No. 82-1724

IN THE

Supreme Court of the United States

October Term, 1983

STATE OF NEW YORK,

Petitioner,

vs.

ROBERT UPLINGER and SUSAN BUTLER,

Respondents.

APPEAL FROM THE COURT OF APPEALS
OF THE STATE OF NEW YORK.

BRIEF OF RESPONDENT ROBERT UPLINGER

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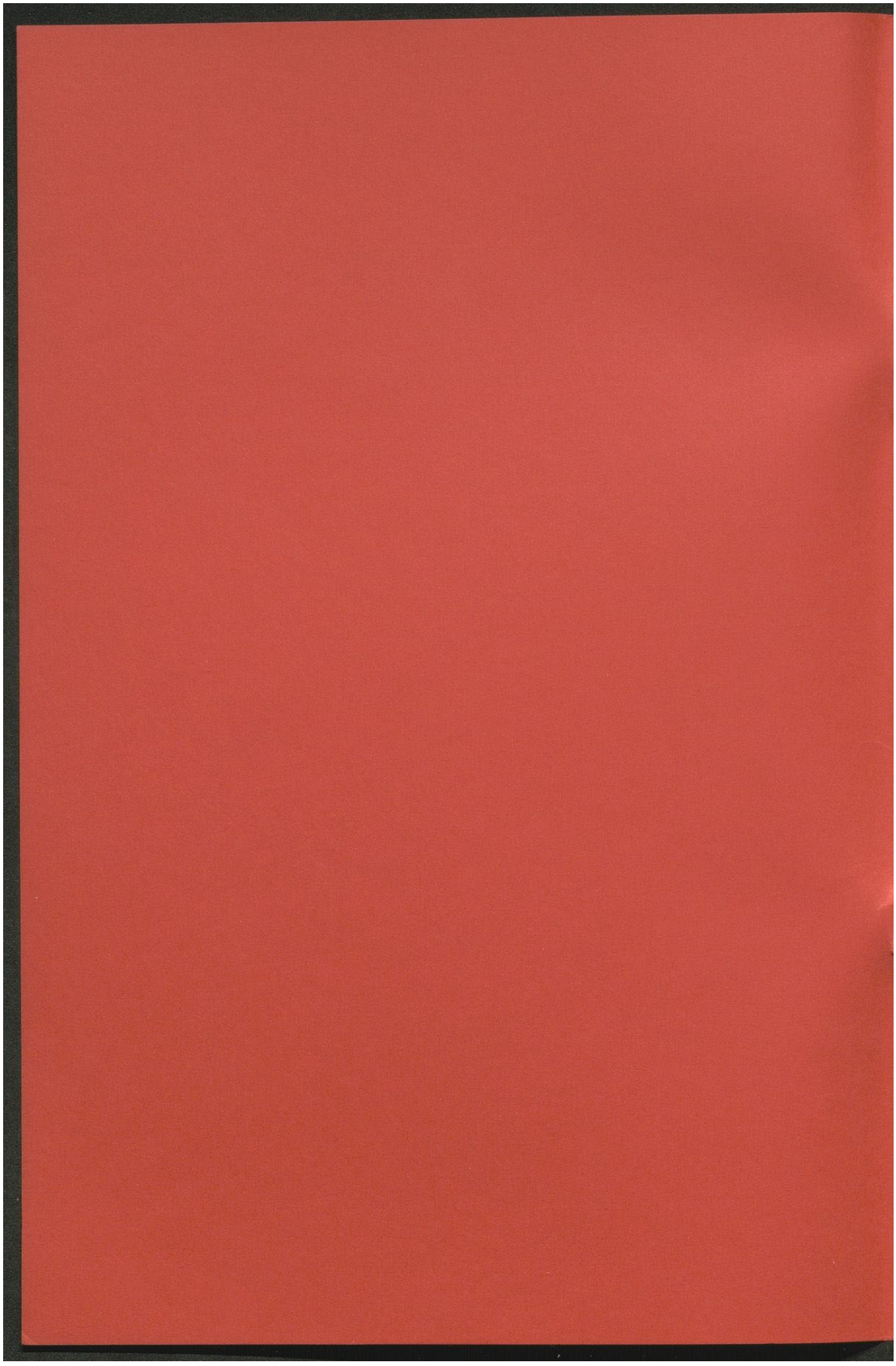

Questions Presented

1. As applied to loitering for the purpose of engaging in [a] a discreet, private conversation [b] with one other adult in a public place, [c] where there is no one present who can overhear the conversation and [d] where the speaker does not know, and has not acted recklessly in failing to determine, that the other person would be offended by an invitation to go to a private residence and engage in a legal act of sex, does New York Penal Law §240.35-3 (the "Statute") unconstitutionally infringe on First and Fourteenth Amendment rights to freedom of speech and association as to respondent Uplinger and others in similar circumstances?

2. Is the Statute unconstitutionally vague insofar as it is applied to such a loitering situation?

3. Does the Statute violate due process rights?

4. Does the State have a compelling interest which would require that the Statute be upheld?

5. Does the Statute violate rights to the equal protection of the laws of homosexuals insofar as it singles out "deviate" sex acts from other types of sex acts as proscribed objectives of such loitering, thereby discriminating against those (particularly homosexuals) who engage in such variant sex practices?

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GLOSSARY.

The following terms of art and abbreviations are used in this Brief.

Cert. App. = Petition for Certiorari herein, citing the designated Appendix thereto, with the page indicated.

California Commission = Commission on Personal Privacy, State California, appointed by Hon. Jerry Brown, Governor, and which rendered its Report in December 1982.

Commission = New York State Temporary Commission on the Revision of the Penal Law and Criminal Code [footnotes 20, 22 and 23 and accompanying text].

P.L. = New York Penal Law.

Statute = New York Penal Law, Section 240.35-3, Loitering for deviate-sex purposes.

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ON WRIT OF CERTIORARI TO THE NEW YORK STATE COURT OF APPEALS.

BRIEF FOR RESPONDENT ROBERT UPLINGER

Respondent Robert Uplinger respectfully presents his Brief in opposition to the request of the State of New York that the judgment below be reversed.

Statement of the Case

Facts of the incident

The arrest resulted from Officer Nicosia's successful undercover efforts at 2:50 A.M. on North Street in

Buffalo (J.A. 104-105).[1] His assignment was "to talk to suspected homosexuals and arrest them if he was propositioned" (Cert. App. D, 4d). Uplinger said, "hello", "how are you?" to the officer and general conversation ensued, with the officer joining in. Uplinger asked if the officer wanted to "get high" and received a negative answer. At some point, Uplinger asked, "Well, what do you like to do?", and received an answer, "I don't know, what do you like to do?" The conversation went back and forth for a while (J.A. 104).

Acquaintances of Uplinger walked up; he introduced them to Nicosia. Other police officers appeared and ordered everyone to move along; they all complied. Uplinger followed (not "pursued") Nicosia as they moved away (J.A. 104).[2] He invited Nicosia to his apartment. The officer asked what Uplinger wanted to do; he gave a non-committal response. Officer Nicosia feigned his intent to leave for fear of the police. At that, Uplinger again invited the officer to his apartment, this time explaining the type of sex act Uplinger had in mind.[3] He was then arrested (J.A. 104-105).

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[1] North Street is not just a "quite residential neighborhood" street (State's Brief, 4). It has a hotel, with a Howard Johnson's at the corner of North and Delaware, and with a "lot of people in this area" (Officer Burgstahler, J.A. 62). Across from the hotel at 140 North where Nicosia was standing (J.A. 104) was a stone wall and a large vacant lot (J.A. 64). The area had become a meeting place for homosexuals at late night and early morning hours. Only two people were together at a time when sexual solicitation could be established (J.A. 61, 74), but congregations of young men were frequently observed, 15 in a two-block area at the most (J.A. 77-78), generally no more than 4 or 5 together at one time (*id.*), but, according to one resident, never more than 3 to 4 at one time (J.A. 43) and, frequently, solitary persons (J.A. 40). While some male prostitution activity has occurred in recent years, the long-established pattern of non-prostitute homosexuals meeting each other continues.

[2] Uplinger did not "pursue" Officer Nicosia in any persistent or predatory manner, as suggested by the State; he merely "followed" the officer (J.A. 104; contrast State's Brief, 4, 15).

[3] The proposal contemplated oral sodomy (J.A. 105).

It took 10 or 15 minutes (J.A. 127). No monetary consideration was involved (J.A. 76).[4] While the undercover officer initially refused to go to Uplinger's apartment, that refusal was explained in terms of being afraid of the police, not in terms of being offended at what might occur there (J.A. 104). Throughout the suggestive conversation, Nicosia did not indicate in any way that he might be offended at any suggestion of "deviate" sex.[5]

The trial motion and hearing procedure

Uplinger moved to dismiss the information on the ground of the loitering statute's unconstitutionality (J.A. 12-16).[6] City Court held a hearing on the motion, taking testimony from City personnel and private citizens on their perception of the problems posed by homosexuals in public places. With one exception, the testimony did not relate to the actual incident.[7] There was no suggestion that any offensive conduct mentioned in the

[4] The State now equivocates (State's Brief, 21, 25), but the record is clear. "The People concede that the sexual contact offered here was not related to prostitution and was intended to be performed in private." Affirmation, Assistant District Attorney Lokken to the trial court, 9/23/81, at Record 52.

[5] To the contrary, the location of the street as one where homosexuals frequently meet, the hour of the night, the fact that Officer Nicosia was loitering on the street, in keeping with his assignment, and the officer's willingness to engage in small talk with suggestive overtones ["Do you want to get high?", "What do you like to do?"] for a 10 to 15 minute period, all without objection or departure from the conversation, would have tended to assure Uplinger that the officer would not be offended at the suggestion of sex. Nicosia's feigned fear of the police was not inconsistent with this view.

[6] The one non-constitutional argument (J.A. 13, para. 2) was later abandoned. The grounds for the motion in the motion papers were somewhat expanded on oral argument (J.A. 82-98), and Uplinger's present arguments were presented to the New York Court of Appeals.

[7] Officer Burgstahler, a witness in the pre-trial hearing, assisted in Uplinger's arrest and testified briefly on that subject (J.A. 76-77).

testimony[8] was engaged in by Uplinger. Witness Marcy was concerned about prostitutes, not lonely homosexual men seeking companionship (J.A. 59); much of the testimony was to the effect that homosexuals should go to gay bars and stay off the streets (J.A. 39, 58, 78, 121, Cert. App. D, 9d), although violations of the Statute could as easily occur there as on the street. The police consider the Statute as enforceable in one public place as another, including in gay bars (J.A. 121). The trial court acknowledged that the non-prostitute homosexual presented little public problem, but it assumed that male prostitutes would follow such persons to the same area, and that, purportedly, provided the trial court's justification for preserving the Statute (Cert. App. D, 6d-7d). Police and other testimony made it clear that the triggering "offensiveness" of the situations complained of was the presence of these men on the streets, whether or not for the purpose of soliciting sex.[9]

The appeals

Uplinger's appeal to the New York Court of Appeals was not limited to the issues of due process and freedoms of speech and association (State's Brief, 6).[10]

[8] For example, offensive solicitation by male prostitutes (J.A. 73); homosexuals "saturating the area, committing other disorderly acts, urinating on . . . grass and so on and so forth" (J.A. 125).

