SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

FABIAN FARNIA, Petitioner, -v- MUNICIPAL COURT OF THE LOS ANGELES JUDICIAL DISTRICT, Respondent, PEOPLE OF THE STATE OF CALIFORNIA, Real Party in Interest.	Case No. C 334198 MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PETITION FOR WRIT OF PROHIBITION/MANDATE

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I

INTRODUCTION

This brief takes as its starting point the proposition put forward twenty-two years ago by the British Committee on Homosexual Offenses and Prostitution in answer to the question, "What acts ought to be punished by the State?" That Committee, under the chairmanship of Sir John Wolfenden, concluded that "the function of the criminal law" in matters of sexual conduct "is to preserve public order and decency, to protect the citizen from what is offensive or injurious, and to provide sufficient safeguards against exploitation and corruption of others, particularly those who are specially vulnerable because they are young, weak in body or mind, inexperienced, or in a state of special physical, official or economic dependence."[1/] Ordinarily questions such as "What acts ought to be punished by the State?" are addressed to legislatures, and, in the case of the *Report* of the Wolfenden Committee, that question was addressed to Parliament. But the existence of written constitutions in the United States -- both Federal and state -- and the requirement that all laws be in conformity with those constitutions mean that, in this country, questions such as the one just posed must frequently be addressed to the judiciary as well as to the legislature. Accordingly, much of what follows will be devoted to a discussion of the scope of one of California's prostitution laws, i.e., Section 647(b) of the California Penal Code. And, for this purpose, it becomes necessary to begin by tracing briefly the historical background leading to the enactment of Section 647(b) in its present form.

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[1/] Committee on Homosexual Offences and Prostitution, *Report*, command paper 247 (Home Office, London, 1957), pp. 9-10, Hereafter cited as *Wolfenden Report*.

I(a)

Regulation in England

It comes as no surprise to learn that the early Church fathers — consistent with their view that the only licit form of sexual relations was that which is performed within the state of marriage, and, even then only that which could lead to reproduction -- severly condemned prostitution, which, like all other forms of extra-marital sex, was considered shameful and grossly immoral. What may surprise many persons, however, is to learn that St. Augustine and St. Thomas Aquinas both held that prostitution should be legally tolerated for the reason that it was considered to be a protection to the marriage state. Through the availability of prostitution, they argued, married or single men would not be tempted to seduce other men's wives or to have sexual relations with virgins who were potential brides.2/ This view pervaded medieval thinking on the subject, with the result that prostitution was tolerated throughout the medieval period.

This rationale is most appropriately considered today in the context of relationships in which sexual activity is impossible for one of the parties and yet there is sufficient non-sexual substance to justify maintaining the relationship. For example, if because of disease, illness, or physical incapacity created by war or, perhaps, an automobile accident, a person is precluded from having sex in any form with his or her spouse, paying consideration makes it possible for the other spouse to satisfy the fundamental sex drive without threatening the relationship by establishing emotional ties to others on this level. The reasons for maintaining such a non-

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2/ Referring to prostitutes, St. Augustin wrote: "What can be . . . more sordid, more bereft of decency or more full of turpitude than prostitutes, procurers, and the other pests of that sort? [Yet] remove prostitutes from human affairs, and you will unsettle everything on account of lusts"; that is, you will defile everything with lust. (St. Augustine, *De Ordine*, translated by Robert F. Russel (New York, N.Y., Cosmopolitan Science & Arts Service Co., 1942), Book II, chap. IV, sec. 12, p.95)

It must be remembered that, in the eyes of the Church, there was little if any difference between prostitution, fornication, and adultery. All stood equally condemned because they involved extra-marital sex and were likely to involve non-procreative sexual relations as well. As Aquinas stated, "[M]atrimony is natural for men, and promiscuous performance of the sexual act, outside matrimony, is contrary to man's good. For this reason, it must be a sin." Aquinas then points out that it cannot "be deemed a slight sin for a man to arrange for the emission of semen apart from the proper purpose of generating . . . children" because "the inordinate emission of semen is incompatible with the natural good; namely, the preservation of the species." He concludes, therefore, that "after the sin of homicide . . . , this type of sin appears to take next place." Thus fornication and, by extension, prostitution, are second only to murder in their sinfulness. (Thomas Aquinas, *On the Truth of the Catholic Faith: Summa contra Gentiles*, — translated by Vernon J. Bourke (Garden City, New York, 1956), Book III, Part 2, chap. 122(8), (9) & (11), p. 146)

sexual relationship with an incapacitated spouse might include children, loving companionship, or religious conviction.

The toleration of the Middle Ages ended with the Protestant Reformation. Luther and Calvin regarded prostitution with abhorrence and those who engaged in it as the worst of sinners, not because there was something inherently evil about sex for consideration, but because morally all sexual activity outside of marriage was intolerable.[3/] Both of them urged its legal suppression. This position was even more strongly held by the Puritan elements within Calvinism, elements which deeply influenced the sexual attitudes of both England and her colonies. These Puritan attitudes found their most congenial home in the English colonies in the New World, which began their existence often in an atmosphere of severe religious dogmatism. If the United States were, in fact, like Iran, a theocracy, without a First Amendment freedom of choice in religious moral matters and without a doctrine of Separation of Church and State, these anti-prostitution, anti-fornication rationales still might be considered meritorious, and the punishment might be death.

In England itself, however, the common law has never known the crime of prostitution; until the Reformation, all sexual crimes except rape — such as bigamy, incest, sodomy, adultery, and fornication -- were ecclesiastical offenses, cognizable only in the courts Christian.[4/] After the Reformation, most — but not all — of these offenses were secularized and subsumed under the royal jurisdiction. Fornication, however, never became a secular offense, and, since there never had been a specific ecclesiastical crime of prostitution distinct from fornication, no secular crime of prostitution was ever created.

[3/] Luther actually wrote little about prostitution as distinct from fornication and other forms of extra-marital sexual relations, against which he inveighed in the strongest terms. Like the medieval Church before him, he held that the gravamen of the offence was that sexual relations took place outside of marriage, not that they were paid for. One of his continuing charges against the Roman Church was what he considered to be its easy-going attitude toward extra-marital sexual relations. Thus, for example, he stated that a man

> may have had vile commerce with six hundred prostitutes and seduced countless matrons and virgins, and kept many mistresses, yet nothing of this would be an impediment, and prevent his becoming a bishop, or a cardinal, or a pope. (John Dillenberger, ed., *Martin Luther: Selections from his Writings* (Garden City, New York, 1961), p. 347.)

[4/] This did not mean, however, that there were no secular efforts at prohibiting or controlling what amounted to prostitution in England during medieval times. Maitland states from information in the Pipe Rolls that "London citizens used to arrest fornicating chaplains and put them in the Tun [presumably a gaol] as night-walkers; in 1297 the bishop objected and the practice was forbidden. At a

(footnote cont'd)

This is reflected in English law today, which was perhaps best summarized by the Wolfenden Committee in 1957 in the course of explaining the contemporary English attitude toward prostitution. The Committee stated:

> Prostitution in itself is not, in this country, an offense against the criminal law. Some of the activities of prostitutes are, and so are the activities of some others who are concerned in the activities of prostitutes. But it is not illegal for a woman to "offer her body to indiscriminate lewdness for hire," provided that she does not, in the course of doing so, commit any one of the specific acts which would bring her within the ambit of the law. Nor, it seems to us, can any case be sustained for attempting to make prostitution in itself illegal . . . .
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> Prostitution is a social fact deplorable in the eyes of moralists, sociologists and, we believe, the great majority of ordinary people. But it has persisted in many civilizations throughout many centuries, and the failure of attempts to stamp it out by repressive legislation shows that it cannot be eradicated through the agency of the criminal law . . . .
>
> It follows that there are limits to the degree of discouragement which the criminal law can properly exercise towards a woman who has deliberately decided to live her life in this way, or a man who has deliberately chosen to use her services. The criminal law, as the Street Offenses Committee finally pointed out, "is not concerned with private morals or with ethical sanctions."5/

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later time severe by-laws were made for the punishment of prostitutes, bawds, adulterers and priests found with women." (Sir Frederick Pollock & Frederic W. Maitland, *The History of English Law* (Cambridge, England, 1928), Vol. II, p. 543, note 5, citing *Munimenta Gildallae* Rolls Series, containing *Liber Albus & Liber Custumarum*, respectively Vol. II, p. 213 & Vol. I pp. 457-459.) These and other fleeting glimpses of medieval social history would appear to indicate that the main thrust was the suppression of sexual promiscuity in general rather than prostitution in particular.

5/ *Wolfenden Report, op. cit.*, pp. 79-80. The absence of any specific crime of prostitution at common law did not always mean that conduct which amounted to prostitution was not penalized under other statutes, such as those against vagrancy. For example, at the very beginning of the Reformation, under Elizabeth, "an armed company, headed by gentlemen, attacked Bridewell [Prison]. Seeing that their object was the release of certain unrepentant women whose profession concerned the gentlemen only, it is probable that the whole of the rioters were gentlemen." (Sir Walter Besent, *London in the Time of the Tudors*, (London, 1904), p. 387.)

Thus, still today, prostitution itself is not a crime in England. Likewise, sexual solicitations, even for prostitution, in other than public places, are not made criminal. However, there exists in England a veritable mountain of statutes prohibiting certain aspects of prostitution, a mass of laws which covers a huge legal patchwork. At least twenty such enactments are referred to in the footnotes of the *Wolfenden Report*, reflecting a time span of more than six centuries, extending from the Justices of the Peace Act of 1361 to the England and Wales: Sexual Offenses Act of 1956, passed only the year before the appearance of the Wolfenden Committee's *Report*. All these laws continue to be employed in the enforcement of the penal sanctions against these aspects of prostitution.6/ Despite this jumble, it is possible to place all these laws under one of the following four well-defined heads. (In each instance, the conduct listed below constitutes a criminal offense.):

1. Loitering or soliciting by any common prostitute or night-walker in any public place for the purpose of prostitution.7/
2. Living on the earnings of prostitution.8/
3. Procuration, i.e., procuring a woman for the purpose of prostitution.9/
4. Maintaining a brothel.10/

The gist of the first category of offenses remains primarily the act of thrusting unwanted sexual behavior or solicitation upon unwilling viewers or listeners.

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6/ See *Wolfenden Report*, pp. 82-114 and notes, *passim*. One of the reasons for the multiplicity of statutes is the English practice of legislating separately for England, Wales, Scotland, and Northern Ireland, as well as for particular cities. Thus some of the laws on the subject apply only to England and Wales, other to Scotland, some only to greater London, and others again only to burgh police outside of greater London.

7/ *Wolfenden Report*, p. 82 et seq.

8/ *Ibid.*, p. 98 *et seq.*

9/ *Ibid.*, p. 109 *et seq.*

10/ *Ibid.*, p. 101 *et seq.*

I(b)

International Status of Prostitution Laws

Except for those American jurisdictions which, like California, punish prostitution itself, the prostitution laws of no modern state go beyond the four general areas just listed. Some countries' penal codes, in fact, do not cover all four categories. Much of this, particularly in continental Europe, is due to the wide influence of the Code Napoleon. The French Penal Code punishes: (1) pimping; (2) participating in "the profits of prostitution of others;" (3) living on the earnings of an "habitual prostitute;" (4) inducing someone to become a prostitute; and (5) acting "as an intermediary . . . between persons practicing prostitution."11/ It also punishes anyone who "maintains a house of prostitution."12/ Like a number of others, the French Code does not punish soliciting for purposes of prostitution. The German Penal Code, on the other hand, punishes sexual solicitations of all kinds, whether for prostitution or for non-commercial purposes, if done "publicly, in an ostentatious manner, or in a manner likely to disturb the community or other individuals."13/ It also punishes anyone who, acting "for gain," aids "or abets the commission of lewd acts by others by acting as intermediary or by affording or providing the opportunity therefore [pandering]" as well as anyone "who maintains or conducts a bordello."14/ Finally, it punishes any male who derives "his livelihood" from prostitution or who "for gain . . . promotes . . . prostitution."15/ Austria, under the rubric of "pandering," punishes those "who provide prostitutes with regular lodging," or "who make a business of procuring" prostitutes, or who "permit themselves to be intermediators in illicit undertakings of this nature."16/ Like the French Code, the Austrian does not proscribe soliciting for purposes of prostitution. The Greek Code punishes anyone "who, as his

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11/ *The French Penal Code*, translated by Jean F. Moreau & Gerhard O.W. Mueller (Fred B. Rothman & Co., South Hackensack, N.J., 1960), title II, chap. I, sec. IV, article 334 (1)(2).

12/ *Ibid.*, article 335.

13/ *The German Draft Penal Code*, translated by Neville Rose (Fred B. Rothman & Co., south Hackensack, N.J., 1966), Special Part, 2nd Division, title 3, sec. 224(1). This draft code, with some changes that have no relevance here, was enacted into law by the West German *Bundestag* in 1969, and now constitutes the present West German Penal Code.

14/ *Ibid.*, sec. 226(1) & (2).

15/ *Ibid*, sec. 230(1) & (2).

16/ *The Austrian Penal Act*, 1852 and 1945 as amended to 1965, translated by Norbert D. West & Samuel I. Shuman (Fred B. Rothman & Co., South Hackensack, N.J., 1966), Part II, chap. 13, sec 512(a) (b) & (c).

profession, and for financial gain, induces females to commit prostitution" as well as any "male person who derives his livelihood wholly or partially from the exploitation of the income of a female prostitute."17/ The Norwegian Code appears to be one of the most liberal. A provision similar to those which prohibit "procuring" in other jurisdictions punishes "anybody who misleads another to make a living by prostitution, or who is accessory to such misleading."18/ Another section punishes "anybody who furthers the indecent relations of others out of greed or who exploits such relations out of greed."19/ Finally, in a surprising provision, the same code punishes "anybody who tries to restrain a person living by prostitution from ceasing therewith, or is accessory thereto."20/

As one moves away from Europe, one finds the criminal sanctions involving some aspects of prostitution to be fewer and less comprehensive. Thus Japan, in *A Preparatory Draft for the Revised Penal Code*, planned to punish only "pandering," which it defined as conduct whereby anyone "for purposes of gain induces a woman not of a promiscuous character to have sexual intercourse."21/ An almost identical provision, also denominated "pandering," comprises the sole provision on the subject of prostitution in the Korean Penal Code.22/ In Argentina it appears that the only crime is promoting prostitution in instances where "the victim" is under twenty-two years of age, unless the "perpetrator is an ascendant, husband, brother, tutor or person entrusted with the education or care of the victim," in which case the age of the victim is of no consequence.23/ The Turkish Code is similar. Procuring for

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17/ *The Greek Penal Code*, translated by Harald Schjoldager & Finn Becker (Fred B. Rothman & Co., South Hackensack, N.J., 1973), Book II, chap. 20, articles 349(3) & 350.

18/ *The Norwegian Penal Code*, translated by Harald Schjoldager & Finn Becker (Fred B. Rothman & Co., South Hackensack, N.J., 1961), Part II, chap. 19, sec. 202.

19/ *Ibid.*, sec. 206

20/ *Ibid.*, sec. 203.

21/ *A Prepatory Draft for the Revised Penal Code of Japan, 1961*, B.J. George, Jr., ed., (Fred B. Rothman & Co., South Hackensack, N.J., 1964), Part II, chap. XXII, article 263(1).

22/ See *Korean Penal Code*, translated by Paul K. Ryu, (Fred B. Rothman & Co., South Hackensack, N.J., 1960), Part II, chap. 22, article 242.

23/ *The Argentine Penal Code*, translated by Emilio Gonzalez-Lopez (Fred B. Rothman & Co., South Hackensack, N.J., 1963), Book II, title III, chap. 3, article 125(1) (2) & (3).

purposes of prostitution is ordinarily a crime only when the girl is a virgin or is under the age of twenty-one.[24/] However, if the woman is "enticed into prostitution by her husband, ascendant, ascendant by affinity, brother or sister," her age is no longer a factor, and it is a crime even if the woman has reached her majority.[25/]

In Canada prostitution is not, in itself, criminal. Procuring, keeping a bawdy house, and certain forms of public solicitation are punishable offenses.[26/] The statute regulating public solicitation reads "Every person who solicits in a public place for the purpose of prostitution is guilty of an offense punishable on summary conviction."[27/] With respect to the definition and scope of public solicitation, the Canadian courts have held that (1) an undercover police officer's car, where the soliciting allegedly took place, was not a "public place" within the meaning of this section, and (2) to constitute this offense there must not only be a demonstration by the accused of an intention to make herself available for prostitution, but conduct which is pressing or persistent.[28/]

One could go on, but to do so would merely pile Pelion on Ossa. the same would be true if one were to list those countries, such as Italy, which appear to have no criminal sanctions against any aspects of prostitution. The only purpose of this excursus into the laws of foreign countries has been to show which aspects of prostitution are deemed appropriate objects of legal proscription in the eyes of most of the world. There seem to be two common threads running through all of these foreign laws. One is that, although they punish some of the several aspects of prostitution, the conduct itself remains legal. The other is that they do not punish discrete solicitation in private.

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[24/] *The Turkish Penal Code*, translated by Orhan Sepici & Mustapa Ovacik (Fred B. Rothman & Co., South Hackensack, N.J., 1965), Book II, Part 8, chap. III, sec. 436.

[25/] *Ibid.*, sec. 435.

[26/] *Criminal Law*, by Alan W. Mewett and Morris Manning, 1978, Butterworths, Toronto (textbook on substantive criminal law).

[27/] *Martin's Criminal Code*, 1978, Section 195.1.

[28/] *Hutt v. The Queen* (1978), 38 C.C.C.(2d) 418, 82 D.L.R.(3d) 95 (9:0) (S.C.C.)

I(c)

Prohibition in American Jurisdictions

The system of punishing some aspects of prostitution, while not punishing private sexual conduct for a fee or discreet solicitations in private situations, is followed by some — though not a majority--of American jurisdictions. Most American states make prostitution itself a crime along with its ancillary aspects.

Why do most jurisdictions in this country prohibit sexual relations in private merely because a fee is involved? Why are private and discreet solicitations to commit such conduct made criminal?

The answer might lie in the fact that, as in early Christian times, the offense of prostitution is not seen today as morally distinct from other forms of sexual conduct which do not lead to procreation within a marriage. At least some forms of consenting adult private sexual activity not involving consideration are still made criminal by over half of the fifty states. In some cases the laws apply equally to married and unmarried couples. The rationales given by state appellate courts for condoning such statutes often involve religious doctrines, and judicial opinions often include quotes from the Bible. The issue is a question of morals, and, specifically, whether sex for purely recreational purposes is morally corrupt. This brief, in part, explores the present criminal sanctions against prostitution in California in light of some major changes of circumstances in the state and in the country, especially the recent legalization of all forms of consenting adult private sex in California and, in some other states, the growth of the constitutional right to privacy, a new look into what constitutues a valid state interest, and the extent to which the state may intrude into the perogatives of the individual based upon a concept of morals as opposed to a concept of "harms."

The drafters of the Hawaii Penal code, as revised in 1972, suggest public pressure as their reason for not overturning section 712-1200 of that code which prohibits soliciting or engaging in sexual intercourse for a fee:

> History has proven that prostitution is not going to be abolished either by penal legislation nor the imposition of criminal sanctions through the vigorous enforcement of such legislation. Yet the trend of modern thought on prostitution in this country is that "public policy" demands that the criminal law go on record against prostitution. Defining this "public policy" is a difficult task. Perhaps it more correctly ought to be considered and termed "public demand" — a widespread community attitude which the penal law must take into account regardless of the questionable

rationales upon which it is based.

A number of reasons have been advanced for the suppression of prostitution, the most often repeated of which are: "the prevention of disease, the protection of innocent girls from exploitation, and the danger that more sinister activities may be financed by the gains from prostitution." These reasons are not convincing. Venereal disease is not prevented by laws attempting to suppress prostitution. If exploitation were a significant factor, the offense could be dealt with solely in terms of coercion. Legalizing prostitution would decrease the prostitute's dependence upon and connection with the criminal underworld and might decrease the danger that "organized crime" might be financed in part by criminally controlled prostitution.

Our study of public attitude in this area revealed the widespread belief among those interviewed that prostitution should be suppressed entirely or that it should be so restricted as not to offend those members of society who do not wish to consort with prostitutes or to be affronted by them. Making prostitution a criminal offense is one method of controlling the scope of prostitution and thereby protecting those segments of society which are offended by its open existence. This "abolitionist" approach is not without its vociferous detractors. There are those that contend that the only honest and workable approach to the problem is to legalize prostitution and confine it to certain localities within a given community. While such a proposal may exhibit foresight and practicality, the fact remains that a large segment of society is not presently willing to accept such a liberal approach. Recognizing this fact and the need for public order, the Code makes prostitution and its associate enterprises criminal offenses.

Hence, the drafters of the Hawaii Code noted clearly the reliance by Hawaii's legislature on the moral view of the majority over a concept of clearly articulable harms to individuals or society. This brief shall highlight the growing view that it is unconscionable in a free society for the state to criminally punish activity based upon some concept of morals; only conduct which results in a demonstrable harm may be proscribed under this view.

