASH. U.L.Q. 659. *Contra*, Appleton, *Commentary: Professor Michelman's Quest for a Constitutional Welfare Right*, 1979 WASH. U.L.Q. 715; Bork, *Commentary: The Impossibility of Finding Welfare Rights in the Constitution*, 1979 WASH. U.L.Q. 695. For an argument that education is entitled to special constitutional protection, see Levin, *Commentary: Education as a Constitutional Entitlement: A Proposed Judicial Standard for Determining How Much is Enough*, 1979 WASH. U.L.Q. 703.

112. *See* note 66 *supra*.

113. Griswold v. Connecticut, 381 U.S. 479, 506 (1965).

114. *Id.* at 497-98 (Goldberg, J., concurring).

health did not become compelling until after the first trimester of pregnancy.[115] A state, therefore, may interfere with abortion decisions only during the second and third trimesters.[116]

IV. THE HYPOTHETICAL RIGHT TO SEXUAL PRIVACY

In the wake of the Supreme Court's pioneering efforts to establish a right of privacy doctrine, case law is emerging to support the notion that constitutionally protected privacy encompasses the right to engage in private, consensual, sexual activity. The Supreme Court, however, has not elaborated a basis for distinguishing private, sexual activity from "personal intimacies of the home."[117] Yet, *Griswold*'s emphasis on the state's intrustion into the marital bedchamber[118] has led many states to revise their sodomy statutes to exempt married couples.[119] Although dicta in various Supreme Court opinions suggests that "illicit" sexual activity might still be prohibited,[120] some lower courts have construed the right of privacy doctrine to protect private, consensual, nonprocreational sexual activity between married couples.[121] Two state supreme courts have extended this rationale to prohibit state interference with private, consensual sexual activity between unmarried per-

115. 410 U.S. at 163.

116. *Id.* at 163-64.

117. Paris Adult Theater I v. Slaton, 413 U.S. 49, 65 (1973).

118. *See* note 81 *supra*.

119. *See, e.g.,* ALA. CODE tit. 13A § 13A-6-60(2) (Supp. 1978); N.Y. PENAL LAW § 130.002 (McKinney 1975).

120. Carey v. Population Servs. Int'l, 431 U.S. 678, 702 (1977) (White, J., concurring) ("I do not regard the opinion, however, as declaring unconstitutional any state law forbidding extramarital sexual relations."); Paris Adult Theater I v. Slaton, 413 U.S. 49, 68n.15 (1973) ("The state statute books are replete with constitutionally unchallenged laws against prostitution, . . . although [prostitution] may only directly involve 'consenting adults.' "); Griswold v. Connecticut, 381 U.S. 479, 498 (1965) (Goldberg, J., concurring) ("The State of Connecticut does have statutes, the constitutionality of which is beyond doubt, which prohibit adultery and fornication."); *id.* at 505 (White, J., concurring) ("[T]he State's policy against all forms of promiscuous or illicit sexual relationships . . . [is] concededly a permissible and legitimate legislative goal."); Poe v. Ullman, 367 U.S. 497, 552 (1961) (Harlan, J., dissenting) ("I would not suggest that adultery, homosexuality, fornication and incest are immune from criminal enquiry, however privately practiced.").

121. *See, e.g.,* Cotner v. Henry, 394 F.2d 873 (7th Cir.), *cert. denied*, 393 U.S. 847 (1968); Buchanan v. Batchelor, 308 F. Supp. 729 (N.D. Tex. 1970), *rev'd on other grounds sub nom.* Wade v. Buchanan, 401 U.S. 989 (1971); State v. Pilcher, 242 N.W.2d 348 (Iowa 1976); State v. Lair, 62 N.J. 388, 301 A.2d 748 (1973). *But see* Lovisi v. Slayton, 539 F.2d 349, 351 (4th Cir. 1976) (husband and wife waived their right to marital privacy for act of oral sodomy by allowing third party to be present); State v. Bateman, 113 Ariz. 107, 110, 547 P.2d 6, 9 (1976) (state may not interfere with "sexual behavior" but may regulate "sexual misconduct," including consensual sodomy between spouses).

sons of the opposite sex.[122] Going even further, a recent New York decision extends this protection of the right of privacy to private, consensual, homosexual conduct.[123]

In *State v. Pilcher*[124] the Iowa Supreme Court held Iowa's sodomy statute[125] unconstitutional as applied to oral sodomy between consenting,[126] unmarried[127] adults of opposite sexes.[128] The Iowa court first found that the Supreme Court's right of privacy doctrine applies to some sexual activity.[129] It then looked to three lower federal court decisions[130] holding sodomy statutes unconstitutional as applied to married couples.[131] Finally, the court ruled that because the right of privacy extends to sexual relations between married couples,[132] *Eisenstadt v. Baird* mandated a finding that the right also protects the "manner of sexual relations performed in private between consenting adults of the opposite sex not married to each other."[133]

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122. State v. Pilcher, 242 N.W.2d 348 (Iowa 1976); State v. Saunders, 75 N.J. 200, 381 A.2d 333 (1977). *See also* State v. Hill, 166 N.J. Super. 224, 399 A.2d 667 (Law Div. 1978).

123. People v. Onofre, — A.D.2d —, 424 N.Y.S.2d 566 (1980).

124. 242 N.W.2d 348 (Iowa 1976).

125. IOWA CODE ANN. § 705.1 (West 1979).

126. Defendant denied participating in the act, and the complaining witness claimed she had not consented to oral sodomy, although she would have agreed to "normal" sexual intercourse. 242 N.W.2d at 350. The court was unable to determine from the jury's general verdict of guilt whether the act was consensual. Because the jury could have found consent, the court granted defendant standing to challenge the statute as applied to a consensual act. *Id.* at 354-56.

127. Both participants were married to other people. *Id.* at 351. The marital status of the parties was irrelevant to the statutory violation. *Id.* at 352.

128. Defendant stated that he was not challenging the act as applied to homosexual activity or anal sodomy. *Id.* at 352.

129. *Id.* at 357.

130. *Pilcher* relied on Cotner v. Henry, 394 F.2d 873 (7th Cir.) (state cannot prohibit consensual sodomy between wife and husband), *cert. denied*, 393 U.S. 847 (1968); Buchanan v. Batchelor, 398 F. Supp. 729 (N.D. Tex. 1970) (sodomy statute unconstitutional as applied to married intervenors), *rev'd on other grounds sub nom.* Wade v. Buchanan, 401 U.S. 989 (1971), and also discussed Lovisi v. Slayton, 363 F. Supp. 620 (E.D. Va. 1973) (right of privacy extends to consensual sexual relations between adults), *aff'd*, 539 F.2d 349 (4th Cir.), *cert. denied*, 429 U.S. 977 (1976). In *Lovisi*, the district court held that defendants waived their right of privacy as husband and wife to engage in private consensual sodomy by showing photographs of the acts to their daughters. *Id.* at 626-27. On appeal, the Fourth Circuit agreed that the right of privacy encompassed private acts between marriage partners, but found that the Lovisis waived their rights by allowing another person to observe and participate in sexual activities. Lovisi v. Slayton, 539 F.2d 349, 351 (4th Cir.), *cert. denied*, 429 U.S. 977 (1976). *See* 45 GEO. WASH. L. REV. 839 (1977).

