Washington Law Review

Volume 56 | Number 1

12-1-1980

Void-for-Vagueness—Judicial Response to Allegedly Vague Statutes—*State v. Zuanich*, 92 Wn. 2d 61, 593 P.2d 1314 (1979)

Jeffrey Merle Evans

Follow this and additional works at: https://digitalcommons.law.uw.edu/wlr

Part of the Legislation Commons

Recommended Citation

Jeffrey M. Evans, Recent Developments, *Void-for-Vagueness—Judicial Response to Allegedly Vague Statutes—State v. Zuanich, 92 Wn. 2d 61, 593 P.2d 1314 (1979)*, 56 Wash. L. Rev. 131 (1980).
Available at: https://digitalcommons.law.uw.edu/wlr/vol56/iss1/6

This Recent Developments is brought to you for free and open access by the Law Reviews and Journals at UW Law Digital Commons. It has been accepted for inclusion in Washington Law Review by an authorized editor of UW Law Digital Commons. For more information, please contact lawref@uw.edu.

VOID-FOR-VAGUENESS—JUDICIAL RESPONSE TO ALLEGEDLY VAGUE STATUTES—*State v. Zuanich*, 92 Wn. 2d 61, 593 P.2d 1314 (1979).

State v. Zuanich was a consolidation of eight cases. Each defendant was charged either with prostitution under R.C.W. § 9A.88.030[1] or with promoting prostitution under R.C.W. § 9A.88.080.[2] R.C.W. § 9A.88.030 defines prostitution as engaging or offering to "engage in sexual conduct with another person in return for a fee."[3] Before trial, each defendant moved to dismiss the charges on the theory that the definition of prostitution was unconstitutionally vague and, therefore, violated the fourteenth amendment. The superior courts granted the motions and entered judgments of dismissal. Since the charges were dismissed before trial, no findings of fact were made as to the precise conduct in which defendants were engaged.[4]

On its appeal from the dismissals, the prosecution argued that defendants lacked standing to challenge the statutes' constitutionality because their conduct was not before the court.[5] The Washington Supreme Court held that defendants had standing to challenge R.C.W. § 9A.88.030 as vague on its face because they alleged that it could not be constitutionally applied to any set of facts.[6] In reversing the judgments of dismissal, how-

1. The statute provided in pertinent part: "A person is guilty of prostitution if such person engages or agrees or offers to engage in sexual conduct with another person in return for a fee." WASH. REV. CODE § 9A.88.030 (1979). It has since been amended to provide a definition of "sexual conduct." *See* note 81 *infra*.

2. The statute provides in pertinent part: "A person is guilty of promoting prostitution in the second degree if he knowingly: (a) Profits from prostitution; or (b) Advances prostitution." WASH. REV. CODE § 9A.88.080 (1979).

3. *See* note 1 *supra*.

4. State v. Zuanich, 92 Wn. 2d 61, 68, 593 P.2d 1314, 1318 (1979). Apparently, however, two defendants operated "body type studio businesses" wherein the following acts allegedly took place or were discussed: " 'sex', a 'straight lay', a 'screw', a 'blow job', 'acts of prostitution', 'disposal of rubber', *et al.*" Brief of Appellant at 5.

One defendant did set forth the accusation against him in his brief: "John Brandes was charged by information with 'profit[ing] from and advanc[ing] the prostitution of Susan R. Johnson and other persons.' " Brief of Respondents Brandes and Wardell at 3. Miss Johnson was actually a police informant whom Brandes unwittingly hired to work in his "Northwest Catharsis Center." Upon hiring her, defendant Brandes allegedly told her that, though he disapproved of coitus with customers, a "good session" was one wherein the customer experienced an orgasm. Accordingly, Miss Johnson, during her brief employment, "entertained three customers, all of whom she masturbated, with two of them reaching orgasm." *Id.* Defendants' legal theory was that application of the phrase "sexual conduct" to these acts was "most uncertain and vague." *Id.* at 10. The Washington Supreme Court did not reach the merits of this contention because it reviewed the statute on its face.

The specific facts relating to the other seven defendants' conduct were nowhere set forth.

5. Brief of Appellant at 5–6.

6. 92 Wn. 2d 61, 63, 593 P.2d 1314, 1315.

ever, the court held that neither R.C.W. § 9A.88.030 nor R.C.W. § 9A.88.080 were unconstitutionally vague.[7]

In light of the problematic nature of the void-for-vagueness doctrine, this note argues that a defendant should never have standing to challenge a statute as unconstitutionally vague unless sufficient facts have been established[8] to allow the court to review the statute in its actual application to the defendant. If, however, Washington courts insist upon reviewing a challenged statute on its face, they should be alert to the possibility that judicial review under the void-for-vagueness doctrine will become unduly expansive. This note suggests that courts can minimize potential abuse by carefully framing the constitutional issue and by appropriately construing the challenged statute.

I. THE DOCTRINAL BACKGROUND

A. *The Void-for-Vagueness Doctrine: Generally*

The allegation that a statute is void-for-vagueness[9] is a defense to a crime charged under the statute.[10] Courts derive the void-for-vagueness

7. *Id.* at 62, 593 P.2d at 1315.

8. A defendant, under this proposal, would not necessarily have to wait until facts had been found at trial. He might challenge the statute as unconstitutionally vague by motion at the end of the prosecution's presentation of evidence. Resolving every factual dispute in the prosecution's favor, the court could then evaluate the statute's alleged vagueness in light of a defendant's alleged conduct.

9. For analyses of the constitutional aspects of void-for-vagueness, see Aigler, *Legislation in Vague or General Terms*, 21 MICH. L. REV. 831 (1923); Note, (Amsterdam), *The Void-for-Vagueness Doctrine in the Supreme Court*, 109 U. PA. L. REV. 67 (1960); Collings, *Unconstitutional Uncertainty—An Appraisal*, 40 CORNELL L.Q. 195 (1955); Note, *Recent Supreme Court Developments of the Vagueness Doctrine: Four Cases Involving the Vagueness Attack on Statutes During the 1972–73 Term*, 7 CONN. L. REV. 94 (1974); Note, *Due Process Requirements of Definiteness in Statutes*, 62 HARV. L. REV. 77 (1948); Note, *Indefinite Criteria of Definiteness in Statutes*, 45 HARV. L. REV. 160 (1931); Comment, *Reconciliation of Conflicting Void-for-Vagueness Theories by the Supreme Court*, 9 HOUS. L. REV. 82 (1971); Note, *Void-for-Vagueness: An Escape From Statutory Interpretation*, 23 IND. L.J. 272 (1948); Note, *Vagueness Doctrine in the Federal Courts: A Focus on the Military, Prison, and Campus Contexts*, 26 STAN. L. REV. 855 (1974).

For a discussion specifically on the application of the doctrine to statutes prohibiting prostitution, see Rosenbleet & Pariente, *The Prostitution of the Criminal Law*, 11 AM. CRIM. L. REV. 373, 377–78 (1973).

For an analysis of the doctrine's non-constitutional aspects, see Freund, *The Use of Indefinite Terms in Statutes*, 30 YALE L.J. 437 (1921).

