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LEGISLATIVE REFORM OF PROSTITUTION LAWS: KEEPING COMMERCIAL SEX OUT OF SIGHT AND OUT OF MIND

Raymond I. Parnas*

The characterization of prostitution as "recreational commercial sex" was coined by Manhattan Family Court Judge Margaret Taylor in her controversial opinion dismissing juvenile proceedings against a 14-year-old girl charged with prostitution. Judge Taylor held a New York anti-prostitution law unconstitutional, finding that "[h]owever offensive it may be, recreational commercial sex threatens no harm to the public health, safety or welfare, and therefore may not be proscribed." The court also stated that "unmarried adults, including prostitutes and their patrons, have a constitutional right to privacy in the pursuit of pleasure." Approaching the

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* Professor of Law, University of California, Davis. Because of the author's concern for legislative accommodation, which is rather unusual in a law review article, it is significant to point out that Professor Parnas, in his capacity as Senior Consultant to the Senate Select Committee on Penal Institutions, was the co-draftsman and negotiator (with Michael B. Salerno) of California's Uniform Determine Sentencing Act of 1976. Since that time he has served as Consultant to the Joint Committee for Revision of the Penal Code.

The author wishes to acknowledge the special assistance of T. Wade Maney, Teresa Tersol, Sheldon Siporin and all the members of his Legislative Process class in the Fall of 1977. The proposed bill is substantially a product of that class.


issue from still another direction, the judge noted that "anti-prostitution laws are unfairly enforced against women because male patrons usually aren't prosecuted for their part in the crime."

Less fortunate was the defendant in United States v. Blanton who failed in her attempt to defend sexual solicitation charges on the basis of the first amendment's protection of commercial speech. Favorably citing United States v. Moses the Blanton court stated: "There is a legitimate national, state, and community interest in maintaining a decent society . . . and the stemming of commercialized sexual solicitations is an acceptable means of furthering this interest." Indeed, despite Judge Taylor's aforesaid maintenance of the constitutionality of the act of prostitution, she too acknowledged the public's right to be protected from solicitation for the act.

9. Id. at 54.
10. That it may be unlawful to publicly solicit for a lawful act is central to the reform proposed by this article.

In United States v. Moses, 339 A.2d 46 (D.C. Ct. App. 1975), the defendant argued that because the act of prostitution itself was not illegal in the District of Columbia, solicitation for the act must be speech protected by the first amendment. Although adultery, fornication and sodomy were illegal in the subject jurisdiction, the court explicitly did not base its decision on the fact that the solicited acts were criminal and therefore not protected. Instead, the Moses court held that mere solicitation for prostitution was not of the type intended or likely to produce imminent lawless action or violence . . .

. . . [It] is a straightforward business proposal which may be regulated under the standards applicable to "purely commercial advertising." . . .

. . .

. . . We conclude that a solicitation for prostitution is not entitled to immunity under the First Amendment . . .

. . . It is incorrect to contend that government is deprived of the authority to regulate a business activity merely because the activity itself is not illegal.
Increasing recognition of that which distinguishes prostitution from other sexual behavior—namely the commercial element, with special attention directed toward public solicitation—has not been limited to the courts. In the California Legislature, Assemblyman Leroy Greene has been advocating reform of that state's prostitution laws since 1971.11 Despite a variety of approaches and ample constituent support,12 none of his efforts have ever cleared their first policy committee. His most recent legislative attempts, Assembly Bills 1562 and 1563 in 1979, were sent to certain demise by being ordered euphemistically to interim study.13

Id. at 51-53.

Similarly, in 1978 the United States Supreme Court in Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, in applying the more limited first amendment protection of commercial speech "commensurate with its subordinate position in the scale of First Amendment values," Id. at 1918, held that "a lawyer's procurement [in person solicitation] of remunerative employment [an act not illegal in itself] is a subject only marginally affected with First Amendment concerns." Id. at 1920. Disagreeing with the argument "that nothing less than actual proven harm to the solicited individual would be a sufficiently important state interest" the Court upheld the constitutionality of "rules prohibiting solicitation . . . whose objective is the prevention of harm before it occurs." Id. at 1923.

See also notes 17 & 35 infra.

11. The California legislative experience with this subject is well described in Comment, The Victim as Criminal: A Consideration of California's Prostitution Law, 64 CALIF. L. REV. 1235 (1976).

12. A statewide Field Poll (No. 718, May 28, 1971) resulted in 50% favoring legalization with controls. Greene's own poll of 15,000 constituents (with 25% responding) showed 69% favorable. (Greene Press Release 4/26/71). A nationwide Harris Survey in 1973 found only 42% agreeing that "Prostitutes do more harm than good." In 1979 an informal poll of his Sacramento County District showed that about two thirds of the 800 queried supported legalizing prostitution.

13. These companion bills provided that prostitutes licensed by the State Department of Health would be exempt from enforcement of the state's anti-prostitution laws in those cities and counties which opted for such legalization. Questions raised by the Committee staff in their analysis included: 1) inconsistency between jurisdictions with resulting unequal burdens; 2) unequal enforcement where one participant was not licensed; 3) increase in annoyance by licensed streetwalkers; and 4) licensing and revoking procedures. The Assembly Committee of Criminal Justice Analysis concluded:

Are these licensing provisions the solution to the problems associated with prostitution? In considering the economic factors and rehabilitative needs which induce many women to resort to prostitution in the first place, does this legislation avoid all responsibilities to these individuals by ignoring the root causes and encouraging the continuance of these problems? Will this tend to perpetuate, if not aggravate, the economic oppression? Is this the intent?

The bills were supported by the ACLU and the State Public Defender and opposed by the Citizens for Moral Concern and the law enforcement establishment. In 1971, Sheriff Pitchess of Los Angeles County justified his opposition to legalization with
In Greene's reports to his constituents, the distinguishing theme of commercial vs. noncommercial sex has been set out in its most basic form: "Keep in mind that a girl who says 'sex for free' is not a prostitute and not in violation of the law. Let that same girl say 'sex for sale' and she is a prostitute subject to arrest. The prostitution law is pure hypocrisy by declaring money, not sex, is illegal,\textsuperscript{14} ... legally condoning wife swapping, communal orgies and adultery, but not prostitution."\textsuperscript{18}

The criminality of most noncommercial sexual acts between consenting adults in private is no longer an issue in California since the passage of the Brown Act\textsuperscript{16} which repealed laws that had prohibited such private sexual conduct. Accordingly, the "hypocrisy," inconsistency and paradox of continuing to prohibit prostitution flies in the face of today's hedonistically free society. The implication of the Brown Act for prostitution is one of its ancillary issues. The long-term educational and moral impact, if any, remains to be seen. The issue is not whether there should have been such prohibitory laws in the first place; but rather whether once prohibited, decriminalization has a condoning, influencing, causative impact. Such arguments are frequently raised to combat prostitution reform laws, yet they did not succeed in thwarting the similar but more far-reaching issues in the Brown Act.\textsuperscript{17}

concerns about:

1) The spread of VD despite the requirement of periodic checkups because of the inability to detect certain strains of VD and the large number of contacts (estimated at ten per day) by prostitutes in between examinations even when detected;

2) Experience showing that vice even where legalized attracts criminal types;

3) The creation of a "black market" prostitute because the high percentage of married men who go to prostitutes will be fearful of becoming visible by frequenting a location known by all to be a brothel; and

4) Acceptance of prostitution as a way of life breaking down public concern over it and thus opening the door to organized crime which is no problem under the present law.

Letter to Leroy Greene (June 29, 1971).