[9] Note references to "suspected homosexuals" (J.A. 18, 108, 124) "hanging around" (J.A. 62, *cf.* 118-119). The trial court noted this general perceived offensiveness: "The main reason [why the community and the police object to this kind of loitering] is that the occasional soliciting of a teenager or others by homosexuals and *the appearance of homosexuals outside homes reinforces the age-old fear that people have of homosexuals* and renews the offense they take at their activities" (Cert. App. D, 8d, emphasis added).

[10] However, Uplinger did not argue below that denial of equal protection resulted from the exemption of husbands and wives. (See State's Brief, 28-29). The trial judge ruled on that issue *sua sponte*, as a counterpoint to his earlier decision in *Butler* (See Cert. App. D, 1d-3d; *cf.* App. E).

Uplinger argued, in addition:

1. Penal Law §240.35-3 was, in effect, a mere loitering-vagrancy Statute, with no requirement for overt conduct or for a legitimately proscribed loitering objective (*e.g.* criminal acts, presence on prohibited premises). The Statute was unconstitutionally vague under *Papachristou v. City of Jacksonville*, 405 U.S. 156 (1972).[11]

2. The Statute was underinclusive, violating the right to equal protection of the laws.[12]

3. The absolute prohibition against solicitation in a public place unconstitutionally burdened Uplinger's constitutional right of privacy in connection with his ability to engage in consensual, "deviate" sexual intercourse in private.[13]

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[11] See Uplinger Brief, Court of Appeals, 7/19/82 ("Brief Below"), 21-41. Regarding preservation of the issue for appeal, see Brief Below at 2-3.

[12] *Id.*, 63-66.

[13] See *amicus curiae* briefs below of Lambda Legal Defense & Education Fund, 8/12/82 (at 10-24) and Center for Constitutional Rights, 7/29/82 (at 24-34). The right of privacy here involved had been previously determined in *People v. Onofre*, 51 N.Y.2d 476, 415 N.E.2d 936 (1980), *cert. den.* 451 U.S. 987 (1981).

Summary of Respondent's Argument

Point I. Petitioner originally asked that the holding of the New York Court of Appeals in *People v. Onofre,* 51 N.Y.2d 476, 415 N.E.2d 936 (1980), *cert. den.* 451 U.S. 987 (1981), be reviewed as part of this appeal, but has now abandoned that request. The constitutional right of privacy declared by *Onofre* was not directly presented to the courts below for reconsideration in this case. It probably should not be considered by this Court under a proper application of the "not pressed or passed on below" rule. If, on the record now before the Court, the Court wishes to review that issue, further briefing should be required from the State, with an opportunity to respond accorded to Uplinger.

Point II. The Court of Appeals first construed the loitering law narrowly to apply to loitering for the purpose of engaging in the former crime of consensual sodomy (N.Y. Penal Law §130.38), declared unconstitutional by *People v. Onofre, supra.* It then found the Statute, as so construed, unconstitutional. The State incorrectly asks this Court to ignore the construction of the Statute by the State's Court of Appeals. As a result of the narrowing construction of the Statute, the scope of the provision is coextensive with its actual application to Uplinger, and the court below did not err in striking the Statute down in its entirety.

Point III. The loitering statute, as construed and applied, violates the First Amendment free speech rights of Uplinger and of others affected by the provision. Uplinger was arrested as a direct result of his speech. The exceptions to free speech rights do not apply here. The speech was not obscene or lewd. The Statute cannot be justified as being directed against incitements to crime. No justification for the Statute can be based on a motive to protect minors. The "fighting words" exception to free speech does not apply. This Court

should not expand that exception to reach mere "offensive" speech; if it did so, however, any such expanded exception could not apply to Uplinger's conduct here, anyway. There was no intent to offend and the police officer was not, in fact, offended. The Statute is too broadly written and encroaches on First Amendment rights. A narrowly drawn statute could provide time, place and/or manner regulation. Models of such statutes exist in California, Massachusetts and Ohio.

Point IV. The loitering statute is an infringement on First Amendment rights of freedom of association, due to its indirect tendency to chill exercise of those rights and due to its direct effort to limit association of like-minded people in public and, further, its effort to prevent citizens from inviting others to their personal residences for any lawful purpose.

Point V. There is no compelling state purpose for the Statute. Accordingly, there is no basis to permit the Statute to stand in the face of the First Amendment rights involved.

Point VI. The Statute is discriminatory and underinclusive in violation of Uplinger's right to the equal protection of the laws. There is no basis to sustain the Statute's validity when similar protection is withheld from women subjected to "normal" sexual solicitation. The statutory scheme perpetuates a cultural but constitutionally improper assumption of a male-dominated society with women being sexually submissive objects of male sexual aggressiveness. Other men directing their sexual solicitations toward women are not punished, thereby discriminating against homosexuals.

Point VII. The Statute is unconstitutionally vague and violates due process under principles of *Papachristou v. City of Jacksonville, supra.* Moreover, failure to couple

the "loitering" aspect of the Statute with a legitimately proscribeable objective (illegal act, limited-access premises, *etc.*) renders the Statute invalid as being beyond any legitimate state purpose and, further, enhances the vagueness quality of the legislation. Because First Amendment rights are involved, Uplinger is entitled to argue the rights of others: those gay people who are in public and subject to the Statute because of their "purpose", but who have not yet overtly acted thereon.

Point VIII. If the Court reviews the question whether there is a constitutional right of privacy for the performance of sex between two adults, acting consensually, without financial consideration and in a private home, the Court should uphold such a right of privacy. The decision of the Court of Appeals in *People v. Onofre, supra,* is correct. The subject right of privacy is supported by prior decisions of this Court in related situations. Whatever the limits of such right, it at least encompasses voluntary, non-commercial, sex acts in a private residence involving only two adults. It is not necessary to extend this privacy right beyond the front door of the residence. Uplinger's position with respect to his arrest and conviction herein is fully supported by his rights of free speech, association and due process, independent of the right of privacy which would apply to the ultimate act.

POINT I

If the Court considers the right-of-privacy question relating to private, adult and consensual sex, further briefing should be required.

In *People v. Onofre, supra,* the New York Court of Appeals struck down a criminal prohibition of consensual sodomy, in part, because the federal Constitution's right of privacy extended to non-commercial, adult, consensual sex in a private residence. *Id.,* 51 N.Y.2d at 485, 415 N.E.2d at 938-939. In *Uplinger,* that Court held that the State could not prohibit a discreet invitation for sex, when the sex itself could not be prohibited. "This statute [New York Penal Law §240.35-3], therefore, suffers the same deficiencies as did the consensual sodomy statute." Cert., App. B, 2b.

The State now abandons its request for review of the *Onofre* holding (State's Brief, 2). However, because this Court may review "plain error" without request [Rule 34.1(a)] and because the privacy issue may be necessarily implicated by the decision below, it is addressed herein to a limited extent.

However, in *Illinois v. Gates,* _____ U.S. _____ (1983), 76 L.Ed.2d 527, decided after submission of the Uplinger certiorari papers, this Court held that the "not pressed or passed on below" rule should be applied where the State failed "to raise a defense to a federal right or remedy asserted below." *Id.,* 76 L.Ed.2d at 537.

In this case, Uplinger urged the unconstitutionality of the loitering law because *Onofre* had, in effect, legalized private consensual sodomy, the object of his invitation to Officer Nicosia. *Onofre's* correctness was assumed below by both Uplinger and the State. New York did not request reconsideration of *Onofre* in the *Uplinger* proceedings. Accordingly, the question whether *Onofre* was correctly decided by the 1980 Court of Appeals was not directly presented for review by the same Court in 1983.

There are differences between *Uplinger* and *Gates*, however. The deferred question in *Gates* (whether a good-faith exception should be grafted onto the exclusionary rule remedy) was readily severable from the underlying constitutional right (whether the police acted properly under the Fourth Amendment). In *Uplinger*, however, the underlying question of the individual's constitutional right of privacy was implicitly before the Court for further consideration, at least to determine whether the right should be extended beyond the *act* of sex to the *invitation* for sex.

The first *Gates* policy reason for refraining from reviewing the issue is also present in *Uplinger*—absence of full record development. *Id.*, 76 L.Ed.2d at 537.[14] The second policy consideration, deference to initial state-court review, is less forcefully present, since the *Onofre* holding is recent and the likelihood of modification by the state court negligible.[15] Giving the state court the chance "to rest its decision on an adequate and independent state ground" (*id.*) is also diminished in importance, because the Court of Appeals specifically refused to take that route in the 1980 *Onofre* holding itself.[16]

If *Gates* considerations prevail, this Court will not rule on the *Onofre* right of privacy issue. If, however, that

[14] In *Onofre*, a lengthy hearing was held in City Court as to two of the defendants, with testimony being taken and certain text materials introduced in evidence. For an example of a civil case with full record development on the issue, see *Baker v. Wade*, 553 F. Supp. 1121 (DC Tex. 1982) [appeal pending].

[15] After *Onofre*, Judge Gabrielli, who wrote the dissent, retired. He was replaced by Judge Simon, who had joined in the unanimous opinion of the intermediate appellate court which had also struck down the sodomy law. *People v. Onofre*, 72 A.D.2d 268, 424 N.Y.S.2d 566 (4th Dep't 1980).

[16] The Court declined to rule under the New York Constitution, even though request for that relief was specifically renewed by motion for reconsideration. *People v. Onofre*, 52 N.Y.2d 1072 (1981).

issue is necessarily implicated by the *Uplinger* decision below, leading to review of the question herein, the Court should require further briefing by the State, with an opportunity for response by Uplinger. The subject is within the class of "difficult issues of great public importance" (*id.*, 76 L.Ed.2d at 539), meriting full adversarial consideration.

POINT II

This Court is bound by the narrow construction of the loitering statute adopted by the court below.

The Court of Appeals first narrowed the loitering provision by statutory construction and then determined that, as construed, it was unconstitutional. This Court is bound by the state-court construction of the Statute in reviewing the correctness of that court's declaration of its unconstitutionality. *Kolender v. Lawson,* _____ U.S. _____ (1983), 75 L.Ed.2d 903, 908 fn. 4, and text; *Orr v. Allen,* 248 U.S. 35, 36 (1918).

Analysis of the text of the Court of Appeals decision demonstrates the accuracy of respondent's premise.

A. "The statute challenged on these appeals (Penal Law, §240.35, subd 3) . . . MUST BE VIEWED AS A COMPANION STATUTE TO THE CONSENSUAL SODOMY STATUTE (Penal Law, §130.38) which criminalized acts of deviate sexual intercourse between consenting adults." *People v. Uplinger,* Cert. App. B, 2b. (Emphasis added).

The impact of that determination by the Court of Appeals is well-established. "When the Supreme Court of the State has held that two or more statutes must be taken together, we accept that conclusion as if written into the statutes themselves." *Gregg Dyeing Co. v. Query,* 286 U.S. 472, 480 (1932).

