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B. J. George Jr.  
*University of Michigan Law School*

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# LEGAL, MEDICAL AND PSYCHIATRIC CONSIDERATIONS IN THE CONTROL OF PROSTITUTION†

B. J. George, Jr.\*

IN common with other nations of the world the United States today as in the past is faced with the problem of controlling prostitution, particularly in urban areas. At one time or another states and cities in the United States have experimented with the classic methods of controlling prostitution: reglementation, segregation and repression.<sup>1</sup> Reglementation of individual houses or prostitutes has never been carried out on a statewide basis in any state in the United States, though one can find instances in certain large cities in the nineteenth and early twentieth centuries in which city ordinances or *de facto* police regulations provided for licensing of houses by the police and periodic medical examinations of their inmates.<sup>2</sup> Some cities also segregated prostitution in red-light districts, permitting and regulating those houses within the approved districts and repressing those which sprang up elsewhere.<sup>3</sup> But since the early decades of the present century the legislative policy expressed by Congress and in all the states has been one of absolute suppression of prostitution.

The legislative motivation for such repressive legislation is

† This is an expanded version of the national report submitted on topic IV.B.2, "Delimitation of Administrative Regulation and Penal Sanctions in the Fields of Prostitution and Proxenetism," considered at the Sixth International Congress of Comparative Law to be held in August 1962, in Hamburg, West Germany.

\* Professor of Law, University of Michigan.—Ed.

<sup>1</sup> See AMOS, A COMPARATIVE SURVEY OF LAWS IN FORCE FOR THE PROHIBITION, REGULATION AND LICENSING OF VICE IN ENGLAND AND OTHER COUNTRIES (1877); FLEXNER, PROSTITUTION IN EUROPE (1914); cf. LEAGUE OF NATIONS ADVISORY COMMISSION FOR THE PROTECTION AND WELFARE OF CHILDREN AND YOUNG PEOPLE, TRAFFIC IN WOMEN AND CHILDREN COMMITTEE, ABOLITION OF LICENSED HOUSES (League of Nations Pub. No. 1934.IV.7). The current situation is the subject of 13 INTERNATIONAL REVIEW OF CRIMINAL POLICY (ST/SOA/Ser. M/13) (U.N. Pub. Sales No. 58.IV.4) (1958).

<sup>2</sup> MINNEAPOLIS VICE COMMISSION, REPORT 23-27, 59-60 (1911). Occasionally this appears indirectly in the case law, e.g., *People v. Hirsch*, 21 Cal. App. 737, 132 Pac. 1062 (1913), in which the defendant appealed a pandering conviction on the ground he had not yet placed the woman in a house of prostitution because she was not to go to work until she had been physically examined and had received a registration certificate from the police. The appeal failed.

<sup>3</sup> MINNEAPOLIS VICE COMMISSION, REPORT 61-66 (1911) contains an informal survey of the practice. More recent experiences are discussed in Quisenberry, *Eight Years After the Houses Closed*, 39 J. SOCIAL HYGIENE 312 (1953) (Honolulu, Hawaii) and McGinnes & Packer, *Prostitution Abatement in a VD Control Program*, 27 J. SOCIAL HYGIENE 355 (1941) (Memphis, Tenn.).

varied and confused. The traditional Puritan attitude toward all sexual activity except that between husband and wife for the purpose of procreation undoubtedly goes far in accounting for the comprehensive legislation controlling prostitution. Another motivating concern is a humanistic one for the prostitute herself:

"Common prostitution is a miserable occupation in which woman, exploited sexually and economically, subjected arbitrarily to the police, to a humiliating medical supervision, to the caprices of the customers, and doomed to microbes and disease, to misery, is truly abased to the level of a thing."<sup>4</sup>

A third objective is control of the spread of venereal diseases through activities of prostitutes. A fourth may be a desire to further the rehabilitation of the prostitute herself and to prevent promiscuous delinquents, particularly juveniles, from becoming prostitutes. Yet another motivation is that of protecting the civic reputation, particularly when efforts to attract new industries to the city or region may be frustrated by the reputation for vice or lawlessness which the city bears; relatively few communities seek affirmatively a status and reputation as a "sin city." There may be other controlling motivations as well. The very fact of their existence, however, has meant that often the resulting legislation is confusing and difficult of administration because those sponsoring the legislation are unsure of their objectives and consequently unclear as to the best methods of accomplishing them. The same ambivalence can be found at the enforcement level.<sup>5</sup> Nevertheless, at the present time it appears that in most parts of the United States established houses of prostitution do not exist, that there is no extensive international and interstate traffic in women and girls who have been compelled against their will to

<sup>4</sup> DE BEAUVOIR, *THE SECOND SEX* 565 (1953). "It is hard for me to understand how an ethical society can condemn some of its members to the kind of degradation to which even the aristocrats of prostitution, the call girls, are subjected." GREENWALD, *THE CALL GIRL* 174 (Paperback ed. 1958) [hereinafter cited as GREENWALD]. "From the psycho-pathologist's point of view, the objection to a policy of tolerated houses is simply that it tolerates the problem as well as the prostitute. *It gives social sanction to a pathological condition* . . . . As for compulsory prostitution, it is enough to say that measures of this sort constitute a betrayal of every principle that makes for stability in human society." GLOVER, *THE ROOTS OF CRIME* 262 (1960) [hereinafter cited as GLOVER].

<sup>5</sup> TAPPAN, *DELINQUENT GIRLS IN COURT* 87-89 (1947); cf. KANSAS CITY, MO., REV. ORDINANCES § 37-29 (1946) [hereinafter cited as KANSAS CITY ORDS.], which provides that no home for fallen women other than one operated by the city shall be closer than 200 feet to premises used exclusively for residential purposes.

engage in prostitution,<sup>6</sup> that active solicitation of males on the streets is relatively rare and that operators of hotels, taverns, bars and other places where prostitutes might contact or entertain customers are under substantial pressures to keep such activities covert. Although some of this may be the result of a gradual relaxing of community attitudes toward premarital and extramarital sexual relations,<sup>7</sup> much of it is the result of enforcement of the multitude of state statutes and municipal ordinances now in existence. Control of prostitution and related activities assumes four major aspects: control through criminal sanctions, control through judicial proceedings of a civil nature, administrative control measures authorized by statute or ordinance and extra-legal administrative control, particularly by the police.

### I. CONTROL THROUGH CRIMINAL SANCTIONS

*State and Local Control.* State and local legislation is abundant covering all kinds of conduct directly and indirectly involved in prostitution.<sup>8</sup> While no classification of statutes will serve completely all fifty-one American jurisdictions, in general the statutes cover the following classes of persons or activities:

(a) *The female prostitute.* At common law an act of prostitution was not in itself criminal,<sup>9</sup> though to walk the streets at night for the purpose of solicitation may have been.<sup>10</sup> Statutes and ordinances reach either the woman herself because of what she is, the preliminary negotiations with the prospective customer or the act of prostitution itself. In the common-law tradition, preserved in statutes in most jurisdictions, one who holds the status of vagrant is punishable for that fact alone, without the necessity of any particular criminal act being alleged and proved.<sup>11</sup> In many states

<sup>6</sup> Thornton, *Organized Crime in the Field of Prostitution*, 46 J. CRIM. L., C. & P.S. 775 (1956); cf. KINSEY, POMEROY & MARTIN, *SEXUAL BEHAVIOR IN THE HUMAN MALE* 503-04 (1948). A recent United Nations study suggests that the international traffic is diminishing in scope. U.N. DEP'T OF ECONOMICS & SOCIAL AFFAIRS, *STUDY ON TRAFFIC IN PERSONS AND PROSTITUTION* 4-6 (ST/SOA/SD/8) (U.N. Pub. Sales No. 59.IV.5) (1959).

<sup>7</sup> Cf. Dr. Kinsey's statements in *ABORTION IN THE UNITED STATES* 58-59 (Calderone ed. 1958).

<sup>8</sup> A brief summary of statutory coverage and several tables of statutes are found in MUELLER, *LEGAL REGULATION OF SEXUAL CONDUCT* (1961) [hereinafter cited as MUELLER].

<sup>9</sup> GREAT BRITAIN COMMITTEE ON HOMOSEXUAL OFFENCES AND PROSTITUTION, *REPORT* 79 (1957) [hereinafter cited as WOLFENDEN REPORT]; GREAT BRITAIN STREET OFFENCES COMMITTEE 8 (1928); 3 BURDICK, *CRIMES* § 973 (1946).

<sup>10</sup> E.g., *Stokes v. State*, 92 Ala. 73, 9 So. 400 (1890).

<sup>11</sup> Lacey, *Vagrancy and Other Crimes of Personal Condition*, 66 HARV. L. REV. 1203

and cities "common prostitutes" are comprehended within the statutory language,<sup>12</sup> and in other statutes the term "lewd and dissolute persons" will include them.<sup>13</sup> Although recent authority casts doubt on the constitutionality of some of the traditional language defining criminal status,<sup>14</sup> there is enough tradition surrounding the term "common prostitute" that it will probably survive as constitutionally valid unless and until crimes of status *per se* are held to deny due process of law.<sup>15</sup> Streetwalking is often punishable under statute<sup>16</sup> or local ordinance,<sup>17</sup> as is solicitation by the woman herself.<sup>18</sup> A prostitute who enters a restaurant, bar or the like,<sup>19</sup> or who remains there after being ordered out by the proprietor<sup>20</sup> may be punished. The woman who takes her customer to a hotel room, room or apartment for the purpose of committing an act of prostitution often violates a statute or ordi-

(1953); Sherry, *Vagrants, Rogues and Vagabonds—Old Concepts in Need of Revision*, 48 CALIF. L. REV. 557 (1960).

<sup>12</sup> *E.g.*, CAL. PEN. CODE § 647(10); N.Y. CODE CRIM. PROC. § 887(4)(g). Lacey, *supra* note 11, lists 18 states having such provisions. The statutory term may be "disorderly person," *e.g.*, MICH. COMP. LAWS § 750.167 (1948).

<sup>13</sup> *E.g.*, CAL. PEN. CODE § 647(5): "Every lewd and dissolute person"; N.M. STAT. ANN. § 40-48-1 (1953): "lewd, wanton or lascivious persons in speech or behavior"; WASH. REV. CODE § 9.87.010(7) (1957): "lewd, disorderly or dissolute person."

<sup>14</sup> *In re Newbern*, 53 Cal. 2d 786, 350 P.2d 116, 3 Cal. Rptr. 364 (1960). See *People v. Brandt*, 306 P.2d 1069 (Cal. Super. Ct. 1956), which held that the customer of a prostitute was not a lewd and dissolute person.