16. AB 489 Stats. 1975, Chs. 71 & 77.

17. For example, E. CHESSER, LIVE AND LET LIVE: THE MORAL OF THE WOLFENDEN REPORT 107 (1958), asks whether winking at off-street prostitution may increase promiscuity in general. And, is there a connection between the assertion that government should not be able to prohibit private, commercial sexual conduct, unless it can establish the societal benefit of doing so, and the historical allegation that "strict codes of morality in the North tended to assure marital fidelity, so there was
Greene has not been alone in calling for change in California. According to a report of the legislature’s Senate Judiciary Committee,\textsuperscript{18}

\begin{quote}
it is estimated that the prostitution industry in the country encompasses 200,000 to 250,000 prostitutes\textsuperscript{19} with a gross annual revenue of $7 to $9 billion. In contrast, all major league professional teams in the four most popular sports gross less than $500 million in receipts annually. If nothing else, the economic size of the industry should interest government, because neither income nor sales taxes are collected on the monies involved. Each year more than 100,000 arrests for prostitution and related crimes are made . . . convicted prostitutes account for at least 30\% of the population in most women’s jails, and 70\% of women in prison for any crime were first arrested for prostitution . . . . Various police and court agencies are estimated to spend between $600 and $1200 to arrest, try, and incarcerate a single woman charged with prostitution . . . . In [San Francisco, San Diego and Los Angeles in 1975] . . . enforcement of prostitution laws cost approximately $7,000,000.\textsuperscript{20}
\end{quote}

\textsuperscript{18} See Haft, \textit{Hustling for Rights}, 1 CIV. LIB. REV. 8, 12, 16 (1974).

\textsuperscript{19} The Wolfenden Commission in England took the position that public harm was all that should be considered concerning sex acts between consenting adults and recommended repeal of all laws prohibiting sex acts between consenting adults in private. Specifically as to prostitution, it found the nuisance of public solicitation and the spread of VD (\textit{but see note 34 infra}) as legitimate concerns and proposed heavier penalties and enforcement of anti-public solicitation laws invoked on complaint of the person solicited. The resulting Street Offenses Act of 1959 and its effect in England and Wales is more favorably described by A. Sion, \textit{supra} note 1, than E. Chessser.

\textsuperscript{18} Megino, \textit{Prostitution and California Law; An Interim Study} 4-6 (Calif. Senate Comm. on Judiciary Monograph Feb. 1977).

\textsuperscript{19} Comment, \textit{supra} note 11, at 1251, estimates as many as 550,000.

\textsuperscript{20} A year-long study entitled “The Cost-Effectiveness of Enforcing Prostitution Laws” was conducted in San Francisco by Thresa Lynch and Marilyn Neckes. On file at Santa Clara Law Review. They indicate that nationwide, 50,000 persons were arrested for prostitution in 1977. C. Winick & P. Kinsie, \textit{supra} note 1, at 4, estimate 95,550 arrests in 1968. In San Francisco there was an 82\% jump in arrests in 1977 precipitated by complaints from business people after a two-year decline following an open policy of a new administration. Lynch & Neckes at 6, 18. These arrests totaled 2,938, of which 2,101 were females for prostitution, and 325 males as customers. Some people were arrested as many as ten times. Of the 414 who served time out of a total of 2,938 arrests, not one was a customer. Average time served for the 414 was fifty-four days at an incarceration cost of $433,000. Ten to twenty percent of the public defender’s caseload, and ten percent of the district attorney’s misdemeanor cases were for prostitution. The total cost estimate to arrest, defend, prosecute and
Nonetheless, the California Legislature will not be budged, and all fifty states continue to prohibit some aspect of solicitation and/or prostitution. Only Nevada authorizes the act of prostitution, under local option and controls, while continuing to prohibit public solicitation.

Though the cases are inconsistent, litigation has provided more progress toward reform than has the statutory process. Constitutional challenges to anti-prostitution laws have become increasingly broad and creative. The arguments used raise issues concerning: 1) overbreadth and vagueness; 2) status or condition without evidence of actual conduct; 3) infringement of privacy; 4) insubstantial harm to individual or public interest; 5) selective and discriminatory enforcement; and 6) free speech. But constitutional challenges are continuing.

jail in San Francisco in 1977, based on a detailed cost breakdown, was over $2,000,000. Neckes, Fact Sheet on Prostitution (January 1979); Hamilton & Ramirez, *Prostitution: It's a Taxing Proposition*, San Francisco Examiner, Jan. 19, 1979 at 1.

Figuring 4,000 prostitutes in San Francisco, averaging $36,000 a year, the author's estimate revenue of $36,000,000 in taxes could be available if prostitution was legal and thus taxable. Lynch & Neckes, *supra* at 17. (Winick's and Kinsie's estimate of average income in 1968 was under $10,000. C. Winick & P. Kinsie, *supra* note 1, at 5).

21. A chart of all state statutes on prostitution can be found in Rosenbleet & Pariente, *supra* note 4, at 422.


Thirty-three brothels in rural and small-town Nevada, which contain between 225 and 250 prostitutes, are legal or openly tolerated and strictly controlled by the state statute, city and county ordinances, and local rules. Twenty-two of the brothels are in places with populations between 500 and 8,000, and the remaining eleven are in rural areas. The legal and quasi-legal restrictions placed on prostitutes severely limit their activities outside brothels. These restrictions in conjunction with historical inertia, perceived benefits of crime and venereal disease control, and the good image of madams contribute to widespread positive local attitudes toward brothel prostitution. Interactions between clients and prostitutes in brothel parlors are also restricted and limited to a few basic types which are largely determined by entrepreneurial philosophy.

Public solicitation and public prostitution remain prohibited. However, all counties except those of over 200,000 population (which excludes Clark County containing Las Vegas) are authorized to license, tax, regulate or prohibit brothels. The statutes make a brothel illegal within 400 yards of a school or church or on a principal business street. Almost all other regulations are left to the counties or cities. *See note 56 infra.* Other discussions of prostitution in Nevada include, G. Vogliotte, *The Girls of Nevada* (1975).

23. Excellent discussions of these constitutional arguments can be found in Barnett, *Sexual Freedom and the Constitution* (1973); Haft, *supra* note 17, at 15-
ually met with factual disputes over issues of nuisance, health, organized crime, associated street crimes and drug abuse.24

The biggest obstacle to any substantial court or legislative modification, certainly if total decriminalization is seen as the result, has been the Blanton-Moses emphasis on the "community interest in maintaining a decent society."25 Yet the need for reform constantly surfaces at all levels of government. If the judiciary continues to abstain from any substantial policy making on the issue, a determination of the extent of the "community interest" and what is required in "maintaining a decent society" remains with the legislature. The primary purpose of this article is to assist state legislators in reforming prostitution laws by describing the problems, providing data, accommodating interest groups, indicating alternatives, and suggesting one possible comprehensive approach.

Reform implies a problem in need of resolution. Using California as the example, the primary issues appear to be the following:

1. The criminal justice system has been ineffective in controlling or eliminating prostitution. One author has colorfully described the fortitude of the "oldest profession":

16; Rosenbleet & Pariente, supra note 4; Note, supra note 3.
24. Excellent discussions of these traditional issues can be found in the general reference works cited in note 1 supra. See also notes 40, 42 & 50 infra.
25. See notes 6 & 8 supra.

Perhaps the greatest fear underlying all the arguments against decriminalization is that prostitution strikes at the moral fiber of this country, that it is immoral and therefore should remain outlawed. . . . It is the one point of view held by many judges, legislators, and opinion-makers that is most difficult to change because its roots lie more in emotion than in reason.

Haft, supra note 17, at 23.

Schwartz, reporting on the Model Penal Code's continued prohibition of open lewdness, public solicitation of deviate acts, and "the commercial exploitation of human weakness by prostitution," public or private, sets out three rationales for legislation involving substantial moral elements:

1) A statute appearing to express nothing but religious or moral ideas is often defensible on secular grounds.
2) Citizens may legitimately demand of the state protection of their psychological as well as their physical integrity.
3) A third aspect of morals legislation that will enter into the calculation of the rational legislator is that some protection against offensive immorality may be achieved as a by-product of legislation that aims directly at something other than immorality.

One clear lesson to be drawn from the long and turbulent history of prostitution is that neither the State nor the Church knows how to stamp it out. Every move that has so far been tried has met with ignomineous failure. The prostitute has been held up to public obloquy. She has been beaten and branded with hot irons. She has been thrown into prison and sent into exile, and yet she survived.  