10. It should be noted that the void-for-vagueness doctrine is an "adjunct of due process, not criminal law." Note, *Vagueness Doctrine in the Federal Courts: A Focus on the Military, Prison, and Campus Contexts*, 26 STAN. L. REV. 855, 888 (1974). Although the doctrine usually arises in criminal cases, *id.* at 855 n.1, there is some authority for applying the doctrine in civil cases as well. *See, e.g.*, A.B. Small Co. v. American Sugar Refining Co., 267 U.S. 233, 238–42 (1925)(statutory action to recover for breach of contracts); Miller v. Strahl, 239 U.S. 426 (1915)(action to recover for negligent breach of a statutory duty). *See also* Note, *Vagueness Doctrine in the Federal Courts: A Focus on the Military, Prison, and Campus Contexts*, 26 STAN. L. REV. 862 n.32.

doctrine from the constitutional guarantee of procedural due process.[11] A statute "so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process . . . ."[12] It is well settled that, in reviewing a statute to

11. " 'Vagueness' goes to the question of procedural due process, *i.e.*, whether a statute provides fair notice, measured by common practice and understanding, of that conduct which is prohibited and whether there are proper standards for adjudication." Blondheim v. State, 84 Wn. 2d 874, 878, 529 P.2d 1096, 1100 (1975)(and cases cited therein). Under the due process clause of the fifth amendment, the void-for-vagueness doctrine is applicable to acts of Congress. *E.g.*, United States v. L. Cohen Grocery Co., 255 U.S. 81 (1921). Under the due process clause of the fourteenth amendment, the doctrine is applicable to enactments of the states' legislatures. *E.g.*, Edgar A. Levy Leasing Co. v. Siegal, 258 U.S. 242 (1922).

The void-for-vagueness doctrine was unknown in England and the American Colonies. Note, *Void for Vagueness: An Escape From Statutory Interpretation*, 23 IND. L.J. 272, 274–78 (1948). The rule requiring definiteness in statutes originated as a rule of construction in the 19th Century. *See, e.g.*, The Enterprise, 8 F. Cas. 732 (C.C.D.N.Y. 1810)(No. 4,499); United States v. Sharp, 27 F. Cas. 1041 (C.C.D. Pa. 1815)(No. 16,264); Drake v. Drake, 15 N.C. 110, 115 (1833). *See also* Collings, *Unconstitutional Uncertainty—An Appraisal*, 40 CORNELL L.Q. 195, 200 n.10 (1955); Annot., *Vagueness or Indefiniteness of Statute as Rendering It Unconstitutional or Inoperative*, 70 L. Ed. 322 (1924).

Some courts initially linked the doctrine to the sixth amendment requirement that an accused be informed of the nature of the accusation against him. United States v. Capital Traction Co., 34 App. D.C. 592 (1910); Czarra v. Board of Medical Supervisors, 25 App. D.C. 443 (1905). *See also Aigler, Legislation in Vague or General Terms*, 21 MICH. L. REV. 831, 850 (1923). The view that eventually prevailed, however, linked the doctrine to the due process clauses. In 1914, the Court, for the first time, struck down state regulatory legislation as so vague that it contravened the fourteenth amendment. International Harvester Co. v. Kentucky, 234 U.S. 216 (1914); *cf.* Waters-Pierce Oil Co. v. Texas, 212 U.S. 86 (1909) (deriving the doctrine from due process, but upholding the challenged statute). Since 1914, courts have derived the doctrine from procedural due process. *But cf.* United States v. Evans, 333 U.S. 483 (1948) (grounding its refusal to sentence a defendant under a vague penal statute in the principle of separation-of-powers).

12. The quotation in full is the classic statement of the doctrine:

> That the terms of a penal statute creating a new offense must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties, is a well-recognized requirement, consonant alike with ordinary notions of fair play and the settled rules of law. And a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law.

Connally v. General Construction Co., 269 U.S. 385, 391 (1926). A comparison of the above quotation with Mr. Justice Holmes' oft-quoted dictum reveals the divergence in jurists' understandings of the due process requirement of certainty: "[T]he law is full of instances where a man's fate depends on his estimating rightly, that is, as the jury subsequently estimates it, some matter of degree. If his judgment is wrong, not only may he incur a fine or a short imprisonment. . . ; he may incur the penalty of death." Nash v. United States, 229 U.S. 373, 377 (1913)(upholding the Sherman Act and its rule of reason against a charge of impermissible vagueness).

determine whether it violates this principle, courts read the statute in light of the common law[13] and prior judicial construction.[14]

Three considerations underlie the requirement that statutory language meet a criterion of definiteness.[15] First, a statute should provide the com-

13. Note, (Amsterdam), *The Void-for-Vagueness Doctrine in the Supreme Court*, 109 U. PA. L. REV. 67, 84 n.83 (1960). Statutes that codify the common law are rarely overturned on grounds of vagueness. Note, *Due Process Requirements of Definiteness in Statutes*, 62 HARV. L. REV. 77, 81–82 (1948). Since judge-made common law is often as obscure as legislation, State v. Dixon, 78 Wn. 2d 796, 803, 479 P.2d 931, 935 (1971), the application of the void-for-vagueness doctrine exclusively to legislative enactments departing from the common law perhaps indicates that the doctrine originated in the judiciary's distrust of the popularly elected legislatures.

14. Collings, *Unconstitutional Uncertainty—An Appraisal*, 40 CORNELL L.Q. 195, 223–27 (1955); Note, *Due Process Requirements of Definiteness in Statutes*, 62 HARV. L. REV. 77, 81–83 (1948). The application of a new construction of an allegedly vague statute to past acts risks ex post facto problems. Collings, *supra*, at 223. The Court has, nevertheless, stated that a defendant, "at the time he acted, was chargeable with knowledge of the scope of subsequent interpretation." Winters v. New York, 333 U.S. 507, 514–15 (1948). (In *Winters*, however, the Court found the questioned statute void-for-vagueness and reversed defendant's conviction. *Id.* at 520.)

In passing on penal statutes, the Court has even allowed the statutes the "benefit of whatever clarifying gloss state courts may have added (by judicial construction) in the course of litigation of the very case at bar." Note, (Amsterdam), *The Void-for-Vagueness Doctrine in the Supreme Court*, 109 U. PA. L. REV. 67, 73 (1960).

15. In addition to the considerations discussed in the text, the first amendment gives rise to the related doctrine of overbreadth. Both the void-for-vagueness doctrine and the overbreadth doctrine concern statutory imprecision. Whereas the void-for-vagueness doctrine is an adjunct of procedural due process, " 'overbreadth' goes to the question of substantive due process, *i.e.*, whether the statute in question is so broad that it may not only prohibit unprotected behavior but may also prohibit constitutionally protected activity as well." Blondheim v. State, 84 Wn. 2d 874, 878, 529 P.2d 1096, 1100 (1975)(and cases cited therein). *See also* Collings, *Unconstitutional Uncertainty—An Appraisal*, 40 CORNELL L.Q. 195, 214–22, (1955), especially at 214 n.64 (recounting the development of the substantive overbreadth doctrine).

The distinction between vagueness and overbreadth is well settled. *E.g.*, Parker v. Levy, 417 U.S. 733 (1973). The concern of the overbreadth doctrine is scope, not vagueness, of application of a statute; its function is obviously to "buffer" the liberties protected by the first amendment from legislative infringement. *See generally* Note, (Amsterdam), *The Void-for-Vagueness Doctrine in the Supreme Court*, 109 U. PA. L. REV. 67, 75 (1960); Collings, *supra*, at 218–19; Note, *Void for Vagueness: An Escape from Statutory Interpretation*, 23 IND. L.J. 272, 284 (1948).