<sup>15</sup> The term "common prostitute" in the Minnesota statute [MINN. STAT. § 614.57 (1957)] has been held constitutional in *State v. McCorvey*, 114 N.W.2d 703 (Minn. 1962). Professor Sherry suggests a contrary conclusion, Sherry, *supra* note 11, at 563.

<sup>16</sup> *E.g.*, N.Y. CODE CRIM. PROC. §§ 887(4)(c), (d).

<sup>17</sup> *E.g.*, BURBANK, CAL., MUNICIPAL CODE AND CHARTER § 8-208 (1951) [hereinafter cited as BURBANK CODE]; CHICAGO, ILL., MUNICIPAL CODE § 192-5 (Hodes ed. 1939) [hereinafter cited as CHICAGO CODE]; *cf.* *City of Chicago v. Nesbitt*, 19 Ill. App. 2d 220, 153 N.E.2d 259 (1958); LOS ANGELES, CAL., MUNICIPAL CODE § 41.06 (1955) [hereinafter cited as LOS ANGELES CODE]. Compare LOS ANGELES CODE § 41.03(a) which makes it an offense to serve as a look-out on a public street for a prostitute or other person soliciting.

<sup>18</sup> N.Y. CODE CRIM. PROC. § 887(4)(a); BALTIMORE, MD., CHARTER & PUBLIC LOCAL LAWS § 750 (1949); BURBANK CODE § 8-207; KANSAS CITY ORDS. § 43-7; LOS ANGELES CODE § 41.05.

<sup>19</sup> KANSAS CITY ORDS. § 43-7: "No person shall solicit . . . in or about any tavern, saloon, tap room, bar, rooming house or hotel . . ." MADISON, WIS., GEN. ORDINANCES § 26.08 (1949): "It shall be unlawful for any woman of evil name or fame to enter any restaurant, hotel, or eating house, or other public building or to loiter in any of the parks or other public places in said city." *Cf.* LOS ANGELES CODE § 41.07: "No person shall resort . . . to any room used or occupied in connection with, or under the same management as any café, restaurant, soft drink parlor, liquor establishment or similar business . . . for the purpose of having sexual intercourse with a person to whom he or she is not married. . . ."

<sup>20</sup> BURBANK CODE § 8-217(d); LOS ANGELES CODE § 41.11.2(d).

nance.<sup>21</sup> Being an inmate of a house of prostitution is itself criminal.<sup>22</sup>

Instead of or in addition to punishing the prostitute as such or the activities preliminary to specific acts of prostitution, legislation penalizes such acts themselves. In some states those who "commit prostitution" are punishable without the offense being further defined.<sup>23</sup> Other states define prostitution in such terms as "indiscriminate sexual intercourse with males for compensation,"<sup>24</sup> any act of sexual intercourse or any act of deviate sexual conduct for money,<sup>25</sup> "the offering or receiving of the body for sexual intercourse for hire and the offering or receiving of the body for indiscriminate sexual intercourse without hire,"<sup>26</sup> or some similar definition which may or may not be limited to "normal" heterosexual intercourse or to compensated intercourse. Such statutes commonly punish "lewdness" and "assignation" as alternatives to "prostitution." The most common interpretation is that these terms are intended "to cover commercialized vice cases which might be commonly understood as such by the layman but which might slip through a strict legal definition of

<sup>21</sup> E.g., GA. CODE ANN. § 26-6203 (1953) ("enter, or remain in any house, place, building, tourist camp, or other structure . . . for the purpose of prostitution or assignation"); N.C. GEN. STAT. § 14-186 (1953) ("Any man and woman found occupying the same bedroom in any hotel . . . for any immoral purpose, or . . . falsely registering as, or otherwise representing themselves to be, husband and wife in any hotel . . . shall be deemed guilty of a misdemeanor . . ."); BURBANK CODE § 8-209; KANSAS CITY ORDS. § 43-9 ("No person, male or female, shall occupy any room for the purpose of prostitution for hire."); LOS ANGELES CODE § 41.07 ("No person shall resort . . . to any vacant lot, room, rooming house, lodging house, residence, apartment house, hotel, house trailer, street or sidewalk for the purpose of having sexual intercourse with a person to whom he or she is not married . . .") and § 41.09 (resorting to any other place not covered by § 41.07 for such purposes). The California Supreme Court has recently declared LOS ANGELES CODE § 41.07 unconstitutional on the ground that the state has pre-empted the field of regulating criminal aspects of sexual activity and prostitution. *In re Lane*, 367 P.2d 673, 18 Cal. Rptr. 33 (1961). A rehearing was granted January 17, 1962. If the decision stands, presumably all city ordinances in California that touch directly on prostitution and related activities are void and unenforceable; those that indirectly touch on such activities through granting and revocation of various kinds of licenses and assessing criminal penalties for violations in connection with operation of licensed businesses are probably valid if there is no state legislation governing conduct of the particular type of business.

<sup>22</sup> E.g., CAL. PEN. CODE § 315; CONN. GEN. STAT. ANN. § 53-231 (1960); GA. CODE ANN. § 26-6203 (1953); N.Y. MULT. DWELL. L. § 350(1)(c); OHIO REV. CODE ANN. § 2905.27(F) (Baldwin 1958); CHICAGO CODE § 192-1; KANSAS CITY ORDS. § 43-3.

<sup>23</sup> GA. CODE ANN. § 26-6203 (1953); IOWA CODE ANN. § 687.3 (1950); MISS. CODE ANN. § 2333 (1956).

<sup>24</sup> LA. REV. STAT. § 14.82 (1950).

<sup>25</sup> ILL. ANN. STAT. ch. 38, § 11-14(a) (Smith-Hurd 1961); WIS. STAT. ANN. § 944.30 (1958).

<sup>26</sup> OHIO REV. CODE ANN. § 2905.26(A) (Baldwin 1958).

'prostitution'."<sup>27</sup> However, on occasion courts have applied such statutory language to include conduct unrelated to prostitution which the judges find morally repugnant,<sup>28</sup> though this is no doubt a distortion of the legislative purpose.

Although prostitutes might accommodate non-prostitute women who wish to engage in homosexual relations,<sup>29</sup> such conduct is not reflected in the legal materials. Should it occur it would be punishable as sodomy in most states.<sup>30</sup>

(b) *The male prostitute.* Although their conduct less often comes to the attention of the public than does that of female prostitutes, in every metropolitan area there are actual or feigned homosexuals who cater for compensation to the desires of other homosexuals.<sup>31</sup> So long as the statutes use the term "prostitution" without further definition, it may be expected that courts will continue to apply the traditional definition, "the practice of a female offering her body to an indiscriminate intercourse with men,"<sup>32</sup> and will therefore exclude male homosexual conduct from the statutory coverage. However, if the basic prostitution statute applies to "any person"<sup>33</sup> or to "any man or woman"<sup>34</sup> who performs or engages in "lewdness" it is probably adequate to cover such "professional" homosexuality, although such prosecutions are not reflected in the appellate decisions. The soliciting statute is often broad enough to cover solicitation to an act of homosexual-

<sup>27</sup> *State v. Davis*, 165 N.E.2d 504, 509 (Cincinnati, Ohio, Munic. Ct. 1959); cf. *City of Shreveport v. Wilson*, 145 La. 906, 83 So. 186 (1919).

<sup>28</sup> An example is *Dillard v. State*, 226 Ark. 720, 293 S.W.2d 697 (1956), in which the defendant had stayed at a motel with a woman not his wife, and was charged with violating a statute prohibiting one to "remain in any . . . tourist camp . . . for the purpose of prostitution, lewdness or assignation." ARK. STAT. § 41-3202 (1947). The statute defined lewdness to include any indecent or obscene act, and the court utilized a dictionary definition of "indecent" to include anything "morally offensive." "No one could successfully contend that the acts of the appellant in this case were decent or morally right." 226 Ark. at 721, 293 S.W.2d at 698.

<sup>29</sup> KINSEY, POMEROY & MARTIN, *op. cit. supra* note 6, at 596.

<sup>30</sup> KINSEY, POMEROY, MARTIN & GEBHARD, *SEXUAL BEHAVIOR IN THE HUMAN FEMALE* 484 n.36 (1953) lists five states in which female homosexuality is not criminal, three in which homosexual cunnilingus is not criminal and four in which the status of female homosexuality is in doubt. See also MODEL PENAL CODE 279, comment on § 207.5 (Tent. Draft No. 4, 1955).

<sup>31</sup> KINSEY, POMEROY & MARTIN, *op. cit. supra* note 6, at 596; PLOSCOWE, *SEX AND THE LAW* 204 (1951).

<sup>32</sup> *State v. Gardner*, 174 Iowa 748, 751, 156 N.W. 747, 749 (1916).

<sup>33</sup> *E.g.*, ILL. ANN. STAT. ch. 38, § 11-14 (Smith-Hurd 1961); N.J. REV. STAT. § 2A:133-2 (1951). The MODEL PENAL CODE 167 (Tent. Draft No. 9, 1959) adopts this terminology in § 207.12(1). Cf. MISS. CODE ANN. § 2333 (1956), which uses no pronoun or noun, but describes activity only.

<sup>34</sup> HAWAII REV. LAWS § 309-25 (1955).

ity,<sup>35</sup> but homosexual solicitation itself may be directly prohibited.<sup>36</sup> Special statutes or ordinances may reach those who loiter about public toilets or other public places,<sup>37</sup> since this is conduct through which homosexual contacts are commonly made. Indecent exposure or lewd touching statutes<sup>38</sup> are probably also applicable to homosexual solicitation and enticement. Approximating "status crimes" are those ordinances which prohibit persons from appearing in the dress of the opposite sex.<sup>39</sup> Other ordinances are patently aimed at places of entertainment where both male and female homosexuals congregate.<sup>40</sup>

Whether or not such special statutes exist or are applied to homosexual prostitutes, in every state except Illinois<sup>41</sup> and New York<sup>42</sup> homosexual acts are punished as sodomy<sup>43</sup> whether or not they are private, whether or not they are between adults and whether or not they are mutually consented to. The consummated act is therefore clearly criminal. The importance of the solicitation, prostitution, loitering and indecent liberties statutes, therefore, lies in their law enforcement role. Without these statutes,

<sup>35</sup> *E.g.*, HAWAII REV. LAWS § 309-26 (1955); IOWA CODE ANN. § 724.2 (1950); OHIO REV. CODE ANN. § 2905-27(E) (Baldwin 1958); CLEVELAND, OHIO, CHARTER AND CODIFIED ORDINANCES § 13.1313 (1951) [hereinafter cited as CLEVELAND ORDS.]; KANSAS CITY ORDS. § 43-7. But compare some ordinance terminology which is in terms of soliciting "the opposite sex," *e.g.*, BURBANK CODE § 8-208; LOS ANGELES CODE § 41.06; MIAMI, FLA., CODE ch. 35, § 33 (1945) [hereinafter cited as MIAMI CODE].