“The continuing rise in arrest statistics in every major city in the state shows that vigorous enforcement of the present law does not reduce the problem.” Even in the comparatively sexually open society of California in the 1970’s, there appear to be strong reasons why prostitutes are sought out. In fact, one alleged result of the new openness may be an additional cause of some men seeking a prostitute: female pressure on 


Strenuous efforts of numerous organizations to repress prostitution in New York City over a 30-year period are detailed in Waterman, *Prostitution and Its Repression in New York City 1900-1931* (1932), yet all one needs to do to see the long-term effects of that effort is to try to stroll unaccosted down 8th Avenue between 42nd and 50th Streets in Manhattan. E. Kiester, *Crimes with No Victims: How Legislating Morality Defeats the Cause of Justice* 35 (1972), said there were 2,000 Times Square prostitutes. Lynch & Neckes, *supra* note 20, at 2, estimate an astounding 40,000 prostitutes in New York City.

Similar efforts made in Minneapolis and Philadelphia are chronicled in The Prostitute and the Social Reformer: Commercial Vice in the Progressive Era (1911, 1913). These early 20th Century investigative commission reports are particularly illuminating. After several months studying the spread of the “Social Evil” due to the closing of the brothels and the growing use of the telephone and hotels resulting in proliferation of open prostitution, three present-day alternatives confronted the Minneapolis Commission: 1) enforcing the law; 2) tolerating prostitution as an inevitable violation of law; or 3) legalizing, licensing and regulating it. *Id.* at 31. Though acknowledging legalization to be “theoretically logical and consistent,” they found it “practically impossible” as “foreign to the sentiments and feelings of American people and repugnant to their moral sense” and therefore political suicide to any legislature or city council. *Id.* at 33.

Toleration of recognized violations of law was rejected as “demoralizing to a community, and to its public guardians, the police.” The unanimous opinion of the Commission was “that law enforcement ought to be a permanent administrative policy of our city government, to the full extent of the resources of the police department.” *Id.* at 107-108. The Commission’s conclusion concerning the “problem of the ages” in Philadelphia was similar. *Id.* at 31.

Ironically, in 1961 a federal grand jury in Philadelphia endorsed the idea of regulation of prostitution, and in 1971, Winick and Kinsie stated that Minneapolis was one of only six cities in the United States which had streetwalkers in any quantity. C. Winick & P. Kinsie, *supra* note 1, at 10, 167.

men to perform sexually is not present from a prostitute.\(^{28}\) Other relevant but more traditional reasons are: a shyness and fear of rejection with "normal" persons due to personality or appearance; a prostitute's openness to desired "perversions;" and a confidential, "safe" sexual outlet for some married persons.\(^{29}\) Assuming the theoretical desirability of anti-prostitution laws, the inability to enforce them effectively without reducing law enforcement in other areas creates questions of the priority of allocating increasingly scarce resources to competing needs.

2. Flowing from the inability of law enforcement to successfully reduce prostitution's prevalence, the total cost of enforcement including that being paid by consumers of this illegal conduct, raises serious questions of society's view of the criminality of these "services."\(^{30}\)

3. Despite one segment of the community's apparent need and willingness to pay for this illegal conduct, another, and perhaps overlapping, portion of the community continues to be annoyed, harrassed and morally offended by the presence of streetwalkers near homes, businesses or other places of potential contact with their family members. For example, in 1977 in Sacramento, judges formulated new procedures to meet a neighborhood call for action by increasing bail drastically and imposing stringent new conditions of probation (both legally questionable) including no hitchhiking, no hailing of pedestrians or motorists, and no association with other prostitutes or pimps. The main condition and primary goal was to prohibit the prostitutes from returning to the neighborhoods where they were arrested. The obvious occurred, of course. The "action" moved elsewhere and those residents then became outraged and demanded action.\(^{31}\) In Detroit, street prostitution has reached such proportions in some neighborhoods that residents have attempted to chase hookers out by picketing and other forms of intimidation. "Residents

29. However, the age of customers is apparently going up. 20-25% of students surveyed in the 40's and early 50's had their first sexual experience with a prostitute, but in 1967 only 2-7% did. C. Winick & P. Kinsie, supra note 1, at 186. See also Timnick, Typical "Trick" Not Repulsive, Not Hip-He's the Guy Next Door, L.A. Times, May 30, 1977, at 3, col. 1.
30. See H. Benjamin & R. Masters, supra note 1, at 434-74.
complained that housewives and young girls couldn't leave their homes without being approached by 'johns.'"\textsuperscript{32}

4. If prohibitory or regulatory laws continue, the legal challenge as to equal protection in definition and enforcement between male and female prostitutes, and prostitute and "john" (or "jane"?), must be faced.\textsuperscript{33}

\textsuperscript{32} Judge Says Law Gives Street-walkers a Bad Shake, Sacramento Bee. On file at Santa Clara Law Review.

\textsuperscript{33} It may be true, of course, that equal enforcement provisions could make prosecution even more difficult than it is now with the need for decoys and the problem of entrapment. Such an approach would eliminate the possibility of the client testifying against the prostitute, which sometimes happens particularly pursuant to plea bargain or charge dismissal. See C. Winick & P. Kinsie, supra note 1, at 237-38. \textit{See also} Rosenbleet & Pariente, \textit{supra} note 23, at 381-411.

In 1920, the court in People v. Edwards, 180 N.Y.S. 631, 634 (1920), stated, "The men create the market, and the women who supply the demand pay the penalty. It is time that this unfair discrimination and injustice should cease." Apparently that time had not yet arrived when Judge Taylor noted in the aforementioned Manhattan Family Court case, Goodman, \textit{supra} note 1, that during the first six months of 1977, 3,219 prostitution arrests were made of which only 62 were of patrons. Yet the few publicized local efforts at such enforcement on the arrest level, despite evidentiary problems for subsequent prosecution, have appeared to be quite successful.

Judge Taylor's opinion may have been an influence behind the New York police department’s subsequent use of decoy officers posing as prostitutes and District Attorney Morgenthau's subsequent decision to refuse to discuss or bargain out violations of New York's strict statute against patronizing a prostitute as reported in People v. Izsak, 99 Misc. 2d 543, 416 N.Y.S. 2d 1004 (Crim. Ct. N.Y. 1979). \textit{See also} People v. James, 414 N.Y.S. 2d 74 (1979), \textit{reprinted} in 65 A.B.A.J. 1109 (1979).

A California Supreme Court case may have the opposite impact. According to Justice Tobriner, in dissent, from February 26, 1975 to April 22, 1975, while Oakland police were under a court order to employ female decoys to arrest male customers of prostitutes, such arrests coupled with publicity resulted in a devastating reduction in visible prostitution.

The majority, however, refused to sustain a broad range of equal protection claims brought by prostitutes charged with soliciting and engaging in prostitution after the demise of the court-ordered enforcement program. The court held that evidence sustained a finding that:

police department's practice of employing more men than women as decoys for solicitation of acts of prostitution was a consequence of police department's sexually unbiased policy of concentrating its enforcement effort on the profiteer, rather than the customer, of commercial vice; [2] ... city police department did not engage in policy of arresting the woman and not the man in cases of prostitution in which neither party was an undercover vice officer, but instead made arrests based upon probable cause to believe arrestee had committed offense; [3] ... police department's practice of subjecting prostitute to custodial arrest and at the same time releasing customer with written notice to appear in court was based on fact that prostitutes, unlike their customers, did not ordinarily satisfy standards for release; and [4] ... public health officers' practice of quarantining prostitutes when arrested, while not so restricting their customers, was based on fact that prostitutes were more likely
5. Other emerging constitutional challenges such as a right of privacy in general, and in sexual conduct and the use of one's body in particular, should be confronted.  

6. The implications of, and consistency with (or rational distinction between), allowing many private sex acts between consenting adults and enforcing anti-prostitution laws should be considered.

7. Reform or not, methods of motivating the prostitute and pimp to seek and maintain another livelihood should be developed.

Whatever one may think about the hypocrisy or impropriety of legal decision makers considering public morality, the fact is that morality is of crucial legislative importance. However, one other factor may be of greater weight than continued public condemnation of open solicitation for prostitution at this period in time—fiscal economy. In today's climate of tight money, financial austerity and tax revolts, the commercial aspects of "the life" and its economic implications in terms of both possible costs saved and monies collected could make it a prime target for legislative reform. Thus, a consideration of the financial aspects of prostitution as an enterprise is an important theme of the reform legislation suggested in this article. Of even greater weight is the attempt to identify all competing interest groups and alleviate their perceived problems sufficiently to produce a legislative package with the maximum potential for passage. All of this must be accomplished while addressing the problems in need of resolution enumerated above.

