

Decriminalization of Prostitution: The Limits of the Criminal Law

Any sincere judge who is administratively responsible for courts which deal with sex offenders must be struck by the fact that our laws are based on false assumptions and unimaginative cruelty. Prostitutes are dealt with as though they topped the list of dangerous public enemies. . . . And yet after the women are arrested, virtually our only answer is a period of confinement in a penal institution calculated to make more certain their further degradation.¹

In Oregon, adults may engage in consensual sexual activity for love, for mutual enjoyment, for hope of marriage, for support, or for a job promotion. However, if one of them receives or gives a fee for engaging in sexual activity both parties are guilty of a crime² and may receive up to one year in prison³ or a \$1,000 fine.⁴ This comment examines the Oregon prostitution laws and proposes that they be repealed, because enforcement of those laws is an inappropriate and inefficient use of the criminal law and government resources.

I

BACKGROUND OF OREGON PROSTITUTION LAW

Prior to the 1971 Oregon Criminal Code revision, the status or condition of being a common prostitute was criminal under the vagrancy statute,⁵ but the act of prostitution was not a crime. Prostitution was punishable only if it came under another statute on sexual conduct such as adultery,⁶ lewd cohabitation,⁷ seduction,⁸ or fornication.⁹

The vagrancy statute did not specify what evidence was needed to show that a woman was a common prostitute. In 1966 the Oregon supreme

¹ J. MURTAGH & S. HARRIS, *CAST THE FIRST STONE* viii (1957).

² ORS 167.007 (1975): "(1) A person commits the crime of prostitution if:

(a) He engages in or offers or agrees to engage in sexual conduct or sexual contact in return for a fee; or

(b) He pays or offers or agrees to pay a fee to engage in sexual conduct or sexual contact.

(2) Prostitution is a Class A misdemeanor."

³ ORS 161.615 (1975).

⁴ ORS 161.635 (1975).

⁵ Law of Feb. 18, 1911, ch. 95, [1911] Gen. Laws Or. 138 (repealed 1971) (formerly codified at ORS 166.060 (1969)).

⁶ Law of Oct. 19, 1864, § 626, [1845-64] Gen. Laws Or. 557 (Deady 1866) (repealed 1971) (formerly codified at ORS 167.005 (1969)).

⁷ *Id.* § 630, at 558 (repealed 1971) (formerly codified at ORS 167.015 (1969)).

⁸ *Id.* § 631, at 558-59 (repealed 1971) (formerly codified at ORS 167.025 (1969)).

⁹ Law of Feb. 18, 1905, ch. 119, [1905] Gen. Laws Or. 220 (repealed 1971) (formerly codified at ORS 167.030 (1969)). See note 38 *infra*.

court in *State v. Gustin*¹⁰ held that evidence of one act of solicitation was not sufficient for conviction under the statute. Two years later in *State v. Perry*,¹¹ however, the court held that a single act of solicitation, coupled with attending circumstances,¹² was sufficient to support a conviction for vagrancy. The *Perry* court was concerned about the constitutionality of the vagrancy law, and recommended that the legislature draft legislation dealing with conduct rather than status and describing the prohibited acts with precision. Consequently, the legislature adopted the Oregon Criminal Law Revision Commission's proposal making prostitution a crime of action.¹³

The revision made two major changes in the concept of prostitution. The new statutes included men in the definition of prostitute,¹⁴ and prohibited soliciting or engaging in all types of sexual intercourse for a fee.

A provision to include customers in the prohibition against prostitution was rejected by the Commission after the first draft of the 1971 revision.¹⁵ In 1973, however, the women legislators jointly introduced a

¹⁰ 244 Or. 531, 419 P.2d 429 (1966).

¹¹ 249 Or. 76, 436 P.2d 252 (1968).

¹² The *Perry* court held that there must be attending circumstances from which the jury could infer that the woman was a person who offered to engage indiscriminately in illicit intercourse. *Id.* at 82, 436 P.2d at 255.

¹³ ORS 167.002 (1971), as amended, ORS 167.002 (1975) stated:

"(2) 'Prostitute' means a male or female person who engages in sexual conduct for a fee. . . .

(4) 'Sexual conduct' means sexual intercourse or deviate sexual intercourse." ORS 167.007 (1971), as amended, ORS 167.007 (1975) stated: "(1) A person commits the crime of prostitution if he engages in or offers or agrees to engage in sexual conduct in return for a fee."

¹⁴ Oregon case law had defined a prostitute as a female who offered her body for indiscriminate intercourse with men. *See, e.g., State v. Gustin*, 244 Or. 531, 419 P.2d 429, 430 (1966).

¹⁵ One of the Commission's reporters, Roger D. Wallingford, set out the arguments for and against the proposal. The following arguments were noted in support: (1) the equal culpability factor demands equal application of the criminal law; (2) the person is guilty of soliciting commission of a crime; (3) if a patron is found in a place of prostitution, a patronizing statute simplifies law enforcement; (4) a patronizing statute aids in curtailment of prostitution activities; and (5) it would be an expression of public policy against patronizing prostitutes.