As the *Zuanich* defendants did not challenge the prostitution statute on the ground of overbreadth, a complete discussion of that closely related doctrine is beyond the scope of this note. Practitioners, however, should be aware of the possibility of raising an overbreadth defense against a charge of prostitution. Writing in the wake of Roe v. Wade, 410 U.S. 113 (1973), and the "new" substantive due process, some authors speculated that prohibiting prostitution may violate a woman's "right to privacy." Rosenbleet & Pariente, *The Prostitution of the Criminal Law*, 11 AM. CRIM. L. REV. 373, 414 n.228 (1973). Under this view, sexuality would be constitutionally protected, and prostitution statutes would be overbroad. *Cf.* United States v. Herrera, 584 F.2d 1137 (2d Cir. 1978); Summers v. Anchorage, 589 P.2d 863 (Alaska 1978); City of Seattle v. Buchanan, 90 Wn. 2d 584, 593, 584 P.2d 918, 922 (1978) (cases suggest that only sexuality relating to family matters is constitutionally protected). *See also* Annot., 77 A.L.R.3d 519, 543–44 (1977) (summarizing cases wherein courts held statutes proscribing solicitation for prostitution do not infringe a constitutional right to privacy).

mon man with notice of the conduct proscribed.[16] Second, a statute should provide the courts with an ascertainable standard of guilt to guide adjudication.[17] Last, a statute should confine police and prosecutors within bounds sufficiently definite that arbitrary law enforcement is not encouraged.[18]

B. *The Void-for-Vagueness Doctrine: Defendants' Standing*

Judicial review[19] is limited by the requirement that a defendant have standing[20] to challenge a statute's constitutionality. The standing-to-sue

---

16. Collings, *Unconstitutional Uncertainty—An Appraisal*, 40 CORNELL L.Q. 195, 196 (1955); Note, *Recent Supreme Court Developments of the Vagueness Doctrine: Four Cases Involving the Vagueness Attack on Statutes During the 1972–73 Term*, 7 CONN. L. REV. 94, 95 (1974); Comment, *Reconciliation of Conflicting Void-for-Vagueness Theories by the Supreme Court*, 9 HOUS. L. REV. 82, 86–91 (1971). The Washington court has explained on a number of occasions that notice to a defendant is the rationale of the void-for-vagueness doctrine. *E.g.*, State v. Jordan, 91 Wn. 2d 386, 389, 588 P.2d 1155, 1156 (1979); Grant County v. Bohne, 89 Wn. 2d 953, 955, 577 P.2d 138, 139 (1978); State v. Hegge, 89 Wn. 2d 584, 588, 574 P.2d 386, 389 (1978). Indeed in Washington, the void-for-vagueness doctrine originated as a means of ensuring that criminal defendants were notified of proscribed conduct. *See* State v. Brown, 108 Wash. 205, 182 P. 944 (1914): State v. Fox, 71 Wash. 185, 187, 127 P. 1111, 1112 (1912). Compare note 11 *supra* (tracing the development of the doctrine in federal law).

17. Collings, *Unconstitutional Uncertainty—An Appraisal*, 40 CORNELL L.Q. 195, 196 (1955); Note, *Due Process Requirements of Definiteness in Statutes*, 62 HARV. L. REV. 77 *passim* (1948); Comment, *Reconciliation of Conflicting Void-for-Vagueness Theories by the Supreme Court*, 9 HOUS. L. REV. 82, 91–94 (1971). The Washington court has often noted that the need for a standard of adjudication is one of the reasons for the void-for-vagueness doctrine. *E.g.*, Grant County v. Bohne, 89 Wn. 2d 953, 955, 577 P.2d 138, 139 (1978); State v. Carter, 89 Wn. 2d 236, 240, 570 P.2d 1218, 1220 (1977); State v. Hull, 86 Wn. 2d 527, 536, 546 P.2d 912, 918 (1976).

18. Note, *Recent Supreme Court Developments of the Vagueness Doctrine: Four Cases Involving the Vagueness Attack on Statutes During the 1972–73 Term*, 7 CONN. L. REV. 94, 100–05 (1974). Washington courts have noted the desirability of limiting discretion in law enforcement as a reason for the doctrine. *See, e.g.*, Grant County v. Bohne, 89 Wn. 2d 953, 955, 577 P.2d 138, 139 (1978); State v. Carter, 89 Wn. 2d 236, 240, 570 P.2d 1218, 1220 (1977); City of Bellevue v. Miller, 85 Wn. 2d 539, 543–44, 536 P.2d 603, 606 (1975).

19. The classic justification of judicial review of legislation was provided by Chief Justice Marshall in Marbury v. Madison, 5 U.S. (1 Cranch) 49 (1803):

> [A]n act of the legislature, repugnant to the constitution, is void . . . .
>
> It is emphatically the province and duty of the judicial department to say what the law is . . . .
>
> [I]f both the law and the constitution apply to a particular case, so that the court must either decide that case conformably to law, disregarding the constitution; or conformably to the constitution, disregarding the law; the court must determine which of these conflicting rules governs the case. This is of the very essence of judicial duty.
>
> If, then, the courts are to regard the constitution, and the constitution is superior to any ordinary act of the legislature, the constitution, and not such ordinary act, must govern the case to which they both apply.

Id. at 69–70. The Washington State judiciary similarly claims the power to review and invalidate legislation repugnant to the constitution. *See, e.g.*, Windust v. Department of Labor & Ind., 52 Wn. 2d 33, 323 P.2d 241 (1958).

20. Standing is a prerequisite to obtaining "judicial resolution of a controversy." Sierra Club v. Morton, 405 U.S. 727, 731 (1972). Federal court jurisdiction is limited to cases and controversies by

doctrine ordinarily requires a defendant challenging a statute's validity to claim infringement of a legally protected interest[21] not shared with the public at large.[22] A defendant is, therefore, usually barred from challenging a statute's constitutionality in the abstract[23] or as applied to conduct other than his own.[24]

In vagueness challenges, a defendant ordinarily has standing to challenge a statute as unconstitutionally vague only in its application to the conduct of which he is accused.[25] In other words, a defendant must show that the statute's alleged vagueness actually deprived him, in light of his

article III of the United States Constitution. This limitation serves to "define the role assigned to the judiciary in a tripartite allocation of power to assure that the federal courts will not intrude into areas committed to other branches of government." Flast v. Cohen, 392 U.S. 83, 94–95 (1968). "Justiciability is the term of art employed to give expression to this dual limitation. . . ." *Id.* Standing is one of the elements of justiciability. *See* L. TRIBE, AMERICAN CONSTITUTIONAL LAW 56–114 (1978).

Like the federal courts, the Washington courts are open only to litigants with standing. *See* note 22 *infra*. Since the Washington State Constitution contains no limitation of jurisdiction to "cases and controversies," the origin of the standing doctrine in the state courts is unclear. Perhaps a limitation analogous to that of article III can be found in the delegation to the Washington courts of "judicial" power. *Compare* U.S. CONST. art. III *with* WASH. CONST. art IV. *See also In re* Elliott, 74 Wn. 2d 600, 446 P.2d 347 (1968)(stating that the exercise "of the judicial power requires that an actual controversy be before the court. . . ."); Francisco v. Board of Directors of Bellevue Public Schools, 85 Wn. 2d 575, 537 P.2d 789 (1975)(stating that non-judicial power may not vest in a constitutionally created court). In any event, the Washington courts have relied heavily on federal case law in resolving questions of party standing. *See, e.g.*, cases cited in notes 21 & 22 *infra*.