131. State v. Pilcher, 242 N.W.2d at 359.

132. *Id.*

133. *Id.*

Similarly, the New Jersey Supreme Court, in *State v. Saunders*,[134] relied on *Eisenstadt* to overrule two previous decisions[135] and hold that a fornication statute[136] violated the constitutionally protected right of privacy.[137] The *Saunders* court stressed that the right of privacy protected personal decisions closely related to individual autonomy,[138] encompassing "freedom of personal development."[139] Looking to *Carey* and *Roe v. Wade*, the court reasoned that it would be "rather anomalous" to protect a procreation decision but not safeguard the "more fundamental" decision to engage in sexual conduct—conduct that is "a necessary prerequisite" to procreation.[140] In *State v. Hill*[141] a New Jersey superior court extended *Saunders* to apply to consensual, heterosexual sodomy between adult partners who were not married to each other.[142] The court held that the statute constitutionally could apply to only forcible sodomy.[143]

Once the *Pilcher* and *Saunders* courts found interests protected by the right of privacy, they employed strict scrutiny, requiring the states to defend the challenged statutes as necessary to achieve a compelling state interest.[144] Without discussing any asserted state justifications, the *Pilcher* court concluded that the state had not demonstrated a compelling interest.[145] The *Saunders* court, however, analyzed and rejected

134. 75 N.J. 200, 381 A.2d 333 (1977).

135. State v. Clark, 58 N.J. 72, 275 A.2d 137 (1971), and State v. Lutz, 57 N.J. 314, 272 A.2d 753 (1971), upheld the same fornication statute against a privacy challenge. The *Saunders* court declared that *Eisenstadt,* decided after *Clark* and *Lutz*, dictated their overruling. 75 N.J. at 215, 381 A.2d at 340.

136. N.J. STAT. ANN. § 2A:110-1 (West 1969) (repealed 1978).

137. 75 N.J. at 213, 381 A.2d at 339. The facts of the case were in dispute. Two women claimed that defendant and two other men had raped them. Defendant contended that the women had offered to have sex with the men in exchange for "reefers" and that after completion of the sex acts, the women learned that the men had no "reefers," became angry, and reported the incident as rape. The trial judge instructed the jury that if it believed defendant's account of the facts, it should find him guilty of fornication, which he stated to be a lesser included offense of rape. *Id.* at 205, 381 A.2d at 335.

138. *Id.* at 212, 381 A.2d at 339.

139. *Id.* at 213, 381 A.2d at 339.

140. *Id.* at 214, 381 A.2d at 340.

141. 166 N.J. Super. 224, 399 A.2d 667 (Law Div. 1978).

142. *Id.* at 233, 399 A.2d at 671-72. "This court is convinced that there is no basis for differentiating between fornication and consensual sodomy between unmarried persons." *Id.*

143. *Id.*, 399 A.2d at 671-72. The usual disclaimers about homosexual activity are noticeably absent from the court's opinion. *Id.*

144. 242 N.W.2d at 359; 75 N.J. at 217, 381 A.2d at 341.

145. 242 N.W.2d at 359.

four asserted state interests.[146]

The state argued first that the statute was a valid health regulation, designed to check the spread of venereal disease.[147] The court found, however, that the fear of contracting disease should be as great or greater a deterrent to nonmarital sexual activity than would be the fear of prosecution under the statute.[148] Furthermore, the statute might actually be counterproductive because it could deter venereal disease victims from seeking necessary medical treatment.[149]

The *Saunders* court also rejected the state's argument that the fornication statute promoted a state interest in preventing illegitimacy.[150] Essentially following its reasoning on the state's venereal disease argument, the court responded that if the fear of unwanted pregnancy would not deter sexual activity, then the fear of prosecution for fornication also would be of dubious deterrent value.[151]

New Jersey also argued that the use of criminal sanctions for fornication protected the marital relationship.[152] Specifically reserving judgment on the underlying assumption that abstinence from sexual activity induces marriage,[153] the court reasoned that the state's attempt to co-

146. 75 N.J. at 217-19, 381 A.2d at 341-42.

147. *Id.* In *Saunders'* recognition of preventing venereal disease as a significant state interest is the implicit assumption that a prohibition of nonmarital sexual activity, including the statutory offense of fornication, would reduce the number of sexual contacts per person and thus necessarily reduce the spread of venereal disease. This assumption, however, ignores enforcement difficulties.

148. 75 N.J. at 218, 381 A.2d at 341-42. The court noted that the maximum penalty under the act was a fine of $50 and/or six months imprisonment. *Id.* It looked to *Carey* for the proposition that "absent highly coercive measures," it is extremely doubtful that people will be deterred from engaging in extramarital sexual activities. *Id.*

149. *Id.*

150. *Id.*

151. *Id.* at 218-19, 381 A.2d at 342.

The state's interest in reducing illegitimate births is based, in part, on the assumption that there is a greater likelihood of an illegitimate, as opposed to legitimate, child's needing state support. *See* State v. Clark, 58 N.J. 72, 275 A.2d 137 (1971). The court's rationale for rejecting the state interest in promoting marriage would have worked equally well here. *See* notes 152-55 *infra* and accompanying text. If the statute attempted to coerce people into marrying or into having children only after marriage, then the state is interfering with a procreation decision—a decision clearly within the privacy protections. The state's interest in protecting its treasury cannot meet the compelling state interest required of this sort of interference. Illegitimacy, like fornication, may be abhorrent to the views of many people but, according to *Saunders*, those people may not use the criminal sanction to force their beliefs on others. *See* notes 156-58 *infra* and accompanying text.

152. 75 N.J. at 219, 381 A.2d at 342.

153. *Id.*

erce people into marrying was unconstitutional.[154] Allowing the state to use its fornication statute to promote what the court conceded might otherwise be a socially beneficial institution "would undermine the very independent choice which lies at the core of the right of privacy."[155]

Finally, the Court held that the state could not justify the statute as a valid police power regulation of the public morals because only private conduct was in question.[156] Although fornication might be "abhorrent to the morals and deeply held beliefs of many persons,"[157] this concern did not rise to the level of a compelling state interest.[158]

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154. *Id.*

155. *Id. Saunders* dismissed the state interest in promoting marriage without considering legitimate reasons that the state might have for promoting—rather than coercing—marriage and the traditional heterosexual family unit. The family has served as a basic unit for many governmental services and, furthermore, has in the past provided economic and other support to its members that the state might otherwise have to supply. *See* Wilkinson & White, *supra* note 81, at 595. *See also* Moore v. City of East Cleveland, 431 U.S. 494, 503 (1977) ("[T]he institution of the family is deeply rooted in this Nation's history and tradition.").

156. 75 N.J. at 219, 381 A.2d at 342.

157. *Id.* at 220, 381 A.2d at 342.

158. Many courts have recognized that the state's police power includes the ability to protect public morals. *See, e.g.,* Poe v. Ullman, 367 U.S. 497, 546 (1961) (Harlan, J., dissenting) ("[Society] has traditionally concerned itself with the moral soundness of its people. . . ."); Boston Beer Co. v. Massachusetts, 97 U.S. 25, 33 (1878) ("Whatever differences of opinion may exist as to the extent and boundaries of the police power, and however difficult it may be to render a satisfactory definition of it, there seems to be no doubt that it does extend to . . . the preservation of good order and the public morals."); People v. Costello, 90 Misc. 2d 431, 434, 295 N.Y.S.2d 139, 142 (Sup. Ct. 1977) ("The oft-repeated statement that morality cannot be legislated is fallacious; other than traffic regulations virtually all penal law is legislation of morality. Society may not be able to enforce morality, but it clearly can legislate it."). *See also* MODEL PENAL CODE § 207.1, Comment at 212 (Tent. Draft No. 4, 1955); Henkin, *supra* note 14, at 402-05; Schwartz, *Morals, Offenses, and the Model Penal Code*, 63 COLUM. L. REV. 669, 669-73 (1963); Wilkinson & White, *supra* note 8, at 594-95.