Most of the legal distinctions between the states in the area of prostitution do not revolve around the question whether or not they prohibit prostitution itself but how they *define* the term. Most states define "prostitution" as consisting of sexual relations "for hire" or "for a fee." Sometimes variant language is employed,

but with essentially the same meaning. New Jersey, for example, punishes any person who "is an inmate of a house of prostitution or otherwise engages in sexual activity *as a business.*" (Emphasis added.) Soliciting for purposes of prostitution is defined as soliciting "another person in or within view of any public place for the purpose of being hired to engage in sexual activity."[29/]

California's definition of prostitution is in sharp contrast to the above. Section 647(b) of its Penal Code defines prostitution so as to include "any lewd act between persons for money or other consideration." Aside from the fact that no other state appears to use the word "consideration" in its definition of prostitution, this all-embracing language seems startling in light of the historical and traditional concepts of prostitution discussed above. As Professor David Richards has pointed out in his magisterial article on the subject, "The traditional concern for prostitution was peculiarly associated with female sexuality -- more particularly, with attitudes toward promiscuous unchastity in women -- *apart from the commercial aspects.*"[30/] The *Model Penal Code* refers to "16 states whose statutes define prostitution to include promiscuous intercouse *without* hire."[31/] (Emphasis added) By contrast, Secton 647(b) makes money or consideration the determining element in its definition of prostitution, and therefore the determinant of criminality. The provision is not only at odds with the traditional concepts of prostitution — its criminal reach extending beyond that found in all other American jurisdictions except Missouri — but also the statute is inconsistent with California's forward and enlightended approach which promotes individual moral and personal decisions regarding sexual subjects absent some harm to others.[32/]

Thus, in the area of prostitution, the state has become moralist, choosing the moral code of a segment, albeit possibly a majority, of the population, and imposing it upon all, with criminal sanction for disobedience. The issue squarely before the court is the extent to which the state may play this role, depriving the individual of freedom of choice in areas in which no demonstrable harm to others can be found. Under many forms of government, this is no issue at all; it is a tribute to our very political foundations that we are debating this issue through the public forum of the courts.

[29/] *The New Jersey Code of Criminal Justice*, sections 2C:34-1a(1) (2). (Emphasis added.)

[30/] David A.J. Richards, "Commercial Sex and the Rights of the Person: A Moral Argument for the Decriminalization of Prostitution," *University of Pennsylvania Law Review*, CXXVII (No. 5, May, 1979), p. 1204. (Emphasis added.) Hereafter cited as *Commercial Sex and the Rights of the Person.*

[31/] American Law Institute, *Model Penal Code* (Philadelphia, 1959), Tentative Draft, No. 9, Sec. 207.12, p. 175, note 24.

[32/] See *infra.*, "California's Recognition of Sexual Privacy."

II

STATUTORY REGULATION OF PROSTITUTION IN CALIFORNIA

Until 1961 California did not criminalize private sexual conduct performed for money or other consideration. Neither did it prohibit the solicitation of such conduct.

However, early in California history a multitude of statutes was enacted to regulate and prohibit many practices associated with the business of prostitution. These acts remain in full force and effect at the present time and should not be affected by decriminalization of prostitution itself:

Section 266:	Enticement of unmarried female under 18 for prostitution;
Section 266a:	Abduction by fraudulent inducement;
Section 266b:	Abduction to live in illicit relationship;
Section 266d:	Receiving money for placing person in custody for purposes of cohabitation;
Section 266f:	Sale of person for immoral purposes;
Section 266g:	Placing wife in house of prostitution;
Section 266h:	Pimping;
Section 266i	Pandering;
Section 267:	Abduction of person under 18 for prostitution;
Section 309:	Admitting or keeping minors in a house of ill fame;
Section 315:	Keeping or residing in a house of ill fame;
Section 316:	Keeping a disorderly house which disturbs the peace;
Section 318:	Prevailing upon person to visit a house of prostitution;
Sections 11225-35:	Red Light Abatement Act, regulating public or private nuisances.

This brief is not concerned with these statutes or their constitutionality. The focus here is only on the scope and constitutionality of Section 647, subdivision (b) of the Penal Code, which prohibits soliciting or engaging in acts of prostitution. It is first appropriate to review the statutory history and judicial interpretation of this statute before addressing the constitutional and policy considerations which are the primary focus of this brief.

III

LEGISLATIVE HISTORY AND JUDICIAL INTERPRETATION OF SECTION 647(b) AS IT PERTAINS TO PROSTITUTION

The Pre-1961 Statute and Its Construction

In addition to the numerous statutes which were enacted by the California Legislature to regulate the business of prostitution and many of the evils which had been historically associated with it, Section 647, subdivision (10) punished as a vagrant anyone who was considered a "common prostitute." This statute was first enacted in the general penal code revision of 1872 and was based upon a similar statute enacted in 1855.[33/] The statute remained basically unchanged until 1961.

Thus, between 1855 and 1961, engaging in sexual relations for a fee and soliciting for such conduct were not made criminal by California law. Status was penalized, not conduct. Pimping (266h), pandering (266i), keeping a house of ill fame (315), and being a "common prostitute" (647, sub. 10) were crimes.

Since Section 647(10) is the predecessor of Section 647(b), we now examine the scope and definitions given to the former statute by the California appellate courts. The Legislature did not define the term "prostitution" or the term "prostitute" as used in Ssection 647(10) or in statutes regulating other aspects of prostitution; it merely relied on judicial interpretations of these terms.

There is only one reported appellate decision reviewing a conviction under the pre-1961 statute. The court in *People* v. *Brandt* (1956) 306 P.2d 1069, at 1070, interpreted Section 647(10) and stated:

> Obviously a male cannot be a prostitute and hence is not subject prosecution under subdivision (10) of this section. Am.Jur., Vol.42, page 260; 8 Words and Phrases, Common Prostitute, page 166; *Ferguson* v. *Superior Court* 26 Cal.App. 554, 147 P. 603; *In re Carey* 57 Cal.App. 297, 304, 207 P. 271.

This holding is butressed by other California appellate decisions interpreting the meaning of "prostitution" as used in the pimping and pandering statutes. In the context of these statutes California courts had consistently defined "prostitution" as the "common, indiscriminate, illicit intercourse of a woman for hire." *Ferguson* v. *Superior Court* (1915) 26 Cal.App. 554; *People* v. *Marron* (1934) 140 Cal.App. 432;

33/ See Sherry, "Vagrants, Rogues and Vagabonds — Old Concepts in Need of Revision" (1960) Cal.L.Rev. 557, 562.

People v. *Mitchell* (1949) 91 Cal.App.2d 214; *People* v. *Head* (1956) 146 Cal.App.2d 744; *People* v. *Courtney* (1959) 176 Cal.App.2d 731.

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III(a)

The 1961 Statute and Its Construction

The first reported legislative proposal for change of Section 647 came after a hearing of a subcommittee of the Assembly Interim Committee on Judiciary which met in San Francisco in July of 1958.[34/] There were numerous protests against alleged repressive police practices and, as a result, Section 647 became a subject of legislative inquiry. One issue which was discussed concerned the adoption of a state policy to punish persons for their acts and not their status. The following year Assembly Bill 2712 was introduced to revise Section 647. The subdivision dealing with prostitution would have punished every person who "For pecuniary profit, solicits or engages in any act of prostitution."[35/] Most other subdivisions of Section 647 would also have been revised. The bill passed the Legislature but it was vetoed by the Governor for reasons unconnected with the issue of prostitution.

In 1960 the California Supreme Court reviewed a portion of Section 647 which punished as a vagrant anyone who was a "common drunkard." The Court held that where the entire meaning of the subdivision centered on the words "common drunkard," the subdivision was unconstitutionally vague in violation of both state and Federal constitutions. *In re Newbern* (1960) 53 Cal.2d 786. This decision gave added impetus for the movement for legislative revision of Section 647 and another bill was introduced in 1960 to revise this statute and its subdivisions.

Professor Arthur H. Sherry, the person primarily responsible for drafting the revisions of Section 647 which were finally passed by the Legislature in 1960 (effective in 1961) suggested a slight modification of Assembly Bill 2712. In his scholarly article on the subject of vagrancy statutes, he wrote, "This is a simple description of the conduct to be proscribed. It was drafted before the decision in the *Newbern* case which has, by necessary implication, deleted the term 'common prostitutes' from the list of those who are vagrants. The qualification 'for pecuniary profit' added by the Assembly Bill seems unnecesesary," adding in a footnote, "[B]y definition, a prostitute is one who engages in sexual intercourse for hire. *People v. Head* (1956) 146 Cal.App.2d 744, 304 P.2d 761."[36/] Other than the fact that the *Newbern* case mandated some sort of legislative revision and that policy considerations necessitated punishing conduct rather than status, the only reason given by Sherry for the regulation

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[34/] *Id*, at 567

[35/] *Id*, at 568

[36/] *Id*, at 570

of prostitution was that "the pimp, the panderer and the prostitute cannot be permitted to flaunt their services at large."[37/] Again, the implication is some sort of "thrusting" of conduct on an unwilling public.

The Assembly Interim Committee on Criminal Procedure expressly stated it was adopting the definition of the term "prostitution" found in *People v. Head, supra.* That Committee approved Sherry's revision and quoted his comments with full concurrence.[38/]

Therefore, as it became law in 1961, Section 647, subdivision (b) made subject to criminal penalties every person who "solicits or who engages in any act of prostitution."

Who was subject to prosecution under this new prohibition? The Legislature used the phrase *"Every person* who commits any of the following acts" before describing the speech and conduct prohibited. Should this be read literally or did there exist exceptions? What conduct was unlawful to engage in or solicit under this subdivision? With respect to the latter question the Legislature answered it by adopting the definition of "prostitution" as found in *People v. Head, supra.* The prohibited conduct was "common, indiscriminate, illicit intercourse of a woman for hire." See also *People v. Frey* (1964) 228 Cal.App.2d 33. As to the former question, "who was subject to prosecution," a recent pronouncement from a California appellate court is of assistance. "The words, 'every person' . . . who solicits . . . any act of prostitution,' are clear and unambiguous. 'Every,' means 'each and all within the range of contemplated possibilities.' (Webster's New International Dictionary; 3rd ed. 1961; Unabridged, p. 788.)"[39/] The court held that "all persons" who solicit an act of prostitution are guilty. This applies to customers as well as prostitutes.[40/]

Thus, the 1961 statute, as interpreted by the courts, proscribed solicitation or engaging in common and indiscriminate heterosexual intercourse for a fee, without regard to whether the solicitation was made by a man or a woman, a customer or a prostitute.

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[37/] *Id*, at 566

[38/] Report of Assembly Interim Committee of Criminal Procedure, vol. 2 App. to Journal of Assem. Reg. Sess. 1961, pp. 12-13; also see *Leffel v. Municipal Court* (1976) 54 Cal.App.3d 569, 573.

[39/] *Leffel, supra*, at 576

[40/] *Id*, at 576

III(b)

The 1965 Amendment

In 1965 the Legislature amended Section 647(b). The wording of the 1961 enactment was not repealed; instead, the Legislature expanded the definition of prostitution to give the police a tool to deal with the "homosexual problem." Homosexual acts per se were, at the time, illegal. Whereas the 1961 enactment incorporated the definition of prostitution found in *People* v. *Head, supra,* which was limited to sexual intercourse between a man and a woman, this obviously could not be used to prosecute homosexual sex for hire. Therefore, the Legislature added a second sentence to subdivision (b) which read:

> As used in this subdivision, "prostitution" includes any lewd act between persons of the same sex for money or other consideration.41/

This amendment created three changes in the prostitution law. First, it expanded the definition of prostitution to include homosexual acts. Second, it enlarged the ambit of the law to prohibit lewd acts rather than its previous and more narrow criminalization of sexual intercourse for hire. Finally, instead of penalizing the sexual conduct or solicitation if it were "for hire," the amendment enlarged the category of acts proscribed to include all such acts "for money or other consideration."

Since the primary purpose of the 1965 amendment was to bring homosexual acts within the reach of the prostitution law, the rationale for the first change, *i.e.*, adding "of the same sex," is obvious. Also, since persons of the same sex are incapable of engaging in traditional sexual intercourse with each other, *i.e.*, insertion of the penis into the vagina, some additional language was needed to define the prohibited homosexual conduct. The term "lewd" as used in Sections 647(a) and 647(d) was a possible answer, since those statutes were successfully being used by law enforcement primarily to arrest homosexuals for noncommercial sex. This term "lewd" was also expansive enough to allow for great police and prosecutional discretion and to include a wide variety of sexual conduct without necessitating the Legislature's use of embarrassingly explicit language. With respect to the third change, the only plausible rationale for defining the pecuniary aspect as "money or other consideration" is that the Legislature wanted no "loopholes" in the law. If the consideration for the sexual conduct was something of value other than cash, this too was to be prohibited.

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41/ See 1965 *Code Legislation*, Continuing Education of the Bar, at p.182.

III(c)

The 1969 Amendment and Present Wording

In 1969 the Legislature again amended Section 647(b). This amendment deleted from the second sentence of the subdivision the words "of the same sex." There have been no other amendments to the statute, so that the section presently reads:

> Every person who commits any of the following acts is guilty of disorderly conduct, a misdemeanor: (b) Who solicits or engages in any act of prostitution. As used in this subdivision, "prostitution" includes any lewd act between persons for money or other consideration.

In neither the 1965 amendment nor the 1969 amendment did the Legislature define the phrase "any lewd act," thus leaving the extent of the proscription vague and open to individual interpretation and ultimately to limitation by the courts.

Although the Legislative history does not appear to indicate the reason for the 1969 amendment, one logical explanation can be found. This amendment further expands the proscription to make possible prosecutions of heterosexual — as well as homosexual — "lewd acts." Previously, because the 1961 amendment incorporated the definition of prostitution from *People v. Head, supra,* the only prohibited conduct was heterosexual intercourse for hire. Homosexual lewd acts were incuded by the 1965 version of the law. Finally, in 1969, all lewd acts for money or other consideration are prohibited.

The expanded definition of "prostitution" was not discussed by California appellate courts until 1976. In a case involving a conviction under the pandering statute (Penal Code Section 266i prohibits procuring another person for the purpose of prostitution or encouraging another to become a prostitute), the court held that:

> Prostitution is defined as "Common lewdness of a woman for gain" (Black's Law Dictionary (4th ed.)), "act or practice of engaging in sexual intercourse for money." (Random House Dictionary of the English Language (Unabridged Ed.)), or ". . . any lewd act between persons for money or other consideration." (Pen.Code, Section 647(b).) *People v. Fixler* (1976) 56 Cal.App.3d 321, 325.

The *Fixler* case indicates that sexual intercourse for money is prostitution, regardless of the motivation of the participants to the sexual act:

> There can be no question but that Patricia engaged in lewd acts and sexual intercourse for money and that defendants, by providing the money and directing her performances, procured, caused and induced her to do

so. (Citations) There is nothing in statute or case law which would remove this conduct from the ambit of the statute (Pen.Code, Section 266i) simply because the money was provided by nonparticipants in the sexual activity or because defendant's primary motivation was to photograph the activity.

It seems self-evident that if A pays B to engage in sexual intercourse with C, then B is engaging in prostitution and that situation is not changed by the fact that A may stand to observe the act or photograph it. *Fixler, supra,* at 325.

That same year another appellate court in California affirmed the principle that the prostitution statute covers both men and women whether customer or prostitute. "Penal Code Section 647, subdivision (b), is clearly designed to punish specific acts without reference to the status of the perpetrator." *Leffel v. Municipal Court* (1976) 54 Cal.App.3d 569, 573, at 575. The use of the term "every person" in the prostitution statute is to be read literally and means "each and all within the range of contemplated possibilities." *Leffel, supra,* at 576.

This broad interpretation of the term "prostitution" was accepted by yet another appellate court some two years later:

> For the purpose of defining the charged offenses of pimping and pandering the court definded [the term "prostitution" as] "soliciting another person to engage in or engaging in sexual intercourse or other lewd or dissolute acts between persons for money or other considerations." The defense theory is that the statutes condemning pimping and pandering should be taken as implying a definition of the term "prostitution" which imports sexual intercourse for hire and does not include other forms of commercial sex acts. This contention cannot be sustained. The definition used by the court was properly taken from Penal Code Section 647(b) which defines prostitution as including "any lewd act between persons for money or other consideration." *People v. Grow* (1978) 84 Cal.App.3d 310, 313.

The definition of prostitution was again the subject of judicial review in 1977. In a case involving the propriety of using the Red Light Abatement Law to close a building as a nuisance, the court held that sexual intercourse for hire by models whose activity is photographed for a non-obscene publication is "prostitution." *People ex rel. Van De Kamp v. American Art Enterprises* (1977) 75 Cal.App.3d 523, 529.

Another appellate interpretation of Section 647(b) is found in *People v. Norris* (1978) 152 Cal.Rptr. 134. In that case the defendant was convicted of soliciting an undercover vice officer to engage in an act of prostitution. While seated in the officer's automobile, the defendant solicited the officer to engage in an act of oral copulation for $15.00. The location where the act was intended to occur was left unspecified by the defendant. Several issues were raised and addressed on appeal. Defendant complained that the trial court had misinstructed the jury on the required criminal intent under the solicitation portion of the statute. He argued that soliciting for prostitution is a specific intent crime. The appellate court agreed. It held that *engaging* in prostitution is a *general intent* crime and the only intent which must be proved is the intent to commit the prohibited conduct. However, the *soliciting* portion of the statute is a *specific intent* crime, *i.e.*, the requisite intent is to engage in the crime of prostitution. The court held that the purpose of the solicitation portion of the statute is to prevent the solicitation of *crime*. Defendant Norris also complained about the jury instructions defining "prostitution." One instruction, CALJIC 16.420, reads as follows:

> Every person who solicits another to engage in . . . [sexual intercourse for money or other consideration] [or] [any lewd act between persons of the same or different sexes for money or other consideration], is guilty of a misdemeanor.

Another instruction, CALJIC 16.402, defined the term "lewd" as follows:

> As used in the foregoing instruction, the word . . . "lewd" . . . mean[s] lustful, lascivious, unchaste, wanton, or loose in morals and conduct.

The appellate court found these to be proper instructions, relying on the authority of *People v. Williams* (1976) 59 Cal.App.3d 225, 229. The *Williams* Court had authorized such an instruction on the definition of "lewd" as used in Section 647, subdivision (a).

Defendant Norris also claimed that the trial court should have acquitted him because there was no proof that the act of oral copulation was to be performed in a public place. He argued that in addition to the element of money or other consideration, the sexual act solicited must be "lewd." Private sexual conduct between consenting adults is no longer a crime in California and therefore such acts may not be considered "lewd" unless they are performed in public he claimed. Relying on *Silva v. Municipal Court* (1974) 40 Cal.App.3d 733, 735-736, the court held that a solicited act may be considered lewd regardless of where it is to be performed. In *Silva*, the solicitation portion of Section 647, subdivision (a), had been challenged; *Silva*

was decided before the passage of the Consenting Adults Act in 1976.

The most recent California appellate case dealing with the definition of prostitution was decided this year by the Second District Court of Appeal. See *People v. Hill* (1980) 163 Cal.Rptr. 99. In the *Hill* case the defendant was prosecuted under California's pimping and pandering statutes. Both of those statutes include "prostitution" as an operative term. As to the meaning of the term, the Court of Appeal states:

> It is to be noted that Penal Code Section 266h does not define the word "prostitution." In *People v. Fixler* (1976) 56 Cal.App.3d 321, 128 Cal.Rptr. 363, the court defined the term "prostitution" as that term is used in Penal Code Section 266i, the pandering offense. But Penal Code Section 266i, like Penal Code Section 266h, does not define the term "prostitution." The *Fixler* court held that it was construing the term "prostitution" to cover sexual acts such as masturbation, oral copulation, and common lewdness for money. In so construing the term "prostitution" as used in Penal Code Section 266i, the *Fixler* court relied upon dictionary definitions of "common lewdness of a woman for gain," the "act or practice of engaging in sexual intercourse for money" and the definition of "prostitution found in Penal Code Section 647(b), as including "any lewd act between persons for money or other consideration." (Citation) This subdivision of 647 relates to the misdemeanor offense of "disorderly conduct." The *Fixler* court's interpretation of the term "prostitution" for purposes of Penal Code Section 266i was followed in *People v. Grow* (19778) 84 Cal.App.3d 310, 148 Cal.Rptr. 648, but only insofar as it adopted the definition in Penal Code Section 647, subdivision (b). . . .
>
> The California Supreme Court recently had occasion to deal with the phrase, "lewd or dissolute conduct," as it is used in Penal Code Section 647, subdivision (a). This phrase, which is similar to the phrase "lewd act," used as part of the definition of "prostitution" in Penal Code Section 647, subdivision (b), has been attacked as being unconstitutionally vague.
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> In *Pryor v. Municipal Court* (1979) 25 Cal.3d 238, 158 Cal.Rptr. 330, 599 Pac.2d 636, our California high court construed the terms "lewd" conduct and "dissolute" conduct, in a well defined, limited manner so as to make the statutory provision satisfy constitutional standards of specificity. . . .
>
> If the term "prostitution," . . . is to be construed to cover "lewd or dissolute acts in return for money or other consideration," as set forth by

> the trial court in the instructions given in the case before us, a limitation of the meaning of the terms "lewd" and "dissolute," similar to that made by the *Pryor* court, must be applied to preclude the definition of "prostitution" . . . from being unconstitutionally vague. Accordingly, we construed the term "prostitution" . . . as meaning sexual intercourse between persons for money or other considerations and only those "lewd or dissolute" acts between persons for money or other consideration as set forth in the *Pryor* case.

The full import of the *Hill* case will be discussed *infra* in the section entitled "Section 647(b) is Unconstitutionally Vague Because the Definition of the Crime Rests on the Meaning of Such Terms as 'Any Lewd Act' and "Or Other Consideration'."

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III(d)

California Supreme Court

Review of Section 647(b)

The preceding pages have demonstrated that the bulk of cases interpreting the definition of "prostitution" have involved prosecutions under statutes other than Penal Code Section 647(b), such as the pimping and pandering statutes. The only intermediate appellate court cases reviewing Section 647(b) or its predecessor have been *Brandt, supra,* (Appellate Department of the San Joaquin Superior Court), *Leffel, supra,* (Fifth District Court of Appeal), and *Norris, supra,* (Appellate Department of the Los Angeles Superior Court). None of these cases decided issues concerning the constitutionality of Section 647(b) but, rather, involved questions of sufficiency of evidence or interpretation of words and phrases. Notwithstanding the number of years that Penal Code Section 647(b) and its predecessor have been in existence, and the thousands of arrests which are made for violations each year throughout the state, it is amazing that there are only three reported opinions concerning the statute from intermediate appellate courts.

