Right of Privacy Challenges to Prostitution Statutes

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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-

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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, infringe upon freedom of speech, or impose cruel and unusual punishment, 440 WASHINGTON UNIVERSITY LAW QUARTERLY [Vol. 58


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 Rosenblee & 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).

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punishment. 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 and legal commentators have called for the repeal of prostitution statutes and other sexually repressive laws. The National Organization for Women (NOW) and Call Off

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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).


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) contend that the state's criminalization of prostitution is an inappropriate use of governmental resources and that criminal sanctions should be applied to only those activities that cause harm to others. They have argued that criminalization will not eliminate prostitution because punishing the prostitute does not eliminate the demand for commercialized sex.

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.


[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.


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. The wide scale repeal of fornication laws and the increasingly frequent abolition of laws prohibiting consensual sodomy 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.

English common law considered prostitution a spiritual concern with which the secular law should not be involved. American society did not regard prostitution as a significant social problem until the post-Civil War forces of industrialization, immigration, and urbanization combined to lead large numbers of women into the profession. Early or offers to engage in sexual conduct in return for a fee.

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.

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.

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.
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 Circum-specte 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].

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

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) ("If 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.


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; 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.

Solicitation for prostitution is illegal in all jurisdictions in the United States, including those which do not criminalize the actual act of engaging in sex for money. 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. Police officers typically enforce negotiation statutes by posing as customers, arresting the prostitute when she names a price or a specific act. 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, and pandering, and 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.”).


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.”).


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.\textsuperscript{38} Red light abatement acts\textsuperscript{39} allow civil nuisance abatement proceedings to be brought against premises used for prostitution.\textsuperscript{40} City ordinances,\textsuperscript{41} in addition to state statutes, regulate or prohibit massage parlors.\textsuperscript{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.\textsuperscript{43} Today, however, many states

\begin{enumerate}
\item \textsuperscript{38} See, e.g., \textsc{Alaska Stat. §§} 11.66.110-.130 (1978); \textsc{Hawaii Rev. Stat. §§} 712.1201-04 (1976); Ind. Code Ann. § 35-45-4-4 (Burns 1979).
\item \textsuperscript{40} See generally O’Connor, \textit{The Nuisance Abatement Law as a Solution to New York City’s Problem of Illegal Sex Related Businesses in the Mid-Town Area}, 46 \textsc{Fordham L. Rev.} 57 (1977); 1978 \textsc{Det. C.L. Rev.} 135.
\item \textsuperscript{42} Many city ordinances also prohibit prostitution, solicitation for prostitution, and loitering for the purposes of prostitution. See, e.g., \textsc{Morgan v. City of Detroit}, 389 F. Supp. 922, 926 (E.D. Mich. 1975) (citing \textsc{Detroit, Mich., City Ordinances §§} 39-1-52 (1965) (prohibiting accosting and soliciting for prostitution)); \textsc{State v. Armstrong}, 282 Minn. 39, 40, 162 N.W.2d 357, 358-59 (1968) (citing \textsc{Minneapolis, Minn., Ordinances §§} 870.010, .050 (1968) (prohibiting loitering for purposes of prostitution and lurking for purposes of mischief)); \textsc{Salt Lake City v. Allred}, 20 Utah 2d 298, 302, 437 P.2d 434, 437 (1978) (citing \textsc{Salt Lake City, Utah, Rev. Ordinances §§} 32-2-1(7) (1965) (prohibiting directing any person to any place or building for purpose of prostitution)); \textsc{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 \textsc{Norfolk, VA., City Code §§} 31-18, -56, -55 (1958) (prohibiting keeping disorderly house, soliciting for prostitution, frequenting house of ill-fame)); \textsc{City of Seattle v. Jones}, 79 Wash. 2d 626, 627-28, 488 P.2d 750, 751 (1971) (citing \textsc{Seattle, Wash., City Code §} 12.49.019 (1968) (prohibiting loitering for purpose of prostitution)).
\item \textsuperscript{43} For a discussion of the constitutional aspects of massage parlor regulation, see 24 U. Kan. L. Rev. 462 (1976).
\item \textsuperscript{44} See \textit{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

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

II. TRIAL COURT CASES INVALIDATING PROSTITUTION STATUTES

A few trial courts have held prostitution statutes unconstitutional on right-to-privacy grounds, but have been reversed by appellate courts. 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., 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. The case concerned a female juvenile who offered to per-

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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).