B. "We held in *People v. Onofre* (51 NY2d 476) that the State may not constitutionally prohibit SEXUAL BEHAVIOR CONDUCTED IN PRIVATE BETWEEN CONSENTING ADULTS. Inasmuch as THE CONDUCT ULTIMATELY CONTEMPLATED BY THE LOITERING STATUTE may not be deemed criminal, we perceive no basis upon which the State may continue to punish loitering for that purpose. . . . [I]T IS APPARENT FROM THE WORDING OF THIS STATUTE that it was AIMED AT PROSCRIBING OVERTURES, NOT NECESSARILY BOTHERSOME TO THE RECIPIENT, LEADING TO WHAT WAS, AT THE TIME THE LAW WAS ENACTED, AN ILLEGAL ACT." *People v. Uplinger*, Cert. App. B, 2b-3b. (Emphasis added).

In other words, the loitering law, P.L. §240.35-3, was intended as an aid in the enforcement of the consensual sodomy statute, P.L. §130.38. As explained below, the consensual sodomy law was intended to reach private, "deviate"-sex activity, not necessarily related to public sexual offensiveness. This *public* loitering, for this *private* purpose, was the one public sexual offense not already covered by the New York statutory scheme governing sexual behavior.[17]

C. "Because the statute itself is devoid of a requirement that the conduct proscribed be in any way offensive or annoying to others, THE CHALLENGED STATUTE CANNOT BE CATEGORIZED AS A HARASSMENT STATUTE. *Id.* at 2b. (Emphasis added).

As a matter of statutory construction, it was not the legislative intent behind the loitering provision to prevent public harassment, to avoid a public "nuisance" or to prevent "indiscriminate sexual solicitation",

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[17] The Penal Law sections affecting sex are at Appendix A hereto.

unrelated to the illegality of the ultimate sex act. Instead, the Statute's purpose was to provide an inchoate offense, similar to solicitation and attempt offenses, to aid in preventing violations of P.L. §130.38. Public protection against harassment and other actually offensive conduct was available under other statutes [*e.g.* harassment, P.L. §240.25; disorderly conduct, P.L. §240.20; criminal nuisance, P.L. §240.45] or could be further protected by additional, "properly drafted" legislation (Cert. App. B, 2b).

The Court of Appeals' construction of the loitering law is rational and consistent with the statutory scheme. This Court cannot review the correctness of that construction, and the State's request for such review is inappropriate.[18] *United States v. Thirty-seven Photographs*, 402 U.S. 363, 369 (1971). A brief review of New York's statutory scheme will, however, confirm this analysis of the meaning of the decision below.

The New York Statutory Scheme

Penal Law Article 130 covers sex offenses generally and, with the exception of the consensual sodomy provision (P.L. §130.38), covered only nonconsensual sex acts (whether without consent in fact or by operation of law). Commercial sex offenses are covered by Article 230. Adultery is proscribed in section 255.17, within the article dealing with the protection of the marriage institution. All of these offenses are result-oriented, being considered evil in themselves, whatever actual harm may occur in particular instances.

[18] The State challenges the Court of Appeals' interpretation of the statute (State's Brief, 10-12, 20), pointing out what that "court ignored in its assessment of the purview of the statute" (*id.* 11). The State then builds its case on its own statutory interpretation (*id.* 11-12, 24, 29) and on the opinion of the dissenting judge below (*id.* 14, 18). However, it is the majority opinion below which binds this Court.

Contrasted to these are the place-oriented offenses, which include: (1) public lewdness (P.L. §245.00), (2) deviate-sex loitering (P.L. §240.35-3), (3) prostitution-purpose loitering (P.L. §240.37) and, to the extent they apply to sex-related activities, (4) harassment (P.L. §240.25) and disorderly conduct (P.L. §240.20).

Public lewdness, prohibiting exposure of "the private or intimate parts of his body in a lewd manner or commission of any other lewd act . . . in a public place", would apply to any public sex act, not simply to "deviate sex". Solicitation for such a crime is already provided by Penal Law §100.00.[19]

As to private sex acts, the Legislature intended no proscription of "normal" sex (absent adultery). To avoid the appearance of condoning it, however, "deviate" sex was outlawed.[20] Here, however, a husband-wife exception was created (P.L. §130.00-2). That exception did not apply to public lewdness,[21] further confirming the conclusion that the consensual sodomy law was intended to reach private sex only (where a husband-wife exception would be at least understandable; it would be absurd to attribute to the Legislature an intent to permit married persons to commit "deviate" sex in public, while denying that right to others).

Moreover, the court's conclusion that P.L. §240.35-3 served only a supportive role to the consensual sodomy statute (P.L. §130.38) is supported by legislative history.

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[19] Moreover, the Court of Appeals has left clear power to the Legislature to add further prohibitions of a "general nature . . . properly drafted". *People v. Uplinger*, Cert. App. B, 2b.

[20] Memorandum, Assemblyman Richard J. Bartlett, Chairman, N.Y. State Temporary Commission on Revision of the Penal Law and Criminal Code (the "Commission"), N.Y. State Legislative Annual, 1965, 51 at 52; Message, Hon. Nelson A. Rockefeller, Governor, July 20, 1965, McKinney's 1965 Session Laws of New York, 2120-21.

[21] The "deviate sexual intercourse" definition applied only "to this article" [Article 130]. P.L. §130.00.

The proposal originally was to reach any lewd or sexual purpose, not just "deviate sex".[22] In the 1965 legislative session, however, the recommendation was limited to "deviate" sex purposes only[23] and the consensual sodomy prohibition was added.[24] As the Court of Appeals has now ruled, the result was a limited loitering provision designed to aid in the prevention of the illegal act of consensual sodomy in a private place.[25]

While the loitering statute, by its terms, is applicable to any "deviate" sex, homosexual or heterosexual, the former Penal Law was directed specifically at male homosexuality. Former N.Y. Penal Law §722-8, as amended (1964). Police practice under the new statute, but prior to *People v. Onofre, supra,* was to enforce the loitering provision only against gay men. With the inability to use the consensual sodomy law (Penal Law §130.38) after *Onofre,* the police began to use the statute against suspected prostitutes and their customers (J.A. 61, 106-108; trial court decision, Cert. App. D, 2d-3d), but apparently not against other heterosexuals.

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[22] Study Bill, N.Y. Senate Int. 3918, Assembly Int. 5376, 1964 Legislative Session, Section 250.15-3. The loitering provision was recommended to deal with one of a "group of acts" which involve no intent to cause either public or individual alarm but "which are deemed generally unsalutary or unwholesome from a social viewpoint". Third Interim Report, N.Y. Commission, *etc.* page 27, February 1, 1964 [Leg. Doc. (1964) No. 14]; see, also, Commission Staff Notes, Article 250, pages 387-388, appended to Study Bill, *supra.*

[23] Fourth Interim Report of the Commission, page 49, February 1, 1965 [Leg. Doc. (1965) No. 25]; see P.L. §240.35-3 (1965).

[24] N.Y. Laws of 1965, ch. 1038.

[25] The narrow construction below conforms to the policy of the New York Court of Appeals to restrict broad-language statutes in the sex and indecency area. "Statutes punishing indecent exposure, though broadly drawn, must be carefully construed to attack the particular evil at which they are directed." *People v. Price,* 33 N.Y.2d 831, 832, 307 N.E.2d 46 (1973).

The opinion below did not discuss the Susan Butler facts. Implicit, however, is the finding that Butler's conduct fell without the statute's scope; she should have been prosecuted for public lewdness (P.L. §245.00) or for prostitution-loitering (P.L. §240.37). Solicitation for a crime such as public lewdness, is already provided by P.L. §100.00.

POINT III

New York Loitering Law §240.35-3 violates the First Amendment right to freedom of speech.

Uplinger's arrest became assured with his utterance of the words: "[I]f you drive me over to my place . . . I'll blow you."[26] We evaluate, therefore, pure "speech", just as the message on Cohen's jacket was pure "speech". *Cohen v. California,* 403 U.S. 15 at 18-19 (1971). The State contends that the primary purpose of the loitering law was to prevent "solicitations" (State's Brief, 29). Solicitations, however, are speech, entitled to First Amendment protection. *Bigelow v. Virginia,* 421 U.S. 809 at 818, 826 (1975).

It is likely that the Statute is unconstitutional in all of its possible applications.[27] As applied to Uplinger, the Statute is unconstitutional. Additionally, respondent argues the free speech rights of others under First Amendment overbreadth principles.[28]

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[26] The element of "loitering" added nothing; by itself, it was innocent activity. Compare *Papachristou v. City of Jacksonville,* 405 U.S. 156 at 163-164 (1972).

[27] Based on the apparent state interpretation of the Statute (see Point II, *supra*), the loitering provision may reach only constitutionally protected speech.

[28] "Because overbroad laws, like vague ones, deter privileged activity, our cases firmly establish appellant's standing to raise an overbreadth challenge." *Grayned v. City of Rockford,* 408 U.S. 104, 114 (1972); see *Schad v. Borough of Mount Ephraim,* 452 U.S. 61, 66 (1981).

The question presented is whether a state may absolutely proscribe:

[1] private conversation in a public place,

[2] between two adults voluntarily conversing with each other,

[3] with no indication of possible offense by one if an intimate proposal were to be made by the other and no reckless disregard by the one of the other's probable feelings,

[4] where the conversation cannot be overheard by others and is not accompanied by offensive, observable, physical conduct, and

[5] where the conversation includes an intimate proposal that the two of them go to a private residence,

[6] to engage in a legal and private sexual encounter,

[7] having no commercial overtones.

In short, to what extent can a state make criminal the private, non-commercial, intimate conversations and associations of its citizens, occurring discreetly on the public streets?

General Principles

Privileged speech is not simply speech which communicates ideas or discusses issues [*but cf.* State's Brief, 12]; it is also speech which is emotive [*Cohen v. California, supra* at 25-26], merely entertaining [*Winters v. New York*, 333 U.S. 507, 510 (1948); *Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 65 (1981)], or commercial [*Bates v. State Bar of Arizona*, 433 U.S. 350, 363 (1977)]. Speech on merely private concerns is not excluded from protection. *Connick v. Myers*, _____ U.S. _____ (1983), 75 L.Ed.2d 708, 720. This Court has considered the degree to which speech may be regulated on the basis of

content [see, *e.g., Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 63 *et seq.* (1976)]. Even where content regulation is allowable, government must take a posture of "absolute neutrality . . .; its regulation of communication may not be affected by sympathy or hostility for the point of view being expressed by the communicator." (*Id.* at 67).

In weighing First Amendment interests against conflicting regulatory desires, preference is given to a requirement that, wherever possible, the offended observer respond by "averting his eyes" and thereby avoid the source of offense. *Cohen v. California, supra* at 21. Only when speech invades "substantial privacy interests . . . in an essentially intolerable manner" may government regulate the speech. "Any broader view of this authority would effectively empower a majority to silence dissidents simply as a matter of personal predilections." *Id.*

However, reasonable time, place and manner restrictions may be imposed on protected speech, assuming the neutrality required by this Court. In such cases, however, narrowly defined regulation is required instead of outright prohibition. *Schad v. Borough of Mount Ephraim, supra* at 74-76; *Federal Communications Commission v. Pacifica Foundation*, 438 U.S. 726 (1978).