A state might attempt to protect public morals by regulating three different types of conduct. The first type comprises purely public conduct that is itself offensive or "immoral." A state, for example, may forbid sex acts in public. At the other extreme is purely private conduct, such as nonpublic sexual activity. The third type falls somewhere in between the two extremes and includes behavior that may be best described as public manifestations of private behavior. The purchase of birth control products in a public place is an example of this type of conduct. State regulation of the first type of conduct poses few problems. *See, e.g.,* FCC v. Pacifica Foundation, 438 U.S. 726 (1978) (broadcasting obscenities over radio); Paris Adult Theatre I v. Slaton, 413 U.S. 49 (1973) (viewing obscene movies in public theater). Regulation of the second and third types of conduct, however, impinges on the right of privacy as established by the Supreme Court and applied by *Saunders* and *Pilcher*. Although the second type of conduct, purely private behavior, would seem exempt from the state's police power, the mere existence of private behavior considered by many to be deviate and immoral has been regarded as a sufficient justification for regulation. *See* Schwartz, *supra* note 158, at 671 ("[T]he great majority of people believe that the

Separate opinions in both *Saunders*[159] and *Pilcher*[160] criticized their respective majorities for failing to heed *Doe v. Commonwealth's Attorney,*[161] the Supreme Court's summary affirmance of a three judge district court's upholding of Virginia's sodomy statute as applied to homosexuals.[162] A declaratory judgment action, *Doe* held that Virginia's sodomy statute did not deprive adult male homosexuals—acting consensually and in private[163]—of their constitutional rights of due process and privacy.[164] The divided district court[165] ruled the conduct in question to be "obviously no portion of marriage, home or family life" and, therefore, unprotected by a constitutional right of privacy.[166] In addition, the court declared valid Virginia's criminalization of private, homosexual sodomy because the statute was rationally related to promoting "morality and decency" and preventing possible contributions to "moral delinquency."[167]

The Supreme Court's summary affirmance indicates only its accept-

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morals of 'bad' people do, at least in the long run, threaten the security of the 'good' people. . . . And that belief is not demonstrably false, any more than it is demonstrably true."). Indeed, *Saunders* recognized that some private behavior may, by its very existence, offend or outrage the sensibilities of others. 75 N.J. at 220, 381 A.2d at 341. *Saunders*, however, rejected the assertion that these concerns established a compelling state interest in the regulation of fornication. *Id.* A second public morals basis offered for the regulation of private behavior is that deviant or "immoral" behavior might set an example that others would follow, thus changing the social norm. *See* Wilkinson & White, *supra* note 81, at 594-95. This rationale offers a seemingly persuasive basis for control of the third type of conduct, public manifestation of private behavior. The more prevalent the public manifestations are, the more threatening the possibility of a changing social norm is likely to be. When the state regulates public manifestations of activity protected by the right of privacy, however, it must demonstrate that the regulation is necessary to achieve a compelling state interest. *See* Carey v. Population Servs. Int'l, 431 U.S. 678 (1977).

159. 75 N.J. at 224, 381 A.2d at 344 (Schreiber, J., concurring).

160. 242 N.W.2d at 366 (Reynoldson, J., dissenting).

161. 403 F. Supp. 1199 (E.D. Va. 1975), *aff'd mem.*, 425 U.S. 901 (1976). For detailed discussion of *Doe*, see Richards, *Unnatural Acts and the Constitutional Right to Privacy: A Moral Theory*, 1977 B.Y.U. L. REV. 170; Comment, *The Constitutionality of Sodomy Statutes*, 45 FORDHAM L. REV. 553 (1976); 53 DEN. L.J. 553 (1976); 15 DUQ. U.L. REV. 123 (1976); 45 FORDHAM L. REV. 1281 (1977); 62 IOWA L. REV. 568 (1976); 65 KY. L.J. 748 (1977); 3 WOMEN'S RIGHTS L. REP. 170 (1977).

162. Justices Brennan, Marshall, and Stevens would have noted probable jurisdiction and set the case for oral argument. 425 U.S. at 901.

163. Doe v. Commonwealth's Attorney, 403 F. Supp. 1199, 1200 (E.D. Va. 1975), *aff'd mem.*, 425 U.S. 901 (1976).

164. *Id.* at 1203.

165. *See id.* at 1203-05 (Merhige, J., dissenting).

166. *Id.* at 1202.

167. *Id.* Some commentators have criticized *Doe* for its reliance on statements made by Justice Harlan, dissenting in Poe v. Ullman, 367 U.S. 497, 522 (1961), and for its failure to cite any of

ance of the lower court's result and not necessarily the lower court's reasoning.[168] Thus, the precedential impact of *Doe* on the facts before the *Pilcher* and *Saunders* courts is uncertain. The *Pilcher* majority never mentioned *Doe*, but pointed out that it was not deciding the constitutionality of Iowa's sodomy statute as applied to homosexual acts.[169] The *Saunders* court asserted that it was "not inclined to read this controversial case too broadly."[170] Although it recognized that *Doe* was "technically binding as precedent," the majority refused to extend *Doe*'s rationale to the facts before it.[171]

That *Doe* concerned homosexual conduct is probably sufficient to distinguish it from *Pilcher* and *Saunders*.[172] The fornication statute in-

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the Supreme Court's privacy decisions rendered since *Griswold*. *See* 1977 B.Y.U. L. REV. 170; 53 DEN. L.J. 553 (1976); 15 DUQ. U.L. REV. 123 (1976); 65 KY. L.J. 748 (1977).

The *Doe* majority also looked to traditional moral opinion and the longevity of Virginia's statute to support its holding. 403 F. Supp. at 1202-03, 1203n.2 ("[T]he longevity of the Virginia statute does testify to the State's interest and its legitimacy. It is not an upstart notion; it has ancestry going back to Judaic and Christian law.") (citing *Leviticus* 18:22, 20:33).

168. Fusari v. Steinberg, 419 U.S. 379, 391 (1975) (Burger, C.J., concurring); *cf.* Hicks v. Miranda, 422 U.S. 332 (1975) (district court may not disregard summary dismissal for want of substantial federal question). *See generally* Note, *Summary Disposition of Supreme Court Appeals: The Significance of Limited Discretion and a Theory of Limited Precedent*, 52 B.U.L. REV. 373 (1972).

169. 242 N.W.2d at 352. The dissent read *Doe* as finding that the conduct in question was not protected by the right of privacy; it would have applied only a rational relation test of constitutionality to the Iowa statute. *Id.* at 366 (Reynoldson, J., dissenting).

170. 75 N.J. at 216, 381 A.2d at 340.

171. *Id.* A concurring opinion, however, found *Doe* to be "totally incompatible with the suggestion that the federal right of privacy protects 'individual autonomy.'" *Id.* at 224, 381 A.2d at 344 (Schreiber, J., concurring). Justice Schreiber would have reached the majority's result solely on the basis of the state constitution. *Id.* at 220, 381 A.2d at 343 (Schreiber, J., concurring). A dissenting justice agreed with the majority's reasoning and reading of the Supreme Court's privacy decisions, but would have remanded the case for a determination on whether fornication was a lesser included offense of rape. *Id.* at 229, 381 A.2d at 347 (Clifford, J., dissenting).