21. "One seeking relief must show a clear legal or equitable right and a well-grounded fear of immediate invasion of that right to have standing to bring suit." DeFunis v. Odegaard, 82 Wn. 2d 11, 24, 507 P.2d 1169 (1973) *cert. vacated as moot*, 416 U.S. 312 (1973). *Accord*, Bolser v. State Liquor Control Bd., 90 Wn. 2d 223, 580 P.2d 629 (1978).

22. "A person whose only interest in a legal contoversy is one shared with citizens in general has no standing to invoke the power of the courts to resolve the dispute." Casebere v. Clark County Civil Serv. Comm., 21 Wn. App. 73, 584 P.2d 416 (1978). *Accord*, State v. Lundquist, 60 Wn. 2d 397, 374 P.2d 246 (1962)(a litigant challenging the unconstitutionality of an enactment must claim infringement of "an interest peculiar and personal to himself").

23. "Abstract injury is not enough." Moran v. State, 88 Wn. 2d 867, 871, 568 P.2d 758, 760 (1977) (quoting O'Shea v. Littleton, 414 U.S. 488 (1974)). To have standing to challenge a statute's constitutionality a party must allege "injury in fact." Bolser v. State Liquor Control Bd., 90 Wn. 2d 103, 549 P.2d 721 (1976). Thus, when a party is actually afforded due process, he lacks standing to challenge a statute as violative of the guarantee of due process. State v. McCarter, 91 Wn. 2d 249, 588 P.2d 745 (1978).

If constitutional matters are adjudicated in the abstract, a case lacks the necessary adverseness and any opinion would be advisory. Crane Towing Co. v. Gorton, 89 Wn. 2d 161, 570 P.2d 428 (1977). The Washington court has described "concrete adverseness" as the "gist of the question of standing." DeFunis v. Odegaard, 82 Wn.2d 11, 24, 507 P.2d 1169, 1177 (1973) *cert. vacated as moot*, 416 U.S. 312 (1973).

24. "[O]ne to whom application of a statute is constitutional will not be heard to attack the statute on the ground that impliedly it might also be taken as applying to other persons or other situations in which its application might be unconstitutional." United States v. Raines, 362 U.S. 17, 21 (1960). *See also* Note, (Amsterdam), *The Void-for-Vagueness Doctrine in the Supreme Court*, 109 U. PA. L. REV. 67, 96–97 (1960).

25. State v. Hegge, 89 Wn. 2d 584, 589, 574 P.2d 386 (1978)(citing Parker v. Levy, 417 U.S. 733, 755–56 (1974)). *See* note 29 *infra*.

conduct, of due process of law. An exception to this general rule is sometimes made when statutes are challenged as "entirely" vague,[26] that is, as specifying no standard of conduct at all. A defendant's allegedly criminal conduct is said to be irrelevant because a meaningless statute can have no constitutional application.[27] Accordingly, the defendant would have standing to challenge the statute as unconstitutionally vague on its face.[28] Before the *Zuanich* decision, the status of the exception for "entirely" vague statutes in Washington was unclear.[29]

The distinction between reviewing an allegedly vague statute "on its face" or "as applied" to a defendant's conduct is crucial.[30] The facial review is much broader and allows a defendant to place hypothetical facts before the court to show the infringement of someone's constitutional rights;[31] the as-applied review focuses the court's attention on the relevant facts of the case before it.[32]

II. CHALLENGING R.C.W. § 9A.88.030 AS VAGUE ON ITS FACE

A. *The Court's Reasoning*

In concluding that defendants had standing to challenge the prostitution statute's constitutionality on its face, the Washington Supreme Court reasoned that the usual requirements of standing were inapposite, because

26. City of Bellevue v. Miller, 85 Wn. 2d 539, 536 P.2d 603 (1975) (recognizing the distinction between "entirely" and "partially" vague statutes).

27. Tribe asserts that, when a statute has no meaning at all, its vagueness precludes its fair application in any instance. L. TRIBE, *supra* note 20, at 721. As the facts of the particular case are irrelevant, a defendant would have standing to challenge the statute without placing his conduct before the court. *Id.* The general rule that a defendant has standing to challenge the statute as unconstitutionally vague only in its application to the facts of his particular case would still apply if the allegedly vague statute is only "partially" vague. *Id.* The distinction between "entirely" and "partially" vague statutes is found in federal law. *E.g.*, United States v. Powell, 423 U.S. 87 (1975); Smith v. Goguen, 415 U.S. 566 (1973); Lanzetta v. New Jersey, 306 U.S. 451 (1939).

28. L. TRIBE, *supra* note 20, at 72.

29. Although the Washington court recognized the exception for entirely vague statutes in City of Bellevue v. Miller, 85 Wn. 2d 539, 536 P.2d 603 (1975), the court stated in State v. Hegge, 89 Wn. 2d 584, 574 P.2d 386 (1978): "A defendant challenging a statute as denying him due process under the Fourteenth Amendment because of vagueness must test that alleged vagueness by matching the conduct with which he stands charged against the statute." *Id.* at 589, 574 P.2d at 389. *Accord*, Parker v. Levy, 417 U.S. 733, 756 (1973)(saying that "one to whose conduct a statute clearly applies may not successfully challenge it for vagueness").

30. The distinction is discussed in Note, *Recent Supreme Court Developments of the Vagueness Doctrine: Four Cases Involving the Vagueness Attack on Statutes During the 1972–73 Term*, 7 CONN. L. REV. 94, 110–15 (1974).

31. *Id.*

32. *See* note 25 *supra*.

defendants were alleging that the phrase "sexual conduct"[33] is utterly meaningless and, hence, cannot be constitutionally applied to any set of facts.[34]

B. Analysis

In *State v. Hegge*,[35] the Washington Supreme Court indicated its preference for reviewing an allegedly vague statute in its actual application to a defendant.[36] In *Zuanich*, the court should have followed its previously declared preference and denied defendants standing to challenge R.C.W. § 9A.88.030 as vague on its face. The *Zuanich* defendants gained standing by the mere allegation that R.C.W. § 9A.88.030 is "entirely" vague. Before confirming an exception to the rule of standing in cases of alleged vagueness, the Washington court should have considered more carefully the notion of "entire" vagueness, its implications for judicial review, and whether an exception based on "entire" vagueness is in any way necessary to protect a criminal defendant's rights. Based on these considerations, this note concludes that the *Zuanich* defendants should have been denied standing.

1. The Notion of Entire Vagueness

Courts purport to distinguish partially vague statutes from "entirely" vague statutes. A statute is partially vague if its application is certain as to some "hard core" of conduct though uncertain as to marginal cases.[37] In contrast, a statue is "entirely" vague if its application is uncertain as to all conduct.[38] As applied by the courts, however, this distinction between partial and "entire" vagueness is inscrutable; there exists no criterion whereby partially vague statutes can be distinguished from "entirely" vague statutes.[39]

---

33. R.C.W. § 9A.88.030 is set forth in pertinent part at note 1 *supra*.
34. 92 Wn. 2d at 63, 593 P.2d at 1315.
35. 89 Wn. 2d 584, 574 P.2d 386 (1978).
36. *See* note 29 *supra*.
37. City of Bellevue v. Miller, 85 Wn. 2d 539, 541, 536 P.2d 603, 606 (1975).
38. *Id.*
39. For example, in United States v. L. Cohen Grocery Co., 255 U.S. 81 (1921), the Court held "entirely" vague a statute prohibiting any person from "willfully . . . mak[ing] any unjust or unreasonable rate of charge in . . . dealing in or with any necessaries." *Id.* at 89. The Court still holds to the view that the statute was entirely vague because the seller "could have . . . no idea in advance what an 'unreasonable rate' would be." United States v. Powell, 423 U.S. 87, 92 (1975). *Cf.* H. HART, THE CONCEPT OF LAW 128–29 (1961). Nevertheless, the Court has upheld statutes with extremely similar language. *See* Note, (Amsterdam), *The Void-for-Vagueness Doctrine in the Supreme Court*, 109 U. PA. L. REV. 67, 93 n.139 (1960).