47. See cases cited note 46 supra.


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. That act, if committed by an adult, would have violated the state prostitution statute and would, therefore, require a finding of delinquency. 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." For purposes of this right, the court drew no distinctions between commercial and noncommercial acts or between "deviate" and "normal" acts.

Applying strict scrutiny to New York's prostitution statute, 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, 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. The state had not sustained its burden of showing that prostitution leads to other crimes or is associated with organized crime. Nor had the state shown any empirical connection between prostitution and harm to the stability of the

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. 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.

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 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 "affords not only a procedural guarantee against the deprivation of 'liberty,' but likewise protects substantive aspects of liberty against unconstitutional restrictions by the State." 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.


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, the Court subjects legislation infringing on "fundamental" rights to a stricter standard of review. Such legislation must be necessary to achieve a compelling state interest. The Court presently recognizes as "fundamental" the individual's right to freedom of association, electoral participation, interstate travel, procedural fairness in criminal proceedings, 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."

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.


"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).

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).

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).

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).


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.\(^81\)


\(^74\) *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." \(^83\) *Id. at* 485 (emphasis added).


\(^81\) *Id. at* 565. Some commentators suggested that the *Griswold* decision was also based on the sanctity of the place involved. \(^84\) *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 &
sensadt v. Baird\textsuperscript{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.\textsuperscript{83} Because the right of privacy established in \textit{Griswold} inhere 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.\textsuperscript{84} In 1973 the Court, in \textit{Roe v. Wade},\textsuperscript{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.\textsuperscript{86} The right of privacy recognized in \textit{Roe} reaffirms \textit{Eisenstadt}'s location of the right in the individual and may be characterized as a right of autonomy\textsuperscript{87}—a fundamental right to make certain personal choices free from governmental interference.\textsuperscript{88} Subsequent cases have applied the right of privacy to procrea-

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\item[82.] 405 U.S. 438 (1972).
\item[83.] \textit{Id} at 453. Thus, the absence of a protected relationship was not dispositive.
\item[84.] It is true that in \textit{Griswold} the right of privacy in question inhere 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. \textit{Id} (emphasis in original).
\item[85.] \textit{Id} at 446-47.
\item[86.] 410 U.S. 113 (1973).
\item[87.] \textit{Id} at 154. The Court recognized that the right was not unlimited. \textit{See} text accompanying notes 112-116 \textit{infra}.
\end{itemize}
\end{footnotesize}
tion decisions,99 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 characteristics 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

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.
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. The Court's recent privacy cases concerned activities and interests previously brought within the right and did not broaden privacy protection beyond the contents of the Paris "list." In one case 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." Yet, this "deeply rooted in history and tradition" test does not explain the abortion

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).


105. Id. at 503.
cases, nor does it explain the invalidity—as an infringement of individuals' right of privacy—of the anti-miscegenation statute in Loving v. Virginia. 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. Certainly, the decision to marry or to have children significantly affects the life of the decisionmaker, but education and public assistance 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.