172. Those courts that have dealt with privacy challenges to sodomy statutes as applied to homosexual acts usually do not differentiate between the individual's right to privacy and the state interests that might justify infringement upon that right. The enforcement pattern of sodomy statutes causes part of the difficulty in this area. Law enforcement officials tend to enforce these statutes only in situations in which the act involves force, minors, or public activity, including public solicitation. *See* MODEL PENAL CODE § 207.5, Comment 1 at 278 (Tent. Draft No. 4, 1953). *See, e.g.*, Swikert v. Cady, 381 F. Supp. 988 (E.D. Wis. 1974) (defendant convicted of forcible sodomy has no standing to challenge statute's application to consenting adults); United States v. Brewer, 363 F. Supp. 606 (M.D. Pa.), *aff'd*, 491 F.2d 751 (3rd Cir. 1973) (defendant convicted of consensual sodomy that occurred in prison has no standing to challenge constitutionality of statute as applied to consensual acts in private); Carter v. State, 255 Ark. 225, 500 S.W.2d 368 (1973) (right of privacy does not apply to act that took place in parked automobile in well-lighted parking lot); People v. Roberts, 256 Cal. App. 2d 488, 64 Cal. Rptr. 70 (1967) (no standing

validated in *Saunders* did not apply to homosexual activity;[173] moreover, the Iowa court since *Pilcher* has distinguished between homosexual and heterosexual sodomy. In *State v. Langley*[174] the court upheld, as applied to a forcible, public,[175] and homosexual act, the same sodomy statute invalidated in *Pilcher*.[176] Although it indicated that the decision to engage in private, consensual, homosexual conduct does not fall within the protection of the right of privacy, the Court held that either the forcible or the public nature of the act charged, as well as its homosexual character, was sufficient to distinguish *Pilcher*.[177]

In *People v. Onofre*[178] a New York court distinguished *Doe* as merely a declaratory judgment action. Confronted by a defendant who had plead guilty to private, consensual, homosexual sodomy, the *Onofre* court held that the right of privacy encompassed personal sexual activity, including "intimate consensual homosexual conduct."[179] Like *Pilcher* and *Saunders,*[180] *Onofre* employed strict scrutiny to gauge the constitutionality of the challenged statute.[181] The court acknowledged a legitimate state interest in regulating conduct offensive to the public, but held that private, consensual activity cannot reasonably offend "a public not embarked on eavesdropping."[182] Also recognizing a legitimate state interest in preservation of the institutions of marriage and the nuclear family, the court found this interest insufficient to rise "to the level necessary to support the questioned legislation."[183]

Pilcher, Saunders, and *Onofre* incorporated private, consensual ac-

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to raise privacy argument because act took place in public restroom); United States v. Buck, 342 A.2d 48 (D.C. 1975) (no standing because act took place in public wooded area); United States v. Carson, 319 A.2d 329 (D.C. 1974) (right of privacy does not apply to defendant charged with publicly soliciting an undercover police officer to engage in homosexual act); Hughes v. State, 14 Md. App. 497, 287 A.2d 299 (1972) (defendant convicted of sodomy with minor has no standing to assert constitutionality of statute as applied to consenting adults).

173. *See* note 136 *supra*.

174. 265 N.W.2d 718 (Iowa 1978).

175. *Id.* at 719-20. The court refused to grant defendant standing to raise a privacy challenge to the statute as applied to private, consensual, homosexual sodomy. *Id.* at 722.

176. *Id.* at 722. *See* notes 124-33 *supra* and accompanying text.

177. 265 N.W.2d at 721-22.

178. — A.D.—, 424 N.Y.S.2d 566 (1980).

179. *Id.* at 568.

180. *See* note 144 *supra* and accompanying text.

181. — A.D.—, 424 N.Y.S.2d at 568 (1980).

182. *Id.*

183. *Id.* at 569.

tivity within the right of privacy and established that *Doe* is not dispositive on this issue. Whether the Supreme Court will follow this approach to privacy is uncertain. A plurality of the Court in *Carey*, however, remarked that the Court has never definitively decided "whether and to what extent the Constitution prohibits state statutes regulating such [private, consensual sexual] behavior among adults."[184] Nevertheless, lower court case law indicates, at the very least, that language in the Court's privacy decisions is consistent with the concept of a constitutional right of privacy that encompasses private, consensual sexual activity.

V. THE RIGHT OF PRIVACY APPLIED TO PROSTITUTION STATUTES

The exchange of money—commercialization—is the primary distinction between prostitution and other forms of consensual sexual activity. If *Pilcher, Saunders*, and *Onofre* have correctly construed the right of privacy, a court faced with a right of privacy challenge should consider whether commercialization affects (1) the status of the right to engage in private, consensual sexual activity; and (2) the state's interests in regulating private, consensual sexual activity.

Because the typical method of enforcing prostitution statutes is to arrest the prostitute for solicitation,[185] defendants face a threshold standing issue when raising a right of privacy challenge to prostitution statutes. The appellate court in *In re Dora P.*,[186] for example, dismissed the right of privacy challenge as irrelevant because the accused had been charged with offering to engage in sex for a fee rather than for actually performing the act.[187] In so holding, the court stated that the accused was asserting a right "to use the public streets to solicit" for

184. Carey v. Population Servs. Int'l, 431 U.S. 678, 694 n.17 (1977) (plurality opinion). In dissent in *Carey*, Justice Rehnquist took sharp issue with the plurality's comment. "While we have not ruled on every conceivable regulation affecting such conduct the facial constitutional validity of criminal statutes prohibiting certain consensual acts has been 'definitively' established." *Id.* at 718 n.2 (Rehnquist, J., dissenting). Justice Powell, concurring in *Carey*, took a somewhat different position. "The Court apparently would subject all state regulation affecting adult sexual relations to the strictest standard of judicial review. . . . In my view, the extraordinary protection the Court would give to all personal decisions in matters of sex is neither required by the Constitution nor supported by our prior decisions." *Id.* at 703 (Powell, J., concurring in part and concurring in the judgment).

185. *See* J. JAMES, *supra* note 3, at 50-52.

186. 68 A.D.2d 719, 418 N.Y.S.2d 597 (1979).

187. *Id.* at 729-31, 418 N.Y.S.2d at 603-04.

prostitution.[188] The trial court,[189] however, characterized defendant's claim as an assertion of the individual's right to decide "whether, when and in what manner he or she will engage in private, intimate relations."[190]

The appellate division's focus on solicitation is typical of the approach followed by those courts that find that negotiations occurring in a public place do not come within the protection of the right of privacy.[191] Thus, an Illinois appellate court declared that defendant's right of privacy claim was "utterly at odds" with the conduct (solicitation) for which she was arrested.[192] A Delaware court held that a person has no "right to publicly solicit and sell one's body."[193] A District of Columbia court rejected a right of privacy challenge, asserting, "We are not confronted here with any adult's private, consensual sexual conduct."[194]

Defendants in these cases, however, did not claim any constitutionally protected right to solicit in public; rather, they claimed that the right of privacy encompassed an individual's decision to engage in private, consensual, commercial sexual activities. Had these courts recognized that argument, it would have been necessary for them to consider whether defendants were soliciting for an act that the state could validly criminalize. Following the reasoning of these courts, however, no defendant charged with soliciting for prostitution would be able to

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188. *Id.* at 731, 418 N.Y.S.2d at 603.

189. 92 Misc. 2d 62, 400 N.Y.S.2d 455 (Fam. Ct. 1977), *rev'd sub nom. In re* Dora P., 68 A.D.2d 719, 418 N.Y.S.2d 597 (1979). *See* notes 48-60 *supra* and accompanying text.

190. 92 Misc. 2d at 79, 400 N.Y.S.2d at 464.

191. *See* Morgan v. City of Detroit, 389 F. Supp. 922 (E.D. Mich. 1975); Hicks v. State, 373 A.2d 205 (Del. 1977), *aff'g* 360 A.2d 150 (Del. Super. Ct. 1976) and Blake v. State, 344 A.2d 260 (Del. Super. Ct. 1975); United States v. Moses, 339 A.2d 46 (D.C. 1975); State v. Gaither, 236 Ga. 497, 224 S.E.2d 378 (1976); People v. Johnson, 60 Ill. App. 3d 183, 376 N.E.2d 378 (1976); State v. Price, 237 N.W.2d 813 (Iowa 1976); Commonwealth v. King, — Mass. —, 372 N.E.2d 196 (1977). *King* used this rationale even though the initial negotiations took place through a telephone conversation at defendant's home. Defendant and the undercover police officer made arrangements to meet in a public place, where the final negotiations occurred. — Mass. at —, 372 N.E.2d at 203.