<sup>36</sup> *E.g.*, N.Y. PEN. LAW § 722(8).

<sup>37</sup> *E.g.*, CAL. PEN. CODE §§ 647(5), 647a; N.Y. PEN. LAW § 190-a(2) (subway toilet). See *People v. Hale*, 8 N.Y.2d 162, 168 N.E.2d 518, 203 N.Y.S.2d 71 (1960); *cf.* WOLFENDEN REPORT at 43, indicating how widely disseminated is information about toilets where homosexual contacts may be made.

<sup>38</sup> *E.g.*, ILL. ANN. STAT. ch. 38, § 11-9 (Smith-Hurd 1961): "A lewd exposure of the body done with intent to arouse or to satisfy the sexual desire of the person" or "a lewd fondling or caress of the body of another person of the same sex" in a public place amounts to public indecency.

<sup>39</sup> BURBANK CODE § 7-512.2; CHICAGO CODE § 192-8; Detroit, Mich., Ordinance 317-F, August 7, 1958; MONTGOMERY, ALA., CODE ch. 20, § 58 (1952) [hereinafter cited as MONTGOMERY CODE].

<sup>40</sup> BURBANK CODE § 7-514; *cf.* Detroit, Mich., Ordinance 559-F, § 13(d), March 9, 1961, and 581-F, § 12(d), June 15, 1961, which prohibit "freak dancing" in dance halls and rental halls.

<sup>41</sup> ILL. ANN. STAT. ch. 38, §§ 11-2, 11-3 (Smith-Hurd 1961) reach only deviate sexual assault, "any act of sexual gratification involving the sex organs of one person and the mouth or anus of another" which is compelled by force or threat of force.

<sup>42</sup> N.Y. PEN. LAW § 690 penalizes only sodomy "against the will and without the consent," with special provisions protecting those who are legally or factually unable to consent because of mental defect, intoxication, sleep, stupor, unawareness of the nature of the act or youth (under 18).

<sup>43</sup> See MODEL PENAL CODE 279, comment on § 207.5 (Tent. Draft No. 4, 1955), and compare the recommendations in the WOLFENDEN REPORT at 115-16.



homosexuals must either be caught in flagrant delict, or a plain-clothes officer must let himself be solicited and enough acts done that the court will permit the jury to find that perpetration of, as opposed to mere preparation for, the crime of sodomy has begun. Such problems inherent in the concept of attempt are avoided if there are statutes making the preparatory conduct independently criminal.<sup>44</sup>

It is theoretically possible that houses might be maintained staffed by men to which women could resort for sexual gratification. However, this is incompatible with normal female psychology,<sup>45</sup> and women with such urges can no doubt be accommodated by some cooperative male other than on a commercial basis. In any event, should such establishments come into existence they can be abated as "houses of assignation"<sup>46</sup> and their operators penalized. The acts of the inmates might fall within a fornication statute<sup>47</sup> or might be brought within the concept of "lewdness" if both males and females may commit such acts according to the statutory definition.

(c) *The pander.* The pander or procurer is the individual who places a woman in a house of prostitution or supervises her career.<sup>48</sup> The woman is not considered an accomplice, and her testimony therefore need not be supported under a general accom-

<sup>44</sup> See Arnold, *Criminal Attempts—The Rise and Fall of an Abstraction*, 40 YALE L.J. 53, 61 (1930).

<sup>45</sup> DE BEAUVOIR, *op. cit. supra* note 4, at 687; KINSEY, POMEROY, MARTIN & GEBHARD, *op. cit. supra* note 30, ch. 16, particularly at 681-84.

<sup>46</sup> See text at notes 122-132 *infra*.

<sup>47</sup> See text at notes 83-85 *infra*.

<sup>48</sup> HAWAII REV. LAWS § 309-28 (1955): "Whoever induces, decoys, procures or compels any female against her free will to have sexual intercourse with any person other than himself; whoever induces, compels or procures any female to practice prostitution, or to hold herself out as a prostitute, with the intent thereby to obtain and secure from the female any portion of the gains earned by her in such practices; whoever assumes, or asserts or exercises authority or power to advise, direct or compel any woman to practice prostitution or hold herself out as a prostitute, or to live in a house or place for the practice of prostitution, with intent to participate in, and to obtain any portion of the gains arising from such lewd practices . . . shall be deemed a procurer or pimp . . ." ILL. ANN. STAT. ch. 38, § 11-16(a) (Smith-Hurd 1961): "Any person who performs any of the following acts for money commits pandering: (1) Compels a female to become a prostitute; or (2) Arranges or offers to arrange a situation in which a female may practice prostitution." OHIO REV. CODE ANN. § 2905.17 (Baldwin 1958): "No person shall place any female in the charge or custody of any person for immoral purposes or in a house of prostitution with the intent that she shall lead a life of prostitution, or compel any female to reside with him or with any other person for immoral purposes, or for the purpose of prostitution, or compel her to live a life of prostitution. . . ." Other statutes are cited in MUELLER, Table 6B(a).

plICE statute.<sup>49</sup> Because of the blackmail possibilities inherent in this as well as other sex crimes, however, legislation occasionally requires specific corroboration.<sup>50</sup> The character of the woman is immaterial; she may already be a hardened prostitute.<sup>51</sup> However, there must be some kind of physical or moral coercion present before the crime of pandering is committed,<sup>52</sup> since this is the only substantive element which distinguishes the usual case of pandering from that of solicitation or receiving the earnings of a prostitute (*i.e.*, pimping). Because the statutory language is broad in nature, efforts have been made to apply it to situations not involving prostitution,<sup>53</sup> but only rarely has judicial indignation over immoral conduct precluded a consideration of the legislative purpose.<sup>54</sup>

<sup>49</sup> *People v. Frayer*, 140 Cal. App. 2d 597, 295 P.2d 456 (1956); *People v. Montgomery*, 47 Cal. App. 2d 1, 117 P.2d 437 (1941) (interpreting CAL. PEN. CODE § 1111).

<sup>50</sup> KAN. GEN. STAT. ANN. § 21-937 (1949); N.Y. PEN. LAW § 2460(9). Corroboration must extend to every material element of the crime charged under § 2460, and is therefore more than would be required to corroborate a confession. *People v. Jelke*, 1 N.Y.2d 321, 135 N.E.2d 213, 152 N.Y.S.2d 479 (1956). See also *State v. Bonskowski*, 180 Kan. 726, 308 P.2d 168 (1957).

<sup>51</sup> *People v. Montgomery*, 47 Cal. App. 2d 1, 117 P.2d 437 (1941); *cf.* *State v. Owen*, 124 Kan. 533, 261 Pac. 600 (1927).

<sup>52</sup> *State v. Jackson*, 80 Ariz. 82, 292 P.2d 1075 (1956); *State v. Basden*, 31 Wash. 2d 63, 196 P.2d 308 (1948).

<sup>53</sup> For example, in *Horne v. State*, 220 Ark. 912, 251 S.W.2d 489 (1952), a building contractor invited three young girls to see a house he was building, indecently fondled one of them, and was prosecuted under ARK. STAT. § 41-3217 (1947), for having enticed a female under the age of eighteen to a place for lewd or immoral purposes. His conviction was reversed on the ground "the statute in question . . . is intended to punish persons who engage in the business of enticing young girls to places of assignation for the purpose of prostitution." 220 Ark. at 913, 251 S.W.2d at 489. Compare *Dillard v. State*, 226 Ark. 720, 293 S.W.2d 697 (1956) (discussed at note 28 *supra*), with *Braun v. State*, 143 Ark. 593, 595, 219 S.W. 750, 751 (1920): "The purpose of the statute was to punish persons, whether male or female, who should engage in the business of inveigling or enticing girls under the age of eighteen to places of assignation or other places for the purpose of prostitution or other immoral practices. It has no application to persons who shall take away girls from their fathers or guardians to any convenient place for the sole purpose of having an act of illicit intercourse."

<sup>54</sup> An example is *State v. Rieman*, 118 Kan. 577, 235 P. 1050 (1925), in which certain boys picked up some girls and took them to a farm, ostensibly to do some farm chores; one or more of them had intercourse with one of the girls, which she claimed to have been by force and which the boys claimed was willingly performed. The defendant was prosecuted and convicted under what is now KAN. GEN. STAT. ANN. § 21-937 (1949), which makes it a crime for any person to "persuade, induce, entice or procure . . . any female person . . . to go from one place to another within this state, for the purpose of prostitution, fornication or concubinage." The court held that "procure" meant "to bring about, effect or cause," and that the defendant had caused the girl to go from one place to another for the purpose of fornication, an immoral act. It was immaterial whether the girl knew of the purpose or cooperated in it, a holding reiterated in *State v. Owen*, 124 Kan. 533, 261 Pac. 600 (1927), in which a filiation proceeding and not a felony prosecution was obviously in order.

There are also numerous related statutes covering interstate or intrastate transportation of women for prostitution.<sup>55</sup> Many statutes penalizing the operation of houses of prostitution also are closely related to pandering.<sup>56</sup>

(d) *The pimp*. Pimping as defined by statute consists of soliciting persons to become the customers of prostitutes, the traditional definition, or of living off or receiving the earnings of prostitutes. Occasionally treatment discriminations are made between the two kinds of conduct,<sup>57</sup> one being punished more heavily than the other. Ordinarily compensation must be forthcoming before the crime can be committed,<sup>58</sup> though if no money or other consideration actually passes, the crime of attempted solicitation may have been committed.<sup>59</sup> When receiving earnings is made criminal, money need only be received from one who is known to be a prostitute. The amount received need not form all or a substantial part of the income of the pimp.<sup>60</sup>

Partaking in part both of statutes prohibiting pandering and those prohibiting pimping are those which penalize husbands who cause or permit their wives to commit prostitution,<sup>61</sup> and par-

<sup>55</sup> *E.g.*, GA. CODE ANN. § 26-6204 (1953); KY. REV. STAT. ANN. §§ 436.040(4), (5) (1960); LA. REV. STAT. § 14:84(6) (1950); N.J. REV. STAT. § 2A:133-12 (1951); OHIO REV. CODE ANN. § 2905.21 (Baldwin 1958). There may be a constitutional question whether these provisions conflict with the federal statute, 18 U.S.C. § 2421, discussed in the text at notes 92-105 *infra*. See *Pennsylvania v. Nelson*, 350 U.S. 497 (1956); *DeVeau v. Braisted*, 363 U.S. 144 (1960), for the concepts involved. There are no federal cases on the precise problem here considered.