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. 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. Although Connecticut had a valid interest in the morals of its citizens, its statute was not a necessary means to achieve that goal. 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 formulated 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.
112. See note 66 supra.
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 intrusion into the marital bedchamber118 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, non-procreative 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.
118. See note 81 supra.
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 'consuming 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.").
sons of the opposite sex.\textsuperscript{122} Going even further, a recent New York decision extends this protection of the right of privacy to private, consensual, homosexual conduct.\textsuperscript{123}

In \textit{State v. Pilcher}\textsuperscript{124} the Iowa Supreme Court held Iowa's sodomy statute\textsuperscript{125} unconstitutional as applied to oral sodomy between consenting,\textsuperscript{126} unmarried\textsuperscript{127} adults of opposite sexes.\textsuperscript{128} The Iowa court first found that the Supreme Court's right of privacy doctrine applies to some sexual activity.\textsuperscript{129} It then looked to three lower federal court decisions\textsuperscript{130} holding sodomy statutes unconstitutional as applied to married couples.\textsuperscript{131} Finally, the court ruled that because the right of privacy extends to sexual relations between married couples,\textsuperscript{132} \textit{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."\textsuperscript{133}

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\textsuperscript{123} People v. Onofre, — A.D.2d —, 424 N.Y.S.2d 566 (1980).
\textsuperscript{124} 242 N.W.2d 348 (Iowa 1976).
\textsuperscript{125} IOWA CODE ANN. § 705.1 (West 1979).
\textsuperscript{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. \textit{Id.} at 354-56.
\textsuperscript{127} Both participants were married to other people. \textit{Id.} at 351. The marital status of the parties was irrelevant to the statutory violation. \textit{Id.} at 352.
\textsuperscript{128} Defendant stated that he was not challenging the act as applied to homosexual activity or anal sodomy. \textit{Id.} at 352.
\textsuperscript{129} \textit{Id.} at 357.
\textsuperscript{131} State v. Pilcher, 242 N.W.2d at 359.
\textsuperscript{132} \textit{Id.}
\textsuperscript{133} \textit{Id.}
\end{flushleft}
Similarly, the New Jersey Supreme Court, in *State v. Saunders*, relied on *Eisenstadt* to overrule two previous decisions and hold that a fornication statute violated the constitutionally protected right of privacy. The *Saunders* court stressed that the right of privacy protected personal decisions closely related to individual autonomy, encompassing “freedom of personal development.” 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. In *State v. Hill* a New Jersey superior court extended *Saunders* to apply to consensual, heterosexual sodomy between adult partners who were not married to each other. The court held that the statute constitutionally could apply to only forcible sodomy.

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. Without discussing any asserted state justifications, the *Pilcher* court concluded that the state had not demonstrated a compelling interest. The *Saunders* court, however, analyzed and rejected

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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.
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.\textsuperscript{146}

The state argued first that the statute was a valid health regulation, designed to check the spread of venereal disease.\textsuperscript{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.\textsuperscript{148} Furthermore, the statute might actually be counterproductive because it could deter venereal disease victims from seeking necessary medical treatment.\textsuperscript{149}

The \textit{Saunders} court also rejected the state's argument that the fornication statute promoted a state interest in preventing illegitimacy.\textsuperscript{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.\textsuperscript{151}

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

\textsuperscript{146} 75 N.J. at 217-19, 381 A.2d at 341-42.
\textsuperscript{147}  Id. \textit{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.}
\textsuperscript{148} 75 N.J. at 218, 381 A.2d at 341-42. \textit{The court noted that the maximum penalty under the act was a fine of $50 and/or six months imprisonment. Id. It looked to \textit{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.}
\textsuperscript{149}  \textit{Id.}
\textsuperscript{150}  \textit{Id.}
\textsuperscript{151}  \textit{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. \textit{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 \textit{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 \textit{Saunders}, those people may not use the criminal sanction to force their beliefs on others. See notes 156-58 \textit{infra} and accompanying text.}
\textsuperscript{152} 75 N.J. at 219, 381 A.2d at 342.
\textsuperscript{153}  \textit{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

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) ("The 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 Plcher. 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 ("The great majority of people believe that the
Separate opinions in both *Saunders* and *Pilcher* criticized their respective majorities for failing to heed *Doe v. Commonwealth's Attorney*, the Supreme Court's summary affirmanse of a three judge district court's upholding of Virginia's sodomy statute as applied to homosexuals. A declaratory judgment action, *Doe* held that Virginia's sodomy statute did not deprive adult male homosexuals—acting consensually and in private—of their constitutional rights of due process and privacy. The divided district court 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. 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."