Indeed, this note submits that there are no "entirely" vague statutes. As long as a statute conforms to the rules of English,[40] it can be *very* vague, but never *entirely* vague.[41] Statutes are means of communicating legislatively determined standards of conduct. Statutes are purposive acts designed to "settle questions."[42] Although a rule's application will necessarily be uncertain in marginal cases,[43] a draftsman aims a statute at "paradigm, clear cases."[44] Under this view, a statute would always have a "hard core" of meaning and, hence, would never be "entirely" vague.[45]

40. For example, the statute mentioned in note 39 *supra* has a linguistically correct meaning, although that meaning may be very imprecise. *See* note 45 *infra*.

41. H. HART, *supra* note 39, at 124.

42. *Id.* at 126.

43. *Id.* at 123–33. According to Hart, general rules can never be free from vagueness. Some indefiniteness in meaning is "inherent in the nature of language." *Id.* at 123. At some point, all general rules become of uncertain application; "uncertainty at the borderline" results because legislators cannot foresee every possible case to which the specified standard might apply. *Id.* at 125. Nevertheless, in passing a statute, a legislator envisions the case to which the rule is clearly applied, that is, a "paradigm" case. *Id.*

44. *Id.* at 125.

45. Lanzetta v. New Jersey, 306 U.S. 451 (1939), has been twice cited by the Washington court for the proposition that courts should review an allegedly entirely vague statute on its face. State v. Zuanich, 92 Wn. 2d 61, 63, 593 P.2d 1314, 1315 (1979); City of Bellevue v. Miller, 85 Wn. 539, 541, 536 P.2d 603, 606 (1975). An examination of the statute invalidated in *Lanzetta* reveals the weakness of "entire vagueness."

In *Lanzetta*, the Supreme Court reversed criminal convictions under a New Jersey statute making membership in a gang a crime. The term "gangster" included any person "not engaged in any lawful occupation, known to be a member of any gang consisting of two or more persons . . . who has been convicted of any crime. . . ." 306 U.S. at 452. The Court found the statute on its face so "vague, indefinite, and uncertain" that it could not be applied to any set of facts. *Id.* at 457–58. Notwithstanding the Court's finding, query whether the statute was truly *entirely* vague.

Professor Hart might argue that the drafter of the New Jersey statute had some "paradigm" case in mind and directed the general rule thereto. Accordingly, as long as it conforms to the rules of English, the statute would not be entirely vague. State v. Gaynor, 119 N.J.L. 582, 197 A. 360 (1938), presented such a "paradigm" case clearly falling within the statute's hard core. In *Gaynor*, defendants were "non-residents of New Jersey and ex-convicts, (who) were seized while asleep in a secluded hide-out. They were armed with loaded rifles, revolvers, shot guns, grenades, blasting caps, and a gas riot gun with tear gas crystals. Much of the equipment was stolen. . . ." Collings, *Unconstitutional Uncertainty—An Appraisal*, 40 CORNELL L.Q. 195, 203 (1955). The New Jersey court upheld the statute's application, saying that the statute's evident purpose was to proscribe "the association of criminals for the pursuit of criminal enterprises." 197 A. at 362. The *Gaynor* defendants' conduct is the "paradigm" case of which Hart spoke; it was exactly the fact pattern at which the statute was aimed. This note, therefore, questions whether the New Jersey statute can be said to be "entirely" vague, the Court's opinion in *Lanzetta* notwithstanding.

Examination of another supposedly entirely vague statute reveals the vacuity of the concept of "entire vagueness." A state statute made it a crime to pay workers fulfilling federal contracts "less than the current rate of per diem wages in the locality where the work is performed." Connally v. General Construction Co., 269 U.S. 385, 388 (1926). The Supreme Court held the statute unconstitutionally vague and impossible to apply in any situation. One commentator, however, convincingly pointed out a clear case to which the statute would certainly be applicable: "For example, if the contractor was paying twenty cents a day less than the lowest wage in the vicinity there would be a

2. "Entire" Vagueness and Judicial Review

Even under the usual rule of standing,[46] judicial review[47] under the void-for-vagueness doctrine is troublesome. Decisions under the doctrine have little value as precedents because of their "almost habitual lack of informing reasoning."[48] In other words, decisional law under the doctrine fails to provide any guidance to judicial review of allegedly vague statutes. Not surprisingly, therefore, a determination that a statute is unconstitutionally vague is conclusory; if a court wishes to strike down a statute, it need only state, with no explanation, that it finds the statute so vague that it fails to apprise the common person of ordinary intelligence of the conduct proscribed.[49] The void-for-vagueness doctrine is itself, ironically, vague.[50] Yet, the *Zuanich* court liberalized standing under the doctrine by recognizing the defendants' standing even though no facts were before the court that could guide or limit its review. The court thereby expanded the judiciary's power to review statutes allegedly violative of a doctrine whose content is itself indefinite.[51]

Absent the facts of the case, a court's ruling on a statute's alleged

---

clear violation. . . ." Collings, *supra*, at 201. Indeed, the Court had upheld similar statutes in the past. *Id.* at n.13.

It might be recalled that the Court struck down a prohibition against "unjust rate[s]" in United States v. L. Cohen Grocery, 255 U.S. 81 (1921), as entirely vague. *See* note 39 *supra*. This result is questionable; Professor Hart would assert that even with very general standards in a statute, there will be "plain indisputable examples" of what falls within their hard core: "Some extreme cases of what is, or is not, a 'fair rate' . . . will *always* be identifiable *ab initio*." H. HART, *supra* note 38, at 128 (emphasis added). Under this view, even extremely vague statutes would have some meaning and, hence, could not be *entirely* vague.

46. The usual requirements of standing are discussed in notes 21–24 & 27 and accompanying text *supra*.

47. *See* note 19 *supra*.

48. Note, (Amsterdam), *The Void-for-Vagueness Doctrine in the Supreme Court*, 109 U. PA. L. REV. 67, 70–71 (1960). He continues:

> It is common in the cases which sustain a statute against the charge of vagueness merely to say that it is "as definite as" a statute sustained in some earlier case—an argument which, in view of the fact that the earlier case expressed no criterion of definiteness, is singularly unilluminating. Other cases state only their conclusion—that the statute is too uncertain (or not too uncertain)—and cite in support earlier decisions, not dealing with statutes of similar wording or even similar sphere of operation. . . .

Id. at 71 (footnotes omitted).

49. Comment, *Reconciliation of Conflicting Void-for-Vagueness Theories by the Supreme Court*, 9 HOUS. L. REV. 82, 85 n.15 (1971). That commentator described his impression of case law under the void-for-vagueness doctrine:

> Frequently, the reason given for holding a statute vague or not vague is merely a pronouncement that this case follows some rule with no explanation that will provide guidance for future decisions. Various standards and guidelines given by the Court to determine vagueness tend to be overly broad, leaving the Court with the freedom to do as it pleases.