<sup>56</sup> *E.g.*, N.J. REV. STAT. § 2A:133-10 (1951) (attempting to detain female in disorderly house because of debt); OHIO REV. CODE ANN. § 2905.20 (Baldwin 1958) (detention of person or effects in a disorderly house).

<sup>57</sup> *E.g.*, CAL. PEN. CODE § 266h (living off earnings; 1 to 10 years); CAL. PEN. CODE § 318 (solicitation; up to 6 months, \$500 fine or both); ILL. ANN. STAT. ch. 38, § 11-15 (Smith-Hurd 1961) (soliciting; up to 1 year, \$200 fine or both), ILL. ANN. STAT. § 11-16 (Smith-Hurd 1961) (arranging or offering to arrange prostitution defined as non-compulsory pandering; up to 1 year not in penitentiary or 1 to 5 years in penitentiary); N.J. REV. STAT. § 2A:133-2 (1951) (soliciting a misdemeanor), N.J. REV. STAT. § 2A:133-8 (1951) (accepting earnings a high misdemeanor). Other statutes are gathered and cited in MUELLER, Table 6B(c).

<sup>58</sup> *People v. Smith*, 44 Cal. 2d 77, 279 P.2d 33 (1955).

<sup>59</sup> *Sellers v. United States*, 131 A.2d 300 (D.C. Munic. Ct. App. 1957).

<sup>60</sup> *People v. Coronado*, 90 Cal. App. 2d 762, 767, 203 P.2d 862 (1949): "We do not think the act was intended to favor opulent pimps over impecunious ones. Both are harmful to good morals and the welfare of society. Indeed the former seem more objectionable than the latter, and certainly they are more odious."

<sup>61</sup> *E.g.*, CAL. PEN. CODE § 266g; N.J. REV. STAT. § 2A:133-7 (1951). Special problems have arisen in California because of Civ. CODE § 157: "Neither husband nor wife has any interest in the property of the other, but neither can be excluded from the other's dwelling . . . ." In *People v. Head*, 146 Cal. App. 2d 744, 304 P.2d 761 (1956), the defendant claimed that he could not be convicted of permitting his wife to remain in

ents<sup>62</sup> or others<sup>63</sup> who cause or permit children to remain in a house of prostitution or to engage in prostitution. Child neglect statutes are also in terms broad enough to penalize parents who connive at the delinquency of or who neglect their children for any reason whatever.<sup>64</sup>

(e) *Those who facilitate prostitution.* The persons most obviously facilitating prostitution are operators of houses of prostitution. Laws are in effect in every jurisdiction which make it a criminal offense to own or operate such a house.<sup>65</sup> In addition, activities incidental to the running of such a business fall within the broad language of statutes applicable to pandering and pimping. But beyond this it is common to reach by state statute those whose otherwise legitimate operations may be knowingly misused to facilitate prostitution. Thus criminal penalties lie against one who leases premises with knowledge that they are to be used for purposes of prostitution or who permits known prostitution to continue.<sup>66</sup> Holders of liquor licenses may be guilty of a criminal offense by permitting known prostitutes to frequent their premises.<sup>67</sup> Persons connected with employment agencies who send

a house of prostitution when such house was also their home [thus belying the title of the book by ex-madam Polly Adler, *A HOUSE IS NOT A HOME* (1953)], and he could not, therefore, lawfully eject her even if he did not approve of her practices. The court approved a trial court instruction to the jury that "the defendant could avoid the penalty of the law if he used in good faith all lawful means to have her leave and tried in all reasonable ways to induce her to do so." 146 Cal. App. 2d at 751, 304 P.2d at 166.

<sup>62</sup> E.g., CAL. PEN. CODE § 309; N.J. REV. STAT. § 2A:133-9 (1951); N.Y. PEN. LAW §§ 70(4), 494; PA. STAT. ANN. tit. 18, § 4509 (1945).

<sup>63</sup> KANSAS CITY CODE § 43-5.

<sup>64</sup> E.g., CAL. WELFARE & INST'NS CODE §§ 600, 726; MICH. COMP. LAWS § 722.562 (1948); MO. ANN. STAT. §§ 211.031, 441 (1961); N.Y. CODE CRIM. PROC. §§ 913-a to -dd; BALTIMORE, MD. CHARTER & PUBLIC LOCAL LAWS § 767 (1949).

<sup>65</sup> Statutes are gathered in MUELLER, Table 6A(b).

<sup>66</sup> E.g., IOWA CODE ANN. § 724.6 (1950); N.Y. CODE CRIM. PROC. § 887(4); N.Y. MULT. DWELL. LAW § 350(1); N.J. REV. STAT. § 2A:133-11 (1951); OHIO REV. CODE ANN. § 2905.27(B) (Baldwin 1958). See *People v. Webb*, 25 N.Y.S.2d 554 (Magis. Ct. 1941) *rev'd on other grounds*, 26 N.Y.S.2d 386 (Spec. Sess. 1941). This is a separate matter from the effect that illegal use of the premises may have on the lease, discussed in the text at note 133 *infra*.

<sup>67</sup> E.g., CAL. BUS. & PROF. CODE § 25601 ("disorderly house or place . . . to which people resort for purposes which are injurious to the public morals, health, convenience, or safety . . ."); MISS. CODE ANN. § 10223(1)(e) (1952) ("to permit persons of ill repute, known criminals, prostitutes or minors to frequent his licensed premises . . ."); *cf.* MASS. ANN. LAWS ch. 272, § 25 (1956), which makes it a crime for any person owning, managing or controlling a restaurant, tavern or other place in which food or drink is sold to the public to provide or permit the use of closed or screened booths, stalls or enclosures. Revocation of licenses is discussed in the text at notes 139-140 *infra*.

women to places which they know or on reasonable inquiry could have determined to be of ill repute or houses of prostitution or assignation commit criminal acts.<sup>68</sup> Drivers of taxicabs who knowingly transport prostitutes or customers of prostitutes also commit criminal acts in a number of jurisdictions.<sup>69</sup>

Even more detailed control measures are embodied in local ordinances, reaching activities which at first glance seem unconnected with prostitution, but which in fact play a major role in the suppression of prostitution. Counterpart ordinances to state statutes are common controlling lessors of rooms and apartments<sup>70</sup> and operators of hotels<sup>71</sup> who may rent to prostitutes and others about to engage in illicit sexual activity. Liquor licensees may be under strict control at the local level as to whom they permit on their premises.<sup>72</sup> Owners and operators of dancing academies,<sup>73</sup> public dance halls<sup>74</sup> and rental halls<sup>75</sup> commit criminal acts if prostitutes are permitted on the premises, if solicitation occurs or if lewd conduct takes place. Because the old bordello may today appear in the guise of a Turkish or other public bath, a massage parlor<sup>76</sup> or a place where physical therapy is administered, ordinances are common prohibiting employees of such establishments

<sup>68</sup> *E.g.*, MINN. STAT. § 184.15(8) (1946); N.Y. CODE CRIM. PROC. § 887(4); N.Y. GEN. BUS. LAW § 190; PA. STAT. ANN. tit. 43, § 560(f) (1952); TEX. REV. CIV. STAT. arts. 5221a-5, § 7C(f) and 5221a-6, § 10(f) (Supp. 1961). See *People v. Catalano*, 25 Misc. 2d 342, 205 N.Y.S.2d 618 (Magis. Ct. 1960), which applied the language "who loiters in or near any thoroughfare or public or private place for the purpose of inducing, enticing or procuring another to commit lewdness, fornication, unlawful sexual intercourse or any other indecent act" of N.Y. CODE CRIM. PROC. § 887(4)(c) to one who offered high wages to clients if they would go to bed with their prospective but unnamed employers, though such conversations took place in his offices and not on the public street.

<sup>69</sup> *E.g.*, GA. CODE ANN. § 26-6203 (1953); HAWAII REV. LAWS § 309-26 (1955); KY. REV. STAT. ANN. § 436.075(2) (1960); MISS. CODE ANN. § 2333 (1956); OHIO REV. CODE ANN. § 2905.27(D) (Baldwin 1958). This is in addition to revocation of licenses, discussed in the text at notes 149 and 150 *infra*.

<sup>70</sup> BURBANK CODE § 8-210; CHICAGO CODE § 192-1; Detroit, Mich., Ordinance 320-F, § 9, August 14, 1958; KANSAS CITY ORDS. §§ 43-2, 43-8; LOS ANGELES CODE § 41.10; MONTGOMERY CODE ch. 20, §§ 46(7), 48; MIAMI CODE ch. 35, § 28 (within one week after receiving notice from chief of police that premises are being so used).

<sup>71</sup> Detroit, Mich., Ordinance 319-F, §§ 9, 11, August 14, 1958.

<sup>72</sup> TOLEDO, OHIO, MUN. CODE § 25-2-8 (1956) [hereinafter cited as TOLEDO CODE]. See also the Burbank and Los Angeles provisions cited note 81a *infra*.

<sup>73</sup> LOS ANGELES CODE § 41.35.

<sup>74</sup> BURBANK CODE §§ 7-512.1, 7-514; CLEVELAND ORDS. §§ 11.4309, 13.1707; Detroit, Mich., Ordinance 559-F, §§ 13, 18, March 9, 1961; KANSAS CITY ORDS. § 11-5.

<sup>75</sup> Detroit, Mich., Ordinance 581-F, §§ 12, 14, June 15, 1961.

<sup>76</sup> The WOLFENDEN REPORT at 95-96 forecast such a trend if soliciting were made a criminal offense, and the forecast was correct. See Jones, *The Law Versus Prostitution*, [1960] CRIM. L. REV. 704.

from serving or attending patrons of the opposite sex<sup>77</sup> or nude patrons in the presence of persons of the opposite sex.<sup>78</sup> Call girl operations may masquerade as escort agencies,<sup>79</sup> and so special ordinances sometimes control the operation of these enterprises.<sup>80</sup> Control of taxicab drivers at the local level is also common.<sup>81</sup> The ordinance may apply to all businesses.<sup>81a</sup> Such ordinances form the mainstay of local law enforcement, even though ordinance prosecutions are rarely revealed in the appellate decisions.