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

moral 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).
162. Justices Brennan, Marshall, and Stevens would have noted probable jurisdiction and set the case for oral argument. 425 U.S. at 901.
164. *Id.* at 1203.
165. *See id.* at 1203-05 (Mehl, 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. 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.

The Saunders court asserted that it was “not inclined to read this controversial case too broadly.” Although it recognized that Doe was “technically binding as precedent,” the majority refused to extend Doe’s rationale to the facts before it.

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


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).


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;\(^\text{173}\) moreover, the Iowa court since *Pilcher* has distinguished between homosexual and heterosexual sodomy. In *State v. Langley*\(^\text{174}\) the court upheld, as applied to a forcible, public,\(^\text{175}\) and homosexual act, the same sodomy statute invalidated in *Pilcher*.\(^\text{176}\) 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*.\(^\text{177}\)

In *People v. Onofre*\(^\text{178}\) 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."\(^\text{179}\) Like *Pilcher* and *Saunders*,\(^\text{180}\) *Onofre* employed strict scrutiny to gauge the constitutionality of the challenged statute.\(^\text{181}\) 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."\(^\text{182}\) 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."\(^\text{183}\)

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

\(^{173}\) 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.


\(^{179}\) *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 dispos-
itive 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.”
Nevertheless, lower court case law indicates, at the very least, that lan-
guage 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 distinc-
tion 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 reg-
ulating private, consensual sexual activity.

Because the typical method of enforcing prostitution statutes is to
arrest the prostitute for solicitation, defendants face a threshold
standing issue when raising a right of privacy challenge to prostitution
statutes. The appellate court in *In re Dora P.*, 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. In so holding, the court stated that the
accused was asserting a right “to use the public streets to solicit” for

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 Constitu-
tion nor supported by our prior decisions.” *Id.* at 703 (Powell, J., concurring in part and concur-
rining in the judgment).

185. *See J. JAMES,* *supra* note 3, at 50-52.
187. *Id.* at 729-31, 418 N.Y.S.2d at 603-04.
prostitution. The trial court, 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."

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. 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. A Delaware court held that a person has no "right to publicly solicit and sell one's body." 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."

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.
190. 92 Misc. 2d at 79, 400 N.Y.S.2d at 464.
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. A state may also place an absolute ban on advertisement of illegal products or services. 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.

Several state courts have simply stated that there is no fundamental right to engage in prostitution. 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, and found insufficient analogies between prostitution and the protected activities. 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. 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. The Iowa Supreme Court, in State v. Hen-

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).
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.
erson,\textsuperscript{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.\textsuperscript{204} That court, however, did not even mention its Pilcher\textsuperscript{205} decision in rejecting the right of privacy argument. Instead, the court relied on a pre-Pilcher case, \textit{State v. Price},\textsuperscript{206} to hold that privacy protections do not "extend to the activities of prostitutes in plying their trade."\textsuperscript{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.\textsuperscript{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.\textsuperscript{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,\textsuperscript{210} although recent statistics show that this relationship may no longer

\begin{flushleft}
203. 269 N.W.2d 404 (Iowa 1978).
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. \textit{See generally} Rotunda, \textit{The Commercial Speech Doctrine in the Supreme Court}, 1976 U. I.L.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. \textit{See} Bates v. State Bar, 433 U.S. 350 (1977); Linmark Associates 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, \textit{id.} at 57–60, and concluded that there is no fundamental right to watch obscene movies in a public theater. \textit{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. \textit{See}, \textit{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).