The criticisms of current law cut both ways—more controls on all activity, and no controls on any activity. It is the opinion of this author that neither extreme is politically feasible. Neither a sensible allocation of priorities nor sufficient funds make adequate controls on all prostitution-related activity possible. However, the removal of all controls appears just as politically impossible because of frequently voiced con-
cerns over the possible relationship of prostitution to organized crime, associated street crimes, drug abuse, venereal disease, as well as more widespread feelings against public nuisances and harassment and vocal support for public and moral decency.

37. See notes 42 & 50 infra.
38. Id.
39. Which came first, the chicken or the egg? E. Kiester, supra note 26, at 35, says streetwalkers are often heroin addicts earning money for their habits. Such prostitutes are most likely to be violent. Of those surveyed in New York City, 40% had prior arrests, 20% of which were for homicide, robbery and other acts of violence as well as drug violations, burglary and larceny.
40. The issue of the spread of VD has been used in support of every position taken concerning prostitution. Historically, the belief that prostitutes were the prime cause of the spread of VD was used as a call for strict law enforcement. For example, before World War II, it was believed that three fourths of all VD in the military could have been traced to prostitutes. C. Winick & P. Kinsie, supra note 1, at 245-67. But a 1944 study indicated 12% from prostitutes, 18% "friend," and 69% pick up. E. Chesser, supra note 17, at 109. The World Health Organization reported that in France in 1945 and 1946, 34% and 25%, respectively, of all VD was caused by prostitutes, with the remainder caused by free relations. For 1956 in England they reported a 21% prostitute cause. Id. In some countries (e.g., Italy 1958), the closing of brothels appeared to be a direct cause of an increase in VD. C. Winick & P. Kinsie, supra note 1, at 63-67. However, Waterman writing in 1932 says that the "European experience has pretty definitely exploded that belief, and for more than a generation apologists for the system have been contenting themselves with the assertion that 'it does a little good.'" Waterman, supra note 26, at 35-36. In Nevada, Symanski says that "only one reactive blood test for syphilis came from a regulated brothel in the years 1970 to 1972. All local evidence seems to suggest that "independents are usually responsible for the spread of VD." Annals, supra note 22, at 361. See generally H. Benjamin & R. Masters, supra note 1, at 400-14.

Currently, statistics are being used by those urging decriminalization to argue that so little VD is caused by prostitutes that the costs of controls directed at that source are pointless. For example, a three-year Seattle study attributes only 3 to 5% of VD to prostitutes. See Note, supra note 3, at 254; E. Kiester, supra note 26, at 42. However, the gonorrhea rate for the general population of Oakland was stated to be only 4% as compared with 22% of quarantined female prostitutes. People v. Superior Court, 19 Cal. 3d 338, 353-54, 562 P.2d 1315, 1323, 138 Cal. Rptr. 66, 74 (1977).

Long before the sexually permissive days of the 70's, Chesser stated the contemporary view:

In any case, the extent of venereal disease among prostitutes has been grossly exaggerated and the disease itself has lost much of its former terror owing to recent advances in medicine. There is much more danger of infection from 'amateurs' than from professional prostitutes today, since the latter take stringent measure for their own protection.

E. Chesser, supra note 17, at 75. For more on VD, see note 50 infra.
41. See note 25 supra & note 42 infra.
42. The dispute over whether the law should address issues of morality is perhaps more difficult of a solution than what to do about prostitution itself. This fundamental dilemma has led one author to argue that the legal principle of harm is the method by which prostitution should be analyzed. The four elements of legal harm
The nature of the legislative process is give and take—compromise and accommodation. The real world of fact and opinion, reason and emotion, objectivity and bias, independence and vested interest is reflected by the actions of our public decision makers when they exercise the initial courage of dealing at all with matters of great public controversy. The documented studies and reasoned discourse of academia seems to have more impact when they coincide with political goals. The legislative package proposed here is an openly avowed effort to take into account the realities of the legislative process in general and the issue of prostitution in particular. Within that frame of reference, the Bill proposed here should constitute a middle ground which adds controls to some activity and eliminates controls on other activities in an attempt to appease competing interest groups while picking up more support than opposition as to other provisions of the Act. Accordingly, the digest to such a bill might read as follows:

PROPOSED DIGEST TO
PROPOSED PROSTITUTION CONTROL ACT OF 1984.

Under existing law any solicitation for, or practice of prostitution is a crime. Under existing law public solicitation or public acts are punishable by a $500 fine or up to six months in county jail. Second convictions mandate a mini-

are alleged to be: "(1) a factually demonstrable (2) invasion of a legally protected interest (3) of another (4) imminently caused by the conduct." Note, supra note 3, at 243, 250-53, 258.

Using this rule, the author analyzes traditionally given harms associated with prostitution. The harm of ancillary crime fails to meet causative element (4) because the very illegality of prostitution encourages ancillary crimes such as assault because of the unlikelihood of reporting such crimes within an already illegal context. On the same ground, the potential involvement of organized crime fails because, quoting the 1971 San Francisco Committee of Crime, it is "probable that if prostitution were not a crime, it would not be organized." The small and declining role of organized crime as pointed out by the President's Commission on Law Enforcement and Administration of Justice, The Challenge of Crime in a Free Society 187 (1967), and C. Winick & P. Kinzie, supra note 1, at 232-36, also makes this alleged harm fail the legal harm test. Causation is also not supported in allegations concerning VD, which are more and more suspect on the basis of recent studies. See note 40 supra.

Public solicitation may meet the legal harm test, at least if the solicitee himself is offended, but it fails the causation prong since the act of prostitution need not be prohibited to sanction the public solicitation therefore. The destruction of public morals is the most serious challenge to this rule and is not as adequately dealt with as the others by the author. Perhaps the author has not completely resolved the legal-moral dispute referred to above. Note, supra note 3, at 243, 250-53, 258.
mum of 45 days in jail and three or more convictions mandate a minimum of 90 days in jail. Under this bill public solicitation and public acts of prostitution would continue to be crimes. Under this bill the same punishments are retained but subject to deferred or suspended sentence and possible ultimate dismissal where the defendant satisfactorily completes a reintegration program if provided for such persons in the county of arrest. Under existing law, no requirement is made by statute for equal enforcement against both prostitute and customer. Under this bill, both must be prosecuted if legally admissible evidence is available. Under existing law, many acts of pimping, pandering, forced, fraudulent or other specified acts inducing one to become or continue being a prostitute are punishable by 16 months, two or three years in the State Prison. Under this bill, all such public acts are punishable by two, three, or four years. Under this bill nonpublic acts of prostitution are not prohibited and could not be prohibited by local authorities. Limited regulation by local zoning, licensing, health control or advertising limitations is authorized. Under existing law, a house of prostitution constitutes a nuisance per se and the keeper thereof is subject to a misdemeanor. Under this bill, a finding of habitually disturbing the peace would be required for either sanction to apply. Unlike existing law, where there are no explicit provisions for rehabilitation programs for prostitutes, 50% of all revenues from fines or locally developed controls are required to go to county probation departments for the development of reintegration programs for prostitutes. Under existing law, there are general provisions for the dismissal of convictions upon evidence of rehabilitation, but there are no specific record expungement provisions for prostitutes. Under this bill, record expungement for prostitutes is explicitly provided for where evidence of reintegration is shown. Under existing law, sections concerning prostitution are scattered throughout the Penal Code. Under this bill, all such sections would be repealed or amended and all laws pertaining to prostitution would be consolidated as the Prostitution Control Act of 1984.