(f) *The customer.* Statutes which directly penalize the act of patronizing a prostitute are not common, though they do exist.<sup>82</sup> More often, activity of the customer may violate a collateral statute in broad terms. Fornication statutes, where they exist,<sup>83</sup> apply to any act of sexual intercourse between persons who are not married to each other, except as the legislature<sup>84</sup> or courts<sup>85</sup> add the requirement of public, open or notorious cohabitation. Solicitation statutes or ordinances include the man who initiates contact with a prostitute.<sup>86</sup> Where houses of prostitution exist, those who

<sup>77</sup> DETROIT, MICH., COMP. ORDINANCES, ch. 180, § 16(c) and ch. 181, § 5(b) (1954) [hereinafter cited as DETROIT ORDS.]; LOS ANGELES CODE § 103.205(c).

<sup>78</sup> CHICAGO CODE § 152-6. Compare DETROIT ORDS. ch. 181, § 5(b).

<sup>79</sup> See, e.g., *State v. Poague*, 245 Minn. 438, 72 N.W.2d 620 (1955).

<sup>80</sup> BURBANK CODE § 6-1800 to -1811.

<sup>81</sup> BURBANK CODE § 8-211; CHICAGO CODE §§ 28.1-12, 192-3; KANSAS CITY ORDS. § 43-10; LOS ANGELES CODE §§ 41.08, 41.11; MONTGOMERY CODE ch. 20, § 46(6).

<sup>81a</sup> BURBANK CODE 8-217; LOS ANGELES CODE § 41.11.2; TOLEDO CODE § 17-10-9.

<sup>82</sup> E.g., ILL. ANN. STAT. ch. 38, § 11-18 (Smith-Hurd 1961); WIS. STAT. ANN. § 944.31 (1958); CHICAGO CODE § 192-1. Compare TEX. PEN. CODE art. 607(14) (1952) ("All male persons who habitually associate with prostitutes . . ."). Casual, non-public association with a prostitute in her room is not enough, *Ellis v. State*, 65 Tex. Crim. 480, 145 S.W. 339 (1912), since an isolated act of intercourse is punishable either as fornication or as adultery. However, one who ate and slept in a house of prostitution on a number of occasions and apparently acted as bookkeeper could properly be convicted; the facts suggest that there was more than the status of customer present. *Lingenfelter v. State*, 73 Tex. Crim. 186, 163 S.W. 781 (1914).

<sup>83</sup> Statutes are cited in MUELLER, Table 4B. Similar coverage is sometimes found in ordinances, e.g., BURBANK CODE § 8-209; KANSAS CITY ORDS. § 43-4; LOS ANGELES CODE § 41.07.

<sup>84</sup> E.g., ILL. ANN. STAT. ch. 38, § 11-8 (Smith-Hurd 1961) ("if the behavior is open and notorious"); S.C. CODE § 16-408 (1952); TEX. PEN. CODE art. 503 (1952); WYO. STAT. ANN. § 6-86 (1959).

<sup>85</sup> *City of Chicago v. Murray*, 333 Ill. App. 233, 77 N.E.2d 452 (1947); *Richey v. State*, 172 Ind. 134, 87 N.E. 1032 (1909) (must cohabit, though not necessarily openly).

<sup>86</sup> E.g., HAWAII REV. LAWS § 309-24 (1955): "Any man or woman . . . who solicits . . . another to commit an act of lewdness, assignation or prostitution with himself or herself . . ." See also CHICAGO CODE § 192-7, CLEVELAND ORDS. § 13.1313 and MIAMI CODE ch. 35, § 33. The New York vagrancy provisions [N.Y. CODE CRIM. PROC. § 887(4)(c)] apparently apply. *People v. Hale*, 8 N.Y.2d 162, 168 N.E.2d 518, 203 N.Y.S.2d 71 (1960) (homosexual solicitation). Compare *People v. Gould*, 306 N.Y. 352, 118 N.E.2d 553 (1954), which refused to apply § 887(4)(b) ("who offers or offers to secure another for the purpose of

frequent or loiter about them are guilty of a crime.<sup>87</sup> Statutes<sup>88</sup> or ordinances<sup>89</sup> often penalize anyone who enters any place for purposes of illicit intercourse or lewdness. Appellate courts, however, have not shown overwhelming enthusiasm toward the application of such statutes, particularly those which penalize persons "loitering" in a house of prostitution, to a male who has a single act of intercourse with a prostitute.<sup>90</sup> Lacking any of these statutes, the male's conduct may still amount to aiding and abetting<sup>91</sup> an act of prostitution, thus making him vicariously responsible for the woman's act. In any event, the invocation of these statutes is less likely to be designed to punish the male or control his future activities than it is to coerce him to cooperate with the prosecuting authorities by testifying against the woman.

*Federal control.* Federal legislation is directed chiefly at control of interstate prostitution and at exclusion and deportation of alien prostitutes. The most important statute is the Federal White Slave Act, or Mann Act,<sup>92</sup> which penalizes anyone who knowingly transports in interstate or foreign commerce "any woman or girl for the purpose of prostitution or debauchery, or for any other

prostitution, or for any other lewd or indecent act") to an instance where a man asked a woman to go to work for him as a prostitute. The *Hale* case indicates that § 887(4)(c) would apply to such a case. 8 N.Y.2d at 164, 168 N.E.2d at 519, 203 N.Y.S.2d at 74.

<sup>87</sup> *E.g.*, CONN. GEN. STAT. ANN. §§ 53-231, -232 (1960); MICH. COMP. LAWS § 750.167 (1948); CHICAGO CODE § 192-1; CLEVELAND ORDS. § 13.1314. Compare the interpretation of the vagrancy statute in *Lingenfelter v. State*, 73 Tex. Crim. 186, 163 S.W. 781 (1914), discussed in note 82 *supra*. Compare also MIAMI CODE ch. 35, § 31: "It shall be unlawful for any person to ride or drive or walk through or along any street . . . with any prostitute or woman of ill fame."

<sup>88</sup> *E.g.*, N.J. REV. STAT. § 2A:133-2(f) (1951); TEX. PEN. CODE art. 607(18) (1952).

<sup>89</sup> *E.g.*, BURBANK CODE § 8-209; KANSAS CITY ORDS. § 43-9: "for purpose of prostitution for hire"; LOS ANGELES CODE § 41.11.1. *Cf.* Detroit, Mich., Ordinance 319-F, § 10: "It shall be unlawful for any two persons of opposite sex, except husband and wife or parent and minor child, to occupy jointly and privately any room or rooms in such licensed establishment (hotel)." Section 11 of the same ordinance makes it an offense to register falsely. Similar provisions apply to licensed rooming houses, Ordinance 320-F, § 10. See also the materials cited and discussed in notes 21 and 28 *supra*. The two California ordinances may well be unconstitutional in light of *In re Lane*, 367 P.2d 673, 18 Cal. Rptr. 33 (1961), note 21 *supra*.

<sup>90</sup> Compare *State v. Gardner*, 174 Iowa 748, 156 N.W. 747 (1916), which suggests that the statute applies, with *People v. Brandt*, 306 P.2d 1069 (Cal. Super. Ct. 1956) and *People v. Anonymous*, 161 Misc. 379, 292 N.Y. Supp. 282 (Magis. Ct. 1936), which suggest that a single visit is not enough. See also the Texas cases summarized in note 82 *supra*.

<sup>91</sup> *E.g.*, GA. CODE ANN. § 26-6204 (1953); HAWAII REV. LAWS § 309-30 (1955) ("Any person who is a privy to, or aids, abets or participates in" activity punished as prostitution and related offenses); MISS. CODE ANN. § 2333 (1956); MONTGOMERY CODE ch. 20, § 46(2).

<sup>92</sup> 18 U.S.C. § 2421 (1958).

immoral purpose, or with the intent and purpose to induce, entice, or compel such woman or girl to become a prostitute or to give herself up to debauchery, or to engage in any other immoral practice . . . ." It is clear that the statute was intended by Congress to stop the traffic in women, and it is primarily so applied.<sup>93</sup> Not only has it been frequently invoked against the pander and pimp,<sup>94</sup> but it has also been invoked when a woman was transported to become the "madam" of a Mexican house of prostitution<sup>95</sup> or to become a dancer in a place where prostitutes worked.<sup>96</sup> Several cases have applied the act to men who engaged young girls to work in theaters or shows in which it seemed highly likely that they would become or had subsequently become sexual delinquents.<sup>97</sup> Such cases seem consistent with the purposes of the legislation. The language of the statute is so sweeping, however, that conduct which a United States attorney or a grand jury finds objectionable can also be reached if any interstate travel is involved. Thus successful prosecutions have been maintained against persons who took a mistress along with them on a trip<sup>98</sup> or sent for her to join them,<sup>99</sup> who took or brought a woman across a state line to contract a bigamous marriage for either religious<sup>100</sup> or other reasons,<sup>101</sup> who maintained an adulterous relationship,<sup>102</sup> who took a secretary along in part for the purpose of intercourse<sup>103</sup> or who

<sup>93</sup> See Booth, *The White Slave Traffic Act*, 20 CALIF. S.B.J. 102 (1945); Thornton, *Organized Crime in the Field of Prostitution*, 46 J. CRIM. L., C. & P.S. 775 (1956).

<sup>94</sup> Typical recent cases include *United States v. Ratley*, 284 F.2d 553 (2d Cir. 1960); *Flanagan v. United States*, 277 F.2d 109 (5th Cir. 1960) and *Griffin v. United States*, 272 F.2d 801, *corrected on denial of rehearing* 273 F.2d 958 (5th Cir. 1960). However, to transport a prostitute back from a vacation to her place of work is not within the statute. *Mortensen v. United States*, 322 U.S. 369 (1944); *United States v. Ross*, 257 F.2d 292 (2d Cir. 1958).

<sup>95</sup> *Simpson v. United States*, 245 Fed. 278 (9th Cir.), *cert. denied*, 245 U.S. 667 (1917).

<sup>96</sup> *Beyer v. United States*, 251 Fed. 39 (9th Cir. 1918).

<sup>97</sup> *Athanasaw v. United States*, 227 U.S. 326 (1913); *United States v. Lewis*, 110 F.2d 460 (7th Cir.), *cert. denied*, 310 U.S. 634 (1940); *cf. Berry v. United States*, 295 F.2d 192 (8th Cir. 1961) (entertainer who took young Indian girl along on interstate trip). In *United States v. Mathison*, 239 F.2d 358 (1956) the Seventh Circuit held it was not a violation to transport a young girl to take nude pictures of her, but was sufficient if intercourse with her was also an objective.