> "Access to the 'streets, sidewalks, parks, and other similar public places . . . for the purpose of exercising [First Amendment rights] cannot constitutionally be denied broadly. . . .' Free expression 'must not, in the guise of regulation, be abridged or denied.' " *Grayned v. City of Rockford*, 408 U.S. 104, 117 (1972).

Respondent Uplinger is cognizant of the disagreement within this Court whether and to what extent offensive language should be subject to governmental regulation.

See *Federal Communications Commission v. Pacifica Foundation, supra* at 744-748 (1978); *id.* at 761-762 (Powell, J., concurring) and at 762, *et seq.* (Brennan, J., dissenting). Thus far, this Court has upheld the principle that, however vulgar and distasteful language may be, it is entitled to First Amendment protection as long as it is not obscene in the constitutional sense. Whatever regulation of the time, place and manner of speech may be appropriate for speech which is not obscene, it is unacceptable in our traditions that it should be denied First Amendment protection on an evaluation whether it contains any meaningful ideas. *Winters v. New York, supra* at 510 (*but cf.* State's Brief, 6, 12).

Free Speech Exceptions Not Applicable

The recognized exceptions are not applicable. Those suggested by the State are (a) obscenity, (b) illegal acts, (c) protection of minors and (d) "fighting words".

1. Obscenity

New York seeks to justify the statute by its purpose to protect the public from harassing, indiscriminate solicitations of a "lewd and intimate kind" (State's Brief, 29). Uplinger's speech, "by any community standard [was] lewd if not obscene". *Id.* at 13.

If the State claims the words were obscene, it proposes no justification for that proposition under principles of *Miller v. California,* 413 U.S. 15 (1973). Recognizing "the inherent dangers of undertaking to regulate any form of expression", this Court there required as a condition of prohibiting allegedly obscene, written communication: (a) depiction or description of sexual conduct, (b) specific definition of the conduct by state law, (c) limitation of such determination to works which were prurient, when taken as a whole, (d) which portrayed sexual conduct in a patently offensive way and (e) which lacked any serious literary or other purpose. *Id.* at 23-24.

But "lewdness", like obscenity, should depend more "upon nuances of presentation and the context of its dissemination" [*Paris Adult Theatre I v. Slaton*, 413 U.S. 49 at 84 (1973), Brennan, J., dissenting] than upon automatic proscriptions of particular words or ideas. "[S]ex and obscenity are not synonymous. . . . Sex, a great and mysterious motive force in human life, has indisputably been a subject of absorbing interest to mankind through the ages; it is one of the vital problems of human interest and public concern." *Roth v. United States*, 354 U.S. 476, 487 (1957).

The State assumes Uplinger's comments were "undeniably lewd" (State's Brief, 6), "if not obscene" (*id.* 13). What constitutes "lewdness" in American law is uncertain;[29] certainly, however, the words used by Uplinger were not obscene. See *Federal Communications Commission v. Pacifica Foundation, supra; cf.* P.L. §235.00. Moreover, if the language was subject to prohibition in a public place, the statute did not give the specific notice that constitutional law requires. See *Miller v. California, supra* at 24; *Cohen v. California, supra* at 19.

Uplinger might have invited Nicosia home to engage in "oral sodomy", to "make love", to "stay for the night" or to "have sex", but his actual words were colloquial and sufficient for the occasion, without "portraying sex in a patently offensive way". P.L. §235.00. Even if the words were offensive, the offense was not in the "form of his communication . . . perhaps because it [was] too loud or too ugly in a particular setting" [*Consolidated Edison Co. v. Public Service Commission*, 447 U.S. 530, 547 (Stevens, J. concurring)], but in Uplinger's "message", the idea conveyed. *Id.*, 548.

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[29] See, *e.g.*, *Pryor v. Los Angeles Municipal Court*, 25 Cal.3d 238, at 246-247, 599 P.2d 636, at 640 (1979).

But the State cannot control the "message" if it is to maintain neutrality. It has not demonstrated that Uplinger's words were lewd under the circumstances uttered. Nor does the Statute make any distinction between lewd and non-lewd delivery of the proscribed "message".

The correct constitutional principle, respondent urges, is this: Private discussion of potential sexual conduct with one other person, in the context of a continuing conversation under circumstances in which the sexual overtones have been established and accepted by both parties, cannot, as a matter of constitutional law, be obscene.

2. Incitement to crime

The State argues the loitering statute is concerned with soliciting criminal, as well as non-criminal, acts.[30] State's Brief, 11-12. The short answer is that the Court of Appeals has construed the statute otherwise. (See Point II, *supra*.) As to the former crime of consensual sodomy, it ceased being a crime before Uplinger was arrested (with the denial of certiorari by this Court in *People v. Onofre, supra).* Without regard to the correctness of the *Onofre* decision (*supra*, 51 N.Y.2d 476), Uplinger was entitled to rely on the judgment striking down the consensual sodomy statute. *Ex post facto* considerations and due process standards of fair notice require this result. *Bouie v. City of Columbia,* 378 U.S. 347, 353 (1964); *People v. Heller,* 33 N.Y.2d 314, 330, 307 N.E.2d 805, 814 (1973).

The State attempts to garner support by binding this statute with the need to control prostitution. State's

[30] Compare trial court decision, Cert. App. D, 6d-7d. The culpability of the non-prostitute homosexual for "gay hustler" activities is on the order of the responsibility of the heterosexual male office worker for the street prostitute; to her, he is a potential customer.

Brief, 13, 21. By tolerating deviate-sex-soliciting conversation, it is claimed, "prostitution activities will flourish unchecked". *Id.*, 21.[31] The unspoken premise is that laws against loitering for the purpose of prostitution (P.L. §240.37) and the various prostitution crimes (App. A, *infra* at 2a) do not work. However, it is an extravagant, unsupportable doctrine that would withhold constitutional rights from the law-abiding in order to make apprehension of criminals more certain.[32]

3. Protection of minors

The State emphasizes this concern. State's Brief, 18-20. The Statute nowhere mentions protection of children as one of its objectives. The reviser's comments explaining the similar Model Penal Code provision (State's Brief, 14) omit reference to concerns for child welfare. This is not a statute, like those in *New York v. Ferber*, _____ U.S. _____ (1982), 73 L.Ed.2d 1113, and *Ginsberg v. New York*, 390 U.S. 629 (1968), where New York has adopted protective legislation for children. Nor is the mode of communication one which carries with it a risk that minors will necessarily be exposed to the speech. Contrast *Federal Communications Commission v. Pacifica Foundation, supra* at 732. New York minors, in addition to being protected by general statutes relating to harassment, disorderly conduct, public lewdness, *etc.*, are protected by P.L. §260.10 (Endangering the welfare of a child; see App. A, *infra*, at 2a). If more is needed, new statutes can be enacted. See *New York v. Ferber, supra.*

[31] The State takes no note of the fact that solicitation for "normal" sex is permissible in New York. Why does this not make prostitution "flourish unchecked"?

[32] Reference to crimes such as bestiality, necrophilia, sexual sadism or masochism and forceful insertion of foreign objects in the body (State's Brief, 11), as possible reasons for the loitering law, is made for the first time before this Court. The suggestions are extreme and unsupportable.

4. "Fighting words"

The State urges a greatly expanded "fighting words" exception. If the hearer would probably "experience embarrassment, annoyance or harassment" (State's Brief, 17-18), would probably feel the need to respond (*id.*, 14-15) or would be concerned about a possible "public incident" (*id.*, 17), the exception should be applied. Since "deviate" sex "is presumptively more offensive to the greater portion of the public" (*id.*, 28), it is permissible to create a conclusive presumption of offensiveness and harassment from the language, whatever the facts may be in the particular instance.[33] *Id.* Actual violence or public disorder would be "but an extreme of the harm which could result from the public context of the solicitation". *Id.*, 15.

The State presents the same issue which was presented in *Cohen v. California, supra* at 22-23. There, the question was whether the particular four-letter word could, by California law, be excised "from the public discourse, either upon the theory . . . *that its use is inherently likely to cause violent reaction* or upon a more general assertion that the States, acting as guardians of public morality, may properly remove this offensive word from the public vocabulary." *Id.* (Emphasis added). This Court should disallow the effort here, as it did in *Cohen*.

While offense to the sensibilities of the hearer formed an alternative part of the original "fighting words" concept [*Chaplinsky v. New Hampshire,* 315 U.S. 568,

[33] The State would allow conversations with strangers, including a polite inquiry whether they were homosexuals. State's Brief, 22. Presumably, that would be as offensive to many as actual solicitation. (Compare *Connick v. Myers,* _____ U.S. _____ (1983), 75 L.Ed.2d 708, at 723: "Questions, no less than forcefully stated opinions and facts, carry messages. . . .") An affirmative answer to the inquiry, however, would remove any rational basis for outlawing actual solicitation; the legislative finding of *per se* offensiveness would no longer apply.

572 (1942)],[34] this Court no longer defines the "fighting words" exception on that basis. Only when there is a real possibility of breach of the peace is the exception applicable. Where no particular person was insulted [*Cohen v. California, supra* at 20], no one in fact was "violently aroused" [*id.*] and there was no showing that the speaker intended any such result [*id.*], the "fighting words" doctrine did not apply. Shock or disapproval of the content of the speech is never enough to justify restriction. *Street v. New York,* 394 U.S. 576 at 592 (1969).

Accordingly, for "fighting words" to apply, there must be a showing that the speaker intended to violently arouse and that he, in fact, did so. "Fighting words" consist of "face-to-face, abusive and insulting language likely to provoke a violent retaliation" [*Gooding v. Wilson,* 405 U.S. 518, 530 (1972), Burger, C.J., dissenting.] The cases before this Court have invariably involved language that was clearly intended to be, and could only be understood as being, abusive, insulting, hateful, vulgar and hostile. See, *e.g., Rosenfeld v. New Jersey,* 408 U.S. 901 (1972) (Burger, C.J., Powell, J. and Rehnquist, J., dissenting, three opinions), *Lewis v. New Orleans,* 408 U.S. 913 (1972) (Powell, J., concurring); *Brown v. Oklahoma,* 408 U.S. 914 (1972) (Powell, J., concurring). Even if this Court were to permit punishment for scurillous, offensive language without an actual, present threat of breach of the peace (as argued by the dissenting and concurring Justices in *Rosenfeld, Lewis* and *Brown, supra),* the doctrine could not reach Uplinger's speech in this case. Uplinger intended no insult; his words were "loving" words, not "fighting" words. Uplinger sought Nicosia's friendship, not anger

[34] The state law, as construed, applied only to language directly tending to a breach of the peace. This Court's alternative definition of the exception as including words "which by their very utterance inflict injury", *id.* at 572, was dictum.

and confrontation.[35] On evidence sufficient to himself but, unfortunately, erroneous, he had wrongly judged that Nicosia was looking for the same kind of affection that he also sought.