Id. at 85 (footnotes omitted).

50. The void-for-vagueness doctrine is "amorphous," Note, *Recent Supreme Court Developments of t e Vagueness Doctrine: Four Cases Involving the Vagueness Attack on Statutes During the*

vagueness is arguably hypothetical, conjectural, and abstract.[52] As the Washington court has previously observed: "[k]nowledge of the facts which evoked the issue of law is usually essential to an understanding of the law to be applied."[53] Liberalized standing, as in *Zuanich*, relegates the important facts of a defendant's conduct to "footnote status."[54] In contrast, it invites close judicial scrutiny of legislative draftsmanship.[55]

The *Zuanich* decision thus risks undue conflict with legislative pol-

---

1972–73 Term, 7 CONN. L. REV. 94 (1974), and is an "indefinite concept," Collings, *Unconstitutional Uncertainty—An Appraisal*, 40 CORNELL L.Q. 195 (1955) (quoting Justice Frankfurter).

51. As Justice Powell noted in United States v. Richardson, 418 U.S. 166, 188 (1974) (concurring opinion), "[r]elaxation of standing requirements is directly related to the expansion of judicial power." Expanded judicial review under the void-for-vagueness doctrine is especially alarming because that doctrine leaves judges largely "free to do as [they] please." *See* note 49 *supra*. Because judges are left with largely unfettered discretion, the void-for-vagueness doctrine is applied inconsistently and subjectively:

> The vagueness doctrine remains today one of the more stubbornly obtuse aspects of constitutional law. Because the boundaries of vagueness have never been charted, the doctrine is invoked as a justification for making an extremely wide range of arguments. Hobby-horses mounted, one Justice gallops after first amendment violations, another chases issues of outraged morality, and a third pursues the general nature of the judicial role in American society.

Note, *Recent Supreme Court Developments of the Vagueness Doctrine: Four Cases Involving the Vagueness Attack on Statutes During the 1972–73 Term*, 7 CONN. L. REV. 94 (1974). A quarter century earlier, another commentator agreed, blaming the bench and bar for developing an inscrutable and subjective doctrine: "One's foremost impression is of the capriciousness with which the doctrine of 'void for vagueness' has been argued by parties and used by courts." Note, *Void for Vagueness: An Escape from Statutory Interpretation*, 23 IND. L. REV. 272, 283 (1948). To understand the courts' application of the void-for-vagueness doctrine would, therefore, "require a philosopher's stone, for which one may search in vain in the reported decisions." Collings, *Unconstitutional Uncertainty—An Appraisal*, 40 CORNELL L.Q. 195, 196 (1955). Borchard has suggested that this tendency inheres in substantive due process; "due process" is such a vague notion that it "obviously implies subjective criteria" used to defeat legislation. Borchard, *The Supreme Court and Private Rights*, 47 YALE L.J. 1051, 1077 (1938).

52. State v. Dixon, 78 Wn. 2d 796, 479 P.2d 931 (1971). The "gist" of the standing doctrine is to ensure against such hypothetical decisions. *See* note 23 *supra*.

53. The quotation in full is as follows:

> Courts do not operate in a vacuum. Knowledge of the facts which evoked the issues of law is usually essential to an understanding of the law to be applied. A criminal statute, colorably valid, cannot ordinarily be plucked out of thin air, so to speak, and be made the subject of a sensible judicial analysis.

State v. Dixon, 78 Wn. 2d 796, 801, 479 P.2d 931, 934 (1971).

54. Justice Blackmun has criticized the facial review for shifting the court's attention from the facts of the case before it: "[I]t is no happenstance that in each case the facts are relegated to footnote status, conveniently distant and in a less disturbing focus. This is the compulsion of doctrine that reduces our function to parsing words in the context of imaginary events." Lewis v. City of New Orleans, 415 U.S. 130, 137 (1974)(dissenting opinion).

55. *E.g.*, *Zuanich*, 92 Wn. 2d at 71–83, 593 P.2d at 1319–24. Justice Stafford, dissenting, scrutinized the legislature's actions in passing R.C.W. § 9A.88.030. At the same time, he dismissed defendants' conduct as "totally irrelevant" to the inquiry. *Id.* at 70. In contrast, the Senate Judiciary Committee's specific intent in passing the statute was central to his analysis. *Id.* at 79–83.

icy.[56] The usual method[57] of judicial review is to examine a statute to see if it is unconstitutionally vague as applied to a defendant's conduct.[58] Even if a statute is found unconstitutional in its application to that defendant, the statute remains valid except as applied to an identical set of facts.[59] In contrast, judicial review of a statute on its face, as in *Zuanich*, risks nullification of the statute in its entirety.[60] Where judicial review is not guided by any discernible, pre-existing legal principle[61] and focuses, not on relevant adjudicative facts,[62] but on the legislature's use of language,[63] a court's review becomes less judicial and more like that of a third, legislative chamber.[64]

3. *Entire Vagueness and Defendants' Rights*

In *Zuanich*, no reason appears for the creation of an exception to the usual requirement of standing. The case involved no third parties' rights that needed vindication.[65] The sole question before the court was whether the statute's alleged vagueness denied defendants due process in actual

56. The void-for-vagueness doctrine itself, even without liberalized standing, may be a product of judicial antagonism to legislative policy. *See* notes 17 & 48 *supra*.

57. Tribe describes the "usual process of constitutional adjudication" for overbreadth as the gradual cutting away of "the unconstitutional aspects of a statute by invalidating its improper applications case by case." L. TRIBE, *supra* note 20, at 711.

58. *See* note 25 and accompanying text *supra*.

59. *See* Note, *Recent Supreme Court Developments of the Vagueness Doctrine: Four Cases Involving the Vagueness Attack on Statutes During the 1972–73 Term*, 7 CONN. L. REV. 94, 111 (1974).

60. *Id.*

61. *See* note 5 and accompanying text *supra*.

62. *See* note 54 *supra*.

63. *See* note 55 and accompanying text *supra*.

64. *See* Hardisty, *The Effect of Future Orientation on the American Reformation of English Judicial Method*, 30 HASTINGS L.J. 523, 536–37 (1979)(discussing the tendency of American appellate courts to act like legislative bodies).

65. Professor Tribe noted that one of the usual reasons for making an exception to the requirement of standing is to protect the interests of third parties who are unable or unlikely to seek redress in the courts. L. TRIBE, *supra* note 20, at 103–09. This is the rationale for liberalizing standing when a defendant alleges that a statute is overbroad. Tushnet, *The New Law of Standing: A Plea for Abandonment*, 62 CORNELL L. REV. 663, 691 (1977). The overbreadth doctrine is discussed briefly in note 15 *supra*.

Liberalized standing would clearly have been justified if the *Zuanich* defendants had alleged that R.C.W. § 9A.88.030's language, "sexual conduct," is overbroad. The defendants did argue in passing that "[a]t their broadest the words 'sexual conduct' literally encompass much that qualifies as First Amendment speech . . . the right of 'innocent association.' " Brief of Respondents Brandes and Wardell at 18–19. The Washington court, however, made no mention of the overbreadth argument, perhaps because defendants presented it as a "potential" problem and one "symptomatic" of the prostitution statute's alleged vagueness. *Id.* at 19. For a discussion of the possibility of challenging prostitution statutes as overbroad, see note 15 *supra*.

fact.[66] If the court had denied standing, the case would have been remanded to the superior courts for trial. Once sufficient facts were established,[67] defendants would clearly have standing to challenge the statute as unconstitutionally vague by "matching the conduct" with which they stand charged "against the statute."[68] The court would then have a fully developed fact pattern enabling it to evaluate any alleged lack of notice[69] or arbitrariness[70] in law enforcement. This result is preferable to the one reached by the Washington Supreme Court because it adequately protects both a criminal defendant's right to due process and the legislature's power to decide what the laws shall be, free from judicial intermeddling.