<sup>98</sup> *Caminetti v. United States*, 242 U.S. 470 (1917).

<sup>99</sup> *United States v. Reginelli*, 133 F.2d 595 (3d Cir.), *cert. denied*, 318 U.S. 783 (1943).

<sup>100</sup> *Cleveland v. United States*, 329 U.S. 14 (1946).

<sup>101</sup> *Burgess v. United States*, 294 Fed. 1002 (D.C. Cir. 1924). *Contra*, *Gerbino v. United States*, 293 Fed. 754 (3d Cir. 1923).

<sup>102</sup> *Whitt v. United States*, 261 F.2d 907 (6th Cir. 1959).

<sup>103</sup> *Ghadiali v. United States*, 17 F.2d 236 (9th Cir.), *cert. denied*, 274 U.S. 747 (1927).



during a trip became acquainted with girls whom they then took with them for sexual companionship.<sup>104</sup> Such cases, of course, have nothing to do with control of prostitution, but they indicate the danger inherent in using over-broad statutory language which gives the prosecutor the power to reach either conduct or persons he does not like.<sup>105</sup>

The United States also cooperates in the repression of international traffic in women and children. It became a party to the international convention for suppression of the white slave traffic of 1904<sup>106</sup> and adopted the amending agreement of 1949.<sup>107</sup> However, treaties do not under American law create criminal liability directly,<sup>108</sup> and so the only implementing legislation other than the Mann Act is that which bars the entry of alien prostitutes<sup>109</sup> and authorizes deportation of those who are convicted of crimes involving moral turpitude<sup>110</sup> within five years after their entry.<sup>111</sup>

<sup>104</sup> *Berry v. United States*, 295 F.2d 192 (8th Cir. 1961); *Mellor v. United States*, 160 F.2d 757 (8th Cir.), *cert. denied*, 331 U.S. 848 (1947). In this case the United States attorney told the jury that if it did not find the defendants guilty "we might as well tear up this law . . . and send notice to all the playboys that henceforth they can transport a female from one state to another for the purpose of debauchery and defile the womanhood of America." 160 F.2d at 765. See also *Elrod v. United States*, 266 Fed. 55 (6th Cir. 1920). Compare the approach in *State v. Thibodeaux*, 136 La. 935, 67 So. 973 (1915), which held that "one who transports a woman through or across this state for the purpose of having illicit sexual intercourse with her is not thereby guilty of transporting her for the purpose of prostitution, within the meaning of the statute of 1910." 136 La. at 933. The language of the Mann Act is of course broader than prostitution alone.

<sup>105</sup> Several cases were brought against known underworld figures against whom no other specific misconduct could be proved, e.g., *Caminetti v. United States*, 242 U.S. 470 (1917), and *United States v. Reginelli*, 133 F.2d 595 (3d Cir.), *cert. denied*, 318 U.S. 783 (1943). See also *Booth*, *supra* note 93. There seems also a suspicion in some of the cases that the fact the persons involved were of different races accounted for the bringing of the charges, e.g., *Berry v. United States*, 295 F.2d 192 (8th Cir. 1961); *cf. State v. Davis*, 165 N.E.2d 504 (Cincinnati, Ohio, Munic. Ct. 1959).

<sup>106</sup> Proclamation of June 15, 1908, 35 Stat. 1979.

<sup>107</sup> Proclamation of August 7, 1950 [1951] 2 U.S.T. & O.I.A. 1997; T.I.A.S. No. 2332.

<sup>108</sup> *The Over the Top*, 5 F.2d 838 (D. Conn. 1925); *United States v. Ekenstam*, 7 U.S.C.M.A. 168, 21 C.M.R. 294 (1956). *Contra*, *United States v. Kearny*, 2 Extraterritorial Cases 665 (U.S. Ct. for China, 1923).

<sup>109</sup> Act of June 27, 1952, § 212(a)(12), 66 Stat. 181, 8 U.S.C. § 1182(a)(12) (1958). Those convicted of crimes involving moral turpitude are also ineligible under § 212(a)(9), 66 Stat. 182 (1952), 8 U.S.C. § 1182(a)(9) (1958), and conviction for keeping a brothel or being party as landlord to the keeping of a brothel amounts to such a crime; concealment of the fact in an application for a visa makes the alien deportable. *Ablett v. Brownell*, 240 F.2d 625 (D.C. Cir. 1957).

<sup>110</sup> Act of June 27, 1952, § 241(a)(12), 66 Stat. 204, 8 U.S.C. § 1251(a)(12) (1958).

<sup>111</sup> Act of June 27, 1952, § 241(a)(4), 66 Stat. 204, 8 U.S.C. § 1251(a)(4) (1958). A single conviction must result in a sentence of confinement or actual confinement for a year or more; two or more such convictions authorize deportation whether or not confinement actually ensues.

This can be used as authority to deport alien homosexuals,<sup>112</sup> pimps or panders,<sup>113</sup> and prostitutes,<sup>114</sup> but probably cannot be applied to alien customers of prostitutes.<sup>115</sup> American citizens who have to do knowingly with alien prostitutes within three years after their entry are reached indirectly by a statute which makes it a criminal offense for them to fail to report the facts to the Commissioner of Immigration and Naturalization.<sup>116</sup> The Commissioner is by statute the functionary responsible for gathering and forwarding information relevant to international control of traffic in women and children covered by the international convention.<sup>117</sup>

The United States has not yet ratified the Convention for the Suppression of the Traffic in Persons and of the Exploitation or Prostitution of Others.<sup>118</sup>

## II. CONTROL THROUGH CIVIL ACTIONS

Even though prostitution is made criminal by statute, enforcement of such statutes is entrusted to public officials; if law enforcement is either corrupt or lax, houses of prostitution in one form or another may flourish unhindered. One of the single greatest sources of police corruption in metropolitan areas through the

<sup>112</sup> *Hudson v. Esperdy*, 290 F.2d 879 (2d Cir. 1961). That case involved disorderly conduct under N.Y. PEN. LAW § 722(8); loitering about a public place soliciting men for the purpose of committing the crime against nature or other lewdness. See also *Wyngaard v. Rogers*, 187 F. Supp. 527 (D.D.C. 1960) (same offense).

<sup>113</sup> *Sparado v. Nabors*, 229 F.2d 190 (5th Cir. 1956) (soliciting or aiding or abetting act of prostitution equally included).

<sup>114</sup> *Lane ex rel. Cronin v. Tillinghast*, 38 F.2d 231 (1st Cir. 1930).

<sup>115</sup> Cf. *United States ex rel. Huber v. Sibray*, 178 Fed. 144 (C.C.W.D. Pa. 1910), *rev'd on other grounds*, 185 Fed. 401 (3d Cir. 1911), in which a single act of fornication or adultery was held not to be enough to bar entry, and living in adultery in this country not to be ground for deportation. See also *Posusta v. United States*, 285 F.2d 533 (2d Cir. 1961) (living with paramour does not bar naturalization).

<sup>116</sup> 18 U.S.C. § 2424 (1958).

<sup>117</sup> The function was transferred by 1950 Reorganization Plan No. 2, 64 Stat. 1261, 5 U.S.C. § 3421 (Supp. III, 1961). Typical reports under the act may be found in LEAGUE OF NATIONS, ADVISORY COMMISSION ON SOCIAL QUESTIONS, ANNUAL REPORTS RECEIVED FROM GOVERNMENTS RELATING TO THE TRAFFIC IN WOMEN AND CHILDREN, SUMMARIES FOR 1926 (1928.IV.1., p. 11); 1928 (1930.IV.1., p. 15); 1929 (1931.IV.2., pp. 18-19); 1931 (1932.IV.7., pp. 21-22); 1933-1934 (1935.IV.1., pp. 15-16); 1935-1936 (1937.IV.2., pp. 12-13); 1936-1937 (1938.IV.2., pp. 6-7); and 1938-1939 (1940.IV.3., pp. 7-8, 22-24, 26-27). Reports to the U.N. are available for 1946-47 (E/TWC. 1946-47/Summary, U.N. Pub. Sales No. 1948.IV.2., pp. 8-9, 12-13) and for 1948-1950 (E/TWC/Summary 1948-1950, U.N. Pub. Sales No. 1952.IV.12., pp. 7-8, 23).

<sup>118</sup> United Nations General Assembly Resolution 317(IV) of December 2, 1949. See U.N. DEPT. OF ECON. & SOCIAL AFFAIRS, STUDY ON TRAFFIC IN PERSONS AND PROSTITUTION 50-57 (ST/SOA/SD/8) (U.N. Pub. Sales No. 59.IV.5) (1959).

1930's was organized prostitution.<sup>119</sup> Under such conditions there was not much which reform-minded citizens could accomplish on the criminal law side. Traditional equity practice was not of much assistance either. Nuisances could be abated, but before a private citizen, as opposed to a public official, could maintain an action for an injunction against such a nuisance it was necessary for him to show special and particular injury to himself separate from that suffered by him in common with the public at large.<sup>120</sup> So long as prostitution was conducted in relatively poor and run-down sections of the community, the chances were not great of persons in the locality actually incurring the expense of such an injunction proceeding or of succeeding if they brought it.<sup>121</sup>

As a result, concerned citizens turned to the legislatures for assistance. In the first two decades of this century so-called "Red-Light Abatement Laws" were passed in all states except Nevada, Oklahoma and Vermont.<sup>122</sup> The chief innovation was the provision in all these states except New Jersey and Pennsylvania that private citizens could maintain an abatement action without having to show particular damage or injury. This meant that citizens interested in reform might undertake on their own initiative to repress houses of prostitution or places where prostitutes habitually plied their trade, without the need to rely on local police and prosecuting attorneys. These statutes have been the chief weapon by which red-light districts and organized houses of prostitution have been repressed.<sup>123</sup>

Although statutory details differ, in general the statutes call for an abatement order to be entered pursuant to which all furni-

<sup>119</sup> MURTAGH & HARRIS, *CAST THE FIRST STONE* 202-44 (1957); WATERMAN, *PROSTITUTION AND ITS REPRESSION IN NEW YORK CITY* 46-49 (1932); Quisenberry, *supra* note 3, at 319.

<sup>120</sup> Hoyt v. McLaughlin, 250 Ill. 442, 95 N.E. 464 (1911).