Only once has the California Supreme Court reviewed Section 647(b). In *People v. Superior Court (Hartway)* (1977) 19 Cal.3d 338, the Court considered and decided two issues: (1) whether the statute was being discriminatorily enforced in violation of equal protection, and (2) whether the word "solicit" as used in the statute was unconstitutionally vague. The Court answered each question in the negative. The Court defined the term "solicit" as follows: "to ask earnestly; to ask for the purpose of receiving; to endeavor to obtain by asking or pleading; to entreat, implore, or importune; to make petition to; to plead for; to try to obtain . . . While it does imply a serious request, it requires no particular degree of importunity, entreaty, imploration, or supplication. . . ." *Hartway, supra,* at 346. With respect to the issue of discriminatory enforcement, the Court held that the police did not violate equal protection by concentrating their efforts on investigations and arrests of prostitutes instead of the customers. Justices Tobriner and Wright dissented on this issue. Chief Justice Bird and Justice Tobriner dissented from the denial of rehearing. It appears that *Hartway* was decided by the Court when it was in transition. The majority opinion was written by Justice Clark, joined by Justices Mosk, Richardson, and Sullivan (Sullivan was retired and sitting under temporary assignment until his successor was confirmed). The dissenting opinion was written by Acting Chief Justice Tobriner and was concurred in by Justice Wright (Wright was retired, but like Sullivan, was sitting on temporary assignment until his successor was confirmed). Since the

Court was in a period of great transition, one wonders whether the *Hartway* case would be decided the same way today.

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III(e)

Summary of Present Scope and Interpretation of Section 647 Subdivision (b)

ENGAGING IN PROSTITUTION

1. *Who is subject to prosecution?*
   Every person, both men and women, customers and prostitutes, and "each and all within the range of contemplated possibilities." *Leffel, supra.*

2. *What sexual acts are prohibited if money or other consideration is involved?*
   Sexual intercourse -- *Head, Fixer, supra.*
   Any lewd act between persons -- *Fixler, Grow, Norris, supra.*

3. *What is the requisite intent or motivation?*
   To engage in the prohibited conduct, *i.e.*, to engage in sexual intercourse or any lewd act between persons for money or other consideration. *Norris, supra.*

4. *What is sexual intercourse?*
   Penis in vagina -- see Penal Code Section 261 (rape) and 261.5 (unlawful sexual intercourse) and cases thereunder.

5. *What is a lewd act between persons?*
   Conduct which is lustful, lascivious, unchaste, wanton, or loose in morals. *Norris, supra;* but see *People v. Hill* (1980) 163 Cal.Rptr. 99 which requires alteration of this definition to conform to the definition of lewd in *Pryor v. Municipal Court* (1979) 25 C.3d 238.

SOLICITING AN ACT OF PROSTITUTION

1. *What does "solicit" mean?*
   To plead for, to try to obtain, to ask for the purpose of receiving, although no particular degree of importunity is required. *Hartway, supra.*

2. *What criminal intent is required?*

It must be a serious request with the specific intent that the crime of engaging in prostitution will be committed. *Norris, supra.*

3. *Who is subject to prosecution?*

"All persons" who so solicit. *Leffel, supra.*

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IV

UNDERLYING CONSTITUTIONAL AND STATUTORY CONSIDERATIONS

The previous pages of this brief have explored the history of governmental regulation of private sexual conduct for money. We have analyzed the common law development of such regulation, early and modern English law, the international status of prostitution law, and contrasted all of this with California statutory and case law. With this background material in mind and at hand, we now turn to the constitutional and statutory considerations which are necessary to a proper judicial review of Section 647(b).

Before addressing the main question — may private conduct between consenting adults always be punished by the state merely because money or other consideration is involved? -- we first explore the statutory and constitutional protections of the right to sexual privacy when money or other consideration is not in issue.

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IV(a)

Legislative Recognition of a Right to Sexual Privacy

California law is consonant with English common law in that simple fornication has never been illegal in this state. Other forms of private sex were outlawed until very recently, *e.g.*, sodomy, oral copulation, adulterous cohabitation. It was not until 1976 that all forms of private sexual conduct between consenting adults (not involving money or other consideration) were decriminalized by the Legislature.[42/] This action by the California Legislature came some 15 years after the first such decrimininalization by a state legislature in the United States.

In 1961 Illinois became the first state to decriminalize such private sexual conduct, following the recommendations of the Model Penal Code of the American Law Institute. Seven years elapsed before Connecticut became the second state to adopt those recommendations. Today there are twenty-three states in all which have recognized a right to sexual privacy by decriminalizing such conduct either legislatively or judicially.[43/]

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42/ *California Statues*, 1975, chapter 71, section 10 and chapter 877, section 2.

43/ Alaska, California, Colorado, Connecticut, Delaware, Hawaii, Illinois, Indiana, Iowa, Maine, Nebraska, New Hampshire, New Jersey, New Mexico, North Dakota, Ohio, Oregon, Pennsylvania, South Dakota, Washington, West Virginia, Wyoming, Vermont.

IV(b)

Recognition of Sexual Privacy by the Federal Judiciary

The right to privacy is not specifically mentioned in the United States Constitution. That concept gained significance as a legal right in the famous law review article by Samuel D. Warren and Louis B. Brandeis written in 1890.[44/] They emphasized the need for judicial protection against the ever increasing invasions of individual privacy. They recognized that the exact scope of this right would develop as society changed and that it would be necessary for judges to "define anew the exact nature and extent of such protection."

This law review article became a catalyst for judicial recognition of the right to privacy in American jurisprudence.[45/] In its early development the right to privacy was found to stem from the Fourth and Fifth Amendments. The United States Supreme Court described these Amendments as a shield against governmental invasions "of the sanctity of a man's home and the privacies of life."[46/] In *Union Pacific Railroad v. Botsford* (1891) 141 U.S. 250, 251, the Supreme Court held that the right to privacy encompasses the right of individuals to control their own bodies, stating:

> No right is held more sacred, or is more carefully guarded . . . than the right of every individual to the possession and control of his own person, from all restraint or interferences of others.

No discussion of the early history of the right to privacy and its judicial recognition would be complete without reference to Justice Brandeis' dissenting opinion in *Olmstead v. United States* (1928) 277 U.S. 438, 478.

> The makeres of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings and of his intellect. They knew that only a part of the pain, pleasure and satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. *They conferred, as against the government, the right to be let alone, the most comprehensive of rights and right most valued by civilized men.* To protect that right, every unjustifiable intrusion by the government upon the privacy of the individual, whatever the means employed, must be deemed a violation . . . . (Italics added.)

44/ Warren and Brandeis, "The Right to Privacy," 4 *Harv.L.Rev.* 253 (1967).
45/ H.R. Rodgers, "A New Era of Privacy," 43 *N.D.L.Rev.* 193 (1890)
46/ *Boyd v. United States* (1886) 116 U.S. 616, 630.

The right to control one's own body in deciding medical treatment, for example, is not restricted to the wise. The now Chief Justice Burger, in his dissent in *Application of President & Board of Directors of Georgetown Col.*, 118 U.S.App.D.C. 90, at page 97, 331 F.2d 1010, at page 1017, commented:

> Nothing in this utterance suggests that Justice Brandeis thought an individual possessed these rights only as to sensible beliefs, valid thoughts, reasonable emotions, or well-founded sensations. I suggest he intended to include a great many foolish, unreasonable and even absurd ideas which do not conform, such as refusing medical treatment even at great risk. (Emphasis added.)

This basic foundation--beyond constitution and statute--of the right to privacy is found in the classic treatise, On Liberty, by John Stuart Mill (George Routledge 1905). In that work, the philiosophical underpinnings find their most literate expression:

> [T]here is a sphere of action in which society, as distinguished from the individual, has, if any, only an indirect interest; comprehending all that portion of a person's life and conduct which affects only himself, or if it also affects others, only with their free, voluntary, and undeceived consent and participation. When I say only himself, I mean directly, and in the first instance; for whatever affects himself, may affect others through himself; . . . . This then, is the appropriate region of human liberty. It comprises, first, the inward domain of consciousness; demanding liberty of conscience, in the most comprehensive sense; liberty of thought and feeling; absolute freedom of opinion and sentiment on all subjects, practical or speculative, scientific, moral, or theological . . . . Secondly, the principle requires liberty of tastes and pursuits; of framing the plan of our life to suit our own character; of doing as we like, subject to such consequences as may follow; without impediment from our fellow-creatures, so long as what we do does not harm them, even though they should think our conduct foolish, perverse, or wrong . . .
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> . . . The only freedom which deserves the name, is that of pursuing our own good in our own way, so long as we do not attempt to deprive others of theirs, or impede their efforts to obtain it. Each is the proper guardian of his own health, whether bodily, or mental and spiritual. Mankind are greater gainers by suffering each other to live as seems good to themselves, than by compelling each to live as seems good to the rest.

In addition, Mill gives substance to the concept of "compelling state interest" when he asserts:

> . . . one very simple principle, as entitled to govern absolutely the dealings of society with the individual in the way of compulsion and control, whether the means used be physical force in the form of legal penalties, or the moral coercion of public opinion. That principle is, that the 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. He cannot rightfully be compelled to do or forbear because it will be better for him to do so, because it will make him happier, because, in the opinions of others, to do so would be wise, or even right. These are good reasons for remonstrating with him or reasoning with him, or persuading him, or entreating him, but not for compelling him, or visiting him with any evil in case he do otherwise. To justify that, the conduct from which it is desired to deter him, must be calculated to produce evil to someone else. The only part of the conduct of any one, for which he is amenable to society, is that which concerns others. In the part which merely concerns himself, his independence is, of right, absolute. *Over himself, over his own body and mind, the individual is sovereign.* (Emphasis added)

It was not until 1965 that the Supreme Court recognized that the right to privacy was a basic right implicitly protected by the Federal Constitution. *Griswold v. Connecticut* (1965) 381 U.S. 479. Although there was disagreement as to within which Amendments of the Constitution this right was to be impliedly found, seven justices agreed that it existed. Interestingly enough, the *Griswold* case involved the right to privacy in a sexual context. Since the case involved a married couple, the Court discussed the right in terms of "marital privacy."

Over the next twelve years the federal courts methodically expanded the parameters of the right to privacy. In 1967 the Supreme Court held that the right to privacy protects persons, not places; even when technically in a public place, a person may have a reasonable expectation of privacy against surreptitious governmental action. *Katz v. United States* (1967) 88 S.Ct. 507. In 1968 the United States Court of Appeals held that the Indiana sodomy law may violate the right to marital privacy

if it failed to allow a husband to assert a defense of "consent" in a prosecution for having anal intercourse with his wife. *Cotner v. Henry* (7th Cir., 1968) 394 F.2d 873, 875. In 1969 the Supreme Court again addressed the issue of sexual privacy in a case involving prosecution for possession of obscene material in the privacy of a person's home. In *Stanley v. Georgia* (1969) 394 U.S. 557, 564-565, the Court noted that an individual has a "right to satisfy his intellectual and emtional needs in the privacy of this own home." The Court added, "For also fundamental is the right to be free, except in very limited circumstances, from unwanted governmental intrusions into one's privacy." The next year a three-judge court voided the Texas sodomy law on the grounds that it provided for no exceptions from prosecution for private sexual relations and therefore violated the right to marital privacy. *Buchanan v. Batchelor* (N.D. Tex., 1970) 308 F.Supp. 729, 732-733.47/

That same year a federal court in California held that extramarital heterosexual cohabitation which was discreet -- not notorious or scandalous — was within the plaintiff's right to privacy and that the government could not condition employment on a waiver of that right. *Mindel v. U.S. Civil Service Commission* (N.D.Cal., 1970) 312 F.Supp. 584, 487. A decision from a federal court in the eastern part of the country also activated the right to privacy that year to protect a police officer from losing his job merely because he was a practicing nudist who gathered with fellow nudists on weekends. *Bruns v. Pomerleau* (D.Md., 1970) 319 F.Supp.58. In 1972 the Supreme Court ended the debate over whether the right they discussed in *Griswold* was limited to marital privacy. In *Eisenstadt v. Baird* (1972) 405 U.S. 438, 453, Mr. Justice Brennan, writing for the majority, stated:

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

That same year a three-judge court found that a Congressional enactment denying food stamps to needy households consisting of unrelated persons violated the right to privacy and freedom of association of such persons. The district court

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47/ Reversed on procedural grounds only.

recognized that such an attempt to regulate nontraditional living arrangements is inconsistent with fundamental values of privacy and personal autonomy. *Moreno v. Department of Agriculture* (D.C.D.C., 1972) 345 F.Supp. 310. In 1973 the Supreme Court further expanded the right to sexual privacy. In *Roe v. Wade* (1973) 410 U.S. 113, the Court held that a Texas abortion statute which forbade an abortion except to save the life of the mother violated the right to privacy. Even though important state interests were involved in protecting the fetus, the government interest was not compelling enough to infringe on the mother's freedom of choice to terminate the pregnancy at will during the first trimester. The *Roe* case again emphasized that this right to privacy was an *individual* right.

This ever expanding right to privacy continued to gain almost unrestricted momentum until the issue of homosexuality was raised. Two anonymous plaintiffs manufactured a civil suit to enjoin the enforcement of the Virginia sodomy law under which they said they feared prosecution because they were practicing homosexuals. In a two-to-one decision a three-judge district court denied them the relief sought — quoting from the Bible! *Doe v. Commonwealth's Attorney for the City of Richmond* (E.D.Va., 1975) 403 F.Supp. 1199. The Supreme Court, three justices dissenting, summarily affirmed after the plaintiff's appealed to that Court from the lower court ruling.[48/] The following year the Supreme Court clarified the import and precedential value of *Doe v. Commonwealth*. In *Carey v. Population Services International* (1977) 97 S.Ct. 2010, Justice Brennan, writing for the majority, stated that *Doe* is not to be considered binding precedent and that the extent to which private sexual conduct between consenting adults is protected by the Federal Constitution is still an open question.[49/]

Thus, while the federal courts and particularly the Supreme Court has recognized a right to privacy, with application to certain sexual matters, the full extent of that *federal* right and its application to private sexual conduct of adults is not yet resolved.

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48/ *Doe v. Commonwealth* (1976) 96 S.Ct. 1488-1490

49/ *Carey* at footnote 17.

IV(c)

State Court Decisions
and State Constitutions

Almost simultaneous with the seeming setback of *Doe v. Commonwealth*, several state appellate courts considered the issue of sexual privacy and found that the Federal Constitution protects private sexual relations between consenting adults. In *State v. Elliot* (N.M.App., 1975) 539 P.2d 207, the New Mexico Court of Appeals came to such a conclusion even though none of the parties or attorneys in the action raised the issue. That case involved a prosecution under the sodomy law of that state. The defendant was convicted under facts indicating that force was involved in obtaining the sex acts. The Court, *sua sponte*, held that the statute was overbroad in violation of the right to privacy because it did not provide for the defense of "consent." One year later the New Mexico Supreme Court reversed and held that the Court of Appeals should not have reached the issue on its own initiative.50/

Two different panels of the Arizona Court of Appeals also held that state's sodomy laws unconstitutional in 1975. In one case the defendant was charged with sodomizing his wife, and the other involved unmarried persons. In both cases force was alleged, and the defendants claimed "consent" as a defense. Both panels came to the conclusion that the Federal Constitution protects consensual sodomy in private. *State v. Bateman* (Ariz.App., 1975) 547 P.2d 732; *State v. Calloway* (Ariz.App., 1975) 542 P.2d 1147. The cases were consolidated for hearing in the Arizona Supreme Court, and the following year that court reversed both decisions. *State v. Bateman and Calloway* (Ariz., 1976) 547 P.2d 6. Citing the Bible, that court held that private sexual relations are constitutionally protected except insofar as the state has an interest in regulating them; ever since biblical times, the court said, the state has seen fit to prohibit deviate sexual relations.

Also in 1975, a trial court in New York held that the New York consensual sodomy law, which law allowed consensual sodomy between spouses but forbade it if the parties were not married to each other, violated the right to privacy and equal protection for single individuals. *People v. Rice & Mehr* (1975) 363 N.Y.S.2d 484. That case was later reversed by the New York Court of Appeals. That court felt that the record did not present sufficient facts for deciding the issue, and it therefore sent the case back to the trial court for further proceedings. The Court of Appeals did, however, indicate that *Doe v. Commonwealth* was not dispositive and that the

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50/ *State v. Elliot* (N.M. 1976) 551 P.2d 1352

Court might be receptive to deciding the privacy issue in a future case.[51/]

In 1976 the Iowa Supreme Court declared that state's sodomy law unconstitutional, holding that it violated the right to privacy of married couples and heterosexual unmarried individuals. *State v. Pilcher* (Iowa 1976) 242 N.W.2d 348. The court left open the question as to whether the right to privacy extended to homosexual relations in private, feeling somewhat uneasy on this issue in view of *Doe v. Commonweal* That same year the Iowa Legislature approved a bill to decriminalize private, adult, consensual sexual conduct for all adults regardless of sexual orientation.

The next year a fornication statute was declared unconstitutional by the New Jersey Supreme Court. In the case of *State v. Saunders* (N.J., 1977) 381 A.2d 333, the defendants were convicted under a statute which prohibited "an act of illicit sexual intercourse by a man, married or single, with an unmarried woman." Defendants raised constitutional objections to their conviction in the trial court. Although agreeing that the right to privacy had been expanded to include unmarried individuals by the *Eisenstadt* case in 1972, the trial judge concluded that the state's interest in preventing venereal disease and illegitimacy were sufficiently "compelling" to justify the prohibition.

On appeal, the New Jersey Supreme Court held:

> We conclude that the conduct statutorily defined as fornication involves, by the very nature, a fundamental personal choice. Thus, the statute infringes upon the right of privacy. Although persons may differ as to the propriety and morality of such conduct and while we certainly do not condone its particular manifestations in this case, such a decision is necessarily encompassed in the concept of personal autonomy which our Constitution seeks to safeguard . . .
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> As we stated earlier, the Court in *Carey* and *Wade* underscored the inherently private nature of a person's decision to bear or beget children. It would be rather anomalous if such a decision could be constitutionally protected while the more fundamental decision as to whether to engage in the conduct which is a necessary prerequisite to child-bearing could constitutionally prohibited. Surely, such a choice involves considerations which are at least as intimate and personal as those which are involved in choosing whether to use contraceptives. We therefore join with other courts which have held that such sexual activities between adults are

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[51/] *People v. Rice & Mehr* (N.Y., 1977) 363 N.E.2d 1371.

protected by the right of privacy . . .

Finally, we note that our doubts as to the constitutionality of the fornication statute are also impelled by this Court's development of a constitutionally mandated "zone" of privacy protecting individuals from unwarranted governmental intrusion into matters of intimate personal and family concern. It is now settled that the right of privacy guaranteed under the Fourteenth Amendment has an analogue in our State Constitution. Unlike the California Constitution which contains a specific provision guaranteeing the right to privacy, the New Jersey Constitution has no explicit provision on privacy. Notwithstanding that fact, the Court in New Jersey found the right to be implicit in other provisions.

Having found the fornication statute to impinge on the right to privacy, the court then considered whether it could be justified by any compelling state interest. Four reasons were argued by the State in support of the statute: preventing venereal disease, preventing an increase in illegitimate children, protecting the marital relationship, and protecting public morals.

In response to these arguments, the court held:

> [I]f the State's interest in the instant statute is that it is helpful in preventing venereal disease, we conclude that it is counter-productive. To the extent that any successful program to combat venereal disease must depend upon affected persons coming forward for treatment, the present statute operates as a deterrent to such voluntary participation. The fear of being prosecuted for the "crime" of fornication can only deter people from seeking such necessary treatment . . .
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> As the Court found in *Carey*, absent highly coercive measures, it is extremely doubtful that people will be deterred from engaging in such natural activities. The Court there rejected the assertion that the threat of unwanted pregnancy would deter persons from engaging in extramarital activities. (Citation) We conclude that the same is true for the possibility of being prosecuted under the fornication statute . . . If unavailability of contraceptives is not likely to deter people from engaging in illicit sexual activities, it follows that the fear of unwanted pregnancies will be equally ineffective . . .
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> The last two reasons offered by the State as compelling justifications for the enactment — that it protects the marital relationship and the public morals by preventing illicit sex — offer little additional support for

the law. Whether or not abstention is likely to induce persons to marry, this statute can in no way be considered a permissible means of fostering what may otherwise be a socially beneficial institution. If we were to hold that the State could attempt to coerce people into marriage, we would undermine the very independent choice which lies at the core of the right of privacy. . . .

This is not to suggest that the State may not regulate, in an appropriate manner, activities which are designed to further public morality. Our conclusion today extends no further than to strike down a measure which has as its objective the regulation of *private* morality. To the extent that [this statute] serves as an official sanction of certain conceptions of desirable lifestyles, social mores or individualized beliefs, it is not an appropriate exercise of the police power.

Fornication may be abhorrent to the morals and deeply held beliefs of many persons. But any appropriate "remedy" for such conduct cannot come from legislative fiat. Private personal acts between two consenting adults are not to be lightly meddled with by the State. The right to personal autonomy is fundamental to a free society. Persons who view fornication as opprobious conduct may seek strenuously to dissuade people from engaging in it. However, they may not inhibit such conduct through the coercive power of the criminal law. . . . The fornication statute mocks the dignity of both offenders and enforcers. Surely the dignity of the law is undermined when an intimate personal activity between consenting adults can be dragged into court and "exposed."