The following arguments were noted in opposition: (1) a patronizing statute would be difficult to enforce; (2) it would expose the culpable patron to shake downs, extortion, and blackmail; (3) it would make prosecution of prostitutes more difficult; (4) it would hamper vice squad activity in controlling prostitution; (5) it would not act as a deterrent to the men seeking paid companionship; (6) the patron does not represent an equal threat to social order, for example, with regard to venereal disease, youthful sexual delinquency, involvement in other criminal activities; (7) prosecution would threaten the stability of the home and family with public exposure, damage to reputation, disgrace, and divorce; and (8) a patronizing statute would induce men to seek other, potentially more harmful, sexual relationships, for example, incestuous alliances and the use of force and violence.

The reporter recommended against acceptance of the proposal, because the arguments in opposition seemed more persuasive. He assumed that a patronizing statute would not be a deterrent and concluded that the difficulties of enforcement would outweigh any benefits. He pointed out that any patron who actively solicited a prosti-

bill to add that provision, and it was passed by the legislature.¹⁶ A later amendment expanded the law to include the prohibition of touching for the purpose of arousing or gratifying sexual desire.¹⁷

II

POLICY CONSIDERATIONS

A. Arguments of the 1971 Commission

Enacting a criminal code requires that the legislature consider the proper scope of the criminal law and the desirable means of enforcement. It is not certain, however, that the 1971 Criminal Law Revision Commission, upon whose recommendations the legislature relied, gave adequate attention to those factors when it recommended the continued criminalization of prostitution. The reporter for the Commission's section on prostitution set out the arguments for continued penal repression of prostitution and the arguments for legalization.¹⁸

1. The Reporter's Arguments

In support of continued penal repression the reporter noted the arguments that: (1) prostitution is a significant factor in the spread of venereal disease; (2) it is a source of profit and influence for criminal groups that traffic in other illegal activities; (3) it is a corruptive influence on government and law enforcement agencies; (4) it is a significant factor in social disorganization, undermining marriage, the home, and individual character; and (5) no practical nonpenal alternatives are presently available to deal effectively with the problem of prostitution.

In support of legalization he noted arguments that: (1) the law cannot eliminate prostitution; (2) sumptuary laws incapable of enforcement encourage extortion and arbitrary prosecution; (3) absence of a commercial outlet for male sexuality results in an increase in sex crimes; (4) registration and periodic health inspection best controls the spread of venereal disease; (5) **legalized prostitution affords less opportunity for official corruption than does total repression**; and (6) the containment of prostitution to certain areas facilitates police protection for the general community.¹⁹

tute still would be guilty of a crime under the proposed statute for solicitation of a crime. OREGON CRIMINAL LAW REVISION COMM'N, PROPOSED OREGON CRIMINAL CODE, PROSTITUTION AND RELATED OFFENSES § 3, at 17-18 (Preliminary Draft No. 1, 1969) [hereinafter cited as PROPOSED CRIMINAL CODE, PRELIMINARY DRAFT No. 1].

¹⁶ Ch. 52, § 1, [1973] Or. Laws 100 (codified at ORS 167.007(1)(b) (1975)).

¹⁷ Ch. 699, §§ 5 & 6, [1973] Or. Laws 1594. The amendment was referred to the people by referendum petition and approved November 5, 1974. The committee appointed pursuant to ORS 254.210 to explain the ballot measure stated that this amendment was intended "to be applied to . . . massage parlors." SECRETARY OF STATE, OREGON VOTER'S PAMPHLET 50 (Gen. Election 1974).

¹⁸ PROPOSED CRIMINAL CODE, PRELIMINARY DRAFT No. 1 § 2, at 6.

¹⁹ *Id.*

The reporter cited no authority in support of the arguments for continued penal repression and only a few sources to support the arguments for legalization,²⁰ and he did not discuss the possibility of decriminalization.²¹

2. Counter Arguments

There are many responses to the reporter's arguments in support of continued penal repressions which were not discussed in the Commission's report. They must be considered in any evaluation of the law.

The reporter's first argument for continued penal sanctions, that prostitution is a significant factor in the spread of venereal disease, is contradicted by recent studies which show that prostitutes account for a very small percentage of those infected with gonorrhea or syphilis.²² This finding may be explained by the fact that studies show that the fifteen- to thirty-year-old age group has by far the highest incidence of venereal disease, while prostitutes' clients are generally in the older age groups.²³

Of course, a state has an interest in protecting the health of its citizens, and the spread of venereal disease is a serious health problem. In light of the statistics which show that prostitution contributes very little to the problem,²⁴ however, a general prohibition of prostitution on that basis is overbroad to achieve the legislative purpose, and should be reevaluated.

The reporter's second argument, that prostitution is a source of in-

²⁰ Although the reporter did not cite the source, his arguments in support of continued penal repression were taken from the MODEL PENAL CODE § 207.12, at 169-72 (Tent. Draft No. 9, 1958). The sources he cited in favor of legalizing prostitution are H. BARNES & N. TEETERS, *NEW HORIZONS IN CRIMINOLOGY* 92-96 (3d ed. 1959); H. BLOCH, *CRIME IN AMERICA* 273 (1961); 25 *LAW AND CONTEMPORARY PROBLEMS* 223 (1960) [an incorrect cite] and WATSON, *PSYCHOLOGY FOR LAWYERS* 155 (1960). PROPOSED CRIMINAL CODE, PRELIMINARY DRAFT NO. 1 § 2, at 3-6.