<sup>121</sup> See Johnson, *Good Laws . . . Good Tools*, 38 J. SOCIAL HYGIENE 204 (1952); MINNEAPOLIS VICE COMMISSION, REPORT 61-66 (1911).

<sup>122</sup> A comprehensive study made under the auspices of the American Social Hygiene Association is found in GOULD, *DIGEST OF LAWS DEALING WITH PROSTITUTION AND OTHER SEX OFFENSES* (1942). Alaska and Hawaii, though not covered in that study, also have such statutes. ALASKA COMP. LAWS §§ 56-6-1—56-6-9 (1949); HAWAII REV. LAWS §§ 267-11 to -22 (1955). Current citations may be found in MUELLER, Table 6A(b) (*passim*).

<sup>123</sup> The impetus behind such repression has usually been provided by citizens' groups. The work of the Committee of Fifteen, the Committee of Fourteen and other private groups in New York City is described in WATERMAN, *op. cit. supra* note 119, at 80-116. The chief agency on a nation-wide basis is the American Social Hygiene Association. Its postwar activity is described in Shenehon, *The Prevention and Repression of Prostitution in North America*, 13 INT'L REV. OF CRIM. POLICY 15, 21-23 (ST/SOA/Ser.M/13) (U.N. Pub. No. 58.IV.4) (1958).

ture, fixtures and other contents of the building are to be sold and the building locked up under judicial supervision for a period of one year. If the owner pays all costs of the proceeding and posts a bond equal to the full value of the property<sup>124</sup> conditioned on his immediate abatement of the nuisance, the court may release the premises from the abatement order. Some statutes also authorize a mulct tax of a relatively minor amount on the owner of the building.<sup>125</sup>

These statutes were immediately subjected to attack on constitutional grounds by persons adversely affected by them. The basic abatement provisions were upheld in every state where they were attacked<sup>126</sup> except New Jersey,<sup>127</sup> even when invoked against an owner who was in fact unaware of the use to which his premises were being put by his lessee.<sup>128</sup> There was less agreement as to the constitutionality of the application of the mulct tax to such an owner, some holding this unconstitutional<sup>129</sup> but others approving it.<sup>130</sup> There was less of a willingness to permit owners of personal property found on the premises to be penalized by the sale of their property unless they were joined as parties in the action and were proven to have knowledge of the uses to which the premises were being put.<sup>131</sup> Efforts to utilize the acts to enjoin future individual acts of prostitution failed because of the traditional unwillingness of courts of equity to enjoin criminal acts.<sup>132</sup>

<sup>124</sup> *E.g.*, CAL. PEN. CODE §§ 11232; MASS. ANN. LAWS ch. 139, § 11 (1957); *cf.* MICH. COMP. LAWS § 692.265 (1948) (bond from \$1000 to \$50,000 as set by court).

<sup>125</sup> *E.g.*, CONN. GEN. STAT. ANN. § 19-322 (1960); IOWA CODE ANN. § 99.27 (1949); MINN. STAT. ANN. § 617.40 (1947).

<sup>126</sup> *E.g.*, *People ex rel. Thrasher v. Smith*, 275 Ill. 256, 114 N.E. 31 (1916); *Chase v. Proprietors of Revere House*, 232 Mass. 88, 122 N.E. 162 (1919); *State ex rel. Wilcox v. Ryder*, 126 Minn. 95, 147 N.W. 953 (1914); *State ex rel. Kern v. Emerson*, 90 Wash. 565, 155 Pac. 579 (1916). See also cases cited in notes 128-131 *infra*.

<sup>127</sup> *Hedden v. Hand*, 90 N.J. Eq. 583, 107 Atl. 285 (1919). The court felt the legislation violated state constitutional provisions setting out traditional equity jurisdiction and in effect gave the court equitable jurisdiction over criminal offenses which if asserted would deprive defendants of the rights to grand jury indictment and of trial by jury.

<sup>128</sup> *People v. Casa Co.*, 35 Cal. App. 194, 169 Pac. 454 (1917); *State ex rel. English v. Fanning*, 96 Neb. 123, 147 N.W. 215, *vacated*, 97 Neb. 224, 149 N.W. 413 (1914); *State ex rel. Kern v. Emerson*, 90 Wash. 565, 155 Pac. 579 (1916).

<sup>129</sup> *State ex rel. Kern v. Emerson*, *supra* note 128.

<sup>130</sup> *State ex rel. Wilcox v. Ryder*, 126 Minn. 95, 147 N.W. 953 (1914). The question was left open in *Williams v. State ex rel. McNulty*, 150 Ga. 480, 104 S.E. 408 (1920), and *State ex rel. English v. Fanning*, 97 Neb. 224, 149 N.W. 413 (1914), *vacating* 96 Neb. 123, 147 N.W. 215, in which the tax was held unconstitutional.

<sup>131</sup> *State ex rel. Woodbury County Anti-Saloon League v. McGraw*, 191 Iowa 1090, 183 N.W. 593 (1921); *State ex rel. English v. Fanning*, *supra* note 130.

<sup>132</sup> Compare *People ex rel. Barrett v. Fritz*, 316 Ill. App. 217, 45 N.E.2d 48 (1942),

Use of rented premises by a lessee for purposes of prostitution may also be by statute grounds for revocation of the lease, which of course makes possible the use of legal and equitable remedies to eject the tenant.<sup>133</sup> Occasionally this is made mandatory after notice given by law enforcement authorities.<sup>134</sup>

### III. ADMINISTRATIVE CONTROL

As indicated previously, administrative control in the modern American setting means repression of prostitution rather than licensing or tolerating of houses or official medical inspection of prostitutes. Whenever licensing or medical inspection has been carried on it has been in violation of state law. Even though occasionally one encounters legislation giving city councils the power to "regulate, suppress" or "place under municipal supervision" brothels,<sup>135</sup> the total statutory context makes it clear that prostitution, organized or free-lance, is illegal.

Administrative action, as contrasted with judicial, relating to prostitution falls into two general classifications. The first comprises all penalties which flow against those who have furthered prostitution, chiefly through denial or revocation of licenses and permits to engage in certain kinds of activity. Thus persons convicted of keeping houses of prostitution may by law be ineligible to receive a liquor license,<sup>136</sup> and the same may extend to persons

in which the abatement law was invoked by the prosecutor to enjoin 1400 defendants from violating the gambling laws. The bill was dismissed:

"We think the distinction is clear. If some institution or individual or set of individuals should establish a bawdy house across from any of our homes and the place should become notorious, any one of us could complain and have the place enjoined, either as a private nuisance or as a public nuisance; and this notwithstanding the fact that the inmates thereof might be prosecuted criminally.

"Here, however, equity stops. It cannot enjoin fornication as such any more than it can enjoin murder, rape, mayhem or robbery. It is only when these crimes are carried on in a manner that makes the place of their activity a nuisance that equity intervenes. In the cases of the above bawdy houses the injunctions run only to the premises. They do not mean that the inmates may not carry on their practices in other places. It is the place of the nuisance which is enjoined." 316 Ill. App. at 225-26, 45 N.E.2d at 53.

<sup>133</sup> *E.g.*, CONN. GEN. STAT. ANN. § 52-539 (1960) (following conviction); GA. CODE ANN. § 26-6205 (1953); HAWAII REV. LAWS §§ 267-21, -22 (1955) (following abatement); MASS. ANN. LAWS ch. 139, § 19 (1957).

<sup>134</sup> KANSAS CITY ORDS. § 43-2; *cf.* MIAMI CODE ch. 35, § 28.

<sup>135</sup> NEV. REV. STAT. § 266.350(12) (1961); N.M. STAT. ANN. § 40-34-7 (1953). The Nevada legislature passed a statute in 1950 legalizing prostitution, but it was vetoed by the governor. PLOSCOWE, *SEX AND THE LAW* 255 (1951).

<sup>136</sup> *E.g.*, ILL. ANN. STAT. ch. 43, § 120(5) (Smith-Hurd Supp. 1961); N.Y. ALCO. BEV. CONTROL LAW §§ 126(1), (4).

convicted of soliciting or pandering,<sup>137</sup> or for other crimes involving moral turpitude.<sup>138</sup> Conviction of such offenses after receipt of a license is grounds for revoking it,<sup>139</sup> as may be the fact itself of permitting prostitutes to frequent the premises.<sup>140</sup> Like conditions attach to issuance and revocation of licenses and permits to own and operate employment agencies,<sup>141</sup> escort services,<sup>142</sup> massage parlors,<sup>143</sup> public baths,<sup>144</sup> rental halls,<sup>145</sup> public dance halls,<sup>146</sup> dancing academies<sup>147</sup> or perhaps any business for which a

<sup>137</sup> *E.g.*, ILL. ANN. STAT. ch. 43, § 120(6) (Smith-Hurd Supp. 1961); LA. REV. STAT. §§ 26:79(5), :279(6) (1950).

<sup>138</sup> ILL. ANN. STAT. ch. 43, § 120(6) (Smith-Hurd Supp. 1961); N.J. REV. STAT. §§ 33:1-25 (Supp. 1961), 33:1-31.2 (1938); VA. CODE ANN. § 4-31(1)(b) (Supp. 1960). Good moral character is required under many statutes, *e.g.*, FLA. STAT. ANN. § 561.15 (1962); PA. STAT. ANN. tit. 47, §§ 4-437, -470 (1952). Felony convictions also disqualify rather widely, *e.g.*, FLA. STAT. ANN. § 561.15 (1962); KY. REV. STAT. ANN. § 243.100(1) (1960); N.Y. ALCO. BEV. CONTROL LAW § 126(1); OHIO REV. CODE ANN. § 4303.29 (Baldwin 1958); TEX. PEN. CODE arts. 666-11, -12 (1952), 667-5 (1961). Qualifications for licensing are listed without further citation in JOINT COMMITTEE OF THE STATES TO STUDY ALCOHOLIC BEVERAGE LAWS, ALCOHOLIC BEVERAGE CONTROL 107 (1960). See also BERNARD, LIQUOR LAWS 20-23 (1949); CHILDS, MAKING REPEAL WORK 110-12 (1947).

<sup>139</sup> *E.g.*, CAL. BUS. & PROF. CODE § 24200(d); N.Y. ALCO. BEV. CONTROL LAW § 106(6), N. Y. State Liquor Authority Rule 36(7); VA. CODE ANN. § 4-37(1)(h) (Supp. 1960).