Another rationale for rejecting the privacy challenges to negotiation arrests is that it is inapposite to argue that the state may not regulate acts between consenting adults when, by definition, one party to a solicitation or offer cannot have consented at the time the offer was made.. *See* Morgan v. City of Detroit, 389 F. Supp. 922 (E.D. Mich. 1975); Silva v. Municipal Court, 40 Cal. App. 3d 733, 115 Cal. Rptr. 479 (1974).

192. People v. Johnson, 60 Ill. App. 3d 183, 189, 376 N.E.2d 381, 386 (1978).

193. Blake v. State, 344 A.2d 260, 262 (Del. Super. Ct. 1975), *aff'd sub nom.* Hicks v. State, 373 A.2d 205 (Del. 1977).

194. United States v. Moses, 339 A.2d 46, 50 (D.C. 1975).

raise a right of privacy challenge. Yet, the validity of a defendant's solicitation charge is dependent on the constitutionality of the state's criminalization of the acts solicited. Quite obviously, a state may prohibit solicitation of a crime.[195] A state may also place an absolute ban on advertisement of illegal products or services.[196] Either precept would allow a state to prohibit solicitation for prostitution if the underlying prohibition of prostitution were constitutional. If, however, criminalization of commercial sex is not constitutionally valid, then the state may ban solicitation only as a reasonable time, place, and manner regulation of public advertising.[197]

Several state courts have simply stated that there is no fundamental right to engage in prostitution.[198] Generally, these courts followed the Supreme Court's "catalogue" approach, comparing the activity in question to the list of those which the Supreme Court has found to be constitutionally protected by the right of privacy,[199] and found insufficient analogies between prostitution and the protected activities.[200] Instead of first considering whether there is a constitutional right to engage in nonpublic consensual sexual activities, these courts focused on whether there is a constitutional right to engage in prostitution.[201] When discussing the state's interests in prohibiting prostitution, these courts stressed that they were employing the deferential level of scrutiny—the rational relationship test.[202] The Iowa Supreme Court, in *State v. Hen-*

195. *See generally* W. LAFAVE & A. SCOTT, JR., HANDBOOK ON CRIMINAL LAW § 58 at 414, 414-22 (1972).

196. *See generally* J. NOWAK, R. ROTUNDA & J. YOUNG, HANDBOOK ON CONSTITUTIONAL LAW 767-80 (1978); L. TRIBE, AMERICAN CONSTITUTIONAL LAW 651, 651-56 (1978).

197. L. TRIBE, *supra* note 196. This kind of time, place, and manner regulation could include a ban on all public, in-person solicitation, provided that the ban does not "completely suppress the dissemination of concededly truthful information" about prostitution, were prostitution legal. *See* Carey v. Population Servs. Int'l, 431 U.S. 678, 700-02 (1977).

198. State v. Hicks, 360 A.2d 150 (Del. Super. Ct. 1976), *aff'd*, 373 A.2d 205 (1977); Blake v. State, 344 A.2d 260 (Del. Super. Ct. 1975), *aff'd sub nom.* Hicks v. State, 373 A.2d 205 (1977); State v. Gaither, 236 Ga. 497, 224 S.E.2d 378 (1976) (Hall, J., concurring); State v. Price, 237 N.W.2d 813 (Iowa 1976).

199. *See* notes 92-111 *supra* and accompanying text.

200. Blake v. State, 344 A.2d 260, 262 (Del. Super. Ct. 1975) ("This court would be constrained by logic and common sense from saying that those personal rights implicit in those cases are the same or can be of the same order as the public sale of sex and the human body."), *aff'd sub nom.* Hicks v. State, 373 A.2d 205 (1977); State v. Price, 237 N.W.2d 813, 818 (Iowa 1976) ("We do not believe prostitution is identifiable with or reasonably analogous to the kinds of sexual conduct which have been recognized as within the constitutional right of privacy.").

201. *See* cases cited note 191 *supra*.

202. *Id.*

derson,[203] is the only state high court to have considered a privacy challenge to a prostitution statute after previously finding constitutional protections for noncommercial sexual activities.[204] That court, however, did not even mention its *Pilcher*[205] decision in rejecting the right of privacy argument. Instead, the court relied on a pre-*Pilcher* case, *State v. Price*,[206] to hold that privacy protections do not "extend to the activities of prostitutes in plying their trade."[207] The Iowa court, in essence, was unwilling to find a sufficient analogy between the Supreme Court's privacy cases and the sexual activity involved in prostitution.[208] Because *Pilcher*, however, clearly recognized that the right of privacy encompasses private, consensual sexual activity, the essential distinction between *Henderson* and *Pilcher* is the commercial nature of prostitution.[209]

Several state interests become more significant when private sexual activities become the subject of commerce. First, some states have argued that prostitution is a source of income for organized crime,[210] although recent statistics show that this relationship may no longer

203. 269 N.W.2d 404 (Iowa 1978).

204. *See* State v. Henderson, 269 N.W.2d 404 (Iowa 1978).

205. State v. Pilcher, 242 N.W.2d 348 (Iowa 1976). *See* notes 124-133 *supra* and accompanying text.

206. 237 N.W.2d 813 (Iowa 1976).

207. 269 N.W.2d at 406.

208. 269 N.W.2d at 818.

209. 269 N.W.2d 404 (Iowa 1978). If courts were to ask whether commercialism changes the characterization of a fundamental right, they could find analogies in the demise of the commercial speech doctrine. *See generally* Rotunda, *The Commercial Speech Doctrine in the Supreme Court*, 1976 U. ILL. L.F. 1080. In recent years the Supreme Court has held that advertising is entitled to some first amendment protections; that is, mere commercialization no longer removes speech from its place as a fundamental right. *See* Bates v. State Bar, 433 U.S. 350 (1977); Linmark Assocs. v. Willingboro, 431 U.S. 85 (1977); Virginia State Bd. v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748 (1976); Bigelow v. Virginia, 421 U.S. 809 (1975). These cases support the argument that the decision to engage in sexual relations, if protected by the right of privacy, should not lose its zone-of-privacy protections simply because of commercialization.

In Paris Adult Theatre I v. Slaton, 413 U.S. 49 (1973), the Supreme Court examined the state interests in curtailing dissemination of obscene materials, *id.* at 57-60, and concluded that there is no fundamental right to watch obscene movies in a public theater. *Id.* at 66. The Court's focus on state interests makes it unclear whether the commercialism and the public nature of the place involved affect the characterization of the right in general or merely increase the state's interest. *Paris*, because of its focus on the public nature of the place involved, would appear dispositive of cases involving massage parlors that are open to the public. *See, e.g.*, Brown v. Haner, 410 F. Supp. 399 (W.D. Va. 1976); Garaci v. City of Memphis, 379 F. Supp. 1393 (W.D. Tenn. 1974); Commonwealth v. Bucaulis, — Mass. App. Ct. —, 373 N.E.2d 221 (1978).

210. *See, e.g.*, Blake v. State, 344 A.2d 260 (Del. Super. Ct. 1975), *aff'd sub nom.* Hicks v. State, 373 A.2d 205 (1977); State v. Price, 237 N.W.2d 813 (Iowa 1976); *In re* P., 92 Misc. 2d 62,

exist.[211] In any case, prohibiting prostitution is probably an ineffective way of promoting the state interest in preventing organized crime because the state usually enforces such statutes against street prostitutes[212] whose incomes are probably insufficient to interest large scale organized crime.[213]

Some states have also asserted that their interests in prevention of crimes connected with prostitution, such as robbery and assault, justify prohibition of all prostitution.[214] Some commentators, however, suggest that prostitution's illegality increases the danger of these ancillary crimes.[215] Prostitute and patron alike are easy victims because their participation in the illegal act renders them unlikely to report incidental crimes.[216] Furthermore, even if prostitution were decriminalized, some danger to the participants would remain because of the vulnerability inherent in performing sex acts with strangers.[217]

The state also has an interest in protecting the public from offensive solicitation. Rather than completely prohibiting prostitution, however, the state could promote its interest by directly regulating—or banning—only the offensive public activities.[218] Prostitutes, for example,

400 N.Y.S.2d 455 (Fam. Ct. 1977), *rev'd sub nom. In re* Dora P., 68 A.D.2d 719, 418 N.Y.S.2d 597 (1979). *Accord,* MODEL PENAL CODE § 207.12, Comment 1 at 171 (Tent. Draft No. 9, 1959).

211. PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND THE ADMINISTRATION OF JUSTICE, THE CHALLENGE OF CRIME IN A FREE SOCIETY 189 (1967). *See also* J. JAMES, *supra* note 3, at 48.

212. MODEL PENAL CODE § 207.12, Comment 1 at 170-74 (Tent. Draft No. 9, 1959); J. JAMES, *supra* note 3, at 33-34; H. PACKER, *supra* note 9, at 328-29.

213. *See* V. BULLOUGH, *supra* note 22, at 190; Rosenbleet & Pariente, *supra* note 3, at 417-18.

214. *See* cases cited note 210 *supra*.

215. *See* J. JAMES, *supra* note 3, at 52, 97; *Victim as Criminal, supra* note 9, at 1243-44.

216. *See* J. JAMES, *supra* note 3, at 52, 97.

217. This risk of assault or robbery is present even if no money is exchanged. It increases with the number of sexual contacts. Because most professional prostitutes have many more contacts than do nonprofessional participants in sex acts, there is greater danger to persons engaging in commercialized sex acts.

218. *See* notes 196, 197 *supra* and accompanying text. Several states raised this argument in State v. Hicks, 360 A.2d 150, 152 (Del. Super. Ct. 1976), *aff'd*, 373 A.2d 205 (Del. 1977); Blake v. State, 344 A.2d 260, 261 (Del. Super. Ct. 1975), *aff'd sub nom.* Hicks v. State, 373 A.2d 205 (Del. 1977); Commonwealth v. King, — Mass. —, —, 372 N.E.2d 196, 203 (1977); People v. Costello, 395 N.Y.S.2d 139, 141 (Sup. Ct. 1977); *accord,* MODEL PENAL CODE § 207.12, Comment 4 at 176 (Tent. Draft No. 9, 1959); THE WOLFENDEN REPORT, *supra* note 14, at 133.

The state's interest in protecting the public from offensive public manifestations of prostitution is concededly valid. Uninterested men may be offended by solicitations; all members of the public may be offended by the sight of prostitutes negotiating with potential customers on the public streets. This justification, however, fails to recognize that men frequently greet nonprostitute women on the street with offensive invitations to engage in sex acts. *See* J. JAMES, *supra* note 3, at

could advertise their services in manners less offensive than street solicitation if private prostitution were not illegal.[219]

Similarly, the prohibition of prostitution is a relatively ineffective way of advancing the state's interest in eliminating venereal disease. Although prostitution concededly contributes to a certain amount of venereal disease,[220] nonprofessional, nonmarital sex accounts for the greatest portion of this public problem.[221]

Many commentators and courts have discussed, without much documentation, the effects of prostitution on marriages,[222] family units,[223] and public morals.[224] The threat to marriage from prostitution seems less than that from noncommercial extramarital relationships, for there

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420 n.251. Forbidding solicitation for prostitution is thus underinclusive because it fails to include this type of offensive conduct, and overinclusive because it encompasses private solicitations that do not offend the public.

219. The Wolfenden Committee explicitly recognized this possibility. "Another possible consequence is an increase in small advertisements in shops or local newspapers . . . but we think that this would be less injurious than the presence of prostitutes in the streets." THE WOLFENDEN REPORT, *supra* note 14, at 156. *See also* Kaplan, *supra* note 9, at 593; *Victim as Criminal, supra* note 9, at 1248 n.80. It is possible, however, that the offense to the public from the mere existence of noncriminal prostitution would increase with advertisements in newspapers and other public media. *See* note 158 *supra*.

220. C. WINICK & P. KINSIE, THE LIVELY COMMERCE 64 (1972). *See* People v. Superior Court, 19 Cal. 3d 338, 562 P.2d 1315, 138 Cal. Rptr. 66 (1977); Blake v. State, 344 A.2d 260, 262 (Del. Super. Ct. 1975), *aff'd sub nom.* Hicks v. State, 373 A.2d 205 (1977); People v. Johnson, 60 Ill. App. 3d 183, 190, 376 N.E.2d 381, 386 (1978). *See also* MODEL PENAL CODE § 207.12, Comment 1 at 170-74 (Tent. Draft No. 9, 1959).

Quarantine statutes, which authorize detention of persons convicted of prostitution for diagnosis and treatment of venereal disease, also would be rationally related to this goal. *See, e.g.,* N.M. STAT. ANN. § 30-9-5 (1978); VA. CODE § 18.2-350 (1975); MODEL PENAL CODE § 207.12, Comment 1 (Tent. Draft No. 9, 1959).

221. Teenagers, whose sexual encounters are usually noncommercial, constitute the largest group of venereal disease victims; the prostitute's most frequent patrons are in the 30-60 age group. J. JAMES, *supra* note 3, at 48-49.

222. One of the arguments advanced by nineteenth-century reglementationists was that licensing houses of prostitution would protect the purity of the home by preventing the spread of disease. D. PIVAR, *supra* note 22. Simone de Beauvoir suggested a somewhat different effect of prostitution on marriage: "[A] caste of 'shameless women' allows the 'honest woman' to be treated with the most chivalrous respect." S. DE BEAUVOIR, THE SECOND SEX 555 (1968).

If the danger to marriage and the family is that the father/husband will purchase the services of a prostitute, the danger is real—most patrons of prostitutes are married men. J. JAMES, *supra* note 3, at 49.

223. *See generally* D. PIVAR, *supra* note 22, at 34-35, 40-43.

224. Courts that discuss "public morality" generally find it unnecessary to define this overworked phrase. *See, e.g.,* State v. Bateman, 113 Ariz. 107, 111, 547 P.2d 6, 9-10 (1976); United States v. Moses, 339 A.2d 46, 54 (D.C. 1975); People v. Johnson, 60 Ill. App. 3d 183, 190, 376 N.E.2d 381, 386 (1978).

is no need for emotional or romantic involvement in prostitution. If the danger to family and public morals from prostitution is that young women will choose prostitution over traditional careers and married life, that danger is certain to remain so long as prostitution remains the best-paying job for many women.[225] Providing employment options for these women would ameliorate this risk more effectively than prohibiting prostitution.[226]

Most of these state interests would have little difficulty surviving the rational basis test of constitutionality for commercial regulations. If, however, the courts were to recognize that the commercial activity in prostitution encompasses the exercise of a fundamental right of privacy, they would have to apply strict scrutiny to their prostitution statutes. It seems unlikely that the states could show a complete prohibition of prostitution to be necessary to achieve a compelling state goal. In many cases, the prohibition is not at all successful in preventing the harm it was meant to remedy. Thus, characterization of the right as fundamental or as "merely economic" appears to be outcome-determinative.

CONCLUSION

There seems to be little chance that privacy challenges to prostitution statutes will be successful in the future. Very few courts have been willing to find that the decision to engage in private, consensual sexual relations is a fundamental right. Even if courts were to recognize that premise, however, they would be unlikely to find that commercialism does not change the nature of the right and that the state's interest is insufficient to allow interference with the right.