²¹ Three methods exist for dealing with prostitution: criminalization, legalization, and decriminalization. Criminalization means the prohibition of prostitution and the employment of penal sanctions; legalization means the allowance of it under governmental control; and decriminalization means the removal of both penal sanctions and governmental control.

²² Burnstin & James, *Prostitution in Seattle*, WASH. STATE BAR NEWS, Aug.-Sept. 1971, at 5; Silver, *A Case for Decriminalization: Prostitution and Politics*, 1971 HARV. POL. REV. 10.

²³ One study found that the highest number of reported cases of venereal disease was in the fifteen to thirty age group, accounting for 84 percent of the total reported cases. Yet prostitutes in the study reported that 70 percent of their clients were in the thirty to sixty age group. Burnstin & James, *supra* note 22, at 417. Another study found that there were 1,035 cases of gonorrhea reported for every 100,000 persons in the fifteen to nineteen age group. This compares with 84.6 cases per 100,000 in the forty to forty-seven age group. The comparable figures for syphilis were 20.4 to 8.4 cases. Silver, *supra* note 22, at 11.

²⁴ Dr. Charles Winnick, member of the American Social Health Association and Professor of Sociology, City College of the City University of New York, has stated: "We know from many different studies that the amount of VD attributable to prostitution is remaining fairly constant at a little under 5 percent, which is a negligible proportion compared to the amount of VD that we have." Sherwin & Winnick, *Debate: Should Prostitution Be Legalized?*, *SEXUAL BEHAVIOR*, Jan. 1972, at 66, 72. See also H. BENJAMIN & R. MASTERS, *PROSTITUTION AND MORALITY* (1964).

come for criminal groups that traffic in other illegal activities, is also not substantiated. The evidence indicates that prostitution is not controlled by organized crime.²⁵ Moreover, this allegation actually supports legalization or decriminalization rather than criminalization. If prostitutes' activities were legal, they would not need the protection and support of criminal groups. In addition, they would be able to seek police protection against any criminal group that tried to control them. Such options for prostitutes would make control by criminal groups more difficult and, therefore, less likely.

There is also concern that legalizing prostitution may lead to an increase in related crimes.²⁶ It does not appear, however, that the Supreme Court will uphold criminal statutes which prohibit activities because they might lead to crime. The Court in *Papachristou v. City of Jacksonville*²⁷ overturned a vagrancy statute because the statute presumed that certain groups of people were more likely to commit crimes than others.²⁸ In *Stanley v. Georgia*²⁹ the Court held that people could not be prohibited from having obscene material in their homes on the assumption that it might lead to violent crime or deviant sexual behavior.³⁰

With regard to policy, Oregon already has statutes dealing with all types of illegal activity. These statutes apply to the person committing the crime, thereby fulfilling the state's interest in prohibiting those activities. It is not justifiable to prohibit prostitution because some prostitutes may commit other crimes or have contact with persons who do. As one article pointed out, "[t]o arrest and prosecute prostitutes because crime-related activity *might* be involved either directly or indirectly seems antithetical to the notions of due process, equal protection, and individual liberty."³¹

Moreover, if prostitution were not a crime the customers or prostitutes who were victims or witnesses of related crimes would be able to report them to the police without fear of self-incrimination. The present law appears to encourage related crimes because it decreases the likelihood that they will be reported.

The third argument, that the state has an interest in prohibiting pros-

²⁵ PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, *THE CHALLENGE OF CRIME IN A FREE SOCIETY* 189 (1967); Raskin, *Put Your Clothes Back On Honey, You're Under Arrest*, WASHINGTONIAN, Aug. 1970, at 43.

²⁶ Haft, *Recommendation and Report to the House of Delegates by the Section of Individual Rights and Responsibilities Concerning Prostitution and Solicitation*, 4 HUMAN RIGHTS 77, 84-85 (1974) (report prepared for the American Bar Association, Section of Individual Rights and Responsibilities, Committee on Equal Protection).

²⁷ 405 U.S. 156 (1972).

²⁸ *Id.* at 171.

²⁹ 394 U.S. 557 (1969).

³⁰ *Id.* at 567.

³¹ Rosenbleet and Pariente, *The Prostitution of the Criminal Law*, 11 AM. CRIM. L. REV. 373, 418 (1973) (emphasis in original).

titution because it is a corruptive influence on government and law enforcement agencies, is circular on its face.³² If prostitution were not a crime or were not regulated by the state, prostitutes would have no reason to attempt to corrupt officials.