The pragmatic political policies behind the widely variant themes of punishment and rehabilitation, decriminalization

43. Cal. Penal Code §§ 1203.4-.4a, 1203.45 (West 1980).
and regulation, existing side by side in the digest's brief summary of the bill are suggested by the proposed introductory purpose provisions of the Act:

Section 1. The legislature finds and declares that it is opposed to the solicitation and practice of prostitution. Sound public policy dictates that individuals should be discouraged from engaging in such acts, and alternatives to that conduct should be provided. However, the legislature also finds it necessary to recognize the persistence with which the practice of prostitution continues to survive, despite the most stringent sanctions against it at substantial public expense. The most offensive aspects of prostitution are public solicitation, pimping, pandering, fraudulent or coerced inducement to become a prostitute, and the potential for theft, violence, illicit drug use, disease and the involvement of organized crime. It is the view of the legislature that these aspects will be better controlled and public resources saved, if state attention is focused solely upon them, leaving the regulation, if any, of nonpublic solicitation and nonpublic prostitution to the individual judgment of each local government entity.48

Total decriminalization of all kinds of solicitation or

44. Writing in 1936 about the future of prostitution, Scott noted that:
   It is extremely unlikely that women of respectability will ever compete with the professional prostitute in this matter of satisfying the sexual requirements of male perverts, senescents, and satyrs. For this reason alone prostitution in some form will survive. For this reason alone it will remain a social problem so long as civilization exists.

45. In Nevada it was assumed that prostitution would exist whether or not it was wanted. The judgment followed that it was preferable to keep it off the streets and out of the casino by encouraging it to be elsewhere. Annals, supra note 22, at 374.

Similarly, in England the Wolfenden Commission felt that ridding the streets of the nuisance of public solicitation was worth the consequences of prostitutes plying their trade in bars, dancehalls, nightclubs and through call-girl organizations and other associations with advertising. E. Chess, supra note 16, at 88. The Commission reasoned that street enforcement coupled with private legality would drive solicitation and acts indoors, thereby making it more private, less visible and less offensive. E. Kies, supra note 26, at 41.

46. Perhaps the ultimate in decriminalization is represented by a report from Milan, Italy. Attilio Tonello had an auto accident in which his passenger, a prostitute he had just picked up, was injured. A court awarded the prostitute compensation
acts of prostitution is clearly rejected by this proposed legislation despite the strong support of right of privacy advocates and criminal law purists. The basic conclusion is purely a political one, namely that in this country at this time, despite decriminalization of other crimes, there is still too much opposition to such a dramatic reversal with regard to prostitution. Thus the pros and cons of decriminalization, extensively discussed by numerous commentators elsewhere, need not be considered at any length here. However, the purpose clause allows the legislature to address both sides of the decriminalization issue by expressing its distaste for prostitution, while at the same time acknowledging "the life's" persistence in the face of traditional law enforcement measures. The bill continues law enforcement against public solicitation and public acts of prostitution, with new rehabilitative measures for prostitutes, greater penalties against pimps, and added pressures on customers to reduce the annoyance and nuisance of public solicitation. But as to private solicitation and private acts, the proposed law provides for decriminalization or legalization by regulation at the option of each city and county.

from the driver for loss of earnings during her hospitalization. The full amount of her claim was denied, however, because she failed to prove she was a full-time prostitute. The court noted that it was advising the tax authorities of the award. San Francisco Chronicle, July 1979. On file at Santa Clara Law Review.

47. See, e.g., E. KIESTER, supra note 26; Haft, supra note 17.

48. For example, an excellent discussion of decriminalization can be found in Megino, supra note 18, at 13-22.

49. Rosenbleet & Pariente, supra note 4, at 419-20, challenge the accurateness of public annoyance at open solicitation. They assert that neither physical nor verbal assault occurs very often because prostitutes do not want to offend anyone for fear of being arrested, and they therefore voluntarily limit their place, time and potential customers. Nonetheless, they do not see any hope for legislative change and argue for court challenges to halt the expenditure of money for law enforcement and incarceration.

50. Benjamin and Masters, supra note 1, appear to be the major advocates of legalization of those who have written extensively on the subject. They argue that prostitution, particularly regulated houses, serves many socially useful functions.

The statistical histories of Butte, Montana; Honolulu, Hawaii; and Terre Haute, Indiana, are cited as examples of the theory that access to prostitutes provides an outlet for sex criminals that diminishes their preying on others. In this respect, Saint Augustine is also said to have declared, "Suppress prostitution and capricious lusts will overthrow society." Rosenbleet & Pariente, supra note 4, at 381.

Assemblyman Greene also used this approach in support of his 1979 reform efforts in California (see note 16 supra) saying: "But if the availability of a legal prostitute prevents the rape or injury of one person, it will have been worth it." This idea is also supported by P. GEBHARD, SEX OFFENDERS: AN ANALYSIS OF TYPES (1965); TRAILEN, PLEASURE WAS MY BUSINESS (1961); TIME, Feb. 27, 1969, at 54.
By expressing its distaste for prostitution generally in the purpose clause, acknowledging the strength of prostitution’s persistence, focussing sanctions on the most public and obnoxious aspects, and leaving regulation of private solicitation and prostitution wholly to local government, the legislature avoids the charge that it is condoning the practice of prostitution. In addition, leaving total regulatory authority to local governments (except for the authority to totally prohibit), with no state guidelines or procedures, reduces any image of state sanction. There is little doubt that further deferring to local autonomy by allowing local government to prohibit even private solicitation and prostitution altogether would decrease community resistance to the idea, but that is rejected. The juxtaposition of persistence, costs, and the laundry list of related concerns next to the authorization of local regulation, infers the potential for better controls on the stated problems and attendant costs.

If the visibility of streetwalkers is what primarily offends public sensibilities about prostitution and brings the whole issue of commercial sex into the public forum, how do we get rid of that aspect of “the life”? Historically, stringent law en-

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Diminishing the incidence of rape, other violent crimes, control of VD and unwanted pregnancies and early marriages are also seen as some of the benefits of the Nevada System. *Annals, supra* note 22, at 374.

However, Winick and Kinsie draw exactly the opposite conclusions about the effect of the closure of brothels in Honolulu and Terre Haute, concluding that a reduction in crime and VD occurred. C. Winick & P. Kinsie, *supra* note 1, at 224-25.

51. In Nevada, such a plan (which also specifically barred the county containing Las Vegas from the legalization of prostitution at all) resulted in limiting prostitution to a few primarily rural counties seeking revenue sources. See note 59 infra. California is, of course, a much different state, having numerous large population centers which may make comparisons with Nevada inaccurate. In addition, since this bill directs revenue to reintegration programs for prostitutes, possibly no locality, despite enforcement savings, would stand up to pressure for prohibition if the Nevada plan were adopted, and thus another primary purpose of legalization, namely, removing the public nuisance aspect of solicitation, would be thwarted. Interestingly, in Nevada, some of those counties prohibiting brothels under their local option scheme have problems with streetwalkers and call girls. However, there are no such problems in those areas where prostitution is legal. “They could not compete as the prices in brothels are cheaper. Brothel prostitutes gain in volume what they lose in not charging high prices to a few customers.” *Annals, supra* note 22, at 361. And if there were any communities who did recognize the efficacy of removing the nuisance from the streets, they might be unwilling to accept the anticipated influx of prostitutes and customers from areas totally prohibiting the practice. For example, at one time reducing penalties in New York City resulted in prostitutes flocking there in droves. C. Winick & P. Kinsie, *supra* note 1, at 226. Concern for political expediency must stop short of accommodation which would tend to gut the basic purposes of the Act.
Enforcement measures alone have provided only very temporary relief. They are costly, both in terms of money and police attention, and are never permanent. The prostitutes move elsewhere for a time, sometimes indoors, only to return to the same street again when "the heat is off." Across the board decriminalization would not provide any diminution of the assault on public sensibilities. Several provisions of the proposed legislation are directed at alleviating this problem.

The public image and street visibility of the pimp may be even more obnoxious to the community than that of the prostitute, whom many view as a victim herself. Although

52. Pseudo-massage parlors and other creative enterprises have served as a cover for off-street solicitation and prostitution. In that respect, some may argue they have been beneficial. Legalizing private solicitation and prostitution coupled with controls on them, and existing regulation of the legitimate massage industry could serve to diminish the presence of dingy storefront operations offensive to the public and other legitimate enterprises. See also C. WINICK & P. KINSIE, supra, at 160. Note, Regulation of Massage Parlors, 24 KAN. L. REV. 2 (1975-76).