Applying Principles to this Case

The State argues a case not before the Court. Indiscriminate sexual solicitation did not occur; none of the other argued offensive factual concerns were present. Uplinger spoke with Nicosia 10 or 15 minutes. Much verbal, and presumably nonverbal, communication occurred before Uplinger felt secure in asking the officer home. The conversation was calculated to determine Nicosia's sexual orientation and interests, without giving offense. Uplinger was seeking to avoid giving affront, even to the extent of avoiding the direct question whether Nicosia was homosexual. (See State's Brief, 22). It was only persistent inquiry from Nicosia as to what Uplinger "wanted to do" (J.A. 104) that finally brought an explicit response.

On Nicosia's part, in keeping with his job, he was pretending interest. When the solicitation was made, however, he adopted the "strict liability" assumption of affront. He was in fact neither interested nor affronted; he was just doing a job. But for the fact that he was "on assignment", there was ample opportunity for him to have indicated genuine disinterest early in the conversation, with sure avoidance of any embarrassing turn to the discussion.[36]

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[35] See *Pryor v. Los Angeles Municipal Court, supra,* 25 Cal.3d at 252, 599 P.2d at 644, fn. 7. Compare *Erznoznik v. City of Jacksonville,* 422 U.S. 205 at 210-211, fn. 6 (1975).

[36] Nicosia was not a "captive audience" [State's Brief, 16]. He was, to his knowledge, in an area where homosexuals met, in the early hours of the morning, under conditions which predictably could put him in touch with gay people. He found what he was looking for.

Contrast *State v. Phipps*, 58 Ohio St.2d 271, 389 N.E.2d 1128 (1979), where blunt, immediate and indiscreet inquiry led to a conviction upheld under a statute which, as construed, required application of the "fighting words" exception.[37]

Both California and Massachusetts, by narrowing constructions to their solicitation statutes, have imposed the requirement that (a) the actor "know or should know" of the presence of a person "who may be offended by [the] conduct" (the lewd conduct involved being specifically identified) and (b) that any solicitation, to be punishable, must occur in public and must be for a sex or other lewd act intended to be performed in a public place. *Pryor v. Los Angeles Municipal Court*, 25 Cal.3d 238, 256-257, 599 P.2d 636, 647 (1979); *Commonwealth v. Sefranka*, 308 Mass. 108, 414 N.E.2d 602, 608 (1980). The person who may be offended, of course, may be the addressee of the solicitation or anyone overhearing the conversation.

This Court must evaluate the interests cited by the State and, further, determine whether those interests can be met by a narrowly drawn statute, in place of the legislation before the Court. *Schad v. Borough of Mount Ephraim, supra* at 70-71. The *Phipps, Pryor* and *Sefranka* cases provide models of such narrow legislation. Additionally, New York may broaden the coverage beyond the models; indiscreet, overt and obtrusive public invitation for sex to be performed in a private place may certainly be subjected to appropriate punishment or control.

The present loitering statute, however, is unlimited in scope. It lends itself to discriminatory enforcement. The District Attorney's apprehension about the consequences

[37] The court defined the "fighting words" concept in terms of *Chaplinsky*, including the sensibilities dictum. However, the case was actually decided on the imminent breach of the peace basis.

of its demise is the same "undifferentiated fear or apprehension of disturbance [which] is not enough to overcome the right to freedom of expression". *Cohen v. California, supra* at 23.

Robert Uplinger's conduct would not offend any properly drawn, narrow statute. Even if it were assumed that Uplinger's invitation could have been made illegal (an untenable position, respondent argues), that result could not be reached under the present, broadly written statute. *Gooding v. Wilson, supra* at 520-521.

Government is not the best arbiter of the affective bonding which occurs between human beings. How we express our attraction to each other, establish acquaintance, secure relationships of affection and intimacy, and feed that part of the human spirit which craves friendship, love and attachment, is best dealt with by private, day-to-day, "negotiated" arrangements with others. No one can explain why attraction exists in given situations—what draws A and B together out of the myriad other possibilities available. Beyond establishing boundaries to assure that the relationships are in fact consensual, not part of a general commerce in what should be a non-commercial melieu, and, finally, not destructive of interests needing special protection (*e.g.* children, marriage), American law generally leaves these intensely personal and private decisions to the individual.

One sheds much of his privacy when he ventures out of his home, but not all privacy rights are lost. The intrusion on one's privacy which can occur in a public place [*Kovacs v. Cooper,* 336 U.S. 77, 87 (1949); *Lehman v. City of Shaker Heights,* 418 U.S. 298, 307 (1974) (Douglas, J., concurring); *Cohen v. California, supra* at 21, 22 fn. 9 and text] is the basis of the State's argument (State's Brief, 8-9, 17). A private conversation does not cease to be private simply because it is on a public

street. See *Katz v. United States*, 389 U.S. 347, 351-352 (1967). One's privacy right (here grounded on First and Fourth Amendment principles) should assure that his lawful, private speech, uttered discreetly and politely, without either intent or expectation that it would offend, and seeking no unlawful end, will not require justification before any court. This, respondent believes, is the basis of the Court of Appeals' holding that "this statute, therefore, suffers the same deficiencies as did the consensual sodomy statute" (Cert. App. B, 2b).

Less restrictive burdens are appropriate for oral speech than for written communication. The one is fleeting in time and limited in impact; the private listener can "move on" in his life and put it behind him. Written communication, by contrast, is capable of wide distribution and, if obscene, lewd, libelous or otherwise afflicted, capable of greater harm. It is appropriate, therefore, that any doubts here be resolved in favor of the respondent and the free, unfettered exercise of his First Amendment rights in this oral speech.

Finally, contrary to the State's claim of the offensiveness of Uplinger's invitation to Nicosia, that conversation was much less potentially offensive than others previously before this Court. The comments were not in front of a large audience [contrast, *Rosenfeld v. New Jersey* and *Brown v. Oklahoma, supra*] or broadcast by radio [*Federal Communications Commission v. Pacifica Foundation, supra*]. Its potential impact on the public was minimal.

We have so far assumed, for argument purposes only, that Uplinger's statement to Nicosia did not consist of "ideas". However, he in fact was expressing an idea—both in the declaratory style of his statement and in the message given. It was not simply the information of the availability of a certain experience. More importantly, it was the implied message: "It's ok; I know

what you want. You do not have to be afraid. It's alright to be gay and to do something about it."

In *Miller v. California, supra* at 18-19, this Court allowed control of obscenity in a context where "the mode of dissemination carries with it a significant danger of offending the sensibilities of unwilling recipients or of exposure to juveniles". No less exacting standard should be required where non-obscene speech is being examined. The Uplinger communication carried no "significant danger" of anything other than that the content would offend majority sensibilities, if, unexpectedly, the conversation came to public attention.[38]

POINT IV

New York Penal Law §240.35-3 infringes on the First Amendment right to freedom of association.

All that has been said of Uplinger's right to free speech is equally applicable to his right of freedom of association. That freedom is not restricted to associations which are "political in the customary sense" but includes those which "pertain to the social, legal, and economic benefit of the members." *Griswold v. Connecticut,* 381 U.S. 479, 483 (1965), as quoted in *Sawyer v. Sandstrom,* 615 F.2d 311, 316 (5th Cir. 1980).

Note, also, *Coates v. City of Cincinnati,* 402 U.S. 611 at 615 (1971):

> "The First and Fourteenth Amendments do not permit a State to make criminal the exercise of the right of assembly simply because its exercise may be 'annoying' to some people."

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[38] The State asserts actual harm occurred from Uplinger's solicitation of Nicosia on no basis whatsoever (State's Brief, 20). The pre-trial hearing did not deal with the Uplinger solicitation at all, only with the abstract "problem". How severe a problem exists may be in doubt [see trial court decision, Cert. App. D, 5d-6d], but there was no evidence that Uplinger was there on other occasions or had caused any harm to anyone.

Implicit in the prohibition of the loitering statute is the effort to discourage respondent Uplinger from meeting new people and, where considered personally suitable, to invite them to his home for any lawful purpose—including intimate sexual relations. Respondent acknowledges the appropriateness of time, place and manner regulations of a subject as intimate as personal sex. But the subject statute makes no effort to distinguish between that conduct which would offend and that which would be designed not to offend. Given the common knowledge that there is a substantial minority of homosexual persons in this country,[39] this Court can readily infer the importance of the freedom that they assert to meet each other in public, to make new acquaintances and to comport themselves in a discreet, non-harmful and personally satisfying manner in the course of the exercise of their right of assembly and association. (See J.A. 93-95).

The right of assembly and association includes the opportunity for such gatherings "to further . . . personal beliefs". *Healy v. James,* 408 U.S. 169, 181 (1972). In assessing claims under this heading, the Court is concerned with the "practical effect" of whatever governmental action is at issue (*id.*). While no "direct action" may have been taken to deny assembly/association rights, the First Amendment claim may be grounded on indirect encroachments as well. [*Id.* at 183; *Bates v. City of Little Rock,* 361 U.S. 516, 523 (1960)].

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[39] In addition to the general visibility of homosexuals and homosexual activists in current news and events, consider the findings, as to the incidence of homosexual acts, in such works as Kinsey-Pomeroy-Martin, "Sex Behavior in the Human Male", W.B. Saunders Co., 1948, pages 610, 628, 650-651; National Institute of Mental Health: Task Force on Homosexuality, "Final Report and Background Papers". Edited by John M. Livingwood, M.D. [U.S. Government Printing Office, Stock No. 1724-0244; DHEW Pub. No. (HSM) 72-9116, printed 1972]. *Cf. Baker v. Wade, supra* at 1129 (appeal pending).

Here, the State has passed a broadly worded, vague statute [see Point VII below], which, in effect, cautions gay people especially against meeting each other in public places and becoming "visible", lest they be subjected to control through a "round-up" type of law enforcement undertaken without regard to the relatively narrower core purpose of the statute. Moreover, the policies enunciated by witnesses and the Court at the hearing confirm that the Statute is enforced in Buffalo in a way designed to implement majority desires little related to actual law violation by the subjects of the enforcement. People do not want "suspected homosexuals" (J.A. 18, 108, 119, 124) "hanging around" (J.A. 62, 119). Presence of homosexuals in an area is a factor adversely affecting the interests of businessmen and property values of homeowners. (See trial court decision, Cert. App. D, 5d-6d).[40] The clear preference would be that the young males, presumably homosexuals, would meet each other at gay bars and not where members of the public had to observe them using the streets for socializing purposes (J.A. 39, 57-58, 78, 121; trial court decision, Cert. App. D, 9d). The attitude was epitomized by the trial court's question why it was

[40] Although the trial court spoke in terms of the "soliciting in front of or near their homes and businesses" being the cause of the presumed lower values, the testimony did not support this. Timothy McCarthy, the homeowner who testified (J.A. 30, *et seq.*) was concerned about "gatherings of young males" but he did "not know their purposes specifically" (J.A. 31). While these males had done nothing overtly to annoy or harass him, he was psychologically impeded from going out from his own sense of "apprehension", all resulting from merely "walking by six or seven fellows congregating on the street corner" (J.A. 35). The businessman who testified was Robert Freudenheim (J.A. 41, *et seq.*). He observed young men in the area, just standing around (J.A. 42). He had received no specific complaints from his tenants. While the people on the street were generally quiet (J.A. 44), the fact that they were groups of young males rather than mixed groups of men and women and that they were simply loitering on the street made them undesirable to him (regardless of their purpose) (J.A. 44-46).