State courts, reluctant to interfere with legislative judgments, may simply dismiss the argument with a reference to *Doe v. Commonwealth's Attorney*.[227] Nor is the Supreme Court, having avoided discussion of the issue by its summary affirmance in *Doe*, likely to expand the

225. *See* V. BULLOUGH, *supra* note 22; THE WOLFENDEN REPORT, *supra* note 141, at 132; Nossa, *supra* note 8.

226. Many prostitutes are uneducated women of the urban poor; a disproportionate number of street walkers are minority group members. J. JAMES, *supra* note 3, at 40-41; *accord,* H. PACKER, *supra* note 9, at 328-29.

There is evidence, however, indicating that a certain proportion of women engaged in prostitution would choose prostitution as a profession even if other occupations were available to them. *See* J. JAMES, *supra* note 3, at 39-40; THE WOLFENDEN REPORT, *supra* note 14, at 131.

227. Courts are doing this already with challenges to sodomy statutes. *E.g.,* State v. McCoy,

right of privacy to include even noncommercial sexual behavior. Reformers intent on changing the legal treatment of prostitution, therefore, will be better served by focusing their efforts on state legislatures.

Catherine D. Perry

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337 So. 2d 192 (La. 1976) (opposite sexes); People v. Penn, 70 Mich. App. 638, 247 N.W.2d 575 (1976) (same sex); State v. Elliott, 89 N.M. 305, 551 P.2d 1352 (1976) (opposite sexes).

APPENDIX*

		PROHIBITS:							
STATUTE	DEFINITION	Solicitation	Act	Loitering	Vagrancy	Patron	Fornication	Consensual Sodomy heterosexual	Consensual Sodomy homosexual
ALA. CODE tit. 13A § 13A-11-9(a)(3) (1978)	loiters or remains in a public place for the purpose of engaging in or soliciting another person to engage in prostitution or deviate sexual intercourse	X		X				§ 13A-6-65 X	X
ALASKA STAT. § 11.66.100 (1978)	engages in or agrees or offers to engage in sexual conduct in return for a fee	X	X					§ 11.40.120 X	
ARIZ. REV. STAT. ANN. § 13-3211 (1978)	engaging in or agreeing or offering to engage in sexual conduct with another person under a fee arrangement	§ 13.2905	X					§ 13-1411 X	X
ARK. STAT. ANN. § 41-3002 (1975)	in return for or in expectation of a fee he engages in or agrees or offers to engage in sexual activity	X	X	§ 41-2914		§ 41-3003		§ 41-1813	
CAL. PENAL CODE § 647(b) (Deering Supp. 1979)	solicits or engages in any lewd act between persons for money or other consideration	X	X						
COLO. REV. STAT. § 18-7-201 (1978)	performs, offers, or agrees to perform any act of sexual intercourse or any act of deviate sexual intercourse, with any person not his spouse, in exchange for money or other thing of value	§ 18-7-202	X			§ 18-7-205			

*Adapted and Modified from Rosenbleet & Pariente, *The Prostitution of the Criminal Law*, 11 AM. CRIM. L. REV. 373, 422-26 (1973).

		PROHIBITS:							
STATUTE	DEFINITION	Solicitation	Act	Loitering	Vagrancy	Patron	Fornication	Consensual Sodomy heterosexual	homosexual
CONN. GEN. STAT. § 53a-82 (1979)	engages or agrees or offers to engage in sexual conduct with another person in return for a fee	X	X			§ 53a-83			
DEL. CODE ANN. tit. 11, § 1342 (1974)	engages or agrees or offers to engage in sexual conduct with another person in return for a fee	X	X			§ 1343			
D.C. CODE ANN. § 22-2701 (1975)	invite, entice, persuade or address for the purpose of inviting, enticing or persuading any person for the purpose of prostitution or any other immoral or lewd purpose	X					§ 22-1002	§ 22-3502 X	X
FLA. STAT. ANN. § 796.07(1)(a)	giving or receiving of the body for sexual intercourse for hire and the giving or receiving of the body for licentious sexual intercourse without hire		X				§ 798 03	§ 800.02 X	
§ 796.07(3)(a) (West 1976)	to offer to commit, or to commit, or to engage in, prostitution, lewdness, or assignation	X	X						
GA. CODE ANN. § 26-2012 (1977)	performs or offers or consents to perform an act of sexual intercourse for money	X	X				§ 26-2010	§ 26-2002 X	X
HAWAII. REV. STAT. § 712-1200 (1976)	engages in or agrees or offers to engage in sexual conduct with another person in return for a fee	X	X						
IDAHO CODE § 18-5613 (Supp. 1978)	(a) engages in or offers or agrees to engage in sexual conduct in return for a fee (b) is an inmate of a house of prostitution	X	X			§ 18-5614	§ 18-6603	§ 18-6605 X	X

		PROHIBITS:							
STATUTE	DEFINITION	Solicitation	Act	Loitering	Vagrancy	Patron	Fornication	Consensual Sodomy heterosexual	Consensual Sodomy homosexual
	(c) loiters in or within view of any public place for the purpose of being hired to engage in sexual conduct	X		X					
ILL. ANN. STAT. ch. 38, § 11-14 (Smith-Hurd 1979)	performs, offers or agrees to perform sexual intercourse or deviate sexual conduct for money	§ 11-15	X			§ 11-18			
IND. CODE ANN. § 35-45-4-2 (1979)	performs, or offers or agrees to perform, sexual intercourse or deviate sexual conduct for money or other property	X	X			§ 35-45-4-3			
IOWA CODE ANN. § 725.1 (West 1979)	sells or offers for sale his or her services as a partner in a sex act, or who purchases or offers to purchase such services	X	X			X (included in def.)		§ 702.17 X	X
KAN. CRIM. CODE & CODE OF CRIM. PROC. § 21-3512 (Vernon 1974)	performing an act of sexual intercourse for hire or offering or agreeing to perform an act of sexual intercourse or any unlawful sexual act for hire	X	X			§ 21-3515		§ 21-3505	X
KY. REV. STAT. § 529.020 (1975)	engages or agrees or offers to engage in sexual conduct for a fee	X	X	§ 525.090				§ 510.100	X
LA. REV. STAT. ANN. § 14.82 (West Supp. 1980)	(a) the practice by a person of indiscriminate sexual intercourse with others for compensation (b) solicitation by one person of another with the intent to engage in indiscriminate sexual intercourse with the latter for compensation	§ 14.83 § 14.83	X					§ 14.89 X	X

		PROHIBITS								
STATUTE	DEFINITION	Solicitation	Act	Loitering	Vagrancy	Patron	Fornication	Consensual Sodomy heterosexual		homosexual
ME. REV. STAT. tit. 17A § 17A-851 (definition)	engaging in or agreeing to engage in or offering to engage in sexual intercourse or a sexual act in return for a pecuniary benefit									
§ 17A-853-A (1979)	engaging in prostitution	X	X							
MD. ANN. CODE art. 27 § 16 (definition)	offering or receiving of the body for sexual intercourse for hire							X	§ 553	X
§ 15 (Supp. 1979)	(e) procure or solicit for prostitution	X							§ 554	
	(g) engage in prostitution		X							
MASS. GEN. LAWS ANN. ch 272, § 8	solicits for a prostitute						§ 18	X	§ 34	X
§ 53 (West 1968)	common night walkers, prostitutes, may be punished	X		X	X					
MICH. STAT. ANN. § 28.703 (1979)	any person who shall accost, solicit or invite another in any public place or from any vehicle or building to commit prostitution	X				§ 28.704		X	§ 28.570	X
MINN. STAT. ANN. § 609.325	engaging in or offering or agreeing to engage for hire in sexual penetration	X	X			§ 609.32(4)		X	§ 609.293	X
§ 609.725 (West 1979)	vagrancy: a prostitute who loiters on the streets or in a public place with intent to solicit			X	X					
MISS. CODE ANN. § 97-29-49 (1972)	it shall be unlawful to engage in prostitution or aid or abet prostitution or to procure or solicit for the purposes of prostitution	X	X				§ 97-29-1	X	§ 97-29-59	X
MO. ANN. STAT. § 567.010(2) (definition)	engages or offers or agrees to engage in sexual conduct in return for something of value					§ 567.030		§ 566.090	X	
§ 567.020 (Vernon 1979)	prohibits prostitution	X	X							