53. According to Lynch & Neckes, enforcement in San Francisco results in temporary moves across the bay to Oakland and Berkeley or even as far as Fresno, Sacramento, Los Angeles or San Diego with a return as soon as the pressure is off. Lynch & Neckes, supra note 20, at 18.

54. Pimps may serve many functions. They look out for the police, sometimes bribing them. For example, the Knapp Commissions Report in New York City chronicled corruption and bribery within the police department relevant to prostitution. See Haft, supra note 17, at 14. In a sense, pimps constitute the prostitute's business agent, manager and bodyguard. Often overlooked is the fact that they also may provide affection, satisfy emotional and companionship needs, and care for her children while the prostitute is jailed. Part of the reason few pimps are arrested, prosecuted and convicted (according to KIESTER, supra note 26, at 35, only 25 were arrested in California in 1969) is that few prostitutes will testify against them. It is assumed that fear is the reason, but loyalty and affection have also been suggested. It remains true, of course, that some pimps do coerce, threaten, beat, cheat and drug their women. However, their menace may be overrated and their role misunderstood. Nonetheless, even if the evidence were available to support such a less negative view, neither the legislature nor the community it represents is ready to support such an idea nor may it ever be. The power of the pimp may be decreased by a decrease in many of his business and protective functions flowing from a legalization of nonpublic prostitution. See E. KIESTER, supra, note 26, at 41; C. WINICK & P. KINSIE, supra note 1, at 109-21; Haft, supra note 17, at 19; Note, A Proposal for the Legalization of Prostitution in Connecticut, 49 Conn. B.J. 162, 171 (1975).

55. Many, if not most, prostitutes choose to take up "the life" and remain in it. White slavery and coercion by pimps, though definitely occurring, is apparently more fiction than fact in most cases. See E. CHESSER, supra note 17, at 112; C. WINICK & P. KINSIE, supra note 1, at 82; The ANNALS 123, 129 (Mar. 1968); Esselstyn, Prostitution in the United States, Haft, supra note 17, at 12. One example is a personal one from Richard Symanski, who, in a scathing response to a letter critical of his empirical study of prostitution in Nevada, stated: "I have good friends who are female prostitutes both in Nevada and Columbia, and they have convinced me that they are no more abnormal or oppressed than the rest of us, notwithstanding the nature of the
the tougher penalties against pimping are more an accommodation to law and order lobbyists than to reality since few such arrests and prosecutions occur, more stringent sanctions may provide some deterrence.

Public solicitation and public prostitution remain crimes under the proposed law. Potentially tough penalties may have a greater deterrent effect, particularly in the context of other changes. Under the bill, those penalties applied to the prostitute must also be applied to the customer where evidence to do so is available. This mandate may aid in eliminating pressure against arresting customers by those departments who have been courageous and innovative enough to try. Though the likelihood of successful prosecution of a willing customer is low because of the absence of a testifying victim and the difficulty in hearing the solicitation conversation or seeing the passing of money or the act itself, the mere existence of such a law with the real potential for arrest may lead to a significant reduction in street demand, particularly if nonpublic prostitution is safe and readily available.

Decriminalizing nonpublic solicitation and nonpublic prostitution, even within a regulated local framework, is Nevada laws or the social implications of being a prostitute in Latin America."


The very presence of a high prostitute turnover in brothels indicates the absence of external coercion, at least by the house, on the prostitutes. Although sometimes referring to themselves as prisoners because of stringent local and house rules (see note 56 infra), the prostitutes Symanski talked to in Nevada stressed the voluntary nature of their "confinement." Annals, supra note 22, at 359. Whereas some had remained in the same house as long as four years, many more moved on after less than a month. Their reasons for moving also indicate the voluntariness of their profession: 1) house rules, including a too-mechanical in-and-out house approach to clients; 2) number and kinds of girls in the house; 3) boredom; 4) more money elsewhere; 5) the presence of a friend elsewhere; and 6) variety in customers, madames and girls. Id. at 370-71.

Other sources acknowledging considerable volition on the part of the prostitute are: E. Cheasser, supra note 17, at 88; Esselstyn, supra at 128-30, lists the many different types of prostitutes together with a discussion of the attraction of prostitution to women and their motivation (lucrative, not unpleasant, independent, good chance to marry), including the increasingly obsolete clinicians' view of self-destruction, self-abasement, masochism, frigidity, homosexuality and male hatred; Haft, supra note 17, at 151 (escape welfare degradation, support kids, avoid discrimination in employment).

56. Some local regulations in Nevada are that a prostitute must: 1) be at least 21; 2) obtain a work permit, be fingerprinted, photographed and examined by a physician before beginning work; 3) register her auto with the police; 4) notify the police of terminating employment; and 5) obtain weekly medical exams at own expense.
aimed at influencing substantial numbers of prostitutes, and their customers to transact business behind the security of closed doors. Although the bill would not prohibit call girls or other individual entrepreneurs operating in private, clearly one of its more important impacts would be to return brothels to the prominence they had when they were tolerated in the face of prohibitory laws for many of the same reasons they are proposed to be legalized here. The brothel affords safety, su-

57. According to H. BENJAMIN & R. MASTERS, supra note 1, at 240-42, 263-67,
pervision and security from those customers constituting a physical danger not only to the streetwalker and bar hustler but the expensive call girl as well. House discipline and rules protect the prostitute (and customer) from VD, excessive use of alcohol, narcotics addiction, abuse by pimps, and related criminal activity. A well-run house may even offer savings plans, balanced diet and regular hours. In a better brothel they may even learn manners, dress and conversation to facilitate making a better marriage if that is a goal. The entertainment, drink, talk and companionship that went with some brothels was an added feature for many customers. Minimum standards with strict enforcement under a legalized system could provide these features to all.88

Where desired by affected communities, investigation and control of problems long thought to be associated with prostitution, such as coercion, VD, drug abuse, theft, and organized crime, should be facilitated by the easier access to off-street establishments and the prostitutes’ willingness to carry on business undisturbed.

If significant numbers of pimps, streetwalkers and customers clear the streets, and the corresponding increase in private activity is peaceful, police, prosecution and court time and expense should be diminished. Revenue—local, state and

“from the standpoint of the well-being of the prostitute there is not the slightest doubt that the brothel must be favored.”

88. Despite its support for legalized individual private prostitution in England, the Wolfenden Report opposed legal, regulated brothels. The Commission argued: 1) licensing and toleration of brothels by the state would recognize prostitution as a social necessity; 2) such would encourage promiscuity by males and encourage women to become prostitutes; 3) such would create a demand for prostitutes resulting in the traffic of women and children; 4) the control of VD through regulated brothels is more apparent than real because of time intervals and number of contacts; and 5) brothels would be a retrograde step since most countries which have legalized or tolerated them have subsequently closed them down. Comm. on Homosexual and Prostitution, The Wolfenden Report (1963).

Benjamin & Masters respond to each point: 1)(a) the great mass of evidence does indicate it to be a social necessity and allowing private individual prostitution so recognizes that, and (b) it is imprudent to make homosexual behavior easier than some heterosexual conduct; 2) no such evidence in support exists; 3)(a) such traffic has been long exposed as myth except perhaps in South America, and (b) there are always more applicants than available positions at brothels (for example, see note 55 supra regarding Nevada); 4) some control is certainly preferable to no control even if total immunity is impossible; and 5) the closedowns were not because of failure of the brothel system but rather from a feminist and liberal do-gooder position inherited by the United Nations from the League of Nations which also created the popular “bogey” of white slavery.
federal—would be available from individual and collective licensing and income taxes.