"necessary" for gay people to meet each other on the street (J.A. 56).[41] Clearly, the desire of the police is to use the law primarily as an anti-loitering provision, to deal with perceived problems other than mere sex solicitation.[42]

The indirect effect of this broadly-worded and vague statute, therefore, is to abridge the rights of Uplinger and other gay people to freely assemble and associate.

POINT V

There is no compelling state purpose justifying the First Amendment restrictions imposed by the statute.

The State must demonstrate a compelling state purpose to justify restrictions on the exercise of First Amendment rights. *N.A.A.C.P. v. Button*, 371 U.S. 415, 438 (1963). The State argues that it has compelling interests here: [1] fostering the "guarantee of free trade of ideas" (State's Brief, 16), [2] preventing the public from becoming a "captive audience" (*id.*, 17), [3] protecting the privacy of members of the public (*id.*, 18), [4] protecting minors (*id.*, 18-19), [5] dealing with youth "hustlers" (*id.*, 19-20), [6] avoiding public nuisances (*id.*, 20) and [7] preventing criminal acts (*id.*, 20-21).

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[41] Councilman Marcy's answer to the court's question related to prostitution. While the hearing related to non-prostitution activities and that was the case with Uplinger, Marcy was speaking only of the problem of enforcing prostitution laws, not about restricting gay people generally (J.A. 59).

[42] Chief Kennedy testified: "I would say there's a crying demand for legislation and for a law to what we have now, the loitering law, to be effective in responding to complaints of groups of people say who are homosexuals saturating the area, committing other disorderly acts, urinating on their grass and so on and so forth, and walking up and down and soliciting people and I'd say that we have a prime need to . . . control this or do something to prevent this from happening and to respond to the public demand for police services" (J.A. 125).

The State would protect "free trade of ideas" by prohibiting the expression of the idea uttered by Uplinger (*id.*, 16). This would be done without regard to whether there were persons to whom that idea was important, perhaps vital to their emotional and social health. The State then would twist the "captive audience" concept out of all recognition. That concept, as a restriction on free speech, is appropriate where it is virtually impossible to avoid the message by exercising free choice; but no immediate, reckless or indiscriminate solicitation occurred here. Nicosia, had he been a private person uninterested in getting involved with Bob Uplinger and not on official assignment to await a solicitation, would either not have participated in the conversation or would have made his disinclination apparent before any solicitation occurred. This was no loudspeaker case (*Kovacs v. Cooper, supra*) or instance of political advertising on a public transit utility (*Lehman v. City of Shaker Heights, supra*). Nicosia could simply walk away any time.

All of the other "compelling interests" mentioned form no part of the Statute's purpose, as construed by the Court of Appeals, and are fully covered by other sections of the Penal Law. (See Appendix A, *infra.*)

There is another public policy of the State of New York now reflected in Governor Cuomo's Executive Order No. 28, issued November 18, 1983 [Appendix B hereto]:

> "In this case, this statement and Executive Order are clear. Their essence is that our government cannot promote any religion, creed, belief or life-style without thereby threatening all others. This is an argument for securing freedom by insisting on neutrality. It is a proposition that is at the very foundation of our nation's strength. We ought never be embarrassed nor afraid to repeat it." (Appendix B, *infra,* at 9a).

That statement, made with respect to State policy toward homosexuals, but in a different context, applies equally here.

POINT VI

The Statute is discriminatory, underinclusive and a violation of respondent Uplinger's right to the equal protection of the laws.

Although the Commission's original proposal contemplated an all-inclusive proscription against loitering for purposes of soliciting or engaging in "lewd or sexual" conduct [see note 22, *supra*], the final proposal was limited to "deviate" sexual conduct. The primary reach of the statute is directed to homosexuals (Cert. App. D, 3d; see, *supra* at 15). In addition to the discriminatory enforcement which is in fact practiced (J.A. 61, 106-108), the statute's provisions are virtually unenforceable except as against homosexuals whose involvement in sex which is "deviate" or "of a deviate nature" is obvious.

What the present statute directly accomplishes is avoidance of injury to the male ego from the possibility of being solicited for a homosexual act. What the State has a legitimate interest in, however, is providing a reasonable protection to all members of society against offensive or harassing sexual solicitations of any kind. A sexual approach by a man to another man, perhaps in a gay bar, for example, would be punishable under the Statute. The character of the proposed conduct as being "deviate" or "of a deviate nature" would be clear by the gender of the proposed participants. Because the Statute makes no effort to reach seduction approaches of a man to a woman, say, in a modern singles bar, the invitation there to come home and engage in sex is unaffected by the law.

The issue presented is whether there is "some ground of difference that rationally explains the different treatment accorded" different classes of persons. *Eisenstadt v. Baird,* 405 U.S. 438, 447 (1972). If nuisance and harassment involved in sexual solicitation is the

reason for the statute, there is no conceivably satisfactory difference between offensive solicitation of males by homosexual males and the offensive solicitation of females by heterosexual males. The true explanation, respondent submits, is the culturally ingrained attitudes of a male-dominated society which view women as sexually submissive objects of male sexual aggressiveness. These attitudes assign to women the burden of receiving truly indiscriminate sexual solicitations (frequently of a grossly offensive nature) with no legal recourse whatever, while assuring that male machismo assumptions will be fully protected by available legal penalties, independent of any requirement for *mens rea.* (See State's Brief, 28).

POINT VII

The statute violates due process (a) by having no legitimate state purpose and (b) by being unconstitutionally vague.

As previously noted, the State has not demonstrated the compelling state purpose needed to justify the loitering provision's impact on First Amendment liberties. Additionally, the Statute fails to provide even a rational state purpose, insofar as it fails to connect the "loitering" element with a legitimate proscribed activity. This failure, coupled with the generally vague provisions of the Statute, renders the law unconstitutionally vague.

The beginning principle is that the citizen has a fundamental right to the use of the streets for such purposes as do not interfere with the rights of others. "The right to use a public place for expressive activity may be restricted only for weighty reasons." *Grayned v. City of Rockford, supra* at 115; see, also, *Sawyer v. Sandstrom, supra* at 316. Among the appropriate uses of the streets is the exercise of the right of association, covering, as it does, associations which are social in

nature, not just political relationships. *Griswold v. Connecticut, supra* at 483.

A loitering law, however, like the rest of the vagrancy-type statutes, is typically a device "for preventing crime and for removing so-called nuisances—mobs and individual 'undesirables'—from public places". *United States ex rel. Newsome v. Malcolm,* 492 F.2d 1166, 1172 (2d Cir. 1974), *aff'd sub nom. Lefkowitz v. Newsome,* 420 U.S. 283 (1975). The typical defects of such a statute are shared by P.L. §240.35-3:

> "[B]ecause the *crime* prevention components of loitering statutes are aimed at suspected or potential rather than incipient or observable conduct, they may conflict with the deeply rooted Fourth Amendment requirement that arrests must be predicated on probable cause. . . . [Such a loitering statute] imposes criminal liability in the absence of criminal intent, a factor noted by the Supreme Court in *Papachristou,* 405 U.S. at 162. . . ." [*Id.*, emphasis added]
>
> "Moreover, there are insufficient guidelines for enforcement and thus §240.35(6) does not pass constitutional muster on this ground as well. . . . To the extent the statute can be interpreted to support dragnet, street-sweeping operations *absent probable cause of actual criminality,* it conflicts with established notions of due process." [*Id.* at 1173, emphasis added]

While the statute in *Newsome* was the same kind of broad, almost unlimited dragnet statute as was involved in *Papachristou v. City of Jacksonville, supra,* the "deviate"-sex loitering law shares the same defects for conduct prior to actual solicitation. Uplinger has standing to argue unconstitutionality on that ground, first, because the statute affects First Amendment

rights and overbreadth argument should be allowed[43] and, second, because Uplinger himself has presumably been arrested, in part, for his conduct ("loitering") before actual solicitation, not merely for one isolated act of solicitation.

If this be so, however, Uplinger's "loitering",[44] informed by a standardless provision relating to his "purpose", has been transformed into a solicitation offense, where no anti-solicitation statute existed.[45] And the law enforcer has a prime opportunity for arbitrary enforcement, knowing well the vulnerability of most men to exposure and obloquy resulting from merely being arrested for such an offense. (See J.A. 26.)

When a gay man socializes with friends or acquaintances in a public place, he exercises freedoms of speech and association. Assuming it is his intent to refrain from direct solicitation for "deviate" sex, what must he do, nonetheless, to avoid being in violation of the statute? What words should he not say lest he betray too much attraction to another man in the presence of an undercover officer? If he does form the purpose in his mind, however fleetingly, to invite a fellow gay person home for sex, has he become a violator? Will that violation be betrayed by a wink? A smile too eager?

[43] Overbreadth and vagueness are "logically related and similar doctrines" and "facial challenges [are appropriate] in situations where free speech or free association are affected". *Kolender v. Lawson, supra,* 75 L.Ed.2d at 910, fn. 8).

[44] "Loitering", under New York law, is inherently innocent conduct, like "lingering". *People v. Bell,* 306 N.Y. 110, 113, 115 N.E.2d 821, 822 (1953); compare *Papachristou v. City of Jacksonville, supra,* at 163-164 (1972).

[45] N.Y. Penal Law §§100.00 and 100.05 proscribe solicitation for crimes. No New York law (other than business or professional regulatory provisions) prohibits solicitation of lawful and unregulated activity (such as private, adult, non-commercial sex), except the loitering law.

Under the Statute as written, it depends on how an officer chooses to interpret the vague provisions of the law and the extent to which that officer's own prejudices induce him to stretch the law to its maximum conceivable limits, thereby creating a different legal "standard in each case". *Gooding v. Wilson,* 405 U.S. 518, 528 (1972), quoting from *Herndon v. Lowry,* 301 U.S. 242, 263 (1937).

Four troubling consequences of this Statute affect the due process rights of targeted persons. First, the Statute's aim at one's purpose, before it is acted upon, allows prior restraint of speech and association freedoms. Second, it encourages discriminatory enforcement of an "offense" that not only has not yet occurred but may never occur. What discussion would later occur and whether this would result in actual solicitation cannot be determined in advance. The individual, possessed only of intent under American law, must be given the opportunity to withdraw from acting on that intent. Third, the Statute's language permits arrest without probable cause. See *United States ex rel. Newsome, supra.* Finally, in a legal system which allows punishment for solicitation of criminal acts only when the line has been crossed from "mere advocacy" to "incitement to imminent lawless action" [*Brandenburg v. Ohio,* 395 U.S. 444, 448-449 (1969)], the loitering law permits arrest, first, before any solicitation at all has occurred, and, second, where the solicitation, if made, would not even be for a crime.