		PROHIBITS:							
STATUTE	DEFINITION	Solicitation	Act	Loitering	Vagrancy	Patron	Fornication	Consensual Sodomy heterosexual	homosexual
MONT. REV. CODES ANN. § 45-5-601 (1979)	engages in or agrees or offers to engage in sexual intercourse for compensation	X	X					§ 94-5-505	X
NEB. REV. STAT. § 28-1119 (1975)	all prostitutes and tenants of houses used for prostitution are vagrants	X	X		X			X § 28-219	X
NEV. REV. STAT. § 207.030 (1977)	every person who solicits any act of prostitution is a vagrant	X			X			X § 201.190	X
N.H. REV. STAT. ANN. § 645:2 (Supp. 1977)	solicits or engages in sexual penetration or sexual contact in return for consideration	X	X						
N.J. STAT. ANN. § 2A:133-1 (definition)	giving or receiving of the body for sexual intercourse for hire, and the giving or receiving of the body for indiscriminate sexual intercourse without hire				§ 2A:170-5			§ 2A:143-1 X	X
§ 2A:133-2 (West 1979)	(e) procures or solicits for the purpose of prostitution	X							
	(g) engages in prostitution		X						
N.M. STAT. ANN. § 30-9-3 (1978)	engaging in or offering to engage in sexual intercourse for hire	X	X			§ 30-9-3			
N.Y. PENAL LAW § 230.00	engages or agrees or offers to engage in sexual conduct in return for a fee	X	X			§ 230.03		X § 130.38	X
§ 240.37 (McKinney 1980)	loitering for the purpose of prostitution			X					
N.C. GEN. STAT. § 14-203 (definition)	offering or receiving of the body for sexual intercourse for hire or for indiscriminate sexual intercourse without hire						§ 14-184	§ 14-177 X	X
§ 14-204 (1969)	soliciting or engaging in prostitution is illegal	X	X						

		PROHIBITS:							
STATUTE	DEFINITION	Solicitation	Act	Loitering	Vagrancy	Patron	Fornication	Consensual Sodomy heterosexual	homosexual
N.D. CENT. CODE § 12.1-29-03 (1976)	(1) is an inmate of a house of prostitution or is otherwise engaged in sexual activity as a business (2) solicits another person with the intention of being hired to engage in sexual activity	X	X			§ 12.1-20-08	X	§ 12 1-20-12 X	
OHIO REV. CODE. ANN. § 2907.01 (definition) § 2907.25 (Page 1975)	male or female who promiscuously engages in sexual activity for hire no person shall engage in sexual activity for hire	§ 2907.24	X						
OKLA. STAT. ANN. tit.21 § 1030 (West Supp. 1979)	giving or receiving of the body for sexual intercourse for hire or for indiscriminate sexual intercourse without hire	§ 1029(b)	§ 1029(a)					§ 886 X	X
OR. REV. STAT. § 167.002 (definition) § 167.007 (1977)	male or female person who engages in sexual conduct or sexual contact for a fee (a) engages in or offers or agrees to engage in sexual conduct or sexual contact in return for a fee (b) pays or offers or agrees to pay a fee to engage in sexual conduct or sexual contact	X	X			X			
18 PA. CONS. STAT. ANN. § 5902(a) (Purdon Supp. 1979)	(1) is an inmate of a house of prostitution or otherwise engages in sexual activity as a business (2) loiters in or within view of public place for the purpose of being hired to engage in sexual activity	X	X	X		§ 5902(e)		§ 3124 X	X

		PROHIBITS:							
STATUTE	DEFINITION	Solicitation	Act	Loitering	Vagrancy	Patron	Fornication	Consensual Sodomy heterosexual	homosexual
R.I. GEN. LAWS § 11-34-5 (Supp. 1979)	to loiter in or near any thoroughfare or public or private place for the purpose of soliciting or engaging in unlawful sexual intercourse or to commit or induce another to commit such act	X	X	X			§ 11-6-3	§ 11-10-1 X	X
S.C. CODE § 16-15-90 (1976)	It shall be unlawful to: (1) engage in prostitution (2) aid or abet prostitution (3) procure or solicit for the purpose of prostitution	X	X				§ 16-15-60 § 16-15-80	§ 16-15-120 X	X
S.D. CODIFIED LAWS ANN. § 22-23-1 (Supp. 1978)	(1) is an inmate of a house of prostitution or otherwise engages in sexual activity for a fee (2) loiters in view of any public place for the purpose of being hired for a sex act	X	X	X		§ 22-23-9			
TENN. CODE ANN. § 39-3501 (definition)	the giving or receiving of the body for sexual intercourse for hire or for licentious sexual intercourse without hire			§ 39-4701	§ 39-4701			§ 39-707 X	X
§ 39-3502 (1975)	it shall be unlawful to engage in or aid and abet or solicit for prostitution	X	X						
TEX. PENAL GODE ANN. tit. 9, § 43.02(a)	(1) offers to engage, agrees to engage, or engages in sexual conduct for a fee; or (2) solicits another to engage in sexual conduct for hire	X	X					§ 21.06	
§ 43.02(b) (Vernon Supp. 1978)	an offense is established under (a)(1) whether the actor is to receive or pay a fee, under (a)(2) whether the actor solicits a person to hire him or offers to hire the person solicited					X			X

STATUTE	DEFINITION	PROHIBITS: Solicitation	Act	Loitering	Vagrancy	Patron	Fornication	Consensual Sodomy heterosexual	Consensual Sodomy homosexual
UTAH CODE ANN. § 76-10-1302 (1978)	(a) engages or offers or agrees to engage in sexual activity with another person for a fee	X	X			§ 76-10-1303	§ 76-7-104	§ 76-5-407	
	(b) is an inmate of a house of prostitution							X	X
	(c) loiters in or within view of any public place for the purpose of being hired to engage in sexual activity			X					
VT STAT. ANN. tit. 13, § 2631 (definition)	offering or receiving of the body for sexual intercourse for hire and for indiscriminate sexual intercourse without hire								
§ 2632 (1974)	it is unlawful to procure or solicit for prostitution, or engage in prostitution	X	X						
VA. CODE § 18.2-346 (Supp. 1979)	any person who, for money or its equivalent, commits adultery or fornication or offers to commit adultery or fornication and thereafter does any substantial act in furtherance thereof, shall be guilty of prostitution		X				§ 18.2-344	§ 18.2-361	
								X	X
WASH. REV. CODE ANN. § 9A.88.030 (1977)	engages or agrees or offers to engage in sexual conduct with another person for a fee	X	X						
W. VA. CODE § 61-8-5 (1977)	any person who shall engage in prostitution or who shall solicit any other person for prostitution	X	X				§ 61-8-3		

		PROHIBITS:							
STATUTE	DEFINITION	Solicitation	Act	Loitering	Vagrancy	Patron	Fornication	Consensual Sodomy heterosexual	homosexual
WIS. STAT. ANN. § 944.30 (West Supp. 1979)	has or offers to have or requests to have nonmarital sexual intercourse or an act of sexual perversion for any thing of value; any inmate of a house of prostitution	X	X			§ 944.31	§ 944.15	§ 944.16 X	X
WYO. STAT. § 6-5-106	giving or receiving of the body for sexual intercourse for hire or for indiscriminate sexual intercourse without hire	X	X						
§ 6-5-110 (1977)	any female who frequents or lives in a house of prostitution or commits fornication for hire shall be deemed a prostitute		X						