The same kind of reasoning applies to the arguments about pimps or promoters of prostitution. If prostitutes were not subjected to the isolation and degradation of arrests they would not need the moral support of pimps,³³ nor would they need someone to bail them out of jail. By making prostitutes outcasts, the criminal law has forced them to find support where they can.³⁴

The reporter's fourth argument, that prostitution is a significant factor in social disorganization, presents the issue behind most recent debates on prostitution: the legislation of sexual morality. The Oregon legislature addressed this question in 1971 when it abolished criminal penalties for adultery,³⁵ lewd cohabitation,³⁶ seduction,³⁷ and private consensual homosexual conduct between adults.³⁸ In its discussion of these changes the Oregon Criminal Law Revision Commission stated:

The proposed draft, therefore, excludes from the criminal law all sexual practices not involving force, adult corruption of minors, or public offenses and all sexual practices between married persons and consenting adults. As stated in the comments to § 207.5 of the Model Penal Code:

"No harm to the secular interests is involved in atypical sex practice in private between consenting adult partners. This area of private morals is the distinctive concern of spiritual authorities."³⁹

The question which remains, therefore, is why the legislature did not decriminalize prostitution when engaged in by consenting adults in private. In its discussion of homosexual conduct the Commission noted that

³² See Haft, *supra* note 26, at 85.

³³ *Id.*

³⁴ Bauer, *On Pimps*, 1 COYOTE GROWLS, June/July 1975, at 3 (*Coyote Growls* is the newsletter for the prostitutes' union in San Francisco). The author points out that a pimp often plays on prostitutes' alienation from "straight" society and convinces them to join him by offering them affection and security.

³⁵ Law of Oct. 19, 1864, § 626, [1845-64] Gen. Laws Or. 557 (Deady 1866) (repealed 1971) (formerly codified at ORS 167.005 (1969)).

³⁶ *Id.* § 630, at 558 (repealed 1971) (formerly codified at ORS 167.015 (1969)).

³⁷ *Id.* § 631, at 558-59 (repealed 1971) (formerly codified at ORS 167.025 (1969)).

³⁸ *Id.* § 639, at 560 (repealed 1971) (formerly codified at ORS 167.040 (1969)). The fornication statute, Law of Feb. 18, 1905, ch. 119, [1905] Gen. Laws Or. 220 (repealed 1971) (formerly codified at ORS 167.030 (1969)), only applied to heterosexual conduct of a male with a female between the years of 16 and 18. That activity for both males and females is now prohibited by ORS 163.435 (1975), "Contributing to the Sexual Delinquency of a Minor."

³⁹ OREGON CRIMINAL LAW REVISION COMM'N, PROPOSED OREGON CRIMINAL CODE, FINAL DRAFT AND REPORT § 114, at 117 (1970) (hereinafter cited as PROPOSED CRIMINAL CODE, FINAL DRAFT). See also MODEL PENAL CODE § 207.5, at 277-78 (Tent. Draft No. 4, 1953).

laws dealing with prostitution and disorderly conduct would protect the public from public solicitation or performance of sexual acts.⁴⁰ Yet the prostitution laws cover much more than public solicitation or public sexual acts,⁴¹ both of which could be controlled adequately under the disorderly conduct statute.⁴²

The reporter for the Commission did not cite the *Model Penal Code* for his arguments about prostitution, but his are the same arguments as were used by the drafters of the *Code*.⁴³ Because neither the reporter nor the Commission discussed why a distinction should be drawn between commercial and noncommercial sex under the criminal law, it is necessary to look at the discussion in the *Model Penal Code*. The drafters of the *Code* recommended making the distinction primarily because they believed prostitutes were an important source of venereal disease.⁴⁴ That conclusion was based on studies done in World War I⁴⁵ and in the 1940's⁴⁶ on armed forces bases. The drafters concluded that commercial sex must be more likely to spread disease.⁴⁷ Yet, as noted above, recent

⁴⁰ PROPOSED CRIMINAL CODE, FINAL DRAFT § 114, at 117.

⁴¹ See note 2 *supra* for the text of ORS 167.007 (1975).

⁴² ORS 166.025 (1975) reads: "(1) A person commits the crime of disorderly conduct if, with intent to cause public inconvenience, annoyance or alarm, or recklessly creating a risk thereof, he:

(a) Engages in fighting or in violent, tumultuous or threatening behavior; or
 (b) Makes unreasonable noise; or
 (c) Uses abusive or obscene language, or makes an obscene gesture, in a public place; or
 (d) Disturbs any lawful assembly of persons without lawful authority; or
 (e) Obstructs vehicular or pedestrian traffic on a public way; or
 (f) Congregates with other persons in a public place and refuses to comply with a lawful order of the police to disperse; or
 (g) Initiates or circulates a report, knowing it to be false, concerning an alleged or impending fire, explosion, crime, catastrophe or other emergency; or
 (h) Created a hazardous or physically offensive condition by any act which he is not licensed or privileged to do.
 (2) Disorderly conduct is a Class B misdemeanor."

⁴³ See note 20 *supra* and accompanying text.

⁴⁴ MODEL PENAL CODE § 207.12, at 175 (Tent. Draft No. 9, 1958). The drafters also noted that more serious dangers of professional vice are present in commercial sex: "[T]he necessity and means to corrupt law enforcement; incentive to coerce and exploit women; and maintenance of criminal organizations and parasitic elements living on the proceeds of prostitution and therefore committed to promote the activity by finding new customers and new women to serve them." *Id.* However, as has been discussed in the text, these are all problems that result from the criminalization of prostitution, not from the nature of prostitution itself. See text accompanying notes 25-34 *supra*.