Most intrusive on personal liberties, however, is the fact that the Statute defines as a violator one who is merely in a public place with a purpose—an unsatisfactory state of mind. Even without probable cause to arrest for any offense, an officer may construe the observable, but innocent, act of loitering with whatever other factor he considers significant evidence of purpose, and arrest under P.L. §240.35-3 for nothing

more than being in a public place under suspicious circumstances. But legislation in America may not be premised "on the desirability of controlling a person's private thoughts." *Stanley v. Georgia*, 394 U.S. 557, 566 (1969). Compare *People v. Gibson*, 184 Col. 444, 521 P.2d 774 (1974); *Portland v. James*, 251 Ore. 8, 444 P.2d 554, 555-556 (1968).

POINT VIII

The decision below was premised upon a proper determination that the ultimate act, sexual intimacy, was protected by the constitutional right of privacy.

People v. Onofre, supra, determined that consensual sodomy (P.L. §130.38) would no longer be a crime in New York State. That decision was determinative of that issue as to the future incident leading to this litigation, whether or not the *Onofre* legal holding was correctly determined. *Bouie v. City of Columbia, supra* at 353; *People v. Heller, supra* at 330, 307 N.E.2d at 814 (see discussion *supra* at 21). Nonetheless, against the possibility that this Court intends to consider the correctness of the *Onofre* holding as part of this appeal, respondent Uplinger makes the following comments regarding that question.

The Court of Appeals ruled in *People v. Onofre, supra*, on the equal protection question[46] as well as on the privacy issue presented directly by Ronald Onofre, himself, his act having occurred in his apartment. The privacy determination is directly relevant in Uplinger's situation, his intended act also being related to his personal residence.

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[46] The Court of Appeals held in *Onofre* that the exemption of married people from the ban on consensual sodomy created an equal protection problem for those who were not married. *People v. Onofre, supra* at 491-492, 415 N.E.2d at 942-943.

The Court of Appeals could find no objective harm to the public morals or welfare which would justify governmental prohibition of private, "deviant" sex acts described in the statute:

> "In light of these decisions, protecting under the cloak of the right of privacy individual decisions as to indulgence in acts of sexual intimacy by unmarried persons and as to satisfaction of sexual desires by resort to material condemned as obscene by community standards when done in a cloistered setting, no rational basis appears for excluding from the same protection decisions—such as those made by defendants before us—to seek sexual gratification from what at least once was commonly regarded as 'deviant' conduct, so long as the decisions are voluntarily made by adults in a noncommercial, private setting." *People v. Onofre, supra,* 51 N.Y.2d at 488, 415 N.E.2d at 940-941 (emphasis added).

Onofre acknowledged that what has in fact been upheld in the privacy decisions of this Court in *Griswold v. Connecticut, supra, Stanley v. Georgia, supra, Eisenstadt v. Baird, supra,* and *Roe v. Wade,* 410 U.S. 113 (1973), has been the right of the individual to decide how he would experience his sexuality, free of interference from the state, absent special factors justifying such interference.

> "In sum, there has been no showing of any threat, either to participants or the public in general, in consequence of the voluntary engagement by adults in private, discreet, sodomous conduct. Absent is the factor of commercialization with the attendant evils commonly attached to the retailing of sexual pleasures; absent the elements of force or of involvement with minors which might constitute compulsion of unwilling participants or of those too young to make an informed choice, and absent too intrusion on the sensibilities of members of the

public, many of whom would be offended by being exposed to the intimacies of others. Personal feelings of distaste for the conduct sought to be proscribed by section 130.38 of the Penal Law and even disapproval by a majority of the populace, if that disapproval were to be assumed, may not substitute for the required demonstration of a valid basis for intrusion by the State in an area of important personal decision protected under the right of privacy drawn from the United States Constitution—areas, the number and definition of which have steadily grown but, as the Supreme Court has observed, the outer limits of which it has not yet marked." *People v. Onofre, supra,* 51 N.Y.2d at 490, 415 N.E.2d at 941-942.

Prior summary decisions of this Court have not dealt with the underlying issue whether the right of privacy under the United States Constitution extends to voluntary, adult, noncommercial sexual intimacy. (See, Susan Butler Brief in Opposition to Petition for Certiorari herein, at 7-13).

This Court's decisions in the privacy field have established (1) the right of married persons to determine the manner of their sexual intimacies with each other (*Griswold v. Connecticut, supra*), (2) that this same protection is available not just to married persons but to unmarried persons as well (*Eisenstadt v. Baird, supra; Roe v. Wade, supra*) and (3) that the privacy right extends even to erotic activities engaged in purely for pleasure and without the context of a heterosexual coupling, provided that the activity takes place in the home (*Stanley v. Georgia, supra*).

As stated by Chief Justice Burger, the privacy right relates to the "intimacies of the home" (*Paris Adult Theatre I v. Slaton, supra* at 65). *Stanley v. Georgia* was decided "on the narrow basis of the 'privacy of the home', which was hardly more than a reaffirmation that

'a man's home is his castle'." *Paris Adult Theatre I v. Slaton, supra* at 66. "The protection afforded by *Stanley v. Georgia* . . . is restricted to a place, the home." *Id.*, fn. 13. Uplinger, like Stanley, argues for the privacy of his home. His sexual activity can be limited by state law, properly drawn, to his front door.

The constitutional concept is an obvious haven for those subjected to sexual-orientation discrimination in this country.[47] At the same time that a substantial number of the states (in which live a majority of American citizens) have abandoned private sex criminal restrictions, either by legislative or judicial action,[48] and a majority of Americans apparently uphold the concept of privacy in the sexual orientation context,[49] determined community forces continue to seek to repress homosexual expression.

Whether "privacy" is viewed as a personal liberty under limited circumstances to realize one's own personality by making certain intimate and critical decisions without the interference of the state, or, instead, simply as a guaranty against physical interference (in the spirit of the Fourth Amendment guarantees), its reach at least extends to sexual intimacy decisions carried out in one's own home, participated in

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[47] Report of the Commission on Personal Privacy, State of California, December 1982 (the "California Commission"), pp. 304-320.

[48] See *People v. Onofre, supra* at 491, 415 N.E.2d at 942, fn. 5 and source there cited: (22 states, in addition to New York, "decriminalized consensual sodomy between adults in private" as of December 1980).

[49] "The Dimensions of Privacy, A National Opinion Research Survey of Attitudes Toward Privacy", conducted for Century Insurance Company by Louis Harris & Associates, Inc., 1979, as reported in the Report of the California Commission, *supra* at 82 (70% favoring right of privacy for homosexuals engaging in private sex; 79% for heterosexuals engaging in private sex.)

by only two adults and without any of the involvements in which the state has any legitimate interest.[50] These interests do not include espousal of particular religious or philosophical disagreements with variant sexual styles having no demonstrable, resulting secular harm. See *People v. Onofre, supra,* 51 N.Y.2d at 488-490, 415 N.E.2d at 940-941.

The privacy analysis comes from two perspectives. First, privacy is a fundamental right— "the right most valued by civilized men" [*Olmstead v. United States,* 277 U.S. 438 at 478 (1928) (Brandels, J., dissenting)]—and while it is not explicitly contained in the Federal Constitution, it is "implicit in the concept of ordered liberty" [*Roe v. Wade, supra* at 152] which separates American society from most of the others in the world. This aspect of privacy includes the right to autonomy in decision-making, relating to one's personality [*benShalom v. Secretary of Army,* 489 F.Supp. 964 at 975-976 (D.C. Wisc. 1980)], intimate relationships and manner of living—and the right to act on those decisions.[51]

While the right of privacy is not an absolute, it becomes most nearly so in the cloistered setting of one's home. Therefore, the right to choose a partner for sexual intimacy and the right to choose the form that intimacy takes is protected by the confluence of two aspects of privacy, that relating to personal decisions and that relating to the special territory of one's home.[52] The right to privacy touches one of the oldest chords of our American jurisprudence, reflecting concepts which go back to Magna Carta. It embodies the special concern

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[50] *E.g.* avoidance of adultery, protection of children.

[51] See, generally, Karst, "The Freedom of Intimate Associations", 89 Yale L.J. 624 (1980); Richards, "Sexual Autonomy and the Constitutional Right to Privacy", 30 Hastings L.J. 957 (1979); Richards, "Unnatural Acts and the Constitutional Right to Privacy: A Moral Theory", 45 Fordham L.R. 1281 (1977).

[52] Report of the California Commission, note 47 *supra,* at 37-55.

our law has traditionally manifested for the individual's ultimate dominion over his own person.

This brings us to the second perspective, which is focused not on the individual, but on the limitations on the legitimate police power of the state to interfere with non-harmful thoughts, decisions, speech and conduct of individuals. It mandates that the state have a secular and reasonable, and, perhaps, substantial or controlling, interest—a legitimate societal purpose—in interfering with the conduct of members of society.

Privacy is thus like a mighty dam: It ensures a safe and prosperous life downstream by limiting the flow of the flood above, the great power of which, if unleashed, would envelop and destroy what it nourishes and nurtures in its controlled condition. In the year of 1984, it is privacy which prevents Orwell's prediction from reaching fruition.

Conclusion

The judgment below should be affirmed.

Date: December 8, 1983

Respectfully submitted,

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APPENDIX A—New York Statutory Provisions Regulating Sexual Behavior

1. FORCIBLE SEXUAL CONDUCT:

Penal Law §130.35 First degree rape. Male guilty "when he engages in sexual intercourse with a female: 1. By forcible compulsion." Class B felony.

Penal Law §130.50 First degree sodomy. Person guilty "when he engages in deviate sexual intercourse with another person: 1. By forcible compulsion." Class B felony.

Penal Law §130.20 Sexual Misconduct. Person guilty "when: 1. Being a male, he engages in sexual intercourse with a female without her consent; or 2. He engages in deviate sexual intercourse with another person without the latter's consent." Class A misdemeanor.

2. SEX OR OTHER OFFENSE WITH MINORS

Penal Law §130.35 First degree rape. Male guilty "when he engages in sexual intercourse with a female: . . . 3. Who is less than eleven years old." Class B felony.

Penal Law §130.50 First degree sodomy. Person guilty "when he engages in deviate sexual intercourse with another person: . . . 3. Who is less than eleven years old." Class B felony.

Penal Law §130.30 Second degree rape. Male guilty "when, being eighteen years old or more, he engages in sexual intercourse with a female less than fourteen years old." Class D felony.

Penal Law §130.45 Second degree sodomy. Person guilty "when, being eighteen years old or more, he engages in deviate sexual intercourse with another person less than fourteen years old." Class D felony.

Appendix A—New York Statutory Provisions Regulating Sexual Behavior.

Penal Law §130.25 Third degree rape. Male guilty "when: . . . 2. Being twenty-one years old or more, he engages in sexual intercourse with a female less than seventeen years old." Class E felony.

Penal Law §130.40 Third degree sodomy. Person guilty "when: . . . 2. Being twenty-one years old or more, he engages in deviate sexual intercourse with a person less than seventeen years old." Class E felony.