exist.\textsuperscript{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\textsuperscript{212} whose incomes are probably insufficient to interest large scale organized crime.\textsuperscript{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.\textsuperscript{214} Some commentators, however, suggest that prostitution's illegality increases the danger of these ancillary crimes.\textsuperscript{215} Prostitute and patron alike are easy victims because their participation in the illegal act renders them unlikely to report incidental crimes.\textsuperscript{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.\textsuperscript{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.\textsuperscript{218} Prostitutes, for example,

\begin{footnotesize}
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  \item[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.
  \item[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.
  \item[213.] See V. Bullough, supra note 22, at 190; Rosenbleet & Pariente, supra note 3, at 417-18.
  \item[214.] See cases cited note 210 supra.
  \item[215.] See J. James, supra note 3, at 52, 97; Victim as Criminal, supra note 9, at 1243-44.
  \item[216.] See J. James, supra note 3, at 52, 97.
  \item[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.
  \item[219.] 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
\end{itemize}
\end{footnotesize}
could advertise their services in manners less offensive than street solicitation if private prostitution were not illegal.\textsuperscript{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,\textsuperscript{220} nonprofessional, nonmarital sex accounts for the greatest portion of this public problem.\textsuperscript{221}

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

\textsuperscript{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." \textit{The Wolfenden Report}, supra note 14, at 156. \textit{See also} Kaplan, supra note 9, at 593; \textit{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. \textit{See} note 158 supra.


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. \textit{See}, e.g., N.M. \textsc{Stat. Ann.} $\S$ 30-9-5 (1978); \textsc{Va. Code} $\S$ 18.2-350 (1975); \textit{Model Penal Code} $\S$ 207.12, Comment 1 (Tent. Draft No. 9, 1959).

\textsuperscript{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. \textsc{J. James}, \textit{supra} note 3, at 48-49.

\textsuperscript{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. \textsc{Pivar}, \textit{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." \textsc{S. de Beauvoir}, \textit{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. \textsc{J. James}, \textit{supra} note 3, at 49.

\textsuperscript{223} \textit{See generally} D. \textsc{Pivar}, \textit{supra} note 22, at 34-35, 40-43.

\textsuperscript{224} Courts that discuss "public morality" generally find it unnecessary to define this overworked phrase. \textit{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

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\(^{225}\) 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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**APPENDIX**