⁴⁵ MODEL PENAL CODE § 207.12, at 171 n.10 (Tent. Draft No. 9, 1958), citing FEDERAL SECURITY AGENCY, TECHNIQUES OF LAW ENFORCEMENT AGAINST PROSTITUTION 8 (1945).

⁴⁶ MODEL PENAL CODE § 207.12, at 171 n.10 (Tent. Draft No. 9, 1958), citing Turner, *The Suppression of Prostitution in Relation to Venereal Disease Control in the Army*, 7 FED. PROB., Apr.-June 1943, at 8; M. PLOSCOWE, SEX AND THE LAW 264 (1951).

⁴⁷ MODEL PENAL CODE § 207.12, at 171 n.11 (Tent. Draft No. 9, 1958), citing Benjamin, *The Sex Problem in the Armed Forces*, paper read before the Association

studies show that prostitutes account for less than 5 percent of the reported cases of venereal disease, and that noncommercial sex among young people is the primary vehicle for the spread of venereal disease.⁴⁸ In light of those studies, the basis for the distinction between commercial and noncommercial sexual activity was, and is, inappropriate.

The fifth argument, that there are no practical alternatives to penal sanctions, begs the question. The legislature may either legalize or decriminalize prostitution.

An additional argument was raised during the drafting of the 1971 revision, when one of the Commission's reporters expressed the fear that if prostitution were legalized in Oregon there would be an influx of prostitutes and customers from other states.⁴⁹ Oregon, however, does not have a population large enough to support many prostitutes, and the state could control the type of institution that would cater to out of state customers. Moreover, an individual has a constitutionally protected right to travel,⁵⁰ and the state cannot prohibit prostitution for the express purpose of discouraging persons from traveling to Oregon to engage in it.

In reviewing the reporter's arguments for criminalization it becomes apparent that many of them, particularly those concerning association with criminal groups, problems with related crime, and corruption of officials, are stronger arguments for legalization or decriminalization than for continued criminalization. The remaining arguments relate to health and morality. The Commission, however, recognized that sexual morality was not the concern of the criminal law. It is also apparent that data on venereal disease relied upon by the drafters of the *Model Penal Code*, and subsequently by the Commission, was out of date. It is time, therefore, to reevaluate the Oregon law and look at reasons for legalization or decriminalization.

B. Arguments for Removing Penal Sanctions

The main arguments for removing penal sanctions either by legalization or decriminalization are the following: (1) the law cannot eliminate prostitution; (2) sumptuary laws incapable of enforcement encourage arbitrary enforcement and result in disrespect for the law; (3) if there is a victim of the act of prostitution, the law is not protecting her or him; (4) the participants in prostitution are engaging in private sexual activity which the state should not attempt to regulate; and (5) there are better uses for state funds and police resources than the enforcement of prostitution laws.

for the Advancement of Psychotherapy, New York, April 30, 1943; BENJAMIN & ELLIS, *INT. J. OF SEXOLOGY*, Vol. VIII, No. 2.

⁴⁸ See notes 22-24 *supra* and accompanying text.

⁴⁹ See Oregon Criminal Law Revision Comm'n, Subcomm. No. 2, Minutes of Oct. 22, 1969, at 12 (statement by Roger D. Wallingford).

⁵⁰ *Shapiro v. Thompson*, 394 U.S. 618, 634 (1969).

Most commentators agree that the criminal law cannot eliminate prostitution.⁵¹ Laws that cannot be enforced completely are often enforced arbitrarily, and the Oregon prostitution laws are an example. If one assumes that the majority of prostitutes are women, that the majority of customers are men, and that it takes several customers to support one prostitute, one must conclude that the large majority of people violating the prostitution laws are men.⁵² If the law were being enforced equally against both sexes one would expect that the majority of people arrested, or at least half, would be men, yet that is not so. In the state of Oregon in 1974 there were 493 prostitution arrests, 73.3 percent were of women and 26.7 percent were of men.⁵³ Of those arrests, 471 were in Portland, Oregon's major metropolitan area, with women comprising 75.2 percent of those arrested and men 24.8 percent.⁵⁴ In 1975 there were 602 prostitution arrests in Portland, 76.4 percent were of women and 23.6 percent were of men.⁵⁵ In Portland, the only city in the state with an organized vice squad, no women are assigned permanently to the squad, though some are occasionally loaned from other departments.⁵⁶ Furthermore, it has been the policy of the Portland Police Bureau to spend more working hours attempting to arrest women than men for participation in prostitution.⁵⁷

There is no justification for this discrimination.⁵⁸ The Oregon legislature recognized in 1973 that customers are as culpable as the sellers in

⁵¹ Fredrich, *Reflections on the Sad Profession*, TIME, Aug. 23, 1971, at 34 (stating that there are approximately 500,000 professional prostitutes in the United States, and that police make approximately 100,000 prostitution arrests a year); NEWSWEEK, Sept. 4, 1972, at 88 (quoting the city commissioner of Dayton, Ohio to the effect that prostitution cannot be stopped); MODEL PENAL CODE § 207.12, at 169 (Tent. Draft No. 9, 1958) (stating that there were upwards of 200,000 prostitutes in the United States despite criminal prohibitions), citing O. POLLAK, THE CRIMINALITY OF WOMEN 154 (1950); M. PLOSCOWE, SEX AND THE LAWS, ch. 9 (1951).