Penal Law §260.10 Endangering the welfare of a child. Person guilty "when: 1. He knowingly acts in a manner likely to be injurious to the physical, mental or moral welfare of a male child less than sixteen years old or a female child less than seventeen years old. . . ."

3. PROSTITUTION OFFENSES

Penal Law §230.00 Prostitution. Person guilty "when such person engages or agrees or offers to engage in sexual conduct with another person in return for a fee." Class B misdemeanor.

Penal Law §§230.03-230.06 Patronizing a prostitute (various degrees). Person guilty when he "patronizes a prostitute", with increasing degrees of severity depending on the age of the prostitute. Class B misdemeanor to a class D felony.

Penal Law §§230.20, 230.25, 230.30, 230.32 Promoting prostitution (various degrees). Class A misdemeanor to class B felony.

Appendix A—New York Statutory Provisions Regulating Sexual Behavior.

Penal Law §240.37 Loitering for the purpose of engaging in a prostitution offense. "... 2. Any person who remains or wanders about in a public place and repeatedly beckons to, or repeatedly stops, or repeatedly attempts to stop, or repeatedly attempts to engage passers-by in conversation, or repeatedly stops or attempts to stop motor vehicles, or repeatedly interferes with the free passage of other persons, for the purpose of prostitution, or of patronizing a prostitute as those terms are defined in article [230] of the penal law, shall be guilty of a violation and is guilty of a class B misdemeanor if such person has previously been convicted of a violation of this section or of sections 230.00 or 230.05 of the penal law.

"3. Any person who remains or wanders about in a public place and repeatedly beckons to, or repeatedly stops, or repeatedly attempts to stop, or repeatedly attempts to engage passers-by in conversation, or repeatedly stops or attempts to stop motor vehicles, or repeatedly interferes with the free passage of other persons, for the purpose of promoting prostitution as defined in article [230] of the penal law is guilty of a class A misdemeanor."

4. PUBLIC LEWDNESS

Penal Law §245.00 Public lewdness. Person guilty "when he intentionally exposes the private or intimate parts of his body in a lewd manner or commits any other lewd act (a) in a public place, or (b) in private premises under circumstances in which he may readily be observed from either a public place or from other private premises, and with intent that he be so observed." Class B misdemeanor.

Appendix A—New York Statutory Provisions Regulating Sexual Behavior.

5. LOITERING FOR DEVIATE SEX PURPOSES

Penal Law §240.35-3 Loitering. Person guilty "when he: . . . 3. Loiters or remains in a public place for the purpose of engaging, or soliciting another person to engage, in deviate sexual intercourse or other sexual behavior of a deviate nature. . . ." Violation.

6. HARASSMENT

Penal Law §240.25 Harassment. Person guilty "when, with intent to harass, annoy or alarm another person: . . . 2. In a public place, he uses abusive or obscene language, or makes an obscene gesture; or 3. He follows a person in or about a public place or places; or . . . 5. He engages in a course of conduct or repeatedly commits acts which alarm or seriously annoy such other person and which serve no legitimate purpose." Violation.

7. DISORDERLY CONDUCT

Penal Law §240.20 Disorderly conduct. Person guilty "when, with intent to cause public inconvenience, annoyance or alarm, or recklessly creating a risk thereof: 1. He engages in fighting or in violent, tumultuous or threatening behavior; or 2. He makes unreasonable noise; or 3. In a public place, he uses abusive or obscene language, or makes an obscene gesture; or . . . 5. He obstructs vehicular or pedestrian traffic; or 6. He congregates with other persons in a public place and refuses to comply with a lawful order of the police to disperse, or 7. He creates a hazardous or physically offensive condition by any act which serves no legitimate purpose." Violation.

Appendix A—New York Statutory Provisions Regulating Sexual Behavior.

8. MISCELLANEOUS OFFENSES

Penal Law §130.20 Sexual misconduct. Person guilty "when: . . . 3. He engages in sexual conduct with an animal or a dead human body." Class A misdemeanor.

Penal Law §130.70 Aggravated sexual abuse. Person guilty "when he inserts a foreign object in the vagina, urethra, penis or rectum of another person causing physical injury to such person" by force or under other conditions stated in section. Class B felony.

Penal Law §§130.55, 130.60, 130.65 Sexual abuse. Person guilty "when he subjects another person to sexual contact" under varying conditions of actual or constructive lack of consent. Class B misdemeanor to class D felony.

9. CRIMINAL SOLICITATION

Penal Law §100.00 Criminal solicitation, third degree. Person guilty "when, with intent that another person engage in conduct constituting a crime, he solicits, requests, commands, importunes or otherwise attempts to cause such other person to engage in such conduct." Violation.

Penal Law §100.05 Criminal solicitation, second degree. Person guilty "when, with intent that another person engage in conduct constituting a felony, he solicits, requests, commands, importunes or otherwise attempts to cause such other person to engage in such conduct." Class A misdemeanor.

10. CRIMINAL NUISANCE

Penal Law §240.45 Criminal nuisance. Person guilty "when: 1. By conduct either unlawful in itself or unreasonable under all the circumstances, he knowingly or recklessly creates or maintains a condition which endangers the safety or health of a considerable number of persons; or 2. He knowingly conducts or maintains any premises, place or resort where persons gather for purposes of engaging in unlawful conduct." Class B misdemeanor.

11. CONSENSUAL SODOMY

Penal Law §130.00-2. Sex offenses; definitions of terms. "2. Deviate sexual intercourse means sexual conduct between persons not married to each other consisting of contact between the penis and the anus, the mouth and penis, or the mouth and vulva."

Penal Law §130.38 Consensual sodomy. "A person is guilty of consensual sodomy when he engages in deviate sexual intercourse with another person." Class B misdemeanor. [Note: Declared unconstitutional, December, 1980, in *People v. Onofre, supra.*]

* Notes: Excluded are offenses involving sex with a person incapable of consent for reasons other than age (Penal Law §§130.25-1, 130.35-2, 130.40-1, 130.50-2, 130.60-1, 130.65-2) and permitting prostitution (Penal Law §230.40).

APPENDIX B—Executive Order No. 28, Prohibiting Discrimination Against Homosexuals in Employment or Provision of State Services, Hon. Mario M. Cuomo, New York Governor, November 18, 1983

STATE OF NEW YORK

EXECUTIVE CHAMBER

No. 28

EXECUTIVE ORDER

Ours is a unique government. It was created and has been preserved by people from all over the world who came here seeking one thing above all others: freedom—freedom to believe and to act on those beliefs; freedom that says that so long as an individual's conduct and actions remain a matter of personal expression and do not deprive others of their rights, they should be neither restrained nor punished by government.

Our nation values freedom so greatly, it has been written into our Constitution. We all prize that freedom and millions have fought to protect and to extend it.

Each generation has come to understand the basic wisdom of our Constitution: that only by protecting the freedom of others can we ensure it for ourselves; that to encourage or allow government to discriminate against any belief or creed or private way of life would threaten us all. This is so because we could never be sure which particular value would dominate government at any particular point in time. Only neutrality by government was deemed safe and that is what our Constitution assures.

This freedom makes us strong. It is essential to our pluralism. It protects religious believers, and agnostics, and atheists, and political dissenters, and conservatives and liberals, creating a nation and a state where the right to live as conscience dictates is enshrined as law.

Because of such freedom we enjoy a cultural and religious diversity unmatched by any other nation.

The freedom our Constitution grants, however, requires that government exercise a degree of tolerance unthinkable in societies less open or diverse than ours. It demands a tolerance for the privacy of each individual, a refusal to use the state as an instrument of coercion of belief or thought, however desirable the majority regards a particular belief or thought to be.

Even when this freedom is unchallenged, it is so precious to us all that our commitment to preserve it from encroachment by government deserves constant reaffirmation and reiteration. But when this freedom is questioned or when evidence of unfair discrimination exists, then our reaffirmation is not an option—it is a simple necessity.

I have seen evidence of such encroachment. As Secretary of State, I was required to issue special regulations to prohibit discrimination against individuals seeking licenses for certain occupations or corporate privileges. Up to that time such licenses were denied on the basis of sexual orientation or even presumed sexual orientation. There is no reason to believe that the discrimination apparent in that part of government was confined there.

No one argued then against my change in the State's regulations. No one was heard to say that government had no place in fighting unfair discrimination. In fact, in recognition of this, a personnel directive against discrimination in hiring was issued during the prior administration.

I suggest, respectfully, that what was right then is right now. And I believe that there is no justification for

the failure to announce freedom from discrimination as the policy, not just of the Department of State but of this entire State government.

Indeed, the most persistent argument that has been offered in opposition to my stating the views contained in this Order does not really contradict any of them. Rather it says, in effect, we ought not to state this constitutional truth because it may be misrepresented to be something else. Specifically, it is suggested that the argument against discrimination will be distorted into an argument promoting homosexuality.

The argument is beside the mark. There is no perfect protection against distortion. Indeed one could as easily argue that silence on this issue could be distorted into an argument promoting discrimination against homosexuals.

In this case, this statement and Executive Order are clear. Their essence is that our government cannot promote any religion, creed, belief or life-style without thereby threatening all others.

This is an argument for securing freedom by insisting on neutrality. It is a proposition that is at the very foundation of our nation's strength. We ought never be embarrassed nor afraid to repeat it.

Accordingly, for all the above reasons, I am this day reiterating the law set down by the Constitution of the United States and the Constitution of the State of New York as the policy of this Administration.

Appendix B—Executive Order No. 28.

STATEMENT OF POLICY

1. No State agency or department shall discriminate on the basis of sexual orientation against any individual in the provision of any services or benefits by such State agency or department.

2. All State agencies and departments shall prohibit discrimination based on sexual orientation in any matter pertaining to employment by the State including, but not limited to, hiring, job appointment, promotion, tenure, recruitment and compensation.

3. The Office of Employee Relations is hereby directed to promulgate clear and consistent guidelines prohibiting discrimination based on sexual orientation to maintain an environment where only job-related criteria are used to assess employees or prospective employees of the State. The Office shall also implement a procedure to ensure the swift and thorough investigation of complaints of discrimination based on sexual orientation. Particular effort should be made to conduct investigations with due regard for confidentiality.

4. In order to assure that we understand fully the extent and nature of any discrimination that exists, I will appoint a Task Force, including the Commissioners of the Departments of Correctional Services, Health, Mental Health, Labor, Social Services and the Division of Human Rights, the Superintendent of State Police, the President of the Civil Service Commission, the Directors of the Women's Division, the Office of Employee Relations, the Division for Youth and the Office for the Aging, the Chairman of the State Liquor Authority and seven private citizens whom I shall designate. The Task Force shall submit such reports and recommendations as it sees fit, dealing with individuals'

rights to the benefit of government services and opportunity for government service regardless of sexual orientation.

I shall designate a Chairperson and Vice-Chairperson of the Task Force. Its members shall receive no compensation, but shall be entitled to reimbursement for any necessary expenses incurred directly in connection with the performance of their duties.

GIVEN under my hand and the Privy Seal of the State in the City of New York this 18th day of November in the year one thousand nine hundred eighty-three.

/s/ MARIO M. CUOMO