III. "SEXUAL CONDUCT" AND UNCONSTITUTIONAL VAGUENESS

A. *The Court's Reasoning*

In reversing the superior courts' dismissals of the charges, the court upheld the prostitution statute against the assertion that it is unconstitutionally vague. The test to be applied, the court ruled, is whether the statutory language possesses a "hard core" of meaning.[71] Applying the test to R.C.W. § 9A.88.030,[72] the court concluded that "sexual conduct" possesses the constitutionally required "hard core" meaning, to-wit, heterosexual genital intercourse.[73] The court reached this conclusion by reference to the reasonable person,[74] who would find that sexual conduct necessarily encompasses heterosexual genital intercourse.[75]

---

66. In alleging that R.C.W. § 9A.88.030 is "entirely" vague, the *Zuanich* defendants were alleging that it deprived them of due process in fact; because it is "entirely" vague, they argued, it cannot be constitutionally applied to anyone, including the defendants. 92 Wn. 2d at 62–63, 593 P.2d at 1315. *See also* note 27 *supra*.

67. *See* note 8 *supra*.

68. State v. Hegge, 89 Wn. 2d 584, 589, 574 P.2d 386, 389 (1978).

69. *See* note 16 and accompanying text *supra*.

70. *See* note 18 and accompanying text *supra*.

71. 92 Wn. 2d at 63, 593 P.2d at 1316.

72. *See* note 1 *supra*.

73. 92 Wn. 2d at 64, 593 P.2d at 1316. Defendants argued that the phrase "sexual conduct" would literally encompass "the flirting of a braless waitress, the dancing of a go-go girl, the operation of a kissing booth, and even the Miss America bathing suit competition." *Id.* at 68, 593 P.2d at 1318. The court termed this argument "interesting but irrelevant" to its inquiry concerning the statute's hard core application. *Id.*

74. *Id.* at 64, 593 P.2d at 1316.

75. *Id.* One defendant submitted a poll conducted in Seattle's University District. That poll purported to show that the reasonable person of ordinary intelligence has no understanding of the meaning of "sexual conduct." In reply to that assertion, the court stated:

> The one question which defendants neglect to ask is whether heterosexual genital intercourse is sexual conduct. While there may be some pre-Fall Eden in which this question could not be

B. Analysis

1. Framing the Legal Issue

The court's phrasing of the issue failed to incorporate considerations important to judicial review of statutes under the void-for-vagueness doctrine. The court stated the legal issue as a question: "Is there a 'hard core' to the meaning of 'sexual conduct' which will save it from constitutional attack?"[76] This phrasing did not incorporate the presumption in favor of the statute's constitutionality.[77] It also failed to acknowledge the settled rule that the party challenging a statute as unconstitutionally vague bears the burden of establishing the unconstitutionality beyond all reasonable doubt.[78] In its opinion, the *Zuanich* court mentioned neither the presumption nor defendants' burden of proof. To ensure consideration of these matters, the court should have phrased the legal issue differently: "Do defendants establish that R.C.W. § 9A.88.030 lacks a presumed 'hard core' of meaning?" If reasonable minds might differ as to the answer, the statute should be upheld.

In *Zuanich*, since the court upheld the statute, no immediate harm was done by not carefully framing the constitutional issue. The indefiniteness[79] of the void-for-vagueness doctrine, however, makes a careful phrasing of the legal issue of utmost importance;[80] otherwise the danger is that in future cases like *Zuanich*, the courts will fail to ask the right legal question, increasing the risk that they will obtain the wrong legal answer.

2. Statutory Construction As An Alternative to Void-for-Vagueness

In deciding what conduct falls within the statute's hard core of meaning, the Washington Supreme Court should have provided a more complete construction[81] of the allegedly vague term. By finding heterosexual

---

answered affirmatively *to argue that heterosexual genital intercourse is not sexual conduct is a doctrine to which no reasonable person could ascribe.*

Id. (emphasis added).

76. *Id.* at 63, 593 P.2d at 1316.

77. State v. Dixon, 78 Wn. 2d 796, 804, 479 P.2d 931, 936 (1971) (and cases cited therein).

78. *Id.*

79. *See* notes 48–51 and accompanying text *supra*.

80. The void-for-vagueness doctrine invites judicial nullification of legislation where it is repugnant to the reviewing court's social or moral predilections. *See* notes 85 & 86 *infra*. If courts keep in mind that, where reasonable persons may differ as to a statute's vagueness, the statute is to be upheld, the doctrine's subjectiveness may be ameliorated.

81. The Washington legislature has since amended R.C.W. § 9A.88.030 to provide a definition of "sexual conduct," WASH. REV. CODE § 9A.88.030(2) (1979) (as amended by 1979 Wash. Laws 1st Ex. Sess., ch. 244, § 15). The following discussion, therefore, is provided only to show that an expansive construction of "sexual conduct" was possible in light of the legislature's purpose.

Before 1975, prostitution was not a state offense. State v. Zuanich, 92 Wn. 2d at 73, 593 P.2d at

genital intercourse within the meaning of "sexual conduct," the court resolved only the question whether R.C.W. § 9A.88.030 is vague on its face. The court left unanswered the question whether the statute can be applied to a number of fact situations,[82] including those of the eight defendants. It is well settled that prior judicial construction will cure a statute's alleged vagueness.[83] Accordingly, if the *Zuanich* court had further construed "sexual conduct," R.C.W. § 9A.88.030 would have been immune to attack on ground of vagueness to the extent of the construction.[84] This result is desirable for several reasons.

First, it would have lessened the occasion for future judicial review of the statute under the void-for-vagueness doctrine. The scope of that review is unsettlingly expansive. Like the old doctrine of substantive due

---

1320. The legislature had proscribed acts relating to prostitution: promoting prostitution, profiting from prostitution, and accepting the earnings of a common prostitute. *Id.* The courts construed the term "prostitute" to mean a woman who carries on indiscriminate illicit sexual intercourse with more than one man. State v. Chemeres, 20 Wn. 2d 712, 147 P.2d 815 (1944).

In 1973, the legislature rejected the judicially provided definition. For purposes of prosecuting pimps and procurors, the legislature defined prostitution as engaging or offering to engage "in sexual conduct with another person in return for a fee." 1973 Wash. Laws 1st Ex. Sess., ch. 154, § 124 (amending WASH. REV. CODE § 9.79.030). "Sexual conduct" was expressly defined as "either or both sexual intercourse or any conduct involving the sex organs of one person and the mouth or anus of another." *Id.*

In 1975, the Senate Judiciary Committee drafted a bill making prostitution itself a crime. The Committee defined prostitution as "sexual conduct with another person in return for a fee." 1975 Wash. Laws 1st Ex. Sess., ch. 260, § 9A.88.030. It did not, however, retain the 1973 definition of "sexual conduct." In response to a specific inquiry from the Senate floor, Senator Francis, the bill's co-sponsor and chairman of the Senate Judiciary Committee, explained the intentional ommission of any definition of sexual conduct. It was the Committee's opinion, he said, that a further definition of "sexual conduct" would allow potential defendants to evade the letter of the law's proscription: "If you more narrowly define sexual conduct, I think you will find someone creative and ingenious enough to find the way around it every time." Senate Journal at 748, 44th Legislature (1975). The legislature deleted the 1973 definition from the criminal code and passed the bill. The bill became R.C.W. § 9A.88.030, challenged in *Zuanich*.