⁵² Customers are guilty of prostitution under the Oregon law. See note 2 and text accompanying note 16 *supra*.

⁵³ Telephone interview with Steven C. Kincaid of the Uniform Crime Reporting Office in Salem, Oregon, March 15, 1976. See also NEWSWEEK, June 28, 1976, at 27, 28 ("more than three-quarters of all those who are actually arrested for commerce in sex are women").

⁵⁴ Telephone interview with Officer Michael Hentschell of the Portland vice squad, September 22, 1975.

⁵⁵ Telephone interview with Officer Michael L. Wiebe of the Portland vice squad, March 14, 1976.

⁵⁶ Telephone interview with Officer Michael Hentschell of the Portland vice squad, September 22, 1975.

⁵⁷ *Id.*; Interview with John McNab, then head vice squad officer with the Portland Police Bureau, in Portland, Oregon, July 17, 1974.

⁵⁸ An equal protection attack could be made on the basis of the arrest statistics in Portland and the admission by the police that they enforce the law more strenuously against women, but a discussion of that attack is beyond the scope of this comment. As a result of equal protection challenges by the American Civil Liberties Union some police forces are now arresting prostitutes and customers in more equal numbers. NEWSWEEK, June 28, 1976, at 27, 28.

acts of prostitution.⁵⁹ When discriminatory enforcement occurs, it can only encourage disrespect for the law among both those who suffer punishment and those who evade it.

If the prostitution laws are intended to protect someone, it is difficult to determine who the beneficiaries are. They do not protect the prostitutes, who receive fines, jail terms, and criminal records, all of which make the transition to "straight" society extremely difficult.⁶⁰ Nor are the customers protected when they too are subject to fines, jail terms, and possible loss of jobs or families.⁶¹

One must then ask whether the laws protect the public. If the prostitutes or their customers disrupt the public order, Oregon has a statute to punish such behavior.⁶² If they do not disrupt the public order, there is no need for laws to protect the public from prostitution. Some members of the public probably do not want to see any indication that prostitution exists. In determining whether that interest is a justification for criminalizing prostitution, however, the legislature must weigh the value of creating an illusion that prostitution does not exist⁶³ against the grave harm done to the participants by the present laws.

Prostitutes and their customers engage in private sexual activity by mutual consent. Private sexual activity does not directly affect anyone but the participants, and the legislature has recognized that such behavior is a matter of spiritual, not secular interest.⁶⁴ By continuing to criminalize prostitution the legislature is being inconsistent in its positions on private sexual activity and individual liberty.⁶⁵

In addition, the state of Oregon has limited financial and law enforcement resources. With the recent concern about theft, violent crime, and overcrowding in jails and prisons, the legislature must determine the best

⁵⁹ See note 2 and text accompanying note 16 *supra*.

⁶⁰ Common sense indicates that a person who has been convicted of prostitution will have a very difficult time finding a good job if she or he attempts to find other employment. By criminalizing prostitution our laws have made that profession a trap for those who, for whatever reason, find themselves there. See Silver, *supra* note 22, at 13.

⁶¹ When a customer is arrested for participating in prostitution his name may be published in the local newspaper. NEWSWEEK, June 28, 1976, at 27, 28. That notoriety can result in a loss of prestige and extreme embarrassment.

⁶² ORS 166.025 (1975) prohibits disorderly conduct. The text is set out in note 42 *supra*.

⁶³ See note 51 *supra* and accompanying text.

⁶⁴ PROPOSED CRIMINAL CODE, FINAL DRAFT § 114, at 117.

⁶⁵ Some have argued that prostitution laws are unconstitutional in that they invade an individual's right of privacy, relying on *Griswold v. Connecticut*, 381 U.S. 479 (1965), and *Roe v. Wade*, 410 U.S. 113 (1973). See, e.g., Haft, *supra* note 26, at 81-83; Rosenbleet & Pariente, *supra* note 31, at 411-21. This argument seems to have been blunted by the Supreme Court's affirmance, without discussion, of a three-judge district court opinion rejecting a right of privacy argument based on *Griswold* and upholding a state statute making private and consensual acts of sodomy a crime. *Doe v. Commonwealth's Attorney*, 96 S. Ct. 1489 (1976) (three justices voted for oral argument), *aff'g* 403 F. Supp. 1199 (E.D. Va. 1975).

way to allocate those resources. Even assuming that prostitution is undesirable, the legislature must determine if the prostitution laws are worth the expense and the allocation of resources that could be used to combat more harmful activity. It is estimated that from \$246,500 to \$493,000 were spent on the investigation and prosecution of prostitution in Oregon in 1974,⁶⁶ and from \$316,000 to \$632,000 in 1975.⁶⁷ The evidence indicates that efforts to suppress prostitution are failing.⁶⁸

The present prostitution laws have resulted in discriminatory enforcement against women, police records for prostitutes and customers, state interference in matters of sexual morality, and inefficient use of police time and public funds. Their impact on the lives of those arrested is immeasurable. The present laws have not resulted in the elimination or control of prostitution. Their repeal would have very little impact on the lives of nonparticipants. For these reasons, and those discussed in the last section, it is time for the Oregon legislature to remove penal sanctions for prostitution.