<table>
<thead>
<tr>
<th>STATUTE</th>
<th>DEFINITION</th>
<th>Solicitation</th>
<th>Act</th>
<th>Loitering</th>
<th>Vagrancy</th>
<th>Patron</th>
<th>Fornication</th>
<th>Consensual Sodomy</th>
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<tbody>
<tr>
<td>ALA. CODE tit. 13A § 13A-11-9(a)(3) (1978)</td>
<td>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</td>
<td>X</td>
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<td>§ 13A-6-65</td>
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<td>ALASKA STAT. § 11.66.100 (1978)</td>
<td>engages in or agrees or offers to engage in sexual conduct in return for a fee</td>
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<td>§ 11.40.120</td>
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<td>ARIZ. REV. STAT. ANN. § 13-3211 (1978)</td>
<td>engaging in or agreeing or offering to engage in sexual conduct with another person under a fee arrangement</td>
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<td>ARK. STAT. ANN. § 41-3002 (1975)</td>
<td>in return for or in expectation of a fee he engages in or agrees or offers to engage in sexual activity</td>
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<td>§ 41-2914</td>
<td>§ 41-3003</td>
<td>§ 41-1813</td>
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<td>CAL. PENAL CODE § 647(b) (Deering Supp. 1979)</td>
<td>solicits or engages in any lewd act between persons for money or other consideration</td>
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<td>COLO. REV. STAT. § 18-7-201 (1978)</td>
<td>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</td>
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<td>X</td>
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<td>§ 18-7-205</td>
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*Adapted and Modified from Rosenbleet & Pariente, *The Prostitution of the Criminal Law*, 11 AM. CRIM. L. REV. 373, 422-26 (1973).*
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<td>CONN. GEN. STAT. § 53a-82 (1979)</td>
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<td>DEL. CODE ANN. tit. 11, § 1342 (1974)</td>
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<td>§ 1343</td>
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<td>D.C. CODE ANN. § 22-2701 (1975)</td>
<td>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</td>
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<td>§ 22-1002</td>
<td>§ 22-3502</td>
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<td>FLA. STAT. ANN. § 796.07(1)(a)</td>
<td>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 to offer to commit, or to commit, or to engage in, prostitution, lewdness, or assignation</td>
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<td>GA. CODE ANN. § 26-2012 (1977)</td>
<td>performs or offers or consents to perform an act of sexual intercourse for money</td>
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<td>HAWAII. REV. STAT. § 712-1200 (1976)</td>
<td>engages in or agrees or offers to engage in sexual conduct with another person in return for a fee</td>
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<td>IDAHO CODE § 18-5613 (Supp. 1978)</td>
<td>(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</td>
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<td>(e) loiters in or within view of any public place for the purpose of being hired to engage in sexual conduct</td>
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<td>Ill. Ann. Stat. ch. 38, § 11-14 (Smith-Hurd 1979)</td>
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<td>Ind. Code Ann. § 35-45-4-2 (1979)</td>
<td>performs, or offers or agrees to perform, sexual intercourse or deviate sexual conduct for money or other property</td>
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<td>Iowa Code Ann. § 725.1 (West 1979)</td>
<td>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</td>
<td>X</td>
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<td>Indiv. &amp; Code of Crim. Proc. § 21-3512 (Vernon 1974)</td>
<td>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</td>
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<td>engages or agrees or offers to engage in sexual conduct for a fee</td>
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<td>La. Rev. Stat. Ann. § 14.82 (West Supp. 1980)</td>
<td>(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</td>
<td>§ 14.83</td>
<td>X</td>
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<td>§ 14.89</td>
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<td>(b) solicitation by one person of another with the intent to engage in indiscriminate sexual intercourse with the latter for compensation</td>
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<td>SOLICITATION</td>
<td>ACT</td>
<td>LOITERING</td>
<td>VAGRANCY</td>
<td>PATRON</td>
<td>FORNICATION</td>
<td>CONSENSUAL SODOMY</td>
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<tr>
<td>ME REV. STAT. tit. 17A § 17A-851 (definition)</td>
<td>engaging in or agreeing to engage in offering to engage in sexual intercourse or a sexual act in return for a pecuniary benefit engaging in prostitution</td>
<td>X</td>
<td>X</td>
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<tr>
<td>ME REV. STAT. tit. 17A § 17A-853-A (1979)</td>
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<tr>
<td>MD. ANN. CODE art. 27 § 16 (definition) § 15 (Supp. 1979)</td>
<td>offering or receiving of the body for sexual intercourse for hire (e) procure or solicit for prostitution (g) engage in prostitution</td>
<td>X</td>
<td>X</td>
<td></td>
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<td>X</td>
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<tr>
<td>MASS GEN. LAWS ANN. ch. 272 § 5 § 53 (West 1968)</td>
<td>solicits for a prostitute common night walkers, prostitutes, may be punished</td>
<td>X</td>
<td>X</td>
<td>X</td>
<td>X</td>
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<td>§ 18</td>
<td>X</td>
</tr>
<tr>
<td>MICH. STAT. ANN. § 28.703 (1979)</td>
<td>any person who shall accost, solicit or invite another in any public place or from any vehicle or building to commit prostitution</td>
<td>X</td>
<td></td>
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<td>§ 28.704</td>
<td></td>
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<tr>
<td>MINN. STAT. ANN. § 609.325 § 609.725 (West 1979)</td>
<td>engaging in or offering or agreeing to engage for hire in sexual penetration vagrancy: a prostitute who loiters on the streets or in a public place with intent to solicit</td>
<td>X</td>
<td>X</td>
<td></td>
<td>X</td>
<td>X</td>
<td>§ 609.32(4)</td>
<td>X</td>
</tr>
<tr>
<td>MISS. CODE ANN. § 97-29-49 (1972)</td>
<td>it shall be unlawful to engage in prostitution or aid or abet prostitution or to procure or solicit for the purposes of prostitution</td>
<td>X</td>
<td>X</td>