The bill provides that at least 50% of all local revenues from fines and licenses,\(^{59}\) are to be provided to the appropriate probation department to establish reintegration programs for prostitutes seeking to establish a new lifestyle. If arrested, the prostitute’s involvement in such programs may avoid all or part of criminal proceedings. A showing of one year without conviction and evidence of reintegration can result in record expungement of prostitution convictions. Despite current evidence which suggests that the decision to be and remain a prostitute is much more freely and independently made than previously thought,\(^{60}\) the alternatives provided by the bill, particularly as funded essentially by the prostitutes themselves, not only serve to satisfy legislators and others sympathetic to the rehabilitation model, but provide an important basis for a novel pilot study of cause and effect. Of course, any resulting decrease in the number of prostitutes would also represent a cost savings to the community. The reintegration program provisions, applicable to court ordered placements as well as voluntary placements, also reaffirm the legislature’s expressed displeasure with prostitution of any kind by indicating it is out of the mainstream of society, and by providing a mechanism for changing prostitutes’ lifestyles and reintegrating them into the “normal” community.\(^{61}\)

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59. License fees in Nevada in 1974 ranged from $100 a year to $25,000. ANNALS, supra note 22, at 365 n.52. Later reports are higher. Megino states that the $35,000 received by Storey County is 10% of the general budget. Lyon County totals $50,000 annually from four brothels while Churchill County’s two brothels pay a total of $15,000. Megino, supra note 18, at 29, 46. See also Lynch & Neckes, supra note 20, at 37.

60. See note 55 supra.

61. Winick & Kinsie indicate that a number of European countries have had a success rate of from 33% to 75% in the “resocialization” of prostitutes, with the most dramatic result occurring among those under the age of twenty-two. C. WINICK & P. KINSIE, supra note 1, at 289-91. However, many prostitutes seem to consciously choose and prefer a life “on the stroll” and feel that they neither need nor want rehabilitation. See Haft, supra note 17, at 8-11. Reintegration of this group could be difficult if not impossible. Nonetheless, many do not consider prostitution to be a good lifestyle and presumably would be interested in alternatives. Lynch & Neckes, supra note 20, at 4. In addition, age eventually forces prostitutes to retire as early as age twenty-five. Streetwalkers Seeking Jobs, Davis Enterprise, Oct. 7, 1977. On file at Santa Clara Law Review. “Society should not shirk its obligation to women who can be induced to seek a way out of a prostitute’s life.” E. KIESTER, supra note 26, at 75. For those susceptible to alternatives, jail or prison offer little rehabilitation and may
The proposed bill as set out in the appendix is a comprehensive approach to law reform, accommodating a variety of legitimate and sometimes competing concerns. These include preservation of traditional standards of public decency, the increasing trend toward protection of private sexual conduct, new notions of equal enforcement of the law, continuing desires to be able to change behavior for the better, and administration of justice needs and costs.62

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62. As previously pointed out in note 16 supra, one approach to dealing with some of these concerns in a related area of the law in California is the Brown Act, AB 489, Stats, 1975, Chs. 71 and 77, which repealed prohibitions against most noncommercial sexual acts between consenting adults in private.

Subsequently, in a non-fee homosexual solicitation case, the California Supreme Court, in Pryor v. Municipal Court, 25 Cal. 3d 283, 599 P.2d 636, 158 Cal. Rptr. 330 (1979), was called upon to consider the continuing validity of previous constructions of Penal Code § 647(a), which declares that a person is guilty of a misdemeanor when he "solicits anyone to engage in or who engages in lewd or dissolute conduct in any public place."

Pryor held that those cases which held "that public solicitation of private conduct falls within the statutory compass . . . are inconsistent with the protection of private conduct afforded by the Brown Act and are no longer viable." Id. at 254, 599 P.2d at 645, 158 Cal. Rptr. at 339. Thus, Penal Code §647(a) was held to apply only to criminal sexual conduct.

Despite the court's extensive reinterpretation of section 647(a), it nonetheless avoided declaring that a properly drafted statute could not constitutionally prohibit such non-commercial public solicitation for the performance of a lawful act. The court states:

By so limiting the reach of the statute, we avoid two substantial constitutional problems. First, we need not attempt the probably impossible task of defining with constitutional specificity which forms of private lawful conduct protected by the Brown Act are lewd or dissolute conduct, the solicitation of which is proscribed by this statute. Second, we avoid the First Amendment issues which . . . attend a statute which prohibits solicitations of lawful acts.

Id. at 254, 599 P.2d at 646, 158 Cal. Rptr. at 339.

Pryor need not be viewed as inopposite to the legislation proposed in this article. First, the legislative intent to continue to bar public solicitation while decriminalizing acts of prostitution in private is apparent on the face of the suggested statute. Second, the specificity of the solicitation prohibited by the proposed bill goes far beyond the Pryor situation by incorporating the court's definition of lewd and dissolute con-
If the premise that present prostitution laws do not adequately address any of these concerns is correct, more and more legislators like California’s Assemblyman Greene will be seeking solutions. Legislative suggestions likely to be effected are those which provide some measure of protection for the legislator from a relatively uninformed and emotional constituency on the one hand and a highly-informed, vested-interest lobbying force on the other, both confronted by a highly volatile and thus very political issue. A balanced approach is the key. If this proposed bill or any part of it aids in that effort, it will have served its purpose.

duct into the statute, joined by the crucial element of a fee, thus eliminating the problem of lack of notice and the resulting discriminatory enforcement which concerned the Pryor court. Third, the extent of the protection of first amendment rights over which the Pryor court worried is already limited by virtue of the presence of the commercial element, coupled with decisions concerning commercial free speech, particularly Ohralik and Moses. See note 11 supra. Fourth, the explicit primary goal of the proposed legislation is to recognize the historical and continuing offensiveness of public solicitation for prostitution. By allowing lawful private conduct while prohibiting public solicitation, the statute effectively reduces at least one aspect of the problem.

63. According to Symanski “[a]n overwhelming majority of those who live with open or legalized prostitution in Nevada favor its presence.” Visibility is low due to small numbers, out-of-the-way places, inconspicuous signs and numerous restrictions. Fewer disorders occur than in other bars and gaming houses. There is almost a paranoia regarding narcotics in the brothels because of the fear of being closed for even minor violations. Thus Symanski’s personal opinion and that of the people of Nevada is that “the Nevada approach has considerable merit.” ANNALS, supra note 22, at 375-77.
APPENDIX

Proposed Prostitution Control Act of 1984

Digest: [See p. 681 supra.]

Section 1. [See p. 683 supra for Purpose provisions.]

Section 2.(a) Every person who solicits, accepts or acquiesces to a solicitation or engages in an act of prostitution on any public street or sidewalk, or in any public park or other place exposed to the public view, or who solicits or engages in an act of prostitution in any building or part of a building open to the public without the permission of the proprietor of such establishment, or any person under the age of 18 who solicits or engages in an act of prostitution anywhere, is guilty of a misdemeanor.

(b) As used in this subdivision, prostitution includes any touching of the genitals, buttocks, or female breast, for purpose of sexual arousal or gratification occurring...

64. A similar approach to legislative reform of prostitution laws in Connecticut was arrived at independently by Farmer, Kessler & Rosenfeld. See Note, supra note 54. The major differences are the inclusion in the proposed California bill of equal enforcement, reintegration, expungement, and express local regulation authority provisions. See note 71 infra. The Connecticut proposal eliminates existing compulsory VD examination provisions and distinguishes in some detail between lawful and unlawful advertising. Note, supra note 54, at 166-69. Prepared for a state senator, no change in Connecticut law had occurred by the summer of 1979.

65. To avoid the appearance of more substantive revision than there is, existing statutory language is used wherever possible. Thus the plain English movement, which the author strongly endorses, takes a back seat to practical enactment considerations. In the interest of conserving space, the repealed and amended sections of existing California law are not set out here as they would be in the form as officially to be introduced.

Passage of this bill in California would require the repeal of Penal Code §§ 266a, 266g, 266h, 266i, 267 and 315, the substance of most of which are integrated into §§ 3 and 4 of this Act.

Amendments to several existing sections would be required including the following:

1) Amends out of Penal Code § 266 "into any house of ill fame, or of assignation, or elsewhere" and "prostitution, or to have."
2) Amends Penal Code § 316 as reflected by § 8 of this Act.
3) Amends out of Penal Code § 318 "or prostitution."
4) Amends out of Penal Code § 647 all of 647(b) and all of the last two paragraphs following 647(i), the substance of most of which are reflected by § 2 of this Act, and requires renumbering of the remaining subdivisions.
5) Amends out of Penal Code § 11225 "lewdness, assignation, or prostitution," in both places they occur.

Other related sections neither amended nor repealed are 266b, d, & f, 273e & f, 309, 370, 371, 372 & 373a of the Penal Code.