III

LEGALIZATION VERSUS DECRIMINALIZATION

Legalization would entail state control of prostitution by licensing, enforced inspection, or state-run businesses. Decriminalization would mean that the state would not control prostitution, but the activity would be subject to regulation and taxation on the same basis as any other business enterprise.

The primary arguments for legalization are that it would provide inspection for venereal disease and restrict prostitution to certain areas.⁶⁹ Some authorities assert, however, that because of the nature of venereal disease and the ineffectiveness of tests on women, control of venereal disease by inspection is impracticable.⁷⁰ Prostitution could be restricted

⁶⁶ There were 493 prostitution arrests in Oregon in 1974. Telephone interview with Steven C. Kincaid of the Uniform Crime Reporting Office in Salem, Oregon, March 15, 1976. For the purposes of this comment the cost per arrest was estimated conservatively at between \$500 and \$1,000.

Estimates have been done on the cost of prostitution arrests in other areas. Silver, *supra* note 22, at 13 (citing an estimated cost of \$950 per arrest in a west coast city); NEWSWEEK, July 8, 1974, at 65 (citing an estimated cost of \$1,000 per arrest in San Francisco); *Cost of Arresting a Prostitute in San Francisco*, 1 COYOTE GROWLS, June/July, 1975, at 3 (estimating a cost of \$1730 to \$2478 per arrest in San Francisco).

⁶⁷ The state figures for prostitution arrests are not yet compiled for 1975, but since there were 602 arrests in Portland in 1975 and the Portland arrests made up 95% of the arrests in 1974, telephone interview with Steven C. Kincaid of the Uniform Crime Reporting Office in Salem, Oregon, March 15, 1976, it is estimated that there were 632 prostitution arrests in Oregon in 1975.

⁶⁸ See note 51 *supra*.

⁶⁹ See PROPOSED CRIMINAL CODE, PRELIMINARY DRAFT NO. 1 § 2, at 6.

⁷⁰ George, *Legal, Medical and Psychological Considerations in the Control of Prostitution*, 60 MICH. L. REV. 717, 799 (1962); Lentino, *Medical Evaluation of a*

to certain areas by the use of zoning laws without resort to state control.⁷¹ In addition, legalization would result in the state spending large amounts of money on regulation and receiving money (fees) from prostitutes. Thus the state would be an active participant instead of simply recognizing that prostitution exists and that it is not reasonable to attempt to control it through the criminal law.⁷²

Prostitution is a controversial area in which the state should not become an active participant without strong policy reasons. Because the reasons advanced for legalization are impracticable or can be achieved with less government involvement, Oregon should decriminalize prostitution and control it by the use of reasonable business regulations.

IV

SOLICITATION FOR PROSTITUTION

Solicitation for prostitution, as well as the sexual activity itself, is prohibited under ORS 167.007.⁷³ If the sexual activity is decriminalized, it follows that solicitation should be decriminalized also.

A. Infringement of Privacy Right

Some may argue that because solicitation is offensive to other individuals it should be prohibited, even if the sexual activity of prostitution is decriminalized.⁷⁴ Nevertheless, individuals have a constitutional

System of Legalized Prostitution, 158 J.A.M.A. 20, 22 (1955). This conclusion is based primarily upon the long incubation period of venereal disease. See MODEL PENAL CODE § 207.12, at 173 (Tent. Draft No. 9, 1958).

⁷¹ *Euclid v. Ambler Co.*, 272 U.S. 365 (1926) (zoning ordinances which classify property by the uses to which it is put and regulate such uses are a proper exercise of the police power). More recently, in *Village of Belle Terre v. Boraas*, 416 U.S. 1 (1974), the Supreme Court upheld the validity of a zoning ordinance which limited a residential area to one-family dwellings and defined "family" as persons related by blood, adoption, or marriage. The Court found that the ordinance affected no fundamental rights guaranteed by the Constitution and therefore applied the rational relationship test to the claim that the ordinance violated the equal protection clause.

Two Detroit ordinances regulating the location of adult bookstores and theaters have been held violative of the equal protection clause. Unlike the Supreme Court in *Belle Terre*, however, the Sixth Circuit found that the purpose of the ordinances was to control content of speech, therefore requiring application of the strict scrutiny test. *American Mini Theatres, Inc. v. Gribbs*, 518 F.2d 1014 (6th Cir.), cert. granted, 423 U.S. 911 (1975) (No. 75-312). Presumably, because prostitution (other than solicitation; see text accompanying notes 79-84 *infra*) does not involve activities protected by the first amendment, zoning ordinances regulating the location of prostitution would be judged under the rational relationship test.

⁷² France, Britain, Japan, Germany, and many other countries have eliminated the crime of prostitution "after experiencing the failure of licensing." Haft, *supra* note 26, at 93.

⁷³ See note 2 *supra* for the text of ORS 167.007 (1975). The key word is "offers."