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<td>§ 97-29-1</td>
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<tr>
<td>MO. ANN. STAT. § 567.010(2) (definition) § 567.020 (Vernon 1979)</td>
<td>engages or offers or agrees to engage in sexual conduct in return for something of value prohibits prostitution</td>
<td>X</td>
<td>X</td>
<td></td>
<td></td>
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<td>§ 567.030</td>
<td></td>
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<tr>
<td>STATUTE</td>
<td>DEFINITION</td>
<td>PROHIBITS:</td>
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<tr>
<td>MONT. REV. CODES ANN. § 43-5-601 (1979)</td>
<td>engages in or agrees or offers to engage in sexual intercourse for compensation</td>
<td>Solicitation: X, Act: X</td>
<td>§ 94-5-505</td>
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<tr>
<td>NEB. REV. STAT. § 28-1119 (1975)</td>
<td>all prostitutes and tenants of houses used for prostitution are vagrants</td>
<td>Solicitation: X, Act: X</td>
<td>§ 28-219</td>
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<tr>
<td>NEV. REV. STAT. § 207.030 (1977)</td>
<td>every person who solicits any act of prostitution is a vagrant</td>
<td>Solicitation: X, Act: X</td>
<td>§ 201.190</td>
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<tr>
<td>N.J. STAT. ANN. § 2A:133-1 (definition)</td>
<td>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 (e) procures or solicits for the purpose of prostitution (g) engages in prostitution</td>
<td>Solicitation: X, Act: X</td>
<td>§ 2A:133-1</td>
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<tr>
<td>N.M. STAT. ANN. § 30-9-3 (1978)</td>
<td>engaging in or offering to engage in sexual intercourse for hire</td>
<td>Solicitation: X, Act: X</td>
<td>§ 30-9-3</td>
<td></td>
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<tr>
<td>N.Y. PENAL LAW § 230.00</td>
<td>engages or agrees or offers to engage in sexual conduct in return for a fee loitering for the purpose of prostitution</td>
<td>Solicitation: X, Act: X</td>
<td>§ 230.03</td>
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<td>§ 240.37 (McKinney 1980)</td>
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<td>§ 130.38</td>
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<tr>
<td>N.C. GEN. STAT. § 14-203 (definition)</td>
<td>offering or receiving of the body for sexual intercourse for hire or for indiscriminate sexual intercourse without hire soliciting or engaging in prostitution is illegal</td>
<td>Solicitation: X, Act: X</td>
<td>§ 14-184</td>
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<td>§ 14-204 (1969)</td>
<td></td>
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<td>§ 14-177</td>
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<td>STATUTE</td>
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<td>PATRON</td>
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<tr>
<td>N.D. CENT. CODE § 12.1-29-03 (1976)</td>
<td>(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</td>
<td>X</td>
<td></td>
<td></td>
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<td>§ 12.1-20-08</td>
<td>X</td>
<td>§ 12.1-20-12</td>
</tr>
<tr>
<td>OHIO REV. CODE. ANN. § 2907.01 (definition) § 2907.25 (Page 1975)</td>
<td>male or female who promiscuously engages in sexual activity for hire no person shall engage in sexual activity for hire</td>
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<td>§ 2907.24</td>
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<tr>
<td>OKLA. STAT. ANN. tit.21 § 1030 (West Supp. 1979)</td>
<td>giving or receiving of the body for sexual intercourse for hire or for indiscriminate sexual intercourse without hire</td>
<td>§ 1029(b)</td>
<td>§ 1029(a)</td>
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<td>§ 886</td>
</tr>
<tr>
<td>OR. REV. STAT. § 167.002 (definition) § 167.007 (1977)</td>
<td>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</td>
<td>X</td>
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<tr>
<td>18 PA. CONS. STAT. ANN. § 5902(a) (Purdon Supp. 1979)</td>
<td>(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</td>
<td>X</td>
<td></td>
<td>X</td>
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<td>§ 5902(e)</td>
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<tr>
<td>STATUTE</td>
<td>DEFINITION</td>
<td>Solicitation</td>
<td>Act</td>
<td>Loitering</td>
<td>Vagrancy</td>
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<td>Fornication</td>
<td>Consensual Sodomy</td>
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<tr>
<td>WASH. GEN. LAWS § 11-34-5 (Supp. 1979)</td>
<td>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</td>
<td>X</td>
<td>X</td>
<td>X</td>
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<td>§ 11-6-3</td>
<td>§ 11-10-1</td>
</tr>
<tr>
<td>S.C. CODE § 16-15-90 (1976)</td>
<td>It shall be unlawful to: (1) engage in prostitution (2) aid or abet prostitution (3) procure or solicit for the purpose of prostitution</td>
<td>X</td>
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<td>§ 16-15-60</td>
<td>§ 16-15-80</td>
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<tr>
<td>S.C. CODE ANN. § 22-23-1 (Supp. 1978)</td>
<td>(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</td>
<td>X</td>
<td>X</td>
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<td>§ 22-23-9</td>
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<tr>
<td>TENN. CODE ANN. § 39-3501 (definition)</td>
<td>the giving or receiving of the body for sexual intercourse for hire or for licentious sexual intercourse without hire</td>
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<td>§ 39-4701</td>
<td>§ 39-4701</td>
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<tr>
<td>§ 39-3502 (1975)</td>
<td>it shall be unlawful to engage in or aid and abet or solicit for prostitution</td>
<td>X</td>
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<tr>
<td>TEX. PENAL CODE ANN. tit. 9, § 43.02(a)</td>
<td>(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 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</td>
<td>X</td>
<td>X</td>
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<td>§ 43.02(b) (Vernon Supp. 1978)</td>
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</tbody>
</table>
| UTAH CODE ANN. § 76-10-1302 (1978) | (a) engages or offers or agrees to engage in sexual activity with another person for a fee  
(b) is an inmate of a house of prostitution  
(c) loiters in or within view of any public place for the purpose of being hired to engage in sexual activity | Solicitation | Act | Loitering | Vagrancy | Patron | Fornication | Consensual Sodomy heterosexual | Consensual Sodomy homosexual |
| | | X | X | | | | § 76-10-1303 | § 76-7-104 | § 76-5-407 | X | 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 | | | | | | § 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 |