The following year a New Jersey appellate court, applying the principles of the *Saunders* case, declared that state's sodomy law unconstitutional.52/

A recent pronouncement on sexual privacy was delivered this year by a New York appellate court. In *People v. Onofre*, _____N.Y.S.2d _____, Appellate Division of the Supreme Court, Fourth Department, Case No. 914/1979, decided January 24, 1980, the defendant was prosecuted for violating that state's consensual sodomy law. The statute prohibited oral and anal sex, whether homosexual or heterosexual in nature. Only consensual sodomy within the marital relationship was not deemed criminal by this statutue. Over the years the New York Legislature had consistently refused to pass bills which would have decriminalized such consensual

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52/ *State v. Cuiffini*, App.Div.Super.Cit., Case No. A-1775-76, decided December 6, 1978.

conduct for the unmarried, thereby forcing individuals to address their privacy arguments to the courts.

The *Onofre* court examined the proferred state interests in regulating private sexual conduct.

> If the interest of the State is the general promotion of morality, we are then required to accept on faith the State's moral judgment. Equally important in the community of man would seem to be some degree of toleration of ideas and moral choices with which one disagrees. The State may have a paternalistic interest in protecting an individual from self-inflicted harm or self-degrading experiences. This again presupposes the validity of the state's judgment, and outright proscription of certain activity can easily become discriminatory governmental tyranny. Curtailing activity which offends the public is a legitimate State interest but the standard to be applied in such a case is the effect that behavior might have on a reasonable person, not the most sensitive member of the community. *Conduct which is carried on in an atmosphere of privacy between two parties by mutual agreement has little likelihood of offending a public not embarked on eavesdropping.* A State interest based upon the prevention of physical violence and disorder fails for the same reason. Sexual conduct with an unwilling partner or one incapable of consent is proscribed by other statutes. (Emphasis added.) *Onofre*, at page 4 of slip opinion.

With respect to the recognition of the right to sexual privacy, no better words can be found:

> Personal sexual conduct is a fundamental right, protected by the right to privacy because of the transcendental importance of sex to the human condition, the intimacy of the conduct, and its relationship to a person's right to control his or her own body (citation). This right is broad enough to include sexual acts between non-married persons (citations) and intimate consensual homosexual conduct (citiation). *Onofre*, at page 3 of the slip opinion.

The most recent state court decision outside of California which recognizes a right to sexual privacy is *Commonwealth of Pennsylvania v. Bonadio*, ____ A.2d ____, Pennsylvania Supreme Court Case No. 105, March term, 1979, filed May 30, 1980. In that case the defendants were arrested at an "adult" pornographic theatre on charges of voluntary deviate sexual intercourse. "Deviate sexual intercourse" was defined by statute as including oral or anal sexual conduct between human beings

who are not husband and wife. Defendants claimed that the classification created by the statute was an infringment on their rights as unmarried persons and for this reason the statute violated equal protection. The Commonwealth argued that the statutory exception for spouses was in furtherance of a legitimate state interest in promoting the privacy inherent in the marital relationship. The Pennsylvania Supreme Court declared the "sodomy" statute unconstitutional on its face because it created impermissible distinctions between married and unmarried persons with respect to sexual conduct in private.

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IV(d)

California's Recognition of Sexual Privacy

Previous to 1970 most judicial statements in California concerning privacy pertained to the law of torts. Tortious invasions of privacy usually took one of four manifestations: (1) the commericial appropriation of a person's name or likeness, (2) intrusion on one's physical solitude or seclusion, (3) publicity placing one in a false light in the public eye, and (4) public disclosure of true embarrassing facts about a person.53/

The California Supreme Court recognized the Federal Constitutional right to privacy in a lawsuit attacking the constitutional validity of a statute requiring public disclosure of the financial interests of candidates for public office. In *City of Carmel-by-the-Sea v. Young* (1970) 2 Cal.3d 259, the Court declared the statute unconstitutionally overbroad because it intruded into both relevant and irrelevant private financial affairs of numerous public officials and employees and was not limited to only such holdings as might be affected by the duties or functions of a particular public office. The Court held that a government purpose to control or prevent activities which are constitutionally subject to state regulation may not be achieved by means which sweep unnecessarily broadly and thereby invade protected freedoms. The Court then recognized that the right to privacy is a basic right even though not expressly mentioned in the Federal Constitution. The Court held that one's personal financial affairs are protected by the right to privacy, stating:

> [T]he right of privacy concerns one's feelings and one's own peace of mind (citation omitted) and certainly one's personal financial affairs are an essential part of such peace of mind.54/

The privacy provision of the California Constitution, article 1, section 1,55/ is independent from and broader than the protections afforded under the Federal Constitution. "The [federal] Constitution does not explicitly mention any right of privacy." *Roe v. Wade* (1973) 93 S.Ct. 705, 726. Until recently, neither did the California Constitution. The Court of Appeal in *N.O.R.M.L. v. Gain* (1979) 161 Cal.Rptr. 181, 183-184, sets out a summary of the history of California's *explicit*

53/ Prosser, Torts (4th Ed.) Section 117, pp. 804-814.

54/ *City of Carmel-by-the Sea v. Young* (1970) 2 Cal.3d 259, 268.

55/ As reworded by further amendment in 1974, article 1, section 1, now reads:

> All people are by nature free and independent, and have certain inalienable rights. Among these are enjoying and defending life and liberty, acquiring, possessing and protecting property, and pursuing and obtaining safety, happiness, and privacy.

constitutional right to privacy:

> [I]n November 1972, the voters of California specifically amended article 1, section 1 of our state Constitution to include among the various "inalienable" rights of "all people" the right of privacy. *White v. Davis* 13 Cal.3d 757, 773, 120 Cal.Rptr. 94, 105, 533 P.2d 222, 233.
>
> A definitive map detailing the outside dimensions of this amendment's protections has not yet been published by the California courts. *(Valley Bank of Nevada v. Superior Court* (1975) 15 Cal.3d 652, 656, 125 Cal.Rptr. 553, 542 P.2d 977, see *People v. Privitera* (1979) 23 Cal.3d 697, 711, 153 Cal.Rptr. 431, 439, 591 P.2d 919, 927. (Bird, C.J. Diss, Opn.: "The right of privacy is a concept of as yet undetermined parameteres.") However, we have learned enough from the first sketchings *(People v. Privitera, supra)* to disagree with respondent's opinion that the right is limited to protection from governmental snooping.
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> *People v. Privitera, supra,* determined only that the right under consideration does not encompass "a right of access to drugs of unproven efficacy" in the treatment of terminal cancer. (23 Cal.3d at p.709, 153 Cal.Rptr. at p. 438, 591 P.2d at p. 926.) Although the majority there also noted that the "principle objective" of the constitutional amendment was to restrain information activities of government and business, the decision does not purport to constrain the application of this constitutional protection to such cases. (Id., at pp. 709 710 153 Cal.Rptr. 431, 591 P.2d 919.)

Furthermore, the United States Supreme Court decisions regarding the right of privacy are not binding on California courts.

> In such constitutional adjudication, our first referent is California law and the full panoply of rights Californians have come to expect as their due. Accordingly, decisions of the United States Supreme Court defining fundamental rights are persuasive authority to be afforded respectful consideration, but are to be followed by California courts only when they provide no less individual protection than is guaranteed by California law. *Serrano v. Priest,* 18 Cal.3d 728, 764, 135 Cal.Rprt. 345, 366, 557 P.2d 929, 950, quoting *People v. Longwill,* 14 Cal.3d 943, 951, fn. 4, 123 Cal.Rptr. 297, 538 P.2d 753.

It must be noted again that the right of privacy is "a concept of as yet undetermined parameters . . ." See dissent in *People v. Privitera* (1979) 23 Cal.3d

697, 153 Cal.Rptr. 431. The concept is yet expanding and as yet judicially unmeasured.

The People's brief in the municipal court implied that the California right to privacy is narrowly limited to instances of privacy invasions by way of clandestine surveillance. A circumspect reading of *Privitera, supra*, and *N.O.R.M.L., supra*, indicate to the contrary. The "legislative history" of the California constitutional right to privacy closely parallels the thoughts, in fact uses the exact words, of Justice Brandeis in his dissent in *Olmstead v. United States* (1928) 48 S.Ct. 564.56/ Based upon the "legislative intent" derived from the language of the 1972 California election brochure, one must conclude that this right is not merely a shield against threats to personal freedom posed by modern surveillance activities.57/

The People's position that the right to privacy in the California constitution is narrowly limited to instances of privacy invasions by way of clandestine surveillance has also been rejected by a majority of the California Supreme Court in the case of *City of Santa Barbara v. Adamson* (1980) 164 Cal.Rptr. 539. In his dissenting opinion in that case, Justice Manuel, joined by Justices Clark and Richardson, states:

> The majority, faced with the authorities delineated above, quite understandably chooses to shift their focus away from the protections offered by the Federal constitution. Turning instead to the comprehensive terms of article 1, section 1 of the state constitution, and seizing upon certain expansive general passages to be found in *White v. Davis* (1975) 13 Cal.3d 757, 120 Cal.Rptr. 94, 533 P.2d 222, they quickly and without significant discussion conclude that the right of privacy set forth in that

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56/ See page 29 of this brief.

57/ The argument in favor of the 1972 amendment contained at p.28 of the California Voter's Pamphlet (1972) stated:

> The right of privacy is a right to be left alone. It is a fundamental and compelling interest. It protects our homes, our families, our thoughts, our emotions, our expressions, our personalities, our freedom of communion and our freedom to assoicate with people we choose.
>
> The right to privacy is much more than "unnecessary wordage." It is fundamental to any free society. Privacy is not now guaranteed by our State Constitution. This simple amendment *will extend various court decisions* on privacy to insure protection of our basic rights.

See also *White v. Davis* (1975) 13 Cal.3d 757, 774. The Supreme Court in *White* acknowledged the propriety of judicial resort to such ballot arguments as an aid in construing such amendments. *White*, 775, at footnote 11

This new constitutional provision was self-executing and needed no enabling legislation. It conferred a judicial right of action on all Californians not only against government intrusions but also against encroachments by private individuals. *White, supra*, at p.773.

provision "comprehends the right to live with whomever one wishes or, at least, to live in an alternate family with persons not related by blood, marriage or adoption." (Citation to majority opinion) Having just discovered the "fundamental" right they seek, they then proceed to set in motion the mighty engine of strick scrutiny. The ordinance, needless to say, does not survive its batterings.

The *Adamson* case lays to rest, once and for all, the argument that the California constitutional right to privacy protects individuals only against surreptitious electronic surveillance. Instead, a majority of the California Supreme Court has recognized that it protects the individual with respect to personal or intimate decisions regarding his or her life style.

In 1973 the California Supreme Court did directly address the issue of sexual privacy. *People v. Triggs* (1973) 8 Cal.3d 884, dealt with clandestine observations by police officers of unsuspecting users of men's restrooms. The Court unanimously stated:

> Most persons using public restrooms have no reason to expect that a hidden agent of the state will observe them. The expectation of privacy a person has when he enters a restroom is reasonable and is not diminished or destroyed because the toilet stall being used lacks a door.
>
> Reference to expectations of privacy as a Fourth Amendment touchstone received the endorsement of the United States Supreme Court in *Katz v. United States* (1968) 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576. Viewed in the light of *Katz*, the standard for determining what is an illegal search is whether defendant's "reasonable expectation of privacy was violated by unreasonable governmental intrusion."58/

The Court specifically based its decision in *Triggs* on the Fourth Amendment to the United States Constitution and on article I, section 19 of the State constitution, recognizing that under the State constitution, the Court retains the power to impose higher standards on searches and seizures than required by the Federal Constitution.59/ Article I, Section 19 contains a "guarantee of personal privacy" against unreasonable searches or seizures.60/

In 1975 the California Legislature voted to decriminalize private sexual conduct between consenting adults by repealing prohibitions against consensual sodomy,

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58/ *People v. Triggs* (1973) 8 Cal.3d 884, 891.
59/ *Ibid*, at p.892, footnote 5.
60/ *People v. Cahan* (1955) 44 Cal.2d 434, 438.

oral copulation, and adulterous cohabitation. The "Consenting Adults Act" or the so-called "Brown Bill" (named after Assembly person Willie Brown (D/San Francisco)) became effective on January 1, 1976.61/ This manifested a major philosophical change and a legal recognition that the state has no business regulating the private morals and private lives of its adult residents in matters of consensual sexual behavior. Later, it would be seen that the "Consenting Adults Act" created two major inconsistencie in the state's penal law.62/

In 1976 the California Court of Appeal granted injuctive relief against a policy regulation of a local housing authority which prohibited rentals to unmarried cohabitors of the opposite sex. The court in *Atkisson v. Kern County Housing Authority* (1976) 59 Cal.App.3d 89, stated:

> The section X.A. policy regulation with which we are concerned automatically presumes immorality, irresponsibility and the demoralization of tenant relations from the fact of unmarried cohabitation. Such presumptions are not necessarily universally true in fact. As such the policy creates an unconstitutional *irrebutable presumption* and must be held to be invalid denial of due process.

The court then discussed cases such as *Griswold* and *Eisenstadt* regarding the right to privacy. It noted that the ban against unmarried cohabiting adults was not merely a regulation but a *total prohibition*. As such, the court held, the "ban contravenes the principles laid down in the above cases and is an invalid infringement of the right of privacy." *Atkisson, supra*, at 98.

Last year Edmund G. Brown Jr., Governor of California, issued Executive Order B-54-79, prohibiting administrative agencies under the jurisdiction of the Governor from discriminating in state employment against any individual solely upon the individual's sexual preference. The primary premise for this order was that "Article I of the California Constitution guarantees the inalienable right of privacy for all people which must be vigorously enforced. . ."63/ This placed the Executive Branch in congruence with the Legislature and Judiciary in recognizing the right to sexual privacy in California as a basic right entitled to special protection.

61/ *California Statutes*, 1975, chapter 71, section 10 & chapter 877, section 2.

62/ One was an inconsistency with subdivision (a) of Section 647 of the Penal Code which prohibited soliciting a lewd act. Ther other is the inconsistency with subdivision (b) of the same section which prohibits engaging in a lewd act for money or other consideration.

63/ The full text of the executive order, issued by Governor Brown on April 4, 1979, reads:

(footnote cont'd)

Also last year the California Supreme Court strictly scrutinized subdivision (a) of Section 647 which prohibits a person, while in a public place, from soliciting or engaging in lewd or dissolute conduct. Much can be learned from *Pryor* v. *Municipal Court* (1979) 25 Cal.3d 238, regarding a method of analyzing the scope and constitutionalit of subdivision (b) of the same section of the Penal Code.

In *Pryor* the petitioner raised several questions concerning the definition of words, freedom of speech, constitutional vagueness and overbreadth, and inconsistency with recent legislative enactments, many of which are the same legal issues involved in the instant case. While a literally identical approach may not be appropriate for an analysis of the defects of subdivision (b), the basic legal and philosophical approach of *Pryor* should prove to be helpful.

At this juncture only the privacy aspects of the *Pryor* decision will be reviewed. The Supreme Court took notice of the passage of the "Consenting Adults Act" and attempted to reconcile any inconsistencies between that act and subdivision (a) of Section 647. In order to avoid First Amendment problems, the Court overruled two previous appellate decisions which held that public solicitation of private sexual conduct was prohibited by 647(a).64/ "[W]e conclude that *Mesa* and *Dudley* are inconsistent with the protection of private conduct afforded by the Brown Act and are no longer viable. . ." *Pryor* at page 254. Furthermore, the Court held that for puposes of Section 647(a), some places would no longer be considered "open to the public" thus recognizing privacy protection for sexual activity conducted within their confines.

WHEREAS, Article I of the California Constitution guarantees the inalienable right of privacy for all people which must be vigorously enforced; and

WHEREAS, government must not single out sexual minorities for harassment or recognize sexual orientation as a basis for discrimination; and

WHEREAS, California must expand its investment in human capital by enlisting the talent of all members of society;

NOW, THEREFORE, I, Edmund G. Brown Jr., Governor of the State of California, by virtue of the power of and authority vested in me by the Constitution and statutes of the State of California, do hereby issue this order to become effective immediately:

The agencies, departments, boards, and commissions within the Executive Branch of state government under the jurisdiction of the Governor shall not discriminate in state employment against any individual based solely upon the individual's sexual preference. Any alleged acts of discrimination in violation of this directive shall be reported to the State Personnel Board for resolution.

64/ *People* v. *Mesa* (1968) 265 Cal.App.2d 746 and *People* v. *Dudley* (1967) 250 Cal.App.2d Supp. 955.

In re Steinke, supra, which involved sexual acts in a closed room in a massage parlor, suggested that a closed room made available to different members of the public at successive intervals was a place "open to the public" under section 647, subdivision (a). (See 2 Cal.App.3d at p.576, 82 Cal.Rptr. 789; *People v. Freeman* (1977) 66 Cal.App.3d 424, 428-429, 136 Cal.Rptr. 76.) We do not endorse that interpretation, which would render a fully enclosed toilet booth (cf. *Bielicki v. Superior Court* (1962) 57 Cal.2d 602, 21 Cal.Rptr. 552, 371 P.2d 288), a hotel room (cf. *Stoner v. California* (1964) 376 U.S. 483, 84 S.Ct. 889, 11 L.Ed2d 856), or even an apartment a place "open to the public" under this section. *Pryor,* at page 256, footnote 12.

Only this year the California appellate courts again issued a decision concerning the right to sexual privacy. In *Wellman v. Wellman* (1980) 164 Cal.Rptr. 148, 152, footnote 5 states:

> While the United States Supreme Court has left open the question whether the "zone of privacy" recognized in *Griswold v. Connecticut* (1965) 381 U.S. 479, 485, 85 S.Ct. 1678, 1682, 14 L.Ed.2d 510, includes consensual sexual behavior among adults *(Carey v. Population Services International* (1977) 431 U.S. 678, 694, fn. 17, 97 S.Ct. 2010, 2021, fn. 17, 52 L.Ed.2d 675), we note that several lower courts have answered that question in the affirmative. (E.g., *State v. Saunders* (1977) 75 N.J. 200, 381 A.2d 333, 339 340; *Mindel v. United States Civil Service Commission* (N.D.Cal. 1970) 312 F.Supp. 485; cf. *Major v. Hampton* (E.D.La. 1976) 413 F.Supp. 66, 70; *Goodrow v. Perrin* (N.H.1979) 403 A.2d 864, 865-866.) As the New Jersey court reasoned in *Saunders, supra,* "It would be rather anomalous if [a person's decision to bare or beget children] could be constitutionally protected while the more fundamental decision as to whether to engage in the conduct which is a necessary prerequisite to child-bearing could be constitutionally prohibited." (381 A.2d, at p. 340) At least one decision of the California Court of Appeal appears to be in accord. *(Fults v. Superior Court* (1979)[65/] 88 Cal.App.3d 899, 904, 152 Cal.Rptr. 210, and see *Atkisson v. Kern County Housing Authority* (1976) 59 Cal.App.3d 89, 98, 130 Cal.Rptr. 375) Our state Supreme Court has referred to a constitutional right of privacy "in matters related to marriage,

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[65/] The court in *Fults* considered "one's sexual relations" as a "well established 'zone of privacy.'"

family, and sex." (*People v. Belous* (1969) 71 Cal.2d 954, 963, 80 Cal.Rptr. 354, 359, 458 P.2d 194, 199.)"66/

In summary, voters have recognized a right to privacy by amending the State constitution. The Legislature acted in furtherance of this right when it decriminali: most forms of private sexual behavior between consenting adults. The Governor built upon this foundation when he issued an executive order prohibiting sexual orientation discrimination. The Supreme Court has declared statutes unconstitutional when they infringed on certain privacy rights; it has recognized another privacy protection in yet another section of the California Constitution which protects all person against unreasonable searches or seizures; and it has attempted to harmonize statutes which apparently conflicted with these recognized privacy rights.

It is thus abundantly clear that this state has a comprehensive policy of protecting sexual conduct in private. The prohibition against sexual conduct in private when money or other consideration is involved seems to be inconsistent with this pervasive policy, and, for that reason, Section 647, subdivision (b) needs to be carefully scrutinized by the courts.

The following pages will deal with specific legal defects in the prostitution statute and suggestions for remedying those defects.

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66/ The *Wellman* court also stated: "[S]uch conduct has been held to to be within the penumbra of constitutional protection afforded rights of privacy. . . so that intrusion by the state in this sensitive area is not a matter to be taken lightly."

V

LEGAL ISSUES PRESENTED

1. Is private sexual conduct between consenting adults or the decision to engage therein protected by the right to privacy under the State and Federal Constitutions?

2. What level of scrutiny should be used to determine the constitutionality of a statute regulating such private sexual conduct?

3. Is Section 647(b) unconstitutionally overbroad in violation of the right to privacy in that it prohibits all procreational, theraputic, and recreational sex merely because money or other consideration is involved?

4. Does Section 647(b) violate the due process and privacy clauses of the State or Federal Constitutions because it infringes on the freedom of choice of individuals to privately offer money or other consideration in order to receive the amount or kind of sexual services that individual desires?

5. What compelling state interest justifies the total prohibition of such private sexual conduct merely because money or other consideration is involved?

6. Is Section 647(b) unconstitutionally vague because it fails to properly define prostitution when it uses such language as "any lewd act" or "other consideration"?

7. If some or all forms of private sex for money or other consideration are constitutionally protected, does Section 647(b) violate the free speech clauses of the State and Federal Constitutions because it appears to prohibit private and nonoffensive speech as well as public and offensive accosting and soliciting?

8. Can the scope of Section 647(b) be narrowed by the courts so that it is harmonized with the state policy protecting sexual privacy as well as avoiding constitutional problems of vagueness and overbreadth?