⁷⁴ For a contrary view, see Rosenbleet & Pariente, *supra* note 31, at 419-20.

right to express themselves as long as they do not infringe on the right of privacy of others.⁷⁵

The line where the right of expression stops and the right of privacy begins has never been clearly established. The acts which have been held to violate the right of privacy have tended to be more extreme than ordinary speech.⁷⁶ In addition, an individual's right of privacy is more limited when that person is in a public place.⁷⁷ The Supreme Court has found no violation of the right of privacy if the offended individual can walk away from the objectionable expression.⁷⁸

Persons who are solicited by prostitutes can walk away if they are offended. Their right of privacy is no more violated than that of a woman subjected to offensive "catcalls" on the street. Because they can walk away they should have no right to be protected.

B. Commercial Speech

The Supreme Court held in *Valentine v. Chrestensen* that the government may regulate purely commercial speech,⁷⁹ but in a later case pointed out that "speech is not rendered commercial by the mere fact that it relates to an advertisement."⁸⁰ In one of its more recent cases on commercial speech, *Bigelow v. Virginia*, the Court stated that *Chrestensen* is not authority for the proposition that all statutes regulating commercial advertising are immune from constitutional challenge.⁸¹

⁷⁵ See Haiman, *Speech v. Privacy: Is There a Right Not to be Spoken To?*, 67 Nw. U.L. Rev. 153, 193 (1972).

⁷⁶ The Minnesota supreme court has ruled that union members cannot picket the home of a nonstriking employee. *State v. Perry*, 196 Minn. 481, 265 N.W. 302 (1936); *State v. Zanker*, 179 Minn. 355, 229 N.W. 311 (1930). The United States Supreme Court has upheld a Trenton, New Jersey statute which made it illegal to drive a sound truck down the street emitting loud and raucous noise. *Kovacs v. Cooper*, 336 U.S. 77 (1949).

⁷⁷ The Supreme Court upheld the District of Columbia Transit Company's right to pipe radio broadcasts on buses even though some customers complained that their right of privacy had been violated. *Public Utilities Comm'n v. Pollak*, 343 U.S. 451 (1952). In a later case the Court upheld a statute which allowed individuals to prevent mail from being delivered to their homes, but noted that "we are captives outside the sanctuary of the home and subject to objectionable speech and other sounds." *Rowan v. Post Office Dep't*, 377 U.S. 708, 738 (1970).

⁷⁸ *Packer Corp. v. Utah*, 285 U.S. 105, 110 (1932). "[T]he law should not attempt to insulate any persons in our society, no matter how willing or unwilling an audience they may be, from the initial impact of any kind of communication, but that law should protect their right to escape from a continued bombardment by that communication if they wish to be free from it." Haiman, *supra* note 75 at 173. See also Haft, *supra* note 26, at 87-90.

⁷⁹ 316 U.S. 52, 54 (1942).

⁸⁰ *Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations*, 413 U.S. 376, 384 (1973) (holding that a Pittsburgh ordinance that forbids newspapers from carrying sex-designated advertising columns for nonexempt job opportunities does not violate petitioner's first amendment rights). See also *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964) (holding that a paid political advertisement is entitled to the same degree of protection as ordinary speech).

⁸¹ 421 U.S. 809, 819-20 (1975).

Regardless of the particular label asserted by the State — whether it calls speech “commercial” or “commercial advertising” or “solicitation” — a court may not escape the task of assessing the First Amendment interest at stake and weighing it against the public interest allegedly served by the regulation.⁸²

Solicitation for prostitution cannot be prohibited unless that prohibition serves a public interest. Solicitation for prostitution does not harm the public unless it is done in a disorderly fashion⁸³ and the state already has a statute to deal with disorderly conduct.⁸⁴

CONCLUSION

The legislature of Oregon should be consistent with the policy of the 1971 revision and decriminalize all consensual adult sexual activity, including prostitution and solicitation for the purpose of prostitution.⁸⁵ Such legislation would demonstrate a concern for individual liberty. The view of some that prostitution is shocking should not be the sole reason for making it a crime. Action by the legislature to decriminalize prostitution would not be a judgment on the desirability of prostitution; it would be a judgment on the proper limits of the criminal law.

TERESE M. WANDLING*

⁸² *Id.* at 826.

⁸³ See text accompanying note 62 *supra*.

⁸⁴ ORS 166.025 (1975). See note 42 *supra* for the text of this statute.

⁸⁵ The 1976 annual meeting of the Oregon State Bar endorsed a bill to be introduced in the 1977 legislature eliminating prostitution as a criminal offense in Oregon by repealing ORS 167.007. The approval was prompted by a recommendation of the Bar's Civil Rights Committee, stating that criminal prohibition of prostitution has proven ineffective and costly, and that the costs are not outweighed by any compelling state interest. The Committee listed the following costs: diversion of police resources; encouragement of the use of illegal means of police control; degradation of the image of law enforcement; discriminatory enforcement against the poor; discriminatory enforcement against women; and invasion of the right of privacy. The Committee took no position on legalization or licensing of prostitution. OREGON STATE BAR, COMMITTEE REPORTS FOR ANNUAL MEETING 72-75 (1976).

Similar proposals also have been made by the American Bar Association Section on Individual Rights and Responsibilities, the National Organization of Women, the California Council of Democratic Clubs, the California Bar Association's 1973 Conference of Delegates, and other women's and political organizations.

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