Note: The table represents the prohibition of various acts related to prostitution, with columns indicating which behaviors are prohibited (X) and which are not ( ). The table also includes references to specific statutes for each prohibition.
<table>
<thead>
<tr>
<th>STATUTE</th>
<th>DEFINITION</th>
<th>PROHIBITS:</th>
</tr>
</thead>
</table>
| 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 | Solicitation: X  
                                |                                                                            | Act: X  
                                |                                                                            | Loitering: X  
                                |                                                                            | Vagrancy: § 944.31  
                                |                                                                            | Patron: § 944.15  
                                |                                                                            | Fornication: § 944.16  
                                |                                                                            | Consensual Sodomy: heterosexual X  
                                |                                                                            | homosexual X  |
| WYO. STAT. § 6-5-106 (1977)            | giving or receiving of the body for sexual intercourse for hire or for indiscriminate sexual intercourse without hire  
                                | any female who frequents or lives in a house of prostitution or commits fornication for hire shall be deemed a prostitute | Solicitation: X  
                                |                                                                            | Act: X  
                                |                                                                            | Loitering: X  
                                |                                                                            | Vagrancy: § 944.31  
                                |                                                                            | Patron: § 944.15  
                                |                                                                            | Fornication: § 944.16  
                                |                                                                            | Consensual Sodomy: heterosexual X  
                                |                                                                            | homosexual X  |