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VI

ISSUE 1

PRIVATE SEXUAL CONDUCT BETWEEN CONSENTING ADULTS OR THE DECISION TO ENGAGE THEREIN IS PROTECTED BY THE RIGHT TO PRIVACY UNDER THE STATE AND FEDERAL CONSTITUTIONS

Without restating all of the arguments and authorities contained in Sections IV(a),(b),(c), and (d) of this brief, it is important to note that not merely conduct itself is protected by the right to privacy, but also the *personal decision* whether to engage in private sexual conduct as well as the *personal decision* as to the manner of engaging in such private sexual conduct, are protected by the right to privacy implicit in the Federal constitution and explicit in article 1 section 1 of the California constitution. Any attempt by the legislature to control that decision or to prohibit such conduct must be supported by a compelling state interest. The most recent California case which bears on this point is *Lasher v. Kleinberg* (1980) 164 Cal.Rptr. 618. In the Lasher case a minor child and its mother, as guardian et litem, brought a paternity suit against Stephen Kleinberg. After admitting paternity, Stephen filed a cross-complaint for fraud, negligent misrepresentation and negligence. Stephen alleged that the mother had falsely represented that she was taking birth control pills and that in reliance upon such representation Stephen engaged in sexual intercourse with her which eventually resulted in the birth of a baby girl unwanted by Stephen. Stephen further alleged that as a "proximate result" of her conduct he had become obligated to support the child financially as well as incurring other damages. After the mother moved for a judgment on the pleadings, the trial court dismissed the cross-complaint. Stephen appealed. On appeal the Court of Appeal states:

> The critical questions before us is whether Roni's conduct toward Stephen is actionable at all. Stephen claims it is actionable as a tort. . .
>
> Broadly speaking the word "tort" means a civil wrong other than a breach of contract, for which the law will provide a remedy in the form of an action for damages. It does not lie within the power of any judicial system, however, to remedy all human wrongs. There are many wrongs which in themselves are flagrant. For instance, such wrongs as betrayal, brutal words, and heartless disregard for the feelings of others are beyond any effective legal remedy and any practical administration of law. (Citation)

To attempt to correct such wrongs or give relief from their effects "may do more social damage than if the law leaves them alone. . . .

We are in effect asked to attach tortious liability to the natural results of consensual sexual intercourse. . . . Claims such as those presented by plaintiff Stephen in this case arise from conduct so intensely private that the courts should not be asked to nor attempt to resolve such claims. Consequently, we need not and do not reach the question of whether Stephen has established or pleaded tort liability on the part of Roni under recognized principles of tort law. In summary, although Roni may have lied and betrayed the personal confidence reposed in her by Stephen, the circumstances and the highly intimate nature of the relationship wherein the false representations may have occured are such that a court should not define any standard of conduct therefor. . . .

The claim of Stephen is phrased in the language of the tort of misrepresentation. Dispite its legalism, it is nothing more than asking the court to supervise the promises made between two consenting adults as to the circumstances of their private sexual conduct. To do so would encourage unwarranted governmental intrusion into matters affecting the individual's right to privacy. In *Stanley v. Georgia* (1969) 394 U.S. 557, 564, 89 S.Ct. 1243, 1247, 22 L.Ed.2d 542, the high court recognized the right to privacy as the most comprehensive of rights and the right most valued in our civilization. Courts have long recognized a right of privacy in matters relating to marriage, family and sex. (Citations to *People v. Belous, Griswold v. Connecticut,* and *Eisenstadt v. Baird.)*

It is appropriate here to summarize the changes in the law since 1961 which make necessary a re-examination of P.C. 647(b). Previous to 1961, the California Legislature did not prohibit private acts of prostitution. Section 647, subdivision 10 prohibited being a "common prostitute" which required as a matter of proof, a course of conduct showing common, indiscriminate sexual intercourse for hire. The regulation of such a course of conduct did not require the police nor the courts to inquire into the private sexual behavior of its citizens. Instead a showing that a person had violated the statute could be made with testimony regarding that person's *course of conduct* in public, without regard to his or her private decisions.

In 1961 the legislature, for the first time, asked the police, prosecutors, and courts to inquire into the private and personal decisions of its citizens when it prohibited all forms of private solicitation or private engaging in sex for any considera-

tion.

When section 647(b) P.C. was first enacted, the right to sexual privacy was yet unrecognized. That right was first found to be implicit in the Federal Constitution in 1965 when the U.S. Supreme Court decided the case of *Griswold v. Connecticut, supra.* The right has been recognized as being specifically protected by article 1, section 1, of the California constitution by legislative, executive, and judicial decisions subsequent to 1972 when that state privacy protection was first enacted by the voters. There exists a state policy protecting sexual privacy, as evidenced by resent developments in California, e.g., passage of the "consenting adults act" by the legislature, (which decriminalized private sexual behavior such as sodomy and adultery), issuance of an Executive Order on sexual orientation discrimination by the Governor, and by holdings of the California Supreme Court and California Courts of Appeal in this state, *(Belous, Triggs, Pryor, Adamson, Wellman, Fults, Atkisson,* and *Lasher, supra).*

There can be no question that private sexual conduct between consenting adults, and the decisions as to whether or not or how to engage in such private conduct is protected by the right to privacy in the state and federal constitutions. Ultimately, the question is, whether this privacy right is lost merely because that decision involves some form of consideration passing between the parties.

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VII

ISSUE 2

REGULATION OF PRIVATE SEXUAL CONDUCT SHOULD BE STRICTLY SCRUTINIZED BY THE COURTS AND SHOULD BE VOIDED ABSENT A SHOWING THAT THERE IS A COMPELLING STATE INTEREST FOR THEIR RETENTION

Whenever a statute directly infringes upon a fundamental right resting in the individual which right is guaranteed either explicitly in the Constitution (privacy) or implicitly by the development of constitutional doctrine, that statute is subject to strict scrutiny. Since Section 647(b) prohibits consenting adult sexual behavior in private, it directly affects the fundamental right to privacy as contained in article I, section 1 of the State constitution, the due process clause of the Fourteenth Amendment to the United States Constitution, and the due process clause of the California constitution. As a result, California law is clear that Penal Code Section 647(b) must be strictly scrutinized, and the engaging portion of that statute must be declared an unconstitutional prohibition of private sexual conduct, unless the People can demonstrate (1) a compelling state interest in such a total prohibition and (2) that the engaging portion is narrowly drawn to achieve a legitimate interest. *Cotton v. Municipal Court* (1976) 59 Cal.App.3d 601; *Paying v. Superior Court* (1976) 17 Cal.3d 908; *Spencer v. G. A. MacDonald Construction Co.* (1976) 63 Cal.App.3d 836; *Serrano v. Priest* (1976) 18 Cal.3d 728; *Gray v. Whitmore* (1971) 17 Cal.App.3d 1; *Weber v. City Council of Thousand Oaks* (1973) 9 Cal.3d 950; *Reece v. Alcoholic Beverage Control Board* (1976) 64 Cal.App.3d 675; *In re Ahmed's Adoption* (1975) 44 Cal.App.3d 810; *D'Amico v. Board of Medical Examiners* (1974) 11 Cal.3d 1.

Where the government restriction is designed to regulate "socially evil conduct" which creates only an *indirect tension* with a fundamental right, the restriction will fail unless: (1) it is within the constitutional power of the government; (2) it furthers an important or substantial government interest; (3) the government interest is unrelated to the suppression of free expression; *and* (4) if the incidental restriction on alleged constitutional protections is no greater than is essential to the furtherance of that interest. *People ex rel. Van de Kamp v. American Art, supra,* at 530.

Finally, even where a law does not directly or indirectly infringe on fundamental rights, it will still be declared unconstitutional in violation of due process if it is based upon false premises, i.e., if it is arbitrary and irrational.

The engaging portion of Section 647(b) prohibits all acts of sexual intercourse

in private for money or other consideration. The soliciting portion prohibits all attempts to secure consent to engage in such conduct, whether the request is in public or in private, whether offensive or discreet. Such a total prohibition results in a direct or, at least, an indirect infringement on the right to sexual privacy. Therefore, the People must show what compelling or substantial government interests require such a broad statute.

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VIII

ISSUE 3

THE ENGAGING PORTION OF SECTION 647(b)
IS OVERBROAD AND VIOLATES
THE RIGHT TO PRIVACY BECAUSE
IT TOTALLY PROHIBITS SEXUAL CONDUCT
MERELY BECAUSE MONEY
OR OTHER CONSIDERATION IS INVOLVED

Section 647(b) prohibits engaging in any act of prostitution. "Prostitution" is defined as sexual intercourse for hire or any lewd act for money or other consideration. All forms of sexual conduct, whether procreational, theraputic, or recreational, are prohibited merely because money or other consideration is somehow injected into the relationship of the participants.

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VIII(a)

Procreational Sex Should be Protected

Procreational sex for money is outlawed by Section 647(b). In his dissenting opinion in the case of *Fournier v. Lopez* (attached with the exhibits for judicial notice by the Court), Court of Appeal Justice Parrish writes:

> The question is, may two people strike an enforceable bargain that if they have a baby, that between *themselves*, only one will be financially responsible for the child's upbringing?
>
> The majority say no because the agreement was based upon an "illicit consideration of meretricious sexual services." (*Marvin v. Marvin* (1976) 18 Cal.3d 660, 671, 672, 674, 683, 684.) They contend this was an agreement for prostitution. (*Marvin* at pp. 674, 686).
>
> Penal Code section 647, subdivision (b) proscribes prostitution. But to describe either the father, the mother or both in this case as a prostitute(s) is completely gratuitous.
>
> This was not a contract in aid of prostitution, it was an agreement in aid of procreation and as such cannot be deemed unenforceable as against public policy. *Fournier*, at page 6 of the slip opinion.

Section 647(b) is overbroad and violates the right to privacy in its prohibition of procreational sex for a consideration. This conclusion is supported by the *Lasher* case, *supra*, because whether or not sexual relations between consenting adults will be procreational or not "is best left to the individuals involved, free from any governmental interference. *Lasher, supra*, at p.621.

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VIII(b)

Theraputic Sex for a Consideration Should be Constitutionally Protected

Do single individuals have the same rights to sexual expression as married people? This question raises the controversial and often misunderstood subject of sex surrogates. For if the answer to this question is in the affirmative, then sex surrogates would be necessary in order to include single individuals in sex therapy when these individuals are unable to supply a suitable partner. The use of sex surrogates raises moral, ethical, professional, and legal problems that usually accompany such progressive techniques or ideas. Essential to a resolution of the conflicting considerations inherent in these issues is an understanding of this unique form of therapy.

SEX SURROGATE THERAPY:

The therapy, as described by Ms. Barbara M. Roberts, begins with sensate focus exercises.67/ This is a procedure of touching which helps the client become in touch with his body. This program includes touching excercises focusing upon various parts of the body. Touching of genitals is not made an essential part of this experience since much anxiety is usually focused there.68/ The general intent of this program is to sensitize the client's entire body. The exercises may include showering together but they are not specifically designed to be erotic. Rather, they are aimed at making the client aware of the sensation of touch.69/

It should be kept in mind that the use of sex surrogates is supervised by a sex therapist. A common misconception is that surrogate partner therapy is an entity unto itself -- separate and distinct from other forms of therapy. In reality, sex surrogate therapy is only a variation of sex therapy.70/ Ms. Roberts describes the role of the therapist as follows:

> Not only is the physical contact between the client and the surrogate part of the written or verbal contract of therapy, but *it is constantly being monitored by the therapist.* An integral part of surrogate partner

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67/ Barbara M. Roberts, M.S.W., *The Use of Surrogate Partners in Sex Therapy* (1979). Ms. Roberts is Director of the Center for Social and Sensory Learning in Los Angeles. She is a California state licensed therapist. The Center specializes in sex therapy for couples, and single men and women, with emphasis upon the development of intimacy as part of the treatment for sexual problems.

68/ *Id* at 8.

69/ *Id*

70/ *Id* at 4.

therapy is the fact that feelings on the part of either the client or the surrogate regarding physical *and emotional* intimacy are discussed openly with the therapist. A third person thereby takes responsibility for using and handling transference.[71]

Consultations between the surrogate and the therapist take place before each session during which the therapist will suggest what form the therapy is to take. Subsequent to each session of therapy, feedback sessions are conducted to enable the therapist to resolve differences of opinion, misunderstandings, and tensions between client and surrogate.

It becomes apparent upon a review of the sex surrogate therapy, that sex, as the word is commonly understood, is the least part of the therapy. If intercourse does take place, it is because the therapist has suggested it for a specific theraputic purpose.[72]

THE NEED FOR SEX SURROGATE THERAPY

The need for this type of therapy should be beyond question in light of the fact that "sexual inadequacy makes psychic invalids of thousands, more likely tens of thousands of Americans each year and fractures or disrupts countless marriages.[73] The treatment is usually successful to the point that in the twenty percent (20%) of the cases where the major symptoms are not completely eliminated, most patients reported less sexual stress, improved family relationships, or other significant benefits.[74]

When asked about the rationale justifying the use of sex surrogates, noted authority, Dr. William H. Masters, stated that he considered a single, sexually dysfunctional male a "social cripple."[75] "Does society want them treated?" he asked. "If they are not treated, it is a discrimination of one segment of society over another."[76]

The need for this type of therapy is further illustrated by statistical information which indicates the poor results of therapy administered to individuals without partners.

This situation has involved basic administrative and procedural decisions. Should the best possible climate for full return of theraputic effort be

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[71] *Id* at 7.

[72] Interview with Ms. Barbara M. Roberts, Playgirl Magazine, March, 1977.

[73] D. Leroy, *The Potential Liability of Human Sex Clinics and Their Patients*, 16 St. Louis Law Journal 586, 600 (1972).

[74] *Id*

[75] *Id* at 591.

[76] *Id*

created for the incredibly vulnerable unmarried males referred for constitution or reconstitution of sexual functions; or should there be professional concession to the mores of society, with full knowledge that if a decision to dodge the issue was made, a significant increase in percentage of therapeutic failures must be anticipated . . . It would have been inexcusable to accept referral of unmarried men and women and then give them statistically less than 25% chance of reversal of their dysfunctional status by treating them as individuals without partners.77/

One commentator has suggested that this therapy is necessary because "if single clients are not treated for sexual dysfunction, personal alienation will increase and cause further weakening of the social fibre."78/

POTENTIAL CRIMINAL LIABILITY

Laws proscribing prostitution usually prohibit the acts of hiring or attempting to hire a woman to engage in sexual conduct with another person. Although surrogate therapy occurs in a supervised medical environment, all or most of the participants may have committed offenses under the laws against prostitution. The potential for liability under various statutes has created problems in administering the therapy since the surrogate may insist on receiving the fee from the therapist. Similarly, the therapist may be reluctant to do this, fearing "legal accusation of pimping and the professional accusation of unethical practice."79/ If the therapist is not willing to actually pay the fee to the surrogate there is a resultant negative effect upon the therapy: "The surrogate is objectified and the client is given the impression that the sexual part of this therapy is separate from the core of therapy."80/

Specific forms of liability may be divided into various categories. The first and most obvious is the category of prostitution. A surrogate who offers services for money could be punishable as a female prostitute. Some statutes, including California's, are broad enough to impose similar liability for male surrogates.81/ Under statutes where employment or supervision is sufficient involvement, persons involved in administering therapy could be in violation of pandering and procuring statutes82/ by providing said surrogates to clients. Sex clinic personnel may also be

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77/ W. Master and V. Johnson, *Human Sexual Inadequacy*, 147-148 (1970)

78/ D. Leroy, *supra* note 7

79/ B. Roberts, *supra* note 1.

80/ *Id*

81/ *See, e.g.*, N.Y. Penal Law Sec. 230.00 (McKinney 1967).

82/ G. Mueller, *The Legal Regulation of Sexual Conduct*, 112-120 (1961).

subject to the laws proscribing pimping, as they may be deemed as persons soliciting others to become customers for prostitution.[83/]

The question is thus presented: Do the statutes prohibiting the above-described conduct apply to surrogate therapy? A two part test to determine the answer to this question has been suggested: "The enactment of penal laws requires an initial policy determination as to (1) those social and individual interests which should be protected by the criminal processes, and (2) the kinds of conduct that should be proscribed."[84/] It is submitted that "our society has such a desperate need for this type of treatment for both single and married persons that it cannot afford to consider valid sexual therapy as an illegal act . . . . Therapeutic intercourse in the sex clinic context must be considered a remedial necessity in American society, not an act of prostitution for which penal discouragement is needed."[85/]

The engaging portion of section 647, subdivision (b) should be declared unconstitutional in that it thus unduly discriminates against the right of unmarried persons to obtain effective sex therapy. Marrieds may seek sex therapy and bring their spouses with them as participating partners in the therapy. An unmarried, who has no partner, is either forced to undergo therapy without a sex partner, or to violate section 647, subdivision (b), by directly or indirectly paying for the services of a professional sex surrogate. The statute, therefore, infringes on the right of the single person to engage in the form of therapy prescribed by the sex therapist if the therapist and patient determine that the best form of therapy requires a sex surrogate. It also transforms the therapist and his office personnel into pimps and panderers. Therefore the engaging portion of section 647, subdivision (b), violates the equal protection clause of the state and Federal Constitutions as well as unneccesarily infringing on the right to privacy of unmarried individuals in a therapy situation.

The Pennsylvania Supreme Court declared the sodomy law of that jurisdiction unconstitutional because, while exempting married couples from its prohibition, it criminalized the same conduct when engaged in by unmarried individuals. In that case the Pennsylvania Supreme Court states:

> The Commonwealth's position is that the statute in question is a valid exercise of the police power pursuant to the authority to regulate

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83/ D. Leroy, *supra* note 7.

84/ George, *Legal, Medical and Psychiatric Consideration in the Control of Prostitution*, 60 Mich.L.Rev. 717, 718 (1961). It should again be noted that the California statute takes into account only the act, not the motivation. See *People v. Fixler* (1976) 56 Cal.App.3d 321.

85/ D. Leroy, *supra* note 7 at 600.

public health, safety, welfare and morals. Yet, the police power is not unlimited . . .

To justify the state in thus interposing its authority on behalf of the public, it must appear, first, that the *interest of the public generally,* requires such interference; and, second, that the means are reasonably necessary for the accomplishment of this purpose, and *not unduly oppressive on individuals.*

The threshold question in determining whether the statute in question is a valid exercise of the police power is to decide whether it benefits the public generally. The state clearly has a proper role to perform in protecting the public from inadvertant offensive displays of sexual behavior, in preventing people from being forced against their will to submit to sexual contact, in protecting minors from being sexually used by adults and in elimiating cruelty to animals. To accomplish these protections, a broad range of criminal statutes constitute valid police power exercises, including proscriptions of indecent exposure, open lewdness, rape, *involuntary* deviate sexual intercourse, indecent assault, statutory rape, corruption of minors, and cruelty to animals. The statute in question serves none of the foregoing purposes. It is nugatory to suggest that it promotes a state interest in the protection of marriage. The voluntary deviate sexual intercourse statute has only one possible purpose: to regulate the private conduct of consenting adults. Such a purpose, we believe, exceeds the valid bounds of the police power while infringing the right to equal protection of the laws guaranteed by the constitutions of the United States and of this Commonwealth.

With respect to regulation of morals, the police power should properly be exercised to protect each individual's right to be free from interference in defining and pursuing his own morality, but not to enforce a majority morality on persons whose conduct *does not harm others.* "No harm to the secular interests of the community is involved in atypical sex practice in private between consenting adult partners." Model Penal Code Section 207.5 - Sodomy and related offenses. Comment (TENT draft #4, 1955). Many issues that are considered to be matters of morals are subject to debate and no sufficient state interest justifies legislation of norms just because a particular belief is followed by a number of people, or even a majority. Indeed what is considered to be "moral" changes with the time

and is dependent upon societal background. Spiritual leadership, not the government, has the responsibility for striving to improve the morality of individuals. Enactment of the voluntary deviate sexual intercourse statute, dispite the fact that it provides punishment for what many believe to be abhorent crimes against nature and perceived sins against God, is not properly within the realm of the temporal police power. . . .

Not only does the statute in question exceed the proper bounds of the police power, but, in addition, it offends the constitution by creating a classification based on marital status (making deviate acts criminal when performed by unmarried persons) where such differential treatment is not supported by a sufficient state interest and thereby denies equal protection of the laws. . . .

The Commonwealth submits that the classification is justified on the grounds that the legislature intended to forbid, generally, voluntary "deviate" sexual intercourse, but created an exception for persons whose exclusion is claimed to further a state interest in promoting the privacy inherent in the marital relationship. We do not find such a justification for the classification to be reasonable or to have a fair and substantial relation to the object of the legislation. *Commonwealth of Pennsylvania v. Bonadio, supra*, at 2-6 of the slip opinion.[86/]

In response to the majority opinion in the *Bonadio* case, Justice Nex filed a dissenting opinion in which he states:

That the majority would suggest that it is beyond the state's power to regulate public health, safety, welfare, and morals is incredible. I assume that regulation of prostitution and hard-core pornography are also now prohibited by todays ruling.[87/]

For the same reasons expoused by the Supreme Court of Pennsylvania, this court should recognize that the engaging portion of section 647, subdivision (b), unconstitutionally infringes on the rights of unmarried persons to engage in sexual relations which would be lawful if engaged in by married persons, not only in sex therapy situations, but in general, assuming an implicit marital exception to the prostitution law. There has obviously never been an arrest or prosecution for a husband's inducing sexual favors from his wife by giving her objects of value.

[86/] _____ A.2d _____, Pennsylvania Supreme Court Case No. 105, March term, 1979, filed May 30, 1980.

[87/] Page 2 of the dissenting opinion of Justice Nex.

VIII(c)

Recreational Sex for Money
Should Not be Prohibited

Not only procreational, and theraputic sex for money or other consideration should be constitutionally protected by the right to privacy, but so should sexual activity which is purely recreational. As Judge Margaret Taylor stated in her excellent opinion on the constitutionality of New York's prostitution law, "However offensive it may be, recreational commerical sex threatens no harm to the public health, safety, or welfare and, therefore, may not be proscribed." *In re P* (1977) 400 N.Y.S.2d 455, 468.