The 50th Annual Convention of the State Bar of California recommended decriminalization of prostitution in 1977. Resolution 4-1 proposed by the Beverly Hills Bar Association, particularly, as well as Resolution 4-2 proposed by the San Diego Bar Association, as previously proposed by the San Francisco Bar Association, were helpful in framing this Act.

66. Much of this section is derived from Comment, supra note 12, at 1262.

67. This rather restrictive language is based on the California Supreme Court's construction of "lewd and dissolute" in Pryor v. Municipal Court, 25 Cal. 3d 283, 599
between two or more persons, at least one of whom receives or on whose behalf a fee is received for the act and such fee is paid by or on behalf of at least one of the other participants in the act.

(c) Where legally admissible evidence is available to support a violation of this act by both the solicitor and solicitee each such person must be prosecuted or neither shall be.

(d) (1) In any accusatory pleading charging a violation of subdivision (a) of this section, if the defendant has been once previously convicted of a violation of the subdivision, the previous conviction is found to be true by the jury, upon a jury trial, or by the court, upon a court trial, or is admitted by the defendant, the defendant shall be imprisoned in the county jail for a period of not less than 45 days, and shall not be eligible for release upon completion of sentence, on parole, or on any other basis until he has served a period of not less than 45 days in the county jail except as provided for in subdivision (d)(3) of this section. In no such case shall the trial court grant probation or suspend the execution of sentence imposed upon the defendant except as provided for in subdivision (d)(3) of this section.

(2) In any accusatory pleading charging a violation of subdivision (a) of this section, if the defendant has been previously convicted two or more times of a violation of the subdivision each such previous conviction shall be charged in the accusatory pleading, and, if two or more of such previous convictions are found to be true by the jury, upon a jury trial, or by the court, upon a court trial, or are admitted by the defendant, the defendant shall be imprisoned in the county jail for a period of not less than 90 days and shall not be eligible for release upon completion of sentence, on parole, or on any other basis until he has served a period of not less than 90 days in the county jail except as provided for in subdivision (d)(3) of this section. In no such case shall the trial court grant probation or suspend the execution of sentence imposed upon the defendant except as provided for in subdivision (d)(3) of this section.

(3) Provided that in those counties which have established pretrial or post-trial reintegration programs or any other reintegration programs specifically directed at the problems and needs of prostitutes, proceedings may be suspended at any time and the defendant placed in such program, and upon satisfactory completion of a period of not more than 90 days, the charges, any conviction and all proceedings relative thereto shall be dismissed.


68. Of 265 prostitutes accepted by the San Francisco Pre-Trial Diversion Project, 82% successfully completed the program between 1/31/77 and 2/1/78. Lynch & Neckes, supra note 20, at 22. However, what constitutes success and its duration is not described.

The Center for Legal Psychiatry, 2424 Wilshire Blvd., Santa Monica, California, has operated a pilot diversion program since 1975 for prostitutes referred to it by the Beverly Hills Municipal Court. Over 98% of those referred are accepted after initial psychological testing to determine that the candidate is not too disturbed for the group treatment offered. Vocational and aptitude tests are subsequently given. Twenty weekly group therapy sessions (eight to twelve participants) led by a team of two mental health professionals follow. An 80% completion rate is expected with a significant number securing “straight jobs.” A record check in 1976 of twenty-nine women who completed the program showed five subsequently arrested, three for prostitution along with other crimes. Center for Legal Psychiatry Announcements, November and December 1978.

69. Under existing law, there is no such exception to the apparently mandatory jail time of second and subsequent convictions. Nonetheless, the policy of the San Francisco District Attorney’s office in 1977 was to grant pretrial diversion or dismiss on first arrests, plea bargain to disturbing the peace on second arrests, plea bargain to
Section 3. Every person who engages in any of the following acts is guilty of a felony and punishable by imprisonment in the state prison for two, three, or four years and by a fine not exceeding one-thousand dollars ($1,000).

(a) The enveiglement, enticement, persuasion, encouragement or procurement by any means whatsoever of any person under the age of 18 years, or of any person never before participating in an act of prostitution, for the purpose of prostitution.

(b) The abduction of any person against his or her will or without his or her consent, or with his or her consent procured by fraudulent inducement or misrepresentation; for the purpose of prostitution.

(c) The placing or leaving or assisting in placing, leaving or remaining of any person by force, intimidation, threats, persuasion, or any other will-overpowering or nonconsensual means, in a house of prostitution.

(d) While knowing another person is a prostitute, publicly soliciting or receiving compensation for publicly soliciting for such prostitute.

(e) Encouraging in any way any person to come into the state for the purpose of prostitution.

(f) Aiding or assisting in any way the unlawful conduct specified in subdivisions (a), (b), (c), (d), and (e) of this Section.

Section 4. In all prosecutions under this Act where any person has engaged in prostitution activity as a result of the unlawful conduct of such person's spouse, such person is a competent witness against his or her spouse.

Section 5. Except as provided by state law, no city, county, or city and county may by ordinance, or otherwise, prohibit prostitution. However, such local governments may by ordinance or otherwise, regulate prostitution by methods including, but not limited to:

(a) Zoning of areas where prostitution may occur;
(b) Regulation of the health aspects of the practice of prostitution;
(c) Licensing of prostitutes and brothels; and
(d) Limitations on advertising not prohibited by Section 3(d).
Section 6. At least 50% of all revenue collected pursuant to any section of this act shall be provided to the probation department in the county in which such revenue is collected, which probation department shall use such funds solely for the purpose of providing assistance, in the form of job training, employment procurement, counseling and guidance, for those who seek to leave the practice of prostitution pursuant to placement in a pretrial or postconviction program or any other reintegration programs established in whole or in part for the reintegration of prostitutes.71

Section 7. Upon petition, dismissal of charges of solicitation or prostitution prior or subsequent to conviction, and release from all penalties and disabilities resulting from the conviction of such offense pursuant to Penal Code §§ 1203.4 and 1203.4a, together with evidence that:

(a) the individual has remained free from any prostitution activities for one year immediately prior to the filing of such petition, and

(b) the individual has satisfactorily participated in a probation department approved reintegration program or the court determines that such participation is not deemed necessary,

shall result in the sealing of the record of conviction, if any, and all other official records in the case. Thereafter such conviction, arrest or other proceeding shall be deemed not to have occurred, and the petitioner may answer accordingly any question relating to their occurrence. Such dismissal and sealed conviction shall not constitute a prior conviction for purposes of any subsequent prosecution.

Section 8. Every person who keeps any place for the purpose of solicitation for or acts of prostitution by which the peace of the immediate neighborhood is habitually disturbed by violations of Sections 415, 647, or any other Sections of the Penal Code resulting in convictions is guilty of a misdemeanor and every such place by which the peace of the immediate neighborhood is habitually disturbed by violations of its residents, employees, owners or customers resulting in convictions of Sections 415, 647, or any other sections of the Penal Code shall constitute a nuisance which may be enjoined, abated and prevented as a public or private nuisance pursuant to the provisions of Sections 11226-11235 of the Penal Code.

tisements for the purpose of this section:

1. Advertisements on the covers or within newspapers and magazines.


3. Advertisements that advertise newspapers, magazines or published directories of prostitutes which carry advertisements for the purpose of prostitution.

(c) Unlawful advertising for the purpose of prostitution is a class A misdemeanor.

Note, supra note 54, at 167.

In Nevada, state statutes provide that it is unlawful to advertise in a public theater or on public streets. Nev. Rev. Stat. §§ 201.430, 201.440 (1979). Some county ordinances are more detailed. Because of the relatively small number of brothels, their out-of-the-way locations, and inconspicuous signs, the visible impact of brothels in Nevada is small. Some of the houses have somewhat suggestive but nonetheless surprisingly temperate names. For example: Cottontail Ranch, Coyote Springs Ranch, Playing Club, Villa Joy, Valley of Love, and Moonlight Ranch. Besides state and local restrictions, "brothel owners are aware that their continuing existence is a function of local image, and they try to maintain at least an acceptable facade." Annals, supra note 22, at 375.

72. This section may present problems between city, county and state authority. While there is probably no problem in designating the use of fines for violations of state law or even county or city ordinances, the use of local licensing fees may be a more delicate matter, possibly requiring its omission.