The obvious purpose of the omission was to define "sexual conduct" more broadly than in 1973. At a very minimum, therefore, the "hard core" meaning of sexual conduct must include "either or both sexual intercourse or any conduct involving the sex organs of one person and the mouth or anus of another." 1973 Wash. Laws 1st Ex. Sess., ch. 154, § 124. This meaning should have been reached by the *Zuanich* court. Since the legislature intended that the courts construe "sexual conduct" even more broadly, the inclusion of other acts, such as masturbation, within its meaning would have been reasonable.

82. Arguably these other fact situations were not before the court and the court should not pass on the statute's application to them. This note agrees; no facts were before the court and, therefore, the court should have avoided reviewing the statute at all by denying defendants standing. *See* notes 19–32 and accompanying text *supra*. If, however, the court decides that it will review a statute on its face on the ground of entire vagueness, this note suggests that expansive judicial construction will obviate the necessity of future judicial review for partial vagueness.

83. *See* note 14 and accompanying text *supra*.

84. *Id.* A proposed construction is set forth in note 81 *supra*.

process,[85] the void-for-vagueness doctrine may be little more than a means by which the judiciary, with regard to matters of policy, substitutes its own predilections for the legislature's.[86] Judicial construction of "sexual conduct" would have eschewed future judicial review and the concomitant risk of judicial nullification of the statute's application.

Second, a further construction of "sexual conduct" would have been more dispositive of the cases before the court. The court's limited construction left unresolved the decisive question whether R.C.W. §

85. The phrase "substantive due process," as used here, refers to the economic content which was read into the fourteenth amendment by such cases as Chicago, Minn. & St. P. Ry. v. Minnesota, 134 U.S. 418 (1890) and Reagan v. Farmer's Loan & Trust Co., 154 U.S. 362 (1894), and which was denounced by Justice Holmes in Lochner v. New York, 198 U.S. 45, 74 (1905). Note, *Void for Vagueness: An Escape from Statutory Interpretation*, 23 IND. L.J. 272, 278 n.33 (1948). In that context, substantive due process was a general limitation upon the police power of the state.

> Any state statute, ordinance, or administrative act which imposed any kind of limitation upon the right of private property or free contract immediately raised the question of due process of law. . . . To be accepted as within the bounds of due process a statute must in the opinion of the court be "reasonable". . . . The result was nothing less than the creation of a new type of judicial review, in which the Court examined the constitutionality of both state and federal legislation in light of the judge's social and economic ideas. . . . The new judicial review thus made the Supreme Court a kind of "negative third chamber" both to the state legislatures and to Congress. Paralleling this development, the supreme courts of the various states became negative third chambers of their own state legislatures.

A. KELLY & W. HARBISON, THE AMERICAN CONSTITUTION, ITS ORIGIN AND DEVELOPMENT 525–26, 541–43 (1970). *See also* Borchard, *supra* note 51. *See also* note 86 *infra*.

86. Determination of the law's policy is a matter for the state legislature. Courtright v. Sahlberg Equip. Inc., 88 Wn. 2d 541, 563 P.2d 1257 (1977). Yet, the void-for-vagueness doctrine may transform the judiciary into a negative third chamber of the legislature.

One observer found it significant in 1931 that the Court should find impermissibly vague "only those statutes which sought to limit the free play of economic forces." *Indefinite Criteria of Definiteness in Statutes*, 45 HARV. L. REV. 160, 162 (1931). Amsterdam noted that the void-for-vagueness doctrine was "born in the reign of substantive due process and throughout that epoch was successfully urged in cases involving regulatory or economic control legislation." Note, (Amsterdam), *The Void-for-Vagueness Doctrine in the Supreme Court*, 109 U. PA. L. REV. 67, 74 n.38 (1960). *See also* Comment, *Reconciliation of Conflicting Void-for-Vagueness Theories by the Supreme Court*, 9 HOUS. L. REV. 82, 84 n.8 (1971). Another writer described the concurrent evolution of economic substantive due process and the void-for-vagueness doctrine as "a coincidence of some moment. . . ." Note, *Void-for-Vagueness: An Escape from Statutory Interpretation*, 23 IND. L.J. 272, 278 (1948). In more recent times, non-economic "personal" freedoms have supplanted laissez-faire as the Court's "sanctum sanctorum." Note, (Amsterdam), *supra*, at 77. At least one authority objects to the use of the due process clause as a pretext for on-going judicial restructuring of society:

> Although "vagueness" has expanded into the civil liberties field, the *implications* of this statement seem still to be true today. If the Court is indeed indulging in an unconscious method curiously like that of "substantive due process" it is deplorable. . . . Mr. Justice Frankfurter intimates that he believes the majority in the *Winters* case were reading into the decision their own predilections, psychological or social.

Note, *Void-for-Vagueness: An Escape from Statutory Interpretation*, 23 IND. L.J. 272, 283–84 (footnotes omitted). The case reference is to Winters v. New York, 333 U.S. 507, 520 (1948) (dissenting opinion).

9A.88.030 could be constitutionally applied to the alleged conduct of the very defendants before the court.[87]

Last, further construction would have better advanced the policies of the void-for-vagueness doctrine.[88] That is, it would have put the common person of ordinary intelligence on clearer notice[89] of the activities constituting "sexual conduct"; it would have provided lower courts with a more definite standard of adjudication;[90] and it would have advised police and prosecutors of the scope of the statute's permissible application.[91]

IV. CONCLUSION

The Washington Supreme Court needs to reconsider the role of the void-for-vagueness doctrine in the state's legal system. The doctrine is itself amorphous. Yet, it is being increasingly invoked as a defense to criminal prosecution. By recognizing defendants' standing in *Zuanich*, the court made clear that a criminal defendant will be allowed to raise the defense of vagueness by motion before trial. This holding ensures that facts relevant to the defense will not be before the court. Why the defense of vagueness should be treated more favorably than the defenses of insanity, necessity, etc., has not been shown. On the other hand, this note has argued that allowing a defendant to raise the defense of vagueness before any facts have been established is antithetical to the adjudicatory nature of the judicial process.

If, for better or worse, the Washington judiciary has assumed the task of passing on a statute's constitutionality without regard to the facts of the case, it should be particularly wary of the void-for-vagueness doctrine's potential for abuse. The court can exercise self-restraint and ameliorate the worst aspects of judicial review under the doctrine by a careful phrasing of the constitutional issue that recognizes the defendant's burden of overcoming the statute's presumed validity. Once a statute has been brought before the court and indicted for impermissible vagueness, the court can avoid future judicial review by proper statutory construction.

Jeffrey Merle Evans

87. The eight defendants' specific conduct is unknown because the charges were dismissed prior to trial. Some details are known as to two defendants. *See* note 4 *supra*.

88. No reason appears why the policies applicable to enacted law under the void-for-vagueness doctrine are not equally applicable to decisional law. *See* notes 14–16 *supra*.

89. *See* note 16 *supra*.

90. *See* note 17 *supra*.

91. *See* note 18 *supra*.