The California Legislature has decriminalized recreational sex in private between consenting adults when no money or other consideration is involved. Why should such sex remain prohibited merely because some consideration is involved?

Obviously the engaging portion of Section 647(b) is not a regulatory but a prohibitory statute whereby no sexual activity may be engaged in for any consideration. There is no limitation on the proscription by age, sex, or relationship of the participants.

As the Court stated in *Galyon v. Municipal Court* (1964) 40 Cal.Rptr. 446, at 449:

> Thus the question is forthrightly presented: is it a proper exercise of the police power of the state to prohibit an act for hire which is not so prohibited for non-hire?

The *Galyon* court noted that the underlying conduct was not the basis for the prohibition since there was no statute proscribing it. Only when the conduct in question was done for hire was it made illegal.

When Section 647(b) was first enacted in 1961 and when the subsequent amendments were made in 1965 and 1969, many forms of private sex were illegal. Since the underlying conduct was often illegal, even when done purely and only out of love, there was no inconsistency in also making it illegal when done for money.

A statute valid when enacted may become invalid by a change in the conditions to which it is applied. *Nashville, C. & St. L. Ry. v. Walters* (1935) 55 S.Ct. 486; *Smith v. Illinois Bell Telephone Co.* (1930) 51 S.Ct. 65.

"A change of conditions may invalidate a statute which was reasonable and valid when enacted. (Citation) Also, due weight must be given to new and changed conditions (citations)." *Galyon, supra,* at 449. Taking a fresh look at a criminal statute, the Court in *Galyon* declared it to be unconstitutional which statute

prohibited the exhibition of one's own deformities or the deformities of another for hire.

Unlike the circumstances surrounding *Pryor v. Municipal Court, supra,* wherein the California Supreme Court felt compelled to overturn nearly 75 years of judicial precedent on the constitutionality of Section 647(a) before it could take a fresh look at the statute because of change in circumstances (passage of consenting adults act), there are no court cases as precedents which have to be overturned on most of the constitutional issues presented in this brief.

Although the engaging portion of Section 647(b) is broad enough to prohibit theraputic and procreational sex for money, Section 647(b) is most often used to prohibit recreational sex for money. A study regarding enforcement of this statute in Los Angeles is attached to this brief as an exhibit and the Court is asked to take judicial notice of it. See Coleman, Wendt, and Schrader, "Enforcement of Section 647(b) of the California Penal Code by the Los Angeles Police Department -- Prostitution and the Police," privately published in 1973 by the National Committee for Sexual Civil Liberties. That study shows that the *engaging portion* of Section 647(b) is virtually a dead letter. A more recent study in San Francisco shows that 95 percent of all arrests under Section 647(b) are for solicitation rather than acts of prostitution.88/

Although the sodomy laws were virtually never enforced and were practically unenforceable against private sexual acts of consenting adults, this did not hinder courts from declaring those laws unconstitutional (see earlier sections of this brief).

In order to enforce the engaging portion against private recreational sexual conduct for money, the police would either have to become accomplices (see *People v. Norris, supra,* where the court held that both participants in the conduct would be accomplices) or would have to violate the reasonable expectation of privacy of the participants by surreptitious surveillance in violation of other constitutional protections (see *People v. Triggs, supra).*

Therefore, because (1) private sex not involving consideration has been decriminalized, (2) enforcement of the engaging portion would require the police to engage in illegal activity themselves, and (3) most importantly because personal sexual relations are constitutionally protected, California courts should not hesitate to declare the engaging portion of Penal Code Section 647(b) unconstitutional.

88/ See Jennings, "The Victim as Criminal: Consideration of California's Prostitution Law," 65 *Cal.Law.Rev.* 1235, 1248, footnote 79 (1976).

IX

ISSUE 4

SECTION 647(b) VIOLATES DUE PROCESS AS WELL AS THE RIGHT TO PRIVACY BECAUSE IT INFRINGES ON THE RIGHT OF INDIVIDUALS TO PRIVATELY OFFER MONEY IN ORDER TO RECEIVE THE AMOUNT OR KIND OF SEXUAL SERVICES THEY DESIRE

Many men choose to use prostitutes. Whether the prostitute is a male or a female, it is common knowledge that, in the overwhelming number of cases, it is males who are the customers. These men have the right to engage in sexual relations in private by virtue of the "Consenting Adults Act" and the constitutional right of privacy. They have the right to publicly make a request of another person to engage in sexual relations in private. *Pryor, supra.* They have the right to engage in sexual relations in places that might technically be considered public so long as no one is present who may be offended. *Pryor, supra.*

For a variety of reasons, many men either cannot, or feel they cannot, receive the amount or kind of sexual activity they desire unless they offer some consideration to their proposed sexual partner. The right of sexual privacy is a hollow right for such men unless they are granted the corresponding right to privately and discreetly offer money or other consideration for sexual services.

Why do men go to prostitutes and what role do prostitutes play in the lives of men? Following is a discourse by Kinsey on the subject. As women achieve a certain degree of equality, articles may be written which explore what role prostitutes play in *their* lives and why *they* use escort services, dating services, and the like. Until that time, the data itself presented in this discourse may prove valuable if the readers can ignore the rather chauvinistic presentation of that data. This article also may prompt the readers to make value judgments. We would simply urge the readers to notice whether those judgments have a basis other than their personal *moral codes.*

> First of all, men go to prostitutes because they have insufficient sexual outlets in other directions, or because prostitution provides types of sexual activity which are not so readily available elsewhere. Many men go to prostitutes to find the variety that sexual experience with a new partner may offer. Some men go because they feel that the danger

of contracting venereal disease from a prostitute is actually less than it would be with a girl who was not in an organized house of prostitution. Some males experiment with prostitution just to discover what it means. In many cases some social psychology is involved as groups of males go together to look for prostitutes.

At all social levels men go to prostitutes because it is simpler to secure a sexual partner commercially than it is to secure a sexual partner by courting a girl who would not accept pay. Even at lower social levels, where most males find it remarkably simple to make frequent contacts with girls who are not prostitutes, there are still occasions when they desire intercourse immediately and find it much simpler to obtain it from a prostitute. As for college-bred males, a great majority of them are utterly ineffective in securing intercourse from any girl whom they have not dated for long periods of time and at considerable expense; and in some cases, their only chance to secure coital experience is with a prostitute. This is, of course, particularly true if the male is away from home in a strange town.

Hundreds of males have insisted that intercourse with a prostitute is cheaper than intercourse with any other girl. The cost of dating a girl, especially at the upper social level, may mount considerably through the weeks and months, or even years, that it may take to arrive at the first intercourse. There are flowers, candy, "coke dates," dinner engagements, parties, evening entertainments, moving pictures, theatres, night clubs, dances, picnics, week-end house parties, car rides, longer trips, and all sorts of other expensive entertainment to be paid for, and gifts to be made to the girl on her birthday, at Christmas, and on innumerable other special occasions. Finally, after all this the girl may break off the whole affair as soon as she realizes that the male is interested in intercourse. Before the recent war the average cost of a sexual relation with a prostitute was one to five dollars. This was less than the cost of a single supper date with a girl who was not a prostitute; and even at the inflated prices of prostitution which prevailed during the war, the cost did not amount to more than many a soldier or sailor was obliged to spend on another girl from whom he might not be able to obtain the intercourse which he wanted.

Men go to prostitutes because they can pay for the sexual relations

and forget other responsibilities, whereas coitus with other girls may involve them socially and legally beyond anything which they care to undertake.

Men go to prostitutes to obtain types of sexual activity which they are unable to obtain easily elsewhere. Few prostitutes offer any variety of sexual techniques, but many of them do provide mouth-genital contacts. The prostitute offers the readiest source of experience for the sadist or the masochist, and for persons who have developed associations with non-sexual objects (fetishes) which have come to have sexual significance for them because of some contact they have had in the past. Most males who have participated in sexual activities in groups have found the opportunity to do so with prostitutes. Nearly all of the opportunity that males have to observe sexual activity is connected with prostitutes, and such experiences are in the history of many more persons than is ordinarily realized.

Some men go to prostitutes because they are more or less ineffective in securing sexual relations with other women. This may be true of males who are unusually timid. Persons who are deformed physically, deaf, blind, severly crippled, spastic, or otherwise handicapped, often have considerable difficulty in finding heterosexual coitus. The matter may weigh heavily upon their minds and cause considerable psychic disturbance. There are instances where prostitutes have contributed to establishing these individuals in their own self esteem by providing their first sexual contacts.

Finally, at the lower social levels there are persons who are feeble-minded, physically deformed, and so repulsive and offensive physically that no woman except a prostitute would have intercourse with them. Without such outlets, these individuals would become even more serious social problems than they already are. Kinsey, "Significance of Prostitution," *Sexual Behavior in the Human Male*, p. 606-608, W.B. Saunders Company, 1948.

The men who choose to offer money or other consideration to obtain sexual satisfaction of a kind they are seeking are usually 30 to 60 years old.89/

89/ Jennifer James, Ph.D., and E. Joseph Jr., Esq., "Prostitution in Seattle," *Washington State Bar News* (Aug-Sept, 1971), at 8; accord: Harry Benjamin, M.D., and R.E.L. Master, *Prostitution and Morality*, (1964), Winick and Kinsie, *The Lively Commerce*, (1972).

The courts would not hesitate to invalidate a statute which expressly granted sexual privacy rights to those who were young, physically attractive, or psychologically aggressive but which denied those rights to persons who were old, unattractive, or otherwise physically or psychologically impaired in their ability to find sexual partners. Yet this is what is done *de facto* by decriminalizing private sex only when no consideration is involved.

Section 647(b) violates the constitutional protections of "life" and "liberty" of article I, section 7 of the State constitution, "pursuit of happiness" and "privacy" of article I, section 1 of that Constitution, and the due process clause of the United States Constitution by infringing on the right of these men to privately and discreetly offer some consideration in order to receive the amount or kind of sexual satisfaction they desire.

Even for those who simply want to shortcut achieving their sexual goal by paying hard cash immediately rather than paying for wine, food, and entertainment over a prolonged period of time, the law should protect their right to sexual privacy and the pursuit of happiness. In both cases, the motivation is *often* the same — companionship, human closeness, and sex, often with very little importance given to ultimate love, marriage, or long-term relationship -- and the interest of the state to become involved in the private lives of its citizens to the extent that it proscribes this behavior is neither rational nor defensible.

Without reiterating the arguments dealing with the morality issues, which issues are discussed sufficiently throughout this Memorandum of Points and Authorities, the question of morality must be mentioned in this context. Many people do not want to see women objectified as sex objects, or men either for that matter. The objectification of human beings as sex objects is a morality matter, and one must be cautious about the extent to which the criminal law should impose the moral judgment of some of society on other members who disagree with that view. A good example is the case of a hypothetical law which would impose criminal sanctions on a woman's posing nude for Playboy Magazine for money. Would such a law be constitutional? How is that different from the present case?

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X

ISSUE 5

THERE IS NO COMPELLING STATE INTEREST
OR EVEN RATIONAL BASIS
FOR A TOTAL PROHIBITION OF PRIVATE SEXUAL CONDUCT
MERELY BECAUSE MONEY OR
OTHER CONSIDERATION IS OFFERED

> That one may not be deprived of "life, liberty, or property without due process of law" has traditionally meant that one may not be deprived arbitrarily of the same . . . But if no set principles are used in defining criminal conduct, if criminality is determined solely by undefinable, constantly changing public notions of morality, is this not an arbitrary imposition of punishment and deprivation of liberty without due process of law?
>
> If due process is to have any meaning at all as a check on the police power, its protection must extend to the very heart of the criminal system and first and foremost provide constitutional limits on what conduct may be declared criminal.90/

This aforementioned law review article will be of great assistance in analyzing the constitutionality of Section 647(b). The full article is attached under separate cover as an exhibit and the Court is requested to take judicial notice of it.

Propositions about criminal law may be divided into three categories: Principles, rules, and doctrines. Those which are universally applicable to all crimes are the principles. These principles consist of seven notions: (1) *mens rea*, (2) act, (3) the concurrence of act and *mens rea*, (4) harm, (5) causation, (6) punishment, and (7) legality. Except for "punishment" and "legality" these principles refer to essential elements of crime.

The principle of harm has been largely ignored -- especially by American jurisprudence. This principle should be one of the primary limitations on the power of the government to make conduct criminal. It should be noted that this principle played an important role in the Pennsylvania Supreme Court's decision to overturn that state's sodomy law.91/

The real purpose of Section 647(b) is to regulate morality. That has traditionally been the purpose of statutes prohibiting sex for hire or "being a common

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90/ Caughey, "Note: Criminal Law -- The Principal of Harm and its Application to Laws Criminalizing Prostitution," 51 *Denver L.Journal* 235, 242 (1974).

91/ See footnote 86, *supra*.

prostitute." These laws were used almost exclusively against "loose women" regardless of whether or not their promiscuity involved money.

The real issue is: When can the government's general authority to regulate public morality (as opposed to private morality) be exercised without transgressing constitutional norms? *"The answer should be* that morals may be regulated by means of the criminal sanction when, and only when, a breach of the moral code would imminently cause a cognizable harm to a legally protected interest of another." Caughey, "The Principle of Harm, *supra*, at page 243.

If conduct is to be punishable, in order to satisfy due process, it must satisfy the four elements of legal harm: (1) a factually demonstrable (2) invasion of a legally protected interest (3) of another (4) imminently caused by such conduct.

The alleged harms associated with *private sex for money* are: (1) it provides an opportunity for ancillary crimes (*i.e.*, robbery, assault, murder), (2) it encourages organized crime, (3) it is a significant factor in the spread of venereal disease, and (4) it contributes to the destruction of public morals.

The following pages will delve into the facts and statistics concerning these alleged harms. Rather than "reinventing the wheel," a portion of Judge Charles Halleck's scholarly opinion will be set forth from the case of *United States v. Moses*, Superior Court of the District of Columbia, Criminal Division, Case No. 17778-72, filed November 3, 1972. This is one of the finest examinations of the harms associated with prostitution that could be found. The Court should also read the opinion of Judge Margaret Taylor in the case of *In re P*, *supra*, which also contains an excellent discourse on this subject. Certain other relevant law review articles are also attached under separate cover and, the Court is requested to take judicial notice of them.92/

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92/ Jennings, "The Victim as Criminal: A Consideration of California's Prostitution Law," 64 *Cal.L.Rev.* 1235, 1242-1250 (1976); Rosenbleet and Pariente, "The Prostitution of the Criminal Law," 11 *American Criminal Law Rev.* 373, 416-421 (1973).

X(a)

An Examination of the "Harms"

Excerpted from *U.S. v. Moses*

VENEREAL DISEASE:

The lore of the harms occasioned by prostitution is as pervasive in our culture as it is unsubstantiated by hard data. Indeed, as Jerome Skolnick has said of this area of legislation, "rather than fact determining policy, policy decides fact."[93/]

Nowhere does this assessment seem more apposite than in the alleged threat posed to community health by prostitution. Even prescinding from the argument that it is a citizen's right to choose not to protect his own health, we are still cited to nothing which supports the proposition that sexual relations between prostitutes and their clients pose any unique threat to the health and well-being of either party. Over a decade ago, it was remarked in a United Nations publication that "[T]he prostitute ceases to be the major factor in the spread of venereal disease in the United States today.[94/] This general conclusion has been firmly ratified by knowledgeable physicians and investigators in the field of public health. Because research has so consistently negated the primacy of prostitution in the transmission of venereal disease, and because the popular belief to the contrary is nevertheless held with the tenacity usually invested in notions born of dogma rather than of science, let us pause to consider the evidence.

Following her comprehensive study of prostitution in Seattle, Professor Jennifer James of the University of Washington School of Medicine observed that:

> Public Health advisors believe that prostitutes are well-educated about venereal disease problems and are watchful for them. They are aware of preventive techniques which include using prophylactics, checking customers, and seeking medical care, because a reputation as one who is infected would cut down the relatively large volume of repeat business which most prostitutes depend on.[95/]

Dr. James further remarks, in a conclusion shared by many of her colleagues, that "Public Health advisors believe that the increase in venereal disease is related more to a general change in sexual values unaccompanied by health education . . ."[96/]

[93/] "Coercion to Virtue" The Enforcement of Morals," 41 *So. Cal. L. Rev.* 588, 599 (1968).

[94/] "Prostitution and Venereal Disease," 13 *Internat'l.L.Rev. of Crim. Policy* 67, 69, October 1958.

[95/] Jennifer James, Ph.D., and E. Joseph Burnstin, Mr., Esq., "Prostitution in Seattle," *Washington State Bar News* (August-September 1971), at 8.

[96/] "Prostitution in Seattle," *supra*, at 8.

Dr. William M. Edwards, Jr., Chief of the Bureau of Preventive Medicine, Nevada State Health Division, recently concurred in this view, saying:

> The problem isn't in the house of prostitution; it's out in the general population . . . Prostitutes are much more alert to the possibilities of infection and get examined very frequently.97/

Dr. Edwards further indicated that the venereal disease rate among prostitutes is less than five percent (5%), while among high school students age 15-19, the rate is twenty five percent (25%). Dr. R. Palmer Beasley of the University of Washington School of Public Health and Community Medicine similarly averred that "(m)ost venereal disease spread is not between prostitutes and their customers. Probably ninety percent (90%) of venereal disease is unrelated to prostitution." Dr. Charles Winick of C.C.N.Y. and the American Social Health Association, co-author of *The Lively Commerce* (New York, 1972), was even more conservative in his estimate:

> We know from many different studies that the amount of venereal disease attributable to prostitution is remaining fairly constant at a little under five percent (5%), which is a negligible proportion compared to the amount of venereal disease that we have.98/

Statistics promulgated by the Public Health Service of the United States Department of Health, Education and Welfare further document the minor role of prostitution in spreading venereal disease:

> In the United States during the 12-month period ending June 30, 1971, less than three percent (3%) of more than 13,600 females diagnosed with infectious syphilis were prostitutes.99/

In Seattle during the three-year period preceding 1971, during which time all women arrested as prostitutes were medically examined, no more than one or two of hundreds were found to have infectious syphilis and fewer than six percent (6%) were infected with gonorrhea.100/ Meanwhile, the gonorrhea rate increased fivefold among residents of Prince George's County, Maryland, in the last decade; and quadrupled in Arlington, Virginia, between 1969-1970 alone.101/

97/ Dr. William Edwards, Jr., statement in the Honolulu *Star-Bulletin*, March 23, 1972, P. B-8.

98/ "Should Prostitution Be Legalized?" *Sexual Behavior*, January 1972, at 72.

99/ Department of Health, Education and Welfare, Public Health Service, June 1, 1972; per J.D. Millar, M.D., Chief, Venereal Disease Branch, Center for Disease Control, Atlanta Georgia.

100/ "Prostitution in Seattle," *supra*, at 8.

101/ *Newsweek*, January 24, 1972, at 46.

The viewpoint of the experts may easily be corroborated inferentially; for while the highest rate of venereal disease exists in the age group 15-30 (comprising eighty-four percent (84%) of all reported venereal disease cases), the age group which most frequents prostitutes is 30-60 (seventy percent (70%) of "johns" in Seattle).[102] Nor is this age pattern for prostitutes' clientele by any means peculiar to Seattle, as other portraits of typical patrons will readily attest.[103] As Robert M. Nellis of the San Francisco City Clinic succinctly put it: "Prostitution is not where it's at with V.D. today; it's Johnny next door and Susie up the street."[104],[105]

Even were this Court persuaded that prostitution is a major source of the proliferation of venereal disease, it is patently clear that this harm could be controlled by a more narrowly drawn statute, one not abridging privacy and personal liberties as does a total prohibition. . . . Other nations have long had schemes requiring prostitutes to register with health authorities, to have regular medical examination, or to comply with other health regulations. In most of the counties of Nevada prostitution is legal in state-licensed houses with provision for medical maintenance. It is not this Court's purpose to encourage prostitution nor to advocate any such scheme of regulation; it is sufficient to note that whatever state interest is entailed here can adequately be protected by means short of prohibition of soliciting and the attendant deprivation of constitutional rights.[106] In light of the foregoing, the hypothetical public health rationale must fail.

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[102] "Prostitution in Seattle," *supra*, at 8.

[103] See, e.g., Harry Benjamin, M.D., and R.E.L. Masters, *Prostitution and Morality*, (1964); Winick and Kinsie, *The Lively Commerce*, (1972).

[104] *Newsweek*, January 24, 1972, at 46.

[105] The progress of medical research in the development of prophylactic drugs for venereal disease deserves at least passing comment here. While some degree of effective venereal disease prophylaxis can be achieved by regular weekly injections of penicillin, as has been done for some years now in certain foreign countries which medically regulate prostitutes (see, *e.g.*, 13 *International Review of Criminal Policy, supra)* A.S.H.A.-sponsored experiments in Nevada testing a new compound Progonasyl, have had extremely optimistic results. Prophylactic use of the drug (which is also an effective contraceptive) by prostitutes in the State-licensed houses of prostitution resulted in a "significant reduction" of the venereal disease rates, especially for gonorrhea, by far the more common disease. ("A Study of Progonasyl Using Prostitution in Nevada's Legal Houses of Prostitution," W.M. Edwards, M.D., Chief, Bureau of Preventive Medicine, Nevada State Health Division, and Richard S. Fox, April 13, 1972).

Thus, whatever state interest may be said to reside in controlling prostitution for the purpose of diminishing venereal disease may soon be eliminated.

[106] "The consensus of opinion in this matter seems to have been best stated by Flexner in 1914 who said (in his classic work *Prostitution in Europe*) that the treating of venereal disease is a health matter falling outside the ambit of the police and can best be served by adequate health facilities and an intensive program of public education. The correctional Association of New York, "Governmental Attitude and Action Toward Prostitution." (November 1967), at 6.

ORGANIZED CRIME:

It is important to consider another potential government allegation, not here made but frequently advanced, and also wholly unsupported by any evidence in these cases, that banning solicitation can be constitutionally justified because prostitution is often linked with organized crime. Again we confront a proposition whose popular acceptance has survived long after the actual conditions which it may once have described. The Presidential Task Force Report on Organized Crime addresses itself directly to this question:

> Prostitution . . . plays a small and declining role in organized crime's operations . . . Prostitution is difficult to organize, and discipline is hard to maintain. Several important convictions of organized crime figures in prostitution cases in the 1930's and 1940's made the criminal executives wary of further participation.107/

Other writers in the field accord with this view. Dr. Charles Winick observes that ". . . nowadays prostitution . . . is too visible an activity for organized crime — it's too dangerous. Therefore, organized crime has pretty much gotten out of the prostitution business."108/ As another scholar added, " . . . organized crime has more lucrative and less perilous enterprises available to it."109/ These views were reiterated within the particular context of the District of Columbia by Lieutenant Charles Rinaldi in an interview conducted while he was chief of the Morals Division of the District of Columbia Metropolitan Police:

> There is no real organization of call girls here in Washington. Maybe there's a loose network, but only infrequently do you find one pimp with a couple of girls working for him. The Mafia isn't around here . . . . Anyway, prostitution just isn't profitable enough in Washington to keep any organization interested.110/

The San Francisco Committee on Crime injects another dimension to the analysis:

> It is also probable that if prostitution were not a crime, it would not be organized. In any event, a law enforcement policy of sweeping

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107/ "Presidential Commission on Law Enforcement and the Administration of Justice, Task Force Report: Organized Crime," p. 4 (1967); cited in The Challenge of Crime in a Free Society, 189 (1967).

108/ "Should Prostitution Be Legalized?" *Sexual Behavior, supra,* at 72.

109/ T.C. Esselstyn, Prostitution in the United States," 376 *Annals of the American Academy of Political and Social Science* 123 (March 1968), at 127.

110/ 5 *Washingtonian* (August, 1970) at 43.

prostitutes off the streets and into our courts is no way to keep organized crime out of prostitution.111/

The Committee is presumably alluding to the need for structure and organization generated by the efforts necessary to elude detection and combat legal prosecution. In such a situation, otherwise private entrepreneurs are forced toward alliances with underworld syndicates for "protection," while the attendant occasion for police corruption grows in ominous proportion.

Another important perspective on the problem is suggested by Professor Kingsley Davis:

> Prostitution has probably declined as underworld business in America; not only have demand and supply slackened, but other activities, such as labor-union control, have proved immensely profitable and easier to organize.112/

While this Court naturally expresses no view on the relationship of organized crime with organized labor, it is a conceivable affiliation no less logically plausible than that of organized crime and prostitution. However, one would expect to find few serious proponents of the abolition of labor unions in order to prevent their potential domination by criminal syndicates. Courts have, in fact, long held that society should regulate illegal conduct directly, rather than prohibit other activities on the ground that those activities are somehow, in some cases, connected with illegality. *Papachristou v. City of Jacksonville*, 405 U.S. 156 (1972); *Stanley v. Georgia*, 394 U.S. 557 (1969).

Accordingly, even if prostitution were closely connected to organized crime, which a careful investigation demonstrates is not the case in this jurisdiction, this Court could not properly support an absolute prohibition of constitutionally protected conduct in order indirectly to suppress proscribed activity. This rationale too must fail.

ANCILLARY CRIMES:

Closely allied with the foregoing alleged state interest in prohibiting solicitation of prostitution is the endeavor to inhibit crimes which may somehow be ancillary to prostitution. By restricting prostitution, so the theory goes, one may also minimize the occurrence of related crimes against the person or property of either consenting party. While the logic of this analysis seems sound, the evidence

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111/ "The San Francisco Committee on Crime: A Report on Non-Victim Crime in San Francisco," Moses Laski and William H. Orrick, Mr., Chairman, (June 3, 1971) at 32.

112/ "Prostitution," *Contemporary Social Problems*, (New York, 1961) at 262.

is less than conclusive.

The Seattle study remarks bluntly that:

> . . . [P]rohibition of prostitution itself causes crime. . . . The prohibition . . . has a double impact. To the extent that prostitutes believe their victims will not report a robbery or theft they will be encouraged to commit it. Further, prostitutes, more than occasional victims of assaults by customers,[113] are also discouraged from involving the law.[114] (Footnote supplied.)

Thus attachment of the stigma and penalties of the criminal law to basically innocuous sensual conduct may actually deter application of such sanctions to genuinely harmful behavior.

Nor is the alternative simply resignation to the criminal activity which may arise in conjunction with prostitution any more than to the crime which may be ancillary to the vending of goods or the practice of law. The San Francisco Committee on Crime was admirably direct in meeting this issue:

> Bearing in mind the financial limits on public resources available to combat crime, this is a poor area to apply "consumer protection" against the consumer's own gullibility. The answer to prostitution-connected force, violence, or theft is that it is chargeable and punishable as a separate crime, independent of any act or solicitation of prostitution.[115]

Stated most baldly, "[I]f prostitutes or pimps rob or beat patrons, the victims should charge robbery or bodily harm, not prostitution."[116] It goes without saying that the prostitutes should also be free to charge robbery or bodily harm against patrons; they ought not to be deprived of protection of life and property simply because of their chosen "profession."

Furthermore, it is not clear that crimes commonly associated with prostitution are primarily attributable to the prostitutes themselves. The San Francisco Committee on Crime rejects such a notion, saying:

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[113] A major study of prostitutes in Seattle during 1970-71, using statistically valid sampling techniques, revealed that more than seventy-sex percent (76.1%) of all female prostitutes were injured while working; sixty-four percent (64%) of these by customers, twenty percent (20%) by police, and sixteen percent (16%) by pimps. Dr. Jennifer James, "A Formal Analysis of Prostitution in Seattle: Final Report," Part I-B (Department of Psychiatry, School of Medicine, University of Washington, 1971).

[114] "Prostitution in Seattle," *supra* at 7-8.

[115] "The San Francisco Committee on Crime: A Report on Non-Victim Crime in San Francisco," *supra*, at 29.

[116] "The Politics of Prostitution," *The Nation* (April 10, 1972) at 463.

> [I]n short, society's effort to prevent crimes of violence associated with prostitution would be more effective by concentrating law enforcement efforts on the pimps rather than on the girls, on the "associated crimes" rather than prostitution.117/

Nor does a proscription of soliciting indirectly accomplish control of the pimps; on the contrary, the intrusion of the criminal law greatly augments the typical prostitute's need for a pimp and his corresponding power to author wrongdoing.

If the evidence in this area of inquiry is less than conclusive, the law is not. To arrest and criminally prosecute a prostitute because of a possibility that crime-related activity might be involved directly or indirectly is massively antithetical to traditional concepts of due process, equal protection, and individual liberty. The Supreme Court recently voided a Florida vagrancy statute which made similar assumptions about the criminal propensities of certain classes of people. In *Papachristou v. City of Jacksonville, supra,* Justice Douglas wrote for a unanimous Court:

> A presumption that people who might walk or loaf or loiter or stroll or frequent houses where liquor is sold, or who are supported by their wives or who look suspicious to the police are to become future criminals is too precarious for a rule of law. The implicit presumption in these generalized vagrancy standards -- that crime is being nipped in the bud -- is too extravagant to deserve extended treatment. Of course, they are nets making easy the round-up of so-called undesirables. But the rule of law implies equality and justice in its application. Vagrancy laws of the Jacksonville type teach that the scales of justice are so tipped that even-handed administration of the law is not possible. The rule of law, evenly applied to minorities as well as majorities, to the poor as well as to the rich, is the great mucilage that holds society together. 405 U.S. at 171.

Within a context of the right to privacy and First Amendment freedoms, the Court in *Stanley v. Georgia, supra,* reached an analogous conclusion concerning prohibition of protected behavior to prevent possible related harms. A state:

> . . . may no more prohibit mere possession of obscenity on the ground that it may lead to anti-social conduct than it may prohibit the possession of chemistry books on the ground that they may lead to the manufacture of homemade spirits. 394 U.S. at 565.

117/ "The San Francisco Committee on Crime: A Report on Non-Victim Crime in San Francisco," *supra,* at 29.

If indeed there is evidence that prostitution is sometimes coincident with certain crimes, there is also ample indication that the extension of the criminal law to soliciting significantly hinders application of legal sanctions to those very crimes. By the most fundamental precepts of our law, it is to those violent acts that such sanctions must directly be addressed. Endorsement of an alleged state interest which precisely inverts this proscriptive emphasis would be a perversion of justice in which this Court will not acquiesce. The rationale fails with its predecessors. . . .

PUBLIC MORALITY:

The inordinate overextension of this statute, so disproportional with any of the potential evils occasioned by solicitation for prostitution, contributes to the inevitable deduction that the government's primary concern here is to suppress prostitution because it is "immoral." Having reached what this Court believes to be the central, if tacit, state interest in these cases, it must now consider the broad question of the right of secular government to regulate public morality.

The government contends that the state has the obligation and right to encourage upright and moral behavior on the part of its citizens. Prescinding from the obvious dilemma of choosing which of a host of conflicting ethical theories to promulgate (and who is to make the choice), affirmation of governmental power to legislate morals is fraught with hazards. Upon the acceptance of such a view, the state may ultimately be given the right to regulate everything. Indeed, there is little human conduct that could not be invested with moral implications; thus the sphere of permissible state regulation could soon devour all personal liberties in the name of community morality. But who shall be the final arbiter — Billy Graham or Billy Sunday, Carl McIntyre or Karl Marx? This Court is convinced that the proper perspective on regulation of public morals was enunciated by the well-known Wolfenden Report:

> Unless a deliberate attempt is to be made by society, acting through the agency of the law, to equate the sphere of crime with that of sin, there must remain a realm of private morality and immorality which is, in brief and cruder terms, not the law's business.118/

The equivalence of crime with sin is surely not tenable in light of the privacy doctrine which we have been discussing. If the right to privacy has any viable meaning, it cannot be defeated by a mere assertion that the state has the right to regulate "immoral" conduct even though that conduct is not shown to hurt

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118/ Committee on Homosexual Offenses and Prostitution, Report, CMD. No. 247 (London, 1957) at 24.

anyone. The advocacy of ethical theories is not synonymous with the demonstration of concrete societal harms. This Court concurs with Mill and Hart in insisting that it is only the latter which would justify a court's finding of an evil sufficient to warrant dilution of liberties. "So long as others are not harmed, we . . . justly deserve freedom, even the freedom to be immoral."[119/] Upon thorough examination of the evidence pertinent to state claims (both stated and implied) of the harms caused by prostitution, the Court is satisfied that they are spurious. The only injury which actually is traceable to consensual acts of prostitution between adults is the sense of indignation spawned in certain other persons. This so-called harm is not of an order cognizable by the law. Absent showing of a concrete evil that government has a right to prevent, prostitution, like other consensual sexual activity, is not a fit matter for proscriptive legislation. The Court agrees that "sexual acts or activities accomplished without violence, constraint, or fraud, should find no place in our penal codes."[120/] Soliciting for prostitution in the District of Columbia is such an uninjurious activity; this perception, coupled with the constitutional rights here at stake, precludes the criminalization of this verbal behavior demanded by Section 2701.

It must also be observed that criminalization of "immoral" behavior collides with other difficulties in its drive to eradicate the universe of undesirable conduct:

> The criminal code of any jurisdiction tends to make a crime of everything that people are against, without regard to enforceability, changing social concepts, etc. . . . . The result is that the criminal code becomes society's trash bin. The police have to rummage around in this material and are expected to prevent everything that is unlawful. They cannot do so because many of the things prohibited are simply beyond enforcement . . . . [121/]

This Court is reminded of the estimate by Kinsey and his associates that were all laws concerning sex crimes rigidly enforced, ninety-five percent (95%) of the male population would at one time or another be in a penal institution.[122/] To

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[119/] Robert N. Harris, Mr., "Private Consensual Adult Behavior: The Requirement of Harm to Others in the Enforcement of Morality," 14 *U.C.L.A. L. Rev.* 581, 603d (1967).

[120/] Rene Guyon, "Human Rights and the Denial of Sexual Freedom," *Sex and Censorship*, Mid Tower, San Francisco, undated; cited in *Prostitution and Morality, supra*, at 366.

[121/] Presidential Commission on Law Enforcement and the Administration of Justice, Task Force Report, (March 13, 1967); cited in Skolnick, "Coercion to Virtue," *supra*, at 628.

[122/] Kinsey, Pomeroy, and Martin, *Sexual Behavior in the Human Male*, *supra*, at 392.

attempt thoroughgoing enforcement of the ban on soliciting prostitution in the District of Columbia would be an enterprise almost equally ambitious, costly, and impracticable. The Court is further convinced that evidence cannot be adduced to show that enforcement efforts under Section 2701 make any significant progress toward the elimination of solicitation for prostitution in this city. Naturally, it transcends the Court's province to make legislative determinations. The Court ventures these explorations simply to suggest the great morass of problems which one encounters in that attempt to regulate an area so broad and nebulous as public morals. For present purposes it suffices to examine the impact of such regulatory efforts upon the exercise of constitutio rights.

This Court finds that a generalized belief that certain conduct is immoral is no substitute for showing of governmentally cognizable harms caused by that conduct. Solicitation for prostitution may be activity that some, even many, in this community find morally reprehensible. Nonetheless, absent any demonstrated tangible harms emanating from this activity, particularly none sufficiently compelling to justify an abridgement of the fundamental rights involved here, the Court concludes that Section 22-2701 is invalid as an unconstitutional invasion of defendants' rights of privacy and free speech. From *U.S. v. Moses, supra.*

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XI

ISSUE 6

SECTION 647(b) IS UNCONSTITUTIONALLY VAGUE BECAUSE THE DEFINITION OF THE CRIME RESTS ON THE MEANING OF SUCH TERMS AS "ANY LEWD ACT" AND "OR OTHER CONSIDERATION"

The only published California appellate decision specifically defining the term "lewd" as used in section 647, subdivision (b), is the case of *People v. Norris, supra.* In that case the Appellate Department of the Los Angeles Superior Court, relying upon *People v. Williams,* (1976) 59 Cal.App.3d 225, 229, held that it was proper to define that term as meaning "lustfull, lascivious, unchaste, wanton, or loose in morals and conduct." See *People v. Norris, supra,* at 88 Cal.App.Supp.3d 40.

There can be no question that such holding by the court in *Norris* has been called into question, if not impliedly overruled, by the Court of Appeal decision in *People v. Hill, supra.* The court in *Hill* recognized that such a definition would be unconstitutionally vague in view of the recent California Supreme Court ruling in *Pryor v. Municipal Court, supra,* which reinterpreted section 647, subdivision (a).

With respect to the definition of the term "prostitution" as used in California's pimping and pandering statutes, the court in *Hill* stated that the term "prostitution" must be limited "as meaning sexual intercourse between persons for money or other considerations and only those 'lewd and dissolute' acts between persons for money or other consideration as set forth in the *Pryor* case." *Hill, supra,* at page 105.

When one turns to the *Pryor* case for the definition of the term "lewd" one finds the holding of the California Supreme Court crystal clear. The Supreme Court states:

> The terms "lewd" and "dissolute" in this section are synonomous and refer to conduct which involves the touching of the genitals, buttocks or female breast for the purpose of sexual arousal, gratification, annoyance or offense, if the actor knows or should know of the presence of persons who may be offended by his conduct. *Pryor, supra,* 158 Cal.Rptr. 330 at 341.

After the *Pryor* decision was handed down by the California Supreme Court and before that decision was final, the Los Angeles City Attorney filed a petition for modification of the court's opinion. (See Exhibit submitted along with

this brief which contains that Petition and the Order of the Supreme Court denying the application for modification.) In that Petition to Modify the City Attorney stated:

> Although the opinion clearly states that the definition of the terms "lewd" and "dissolute" set forth apply only to section 647(a), the phrasing of that definition on page 26 of the slip opinion may cause substantial confusion. The last clause of that definition seemingly limits the terms "lewd" to refer only to acts performed when "the actor knows or should have known of the presence of persons who may be offended by his conduct." It can be expected that an attempt will be made to apply this definition to other statutes employing the term "lewd", such as Penal Code Section 647(b), (prostitution) . . . *Pryor, supra,* "Petition for Modification of Opinion" at pages 5-6.

The Los Angeles City Attorney requested the Supreme Court to detach the clause "if the actor knows or should know of the presence of persons who may be offended by his conduct" from the definition of "lewd" and instead attach it to the definition of "public place". The Supreme Court, on August 29, 1979, entered an Order Denying the Application for Modification.

The case of *People v. Hill, supra,* did not clarify, whether the term "prostitution", insofar as it uses the term "lewd", would include a requirement that the defendant knows or should know of the presence of persons who may be offended before the prohibited conduct is considered "lewd" within the meaning of the prostitution statute.

Many of the trial courts throughout California have adopted a definition of prostitution for purposes of section 647(b) which limits that definition to conduct between two persons which involves the touching of the genitals, buttocks, or female breasts for purposes of sexual arousal, gratification, annoyance, or offense. This approach ignores the Supreme Court's mandate that sexual conduct is not to be considered "lewd" absent an additional showing that the "actor knows or should know of the presence of persons who may be offended."

The Appellate Department of the San Diego Superior Court, in an unpublished opinion, has adopted a definition of the term "prostitution" within section 647, subdivision (b) such that the prosecution need not prove that the ultimate conduct to be performed would be such that the "actor knows or should know of the presence of persons who may be offended." In the case of *People v. Fitzgerald,* Superior Court No. CR 47640, filed November 13, 1979, (a copy of which is submitted under separate

cover as an Exhibit), the court held that "section 647(b) only precludes solicitation of, or engaging in, a sexually motivated act (touching of the genitals, buttocks, or female breasts for the purpose of sexual arousal or gratification for money or other consideration), and does not require knowledge of the presence of persons who may be offended thereby or that a public place or view be involved." *Fitzgerald, supra,* at page 3 of slip opinion. However, that decision was not unanimous. In his dissenting opinion, Superior Court Judge Byron F. Lindsley, stated:

> I disagree with the majority. While *Pryor v. Municipal Court,* (1979) 25 Cal.3d 238, expressly applied to 647(a) only because that was the section there involved, I think Appellant is correct in arguing that *Pryor* also applies to 647(b) as it was involved in this case. While there is a code subsection distinction between the two cases, I believe that it is a distinction without a difference when we give heed to philisophical substance of *Pryor* and its follow-up case *In re Anders,* 25 Cal.3d 414 (October 4, 1979). The opinion in *Anders,* also written by Justice Tobriner, states: "We construe the statute to prohibit only the solicitation or commission of conduct in a public place or one open to the public or exposed to public view, which involves the touching of the genitals, buttocks, or female breasts, for purposes of sexual arousal, gratification, annoyance or offense, by a person who knows or should know of the presences of persons who may be offended by the conduct."
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> I believe this same construction for the same reasons must attach to 647(b) or its meaning it lost.
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> *Pryor* and now *Anders* have pointed the law and its administration toward a new, more rational and reasonable result in this most widely confused and applied area of the law at the point of enforcement. The majority erode the banks of the stream before the law has had a chance to flow within its new bounds." *Fitzgerald, supra,* at pages 3 & 4 of the slip opinion.

Although Mr. Fitzgerald did not receive the benefit of the full definition of "lewd" as set forth by the California Supreme Court in the *Pyror* decision, other defendants have not been so unfortunate. In the case of *People v. Michele Sotello,* Los Angeles Municipal Court Case No. 625374, decided June 6, 1980, Municipal Court Judge Paul I. Metzler, issued the following order overruling a demurrer and constitutionally construing the statute (a copy of which order is attached under separate cover as an Exhibit):

After having considered all of the oral and written arguments presented by counsel for the respective parties -- Jay M. Kohorn for the defendant, and Byron Boeckman, Deputy City Attorney, for the People — at the hearing on the demurrer on June 6, 1980, at 1:00 pm, in Division 104, in the above-entitled case:

IT IS HEREBY ORDERED that the demurrer be and the same is hereby overruled based upon the fact that Penal Code Section 647, subdivision (b) is not unconstitutional as interpreted herein. The term "lewd" must be defined as the Supreme Court defined that term in the case of *Pryor v. Municipal Court* (25 Cal.3d 238, 158 Cal.Rptr. 330), which case constitutionally construed Penal Code Section 647, subdivision (a): the term 'lewd' refers to conduct "which involves the touching of the genitals, buttocks, or female breast for the purpose of sexual arousal, gratification, annoyance or offense, if the actor knows or should know of the presence of persons who may be offended by his conduct."

Thus P.C. section 647(b) would conform to the general scheme of the entire Disorderly Conduct statute (P.C. section 647) in that public offensiveness would be required. The statute would thus also conform to the requirement that the same word used throughout the section be defined in the same manner regardless of which subdivision it appears in, throughout section 647, in order to give reasonable notice to the public as to what conduct is prescribed by the statute.

This order shall constitute the law of the case.

As a result of this ruling the City Attorney determined that it could not prove its case because of leading behavior of the undercover vice officer toward the defendant, and because there were no other members of the public present to be offended and as a result the City Attorney made a motion to dismiss the complaint against the defendant, which motion was accepted by Judge Metzler.

The California constitution requires that laws of a general nature be uniform in operation. Also the California constitution requires that persons similarly situated not be invidiously discriminated against. Furthermore due process requires that the defendant be on notice as to what definition of the crime will be submitted to the jury so that he may prepare for his defense. Each of these rules is violated when one defendant is getting the benefit of the full definition of "lewd" as set forth in the Pryor case while other defendants are being prosecuted and tried under less complete definitions with less restrictions attached.

Petitioner in the instant case, as well as all other defendants who have joined in this petition for a writ, are at a loss as to which definition of "prostitution" or which definition of "lewd" as used in section 647, subdivision (b), will be given to the jury when they face trial. Obviously, some judges require the additional showing that the "actor knows or should know of the presence of persons who may be offended" and other judges do not. This issue, i.e., what definition of "lewd" must be used for purposes of section 647, subdivision (b) in order to satisfy constitutional requirements, must be decided before petitioner faces trial. Otherwise his rights to equal protection, due process, and uniformity of operation of the law are all being violated. This court, and ultimately an appellate court of state-wide jurisdiction, must decide this issue in a published opinion. As a result of such a ruling, all persons being prosecuted under section 647, subdivision (b) will be treated in the same manner by the trial courts, will be judged by the same standards by the juries and will all be on notice as to how to prepare their defense. Until such time as a ruling on this issue is forthcoming from a court of state-wide jurisdiction, petitioner and others similarly situated may not receive a fair trial.

The gravamen of the offense actually rests on a manifestation of intent to include some consideration in the agreement to have sex. Consideration need not take the form of an actual cash flow, and Section 647(b) recognizes this by referring to "money or other consideration." "Consideration" can extend all the way from large sums of cash to the smallest token of personal affection or favor. As Professor David Richards has observed, ". . . [T]here is not always a sharp line, perhaps, between the dinners and entertainment expenses in now conventional pre-marital sexual relations and the more formalized business transactions of the prostitute.[123]

In making money or other consideration the "triggering" factor in determining criminality, the statute severly infringes on the fundamental rights of persons to engage in activities which, because they are so private and intimate in character, should be deemed beyond the reach of the criminal law. Take, for instance, the kind of arrangement which is not unknown among certain ethnic groups, whereby a married couple , one of whose members is infertile, requests a third person to have a baby by the fertile member or by a willing, fertile outsider, so that the couple can adopt it. Under Section 647(b), the couple could be prosecuted for prostitution.[124]

123/ David A.J. Richards, *Commercial Sex and the Rights of the Person, op. cit.*, pp. 1205-1206 (see footnote 30, *supra*).

124/ See Section VIII(a) of this Memorandum, page 55, *supra*.

Again, consider the case of hitch-hikers. Hitch hiking, which is an endemic characteristic of our automobile age, often has wide-spread sexual overtones. There have been cases in which arrests have resulted under Section 647(b) when a suggestion was made that sex could be compensation for a ride to a specific location.125/

The problem of paying for certain types of sexual therapy have already been explored in depth.126/ It should be noted that failure to prosecute does not immunize citizens from the infirmities of being arrested and put through the criminal processes at the whim or specific moral judgment of police officers. Additionally, such overbroad statutory language results in the evils of a type of "prior restraint" by citizens to avoid activity which is within their constitutional rights and perogatives.

In sum, the term *consideration* must be examined with exceptional care and precision in order to construe it in a limited and constitutionally narrow fashion.

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125/ See Coleman, Wendt, and Schrader, "Enforcement of Section 647(b) of the California Penal Code by the Los Angeles Police Department -- Prostitution and the Police," privately published in 1973 by the National Committee for Sexual Civil Liberties.

126/ See Section VIII(b) of this Memorandum, page 56, *supra*.

XII

ISSUE 7

THE SOLICITATION PORTION OF SECTION 647(b) VIOLATES THE FREE SPEECH PROTECTIONS OF THE FIRST AMENDMENT TO THE FEDERAL CONSTITUTION AND ARTICLE I, SECTION 2 OF THE CALIFORNIA CONSTITUTION

As articulated in the foregoing sections of this brief, private sexual conduct between consenting adults or the personal decision to engage in such conduct is constitutionally protected. This is true, even though money or other consideration may be offered or exchanged between the parties to the sex act. Also previously discussed is the fact that the engaging portion of this statute is unconsitutional on its face because it violates the right to privacy, the right to due process of law as guaranteed by both the State and Federal Constitutions, and is constitutionally overbroad.

Because the engaging portion of the statute is unconstitutional, the solicitation portion prohibits requests to commit many forms of *lawful* sexual conduct. We need not, therefore, be concerned here with the longstanding rule that the state may prohibit "solicitation to commit a crime."

Before delving into specific defects in the solicitation portion of this statute, a review of basic constitutional principles of free speech is in order.

"The constitutional guarantees of freedom of speech forbid the States to punish the use of words or language not within 'narrowly limited classes of speech.' *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571, 62 S.Ct. 766, 760, 86 L.Ed. 1031 (1942). Even as to such a class, however, because 'the line between speech unconditionally guaranteed and speech which may be legitimately regulated, suppressed, or punished is finely drawn,' (citation omitted) "[i]n every case the power to regulate must be so exercised as not, in attaining a permissible end, unduly to infringe the protected freedom.' (Citation omitted.) In other words, the statute must be carefully drawn or be authoritatively construed to punish only unprotected speech and not be susceptible of application to protected expression. 'Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity.'" *Gooding v. Wilson* (1972) 92 S.Ct. 1103, 1106.

What are those "narrowly limited classes of speech" which the state has the right to suppress? They include "the lewd and obscene, the profane, the libelous, and the insulting or 'fighting' words -- those which by their very utterance inflict

injury or tend to incite an immediate breach of the peace." *Chaplinsky, supra,* at p. 572. These are the limited classes of speech which the state has the right to punish because of their *content.*

With respect to prohibiting the content of certain classes of speech:

> The question in every case is whether the words are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent. *Brandenburg v. Ohio* (1969) 395 U.S. 415, 429.

The argument that speech is stripped of its First Amendment protection because it is "commercial" was answered a few years ago by the United States Supreme Court:

> The State was not free of constitutional restraint merely because the advertisement involves sales or "solicitations," (citations omitted) or because appellant was paid for printing it, (citations omitted) or because appellant's motive or the motive of the advertiser may have involved financial gain (citations omitted). The existence of "commercial activity, in itself, is no justification for narrowing the protection of expression secured by the First Amendment." *Bigelow v. Virginia* (1975) 95 S.Ct. 2222, 2231.

In the *Bigelow* case the Court noted that it had, in an earlier case, made a holding which *appeared* to strip commercial speech of all constitutional protections, and thus this doctrine had crept into constitutional law. In the case of *Valentine v. Crestensen* (1942) 62 S.Ct. 920, 921, the Supreme Court had said, "We are equally clear the the Constitution imposes no such restraint on government as respects purely commercial advertising." In *Bigelow* the Court explained that holding:

> But the holding is a distinctly limited one: the ordinance was upheld as a reasonable regulation of the manner in which commercial advertising could be distributed . . . . The case obviously does not support any sweeping proposition that advertising is unprotected *per se.* *Bigelow,* at p. 2231.

Before surveying cases involving the free speech clause of the California constitution, caution should be taken that:

> Regardless of the particular label asserted by the State — whether it calls the speech "commercial" or "solicitation" — a court may not escape the task of assessing the First Amendment interest at stake and weigh it against the public interest allegedly served by the regulation.

Bigelow, at 2235.

Article I, section 2 of the California constitution reads: "Every person may freely speak, write and publish his or her sentiments on all subjects, being responsible for the abuse of this right. A law may not restrain or abridge liberty of speech or press." The California Supreme Court recognized in *Robins v. Pruneyard Shopping Center* (1979) 23 Cal.3d 899, 909, that the free speech clause of the California constitution provides more protection against the regulation of speech than does the First Amendment:

> Though the Framers could have adopted the words of the Federal Bill of Rights, they chose not to do so . . . . "[A] protective provision more definitive and inclusive than the First Amendment is contained in our state constitutional guarantee of the right of free speech and press."

The California Supreme Court, in *People v. Fogelson* (1978) 21 Cal.3d 158, 165, held that "distinctly commercial forms of solicitation" are entitled to constitutional protection. The Court has often made distinctions between prohibition of speech because of its *content* and *reasonable regulations* of *time, place,* and *manner.*

The fact that speech involves motivations of "profit" does not dilute protections against regulation of content. *Burton v. Municipal Court* (1968) 68 Cal.Rptr. 721, 724. However, this basic principle does not bestow upon one engaged in a commercial activity "gratuitous immunity from all restraint in the pursuit of his occupation. A municipality may impose reasonable regulations upon the conduct of a business enterprise." *Burton, supra,* at 724.

If a California appellate court could construe the solicitation portion of section 647(b) in a way that would transform it from an unconstitutional restraint on the content of speech and into a reasonable regulation of time, place, and manner of solicitation, the free speech problems could be cured.

> The state may, for example, reasonably regulate time, place, and manner of engaging in solicitation in public places. (Citations omitted.) The state may also reasonably and narrowly regulate solicitations in order to prevent fraud, (citation omitted) or to prevent undue harassment of passersby or interference with the business operations being conducted on the property. *Fogelson, supra,* at 165.

The comments which follow are those of Judge Margaret Taylor, of the Civil Court in New York, author of the decision in *In re P., supra,* submitted herewith as an exhibit. The comments were made in a talk on the problems of prostitution, before the annual conference of the National Committee for Sexual Civil Liberties,

held in Washington, D.C., on May 24, 1980, and explore the street problems relating to solicitation by prostitutes.

If we can clarify our attitudes about prostitutes, then I believe we will have reached a new plateau in our attitudes towards females in general. If we ultimately accept women as humans who are entitled to the same rights, respect and opportunities as men, then we will be able to deal honestly with prostitution (or will we have to start with prostitutes first?).

* * * *

When prostitutes can have unemployment compensation, workmen's compensation, social security, labor unions, child labor law protection, health and safety protections on the job, then I will believe that the restrictions sought to be imposed on prostitutes are solely because of actual incidents of disorderly conduct or harrassment to non-consenting persons by particular prostitutes rather than a desire merely to punish "bad" women.

* * * *

The street problem in New York City is a serious one, particularly as it relates to what you can sell and do on the public sidewalks, whether it is selling products (e.g., flowers, books, items of clothing) or services (e.g., magicians, musicians, prostitutes) or merely "hanging out" (e.g., drunks, loud teenagers shouting obscenities, sleepers).

Of all these groups using the sidewalks, only the prostitutes are arrested, fingerprinted, put in detention pens for 24 to 48 hours, convicted, fined and jailed. None of the other street sellers and users are so abused and degraded and given lifetime stigmatizing records.

I can assure you that many people in New York City are upset about the extent and nature of sidewalk activity. Storeowners are angry about peddlers selling products on the sidewalks immediately in front of the doors of their stores. A composer who lived for many years across the street from Carnegie Hall finds it almost impossible to compose because of the daily off-key violin playing for money which goes on for hours every day in front of Carnegie Hall. I saw a woman in tears pleading in vain with a group of street musicians to stop playing. She pointed out to the uncomprehending pedestrians (who thought the musicians were fun and cute) that she was no longer able to enjoy her apartment on the

second floor because the same musicians played the same five songs under her window for hours every night. Some homeowners in Greenwich Village complain about the tolerant attitude of villagers to the loud and abusive alcoholics who loiter about the sidewalks in front of their brownstones.

All I am suggesting is that we deal with the difficult street problem as a whole and with equal consideration to those who want to use the sidewalks and those who work or live adjacent to these same sidewalks. One group of street sellers should not be unduly punished for their sidewalk solicitations without attempting first, if necessary and constitutionally feasible, to make uniform rules and regulations regarding public sidewalk activities, particularly those in front of persons' places of business and residence.

And Judge Taylor concluded her talk:

"Whenever I forget and for a moment think, Goddesslike, that I can do good and help rather than apply the appropriate standard of 'the least harm,' I repeat to myself a particularly apposite quote from an appeal of one of the more tragic Family Court cases. In this case, a mother, totally frustrated in her attempts to get Family Court to return her child to her, committed suicide. The Appellate Court, admonishing the Family Court, said, 'Of all tyrannies a tyranny sincerely exercised for the good of its victims may be the most oppressive. Those who torment us for our own good will torment us without end for they do so with the approval of their own conscious.'"

On its face, the solicitation portion of Section 647(b) is not a "resonable regulation" of time, place, and manner. It forbids *all solicitations* calculated to obtain consent to engage in private sexual relations with other adults for a consideration. Therefore, until authoritatively construed by an appellate court with power to create statewide precedent, that solicitation portion of the statute is unconstitutionally overbroad. Private and discreet solicitations appear to be prohibited as well as public and offensive solicitations.

Since private sexual conduct between *consenting* adults is statutorily recognized and is constitutionally protected, a person must have the right to solicit for that consent. For many persons, such consent will not be forthcoming from the partner of their choosing, unless they offer some form of consideration. A total prohibition of such an attempt to privately and nonoffensively solicit such consent from a willing listener violates the free speech clauses of the State and Federal Constitutions, particularly the California constitution, since it would be restricting

the content of speech when there has been no "abuse of this right" of free speech.

In the case of *Di Lorenzo v. City of Pacific Grove* (1968) 67 Cal.Rptr. 3, 5, the Court noted that although the government may issue reasonable regulations as to such matters, "the right to regulate does not necessarily sanction the outright prohibition."

The *Di Lorenzo* court made several other pertinent observations about legal distinctions which are involved in the instant case:

> In determining First Amendment rights a distinction is to be made between communications transmitted to willing recipients and messages forced upon those who do not wish to receive them . . . .
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> "The right of free speech is guaranteed every citizen that he may reach the minds of *willing listeners*, and to do so there must be opportunity to win their attention" . . . .
>
> Plaintiff is permitted to hand her newspaper to any Pacific Grove householder who will accept it, and to *solicit consent* to thereafter throw the paper onto the premises. (Emphasis added) *Di Lorenzo*, at 7.

The Court recognized that the requirement of the ordinance compelling consent from the homeowner before throwing newspapers on his premises was reasonable. The ordinance in question did not suffer constitutional infirmity because it allowed the publisher to seek that necessary consent.

In the instant case, the statute appears to prevent one from seeking consent from a potentially willing adult by means of any solicitation which involves the offering of any consideration. This is wherein the defect lies with the solicitation portion of the statute. Many such solicitations can be made in ways which in no way abuse the constitutional right of free speech.

If it is possible to do so, an appellate court must attempt to constitutionally interpret a statute which appears to be constitutionally defective. *Pryor v. Municipal Court, supra,* at 253. However, until so authoritatively construed, the statute is unconstitutional on its face.

The solicitation portion of section 647(b) may be capable of a constitutional construction. Commercial speech is subject to reasonable regulation by the state. Constitutional infirmities with the solicitation portion may disappear if it is limited to *the prohibition of public solicitations for commercial sexual conduct which the speaker knows or should know will be heard by or is directed to a person who may be offended by the solicitation.* Thus the prohibition would be limited to commercially oriented speech which is *thrust* on listeners who may be offended. There is sufficient

state interest to prohibit such commerical speech. The state has a right to enact reasonable regulations to protect the privacy of other citizens and to prevent the advertisers' message from being thrust upon a captive and unwilling audience.

In the area of noncommercial speech, the fact that the speech is or may be offensive is no reason for prohibiting that speech. *Cohen v. California* (1971) 91 S.Ct. 1780. However, commercial speech is subject to reasonable regulation and such a regulation as defined in the previous paragraph would appear to be reasonable.

Such a regulation would be analagous to the regulation of *public sexual conduct* in California under Section 647(a) of the Penal Code. The Supreme Court held that even though sexual conduct occurs in a place that is technically public, there is little state interest in prohibiting such conduct absent a showing that a person is present who may be offended. *Pryor, supra,* at 256. Thus, in order to convict a person for engaging in lewd conduct in public, the prosecution must prove that the defendant knew or should have known that the observer was a person who may be offended.

If construed as previously defined, the solicitation portion of section 647(b) would appear to be a rational balancing of the constitutional rights of those who wish to secure consent for a sexual act to be performed in a private place, on the one hand, and the rights of pedestrians and others to be free from unwanted and sometimes harassing commercial sexual solicitations in public places, on the other hand.

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XIII

CONCLUSION

In asserting that the rights guaranteed the American people by the Federal Constitution go beyond those rights specifically enumerated, Judge Craven states:

> "An individual should retain the right to engage in any form of activity unless there exists a counter-veiling state interest of sufficient weight to justify restricting his conduct. This is the essence of personhood: a rebuttable presumption that all citizens have a right to conduct their lives free from government regulation. A a minimum, personhood should encompass 'the freedom to do anything which injures no one else.'" *Craven, Personhood: The Right to be Let Alone,* 1976 Duke L.J. 699, at page 706.

Private sexual relations between consenting adults is constitutionally protected behavior as is the personal decision to engage in such conduct, and such status is not lost merely because some form of consideration may pass between the participants. The state should remain out of the business of regulating the private sexual lives of its citizens. There is no rational basis, much less a compelling state interest for regulating private morality.

The engaging portion of section 647(b) is in conflict with the constitutional rights of sexual privacy and due process and is, therefore, unconstitutional on its face. Although a court should interpret a statute whenever possible to give it a constitutional construction, no such contruction is readily available to cure the defects of the engaging portion of this statute.

The engaging portion is easily severable from the soliciting portion of the statute. Thus, in order to avoid defeating the obvious intent of the Legislature to regulate the public aspects of prostitution, it will not be necessary to void the entire subdivision if there is a constitutional construction which may be given to the soliciting portion of the statute. Such an interpretation is possible.

The soliciting portion of the statute can be saved if interpreted as a reasonable regulation of commercial speech rather than a total prohibition of the content of expression. After balancing the interests of the state to prohibit the thrusting of offensive speech on unwilling listeners against the constitutional rights of the individual to solicit consent to engage in private sexual relations with a potential partner, such a construction becomes apparent. *The solicitation portion of the statute must be limited to the prohibition of public solicitations of commercial sexual conduct under circumstances where the solicitor knows or should know that a*

listener is present who may be offended by the solicitation. As so construed the solicitation portion of the statute does not offend the First Amendment protections of free speech or article I, section 2 of the California Constitution. Such a construction allows persons to speak freely, but also makes them responsible for the abuse of this right. Although offensiveness is not, *per se*, a reason for *prohibiting* speech because of its content, as so construed, Section 647(b) is not a *prohibition* of the content of speech. It is a reasonable regulation of certain content, namely, commercial sexual solicitation, in a *limited location*, namely, in public places or places open to the public, and in a *limited manner*, namely, in a manner which the defendant knows or should know may offend the listener. As such, it is not an unconstitutional restraint.

Such a construction of Section 647(b) comports with the apparent legislative intent underlying Section 647 of the Penal Code. Subdivision (a) of that Section regulates *public* sexual conduct; subdivision (c) prohibits *public* accosting and begging for alms; subdivision (d) regulates loitering in *public* restrooms; subdivision (e) limits wandering and roaming the *public* streets under criminally suspicious circumstances; subdivision (f) attempts to deal with the *public* inebriate. As it must be constitutionally interpreted, subdivision (b) prohibits *public* and offensive commercial sexual solicitations.

Furthermore, all of the *public aspects* of prostitution which the state has a legitimate interest to regulate or prohibit will be covered by this and other statutes. *Pimping and pandering* are prohibited by section 266h and 266i of the Penal Code. Notwithstanding the decriminalization of private sex for a consideration because of the lack of state interest in such a prohibition, statutes prohibiting pimping and pandering may serve legitimate and possibly compelling state interests, i.e., prevention of corruption and greed in financial transactions involving intimate and personal relations of others. *Keeping a disorderly house* which disturbs the neighborhood is prohibited by section 316 P.C. *Using minors* for purposes of prostitution is prohibited by several statutes, e.g., 267 P.C., 309 P.C., 266 P.C. *Soliciting or engaging in sex with a minor* is prohibited whether or not money is involved under section 647a P.C. (annoying or molesting a minor). *Offensive touchings* are prohibited under section 242 P.C. (battery). *Engaging in public sexual conduct* or soliciting for such conduct is prohibited — whether consideration is involved or not — under section 647(a) P.C. Finally, local ordinances regulating commercial street solicitations of all sorts would apply with equal strength in this area.

Thus, all of the public aspects of prostitution are effectively regulated or prohibited, while private morality is not. This brings the California law into alignment with the laws of most of the rest of the civilized world.

As it stands, subdivision (b) of section 647 fails to take into account the foregoing constitutional principles and therefore violates the right to privacy, due process, equal protection and freedom of speech. Since the statute is unconstitutional on its face, the Demurrer should have been sustained.

This court is requested to issue an alternative writ of prohibition, directed to the Los Angeles Municipal Court, ordering it to refrain from proceeding to trial under section 647, subdivision (b) in the case of petitioner and in the companion cases, because of the unconstitutionality of that statute, or to show cause before this court why it should not be so restrained.

After a full hearing on the merits of the arguments raised in the petition, this court is requested to grant the following relief:

1. Declare the engaging portion of section 647, subdivision (b) to be unconstitutionally over-broad in violation of the right to privacy, due process, and equal protection.

2. To recognize that the engaging portion is severable from the soliciting portion of the statute and to enter an order so holding.

3. To construe the solicitation portion of the statute as being limited to solicitations in public or in private of sexual conduct for hire, when the solicitor knows or should know of the presence of listeners who may be offended by such solicitation.

If the court concludes that such relief is not warranted, petitioners must still be informed as to which definition of "lewd" as used in the prostitution statute will govern their cases when they go to trial. Therefore, in any event, this court is requested to construe the term "lewd" as used in section 647, subdivision (b) as being limited to conduct between persons which "involves the touching of the genitals, buttocks, or female breasts, for purposes of sexual arousal, gratification, annoyance, or offense, when the actor knows or should know of the presence of persons who may be offended by his conduct."

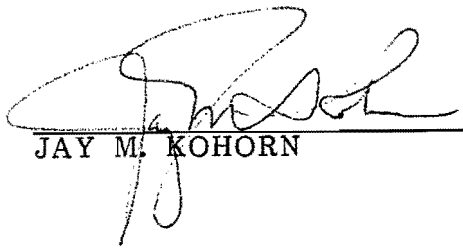
Respectfully submitted:

Counsel:

DATED: 8-14-80

THOMAS F. COLEMAN

Co-Counsel:



DATED: 8-14-80

JAY M. KOHORN