<sup>140</sup> CAL. BUS. & PROF. CODE § 24200(e); FLA. STAT. ANN. § 561.29(1)(a) (1962); KY. REV. STAT. ANN. § 244.120 (1960); MISS. CODE ANN. § 10223(1)(e) (1952); PA. STAT. ANN. tit. 47, § 4-493(14) (1952); VA. CODE ANN. § 4-37(1)(g) (Supp. 1960); MICH. ADMIN. CODE R 436.3(b), (c), (d) (1954). See also CHILDS, *op. cit. supra* note 138, at 142-47. Revocation on such grounds will be upheld if the licensee or his agents or employees have knowledge of the violations taking place or character of the persons congregating. *Presto v. Alcoholic Beverage Control Appeals Bd.*, 179 Cal. App. 2d 262, 3 Cal. Rptr. 742 (1960); *Kershaw v. Department of Alcoholic Beverage Control*, 155 Cal. App. 2d 544, 318 P.2d 494 (1957) (homosexual haunt); *Migliaccio v. O'Connell*, 307 N.Y. 566, 122 N.E.2d 914 (1954); *Lynch's Builders Restaurant v. O'Connell*, 303 N.Y. 408, 103 N.E.2d 531 (1952) (homosexual contacts made); *Reiter Liquor License Case*, 173 Pa. Super. 552, 98 A.2d 465 (1953); *Fernwood Hotel License*, 35 Pa. D. & C. 408, 28 Del. Co. Rep. 398 (1939).

<sup>141</sup> See statutes cited note 68 *supra*.

<sup>142</sup> BURBANK CODE §§ 6-1805, -1809 permits revocation on grounds "(a) That the permittee has, in the course of said business, committed, or caused, permitted, encouraged or condoned the commission of any act in violation of this article, or any lewd or immoral act, or any act of prostitution; (b) That the business has been conducted, in whole or in part, as a subterfuge to facilitate or to conceal the conduct of any unlawful or immoral business or practice."

<sup>143</sup> BURBANK CODE §§ 6-1602(i), -1604 (physical therapy); CHICAGO CODE § 152-1 to 152-8; DETROIT ORDS. ch. 180, §§ 6, 10, 16(c); LOS ANGELES CODE § 103.205(c); MIAMI CODE ch. 9, § 42.

<sup>144</sup> BURBANK CODE §§ 6-1602(i), -1604; DETROIT ORDS. ch. 181, §§ 3, 4; LOS ANGELES CODE § 103.205(c).

<sup>145</sup> Detroit, Mich., Ordinance 581-F, §§ 6, 11, 12, 14 (June 15, 1961).

<sup>146</sup> BURBANK CODE §§ 7-501, 7-514; CLEVELAND ORDS. § 11.4306; Detroit, Mich., Ordinance 559-F, §§ 10, 12, 13, 18 (March 9, 1961); NEW YORK CITY ADMIN. CODE, ch. 18, § 436-1.0(f) (1957); TOLEDO CODE § 25-6-19. For standards of revocation, see *Savoy Associates v. Valentine*, 266 App. Div. 63, 41 N.Y.S.2d 3 (1943), and compare *Adler v. Department of Alcoholic Beverage Control*, 174 Cal. App. 2d 256, 344 P.2d 336 (1959) (revocation of liquor license at taxi dance hall for solicitation of customers to prostitution).

<sup>147</sup> CHICAGO CODE § 116-6; LOS ANGELES CODE § 41.35.

permit is required.<sup>148</sup> Persons holding taxi permits or chauffeur's licenses who are convicted of soliciting, pimping or pandering often forfeit such licenses upon conviction<sup>149</sup> or through administrative action.<sup>150</sup>

The second major area of administrative control is that exercised by public health authorities to control venereal diseases. There seems no disagreement that prostitution is a major factor in the spread of venereal disease. One of the time-honored reasons advanced in favor of regulated, licensed and controlled prostitution is that supervised and institutionalized prostitutes can be kept relatively free from venereal disease and so will infect fewer patrons than if they plied their trade individually without examination.<sup>151</sup> This has proved false in experience wherever such a system has been instituted. American military experience in Europe proved that the greatest single source of infection among American troops in areas where licensing and medical inspection were standard practices was licensed houses.<sup>152</sup> There has been only one instance reported of a rigidly controlled military installation in which venereal disease rates remained phenomenally low, one operated by the British army,<sup>153</sup> but, moral questions aside, there were still instances in which patrons of that brothel became infected.<sup>154</sup> Venereal disease is always a concomitant of prostitution, as has appeared in this country in cities where informal licensing

<sup>148</sup> CHICAGO CODE § 192-4; cf. BURBANK CODE § 8-207; LOS ANGELES CODE § 41.11.2.

<sup>149</sup> E.g., GA. CODE ANN. § 26-6202 (1953); HAWAII REV. LAW § 309-26 (1955); KY. REV. STAT. ANN. § 436.075 (1960); OHIO REV. CODE ANN. § 2905.27(D) (Baldwin 1958); BURBANK CODE § 6-1338 (after arrest or conviction); CHICAGO CODE §§ 28.1-3, -10; MONTGOMERY CODE ch. 33, § 27.

<sup>150</sup> MISS. CODE ANN. § 3497(f) (1956); CHICAGO CODE § 192-4; DETROIT ORDS. ch. 145, § 17; NEW YORK CITY ADMIN. CODE ch. 18, §§ 436-2.0(24)(p), (27), (38) (1957). See *Deitchman v. Kennedy*, 5 Misc. 2d 680, 162 N.Y.S.2d 127 (Sup. Ct. 1957); *Abraham v. Valentine*, 166 Misc. 447, 300 N.Y. Supp. 796 (Sup. Ct. 1937).

<sup>151</sup> MINNEAPOLIS VICE COMMISSION, REPORT 40-55 (1911); BROUGHTON, PROSTITUTION AND THE WAR 12-19 (Public Affairs Pamphlet No. 65, 1942); Thornton, *Controlled Prostitution—A Myth*, 40 J. SOCIAL HYGIENE 111 (1954); Williams, *The Suppression of Commercialized Prostitution in the City of Vancouver*, 27 J. SOCIAL HYGIENE 364 (1941). See also Willcox, *Prostitution and Venereal Disease*, 13 INT'L REV. OF CRIM. POLICY 67 (ST/SOA/Ser.M/13) (U.N. Pub. No. 58.IV.4) (1958).

<sup>152</sup> Lentino, *Medical Evaluation of a System of Legalized Prostitution*, 158 J. Am. Medical A. No. 1, p. 20 (1955).

<sup>153</sup> Bettley, *The Medical Conduct of a Brothel*, 25 BRIT. J. VENEREAL DISEASE 56 (1949).

<sup>154</sup> The rate achieved was 0.31 per 1000 exposures. But it seemed possible to transmit the disease without the woman herself becoming infected. "It seems most likely that infective material from one client affected the next and was then removed by the woman in the course of her own prophylaxis; perhaps these women, exposed to risks so often, had a partial degree of immunity." *Id.* at 66.

and regulation have occurred. A study in Memphis indicated that all prostitutes who were suspected sources of disease had certificates showing them to be free from disease.<sup>155</sup> Ninety percent of inmates of houses of prostitution in one unidentified southern city were found to be infected.<sup>156</sup> Individual streetwalkers are also likely to be infected; 37 out of 50 in one random sample were so found.<sup>157</sup> Because venereal disease is quite difficult to detect in a woman, and since heavy doses of antibiotics taken immediately prior to a blood or smear test may produce a negative reading, medical opinion seems uniform that medically supervised prostitution is impossible as a solution to the venereal disease problem.<sup>158</sup> Public health records show a marked decrease in VD rates whenever organized prostitution is suppressed—a two-thirds decrease in Honolulu between 1945 and 1953;<sup>159</sup> a 31 percent decrease in Vancouver, B.C., with prostitutes declining from 24.6 percent of the suspected sources to only 7.5 percent.<sup>160</sup> Such experience is readily understandable in that a girl in a house of prostitution, particularly of the lowest type, can entertain between 30 and 100 men in a 20-hour period, whereas a call girl or a promiscuous amateur can accommodate only a fraction of that number.<sup>161</sup> Public health considerations, therefore, have loomed large in any program for the suppression of prostitution through application of criminal law.

Beyond this, however, statutes which are civil in nature are used to combat communicable diseases, and in so doing affect indirectly the practice of prostitution. All states by law have established health departments with either express or delegated powers to seek out persons infected with communicable diseases and to quarantine them until they are cured. Although the general communicable disease statute may be broad enough in many instances

<sup>155</sup> McGinnis & Packer, *Prostitution Abatement in a V.D. Control Program*, 27 J. SOCIAL HYGIENE 355, 357 (1941).

<sup>156</sup> Thornton, *supra* note 151, at 114.

<sup>157</sup> Planning for "The Kind of Help They Need," 28 J. SOCIAL HYGIENE 388 (1942). In the sample of women studied by the Gluecks only 21.5% were found free from syphilis and gonorrhoea. GLUECK, FIVE HUNDRED DELINQUENT WOMEN 191-93 (1934).

<sup>158</sup> Willcox, *supra* note 151; Lentino, *supra* note 152; PLOSCOWE, *op. cit. supra* note 135, at 263-65; MINNEAPOLIS VICE COMMISSION, REPORT 48-53 (1911). Only the call girl may be an exception. GREENWALD at 18.

<sup>159</sup> Quisenberry, *Eight Years After the Houses Closed*, 39 J. SOCIAL HYGIENE 312, 318 (1953).

<sup>160</sup> Williams, *supra* note 151, at 371.

<sup>161</sup> Brewer, *VD Prevention—A Dual Job*, 40 J. SOCIAL HYGIENE 99, 104 (1954).



to cover all persons, including prostitutes, infected with venereal diseases, in over forty jurisdictions there are special statutes authorizing administrative action against prostitutes because of their disease-spreading propensities. In the absence of or in addition to state legislation, local ordinances or board of health regulations promulgated pursuant to general legislative authorization often accomplish the same thing.

The statutes naturally vary in their terms. Under some of them a health officer may order examination of persons reasonably suspected of being infected with a venereal disease, and if the disease proves to be present, may quarantine the subject for treatment and cure.<sup>162</sup> In certain states prostitutes or those apprehended while associating with prostitutes are automatically to be suspected of infection and are to be examined and held until the results of the examination are known.<sup>163</sup> Provisions are also common authorizing compulsory examination of any prisoner in any jail or prison, whether before or after conviction, and the continued detention of such person without bail until a final report can be made.<sup>164</sup> If a convict's sentence expires before he is cured of his infection, he may be held in custody after such expiration until a cure is effected.<sup>165</sup> Occasionally statutes deny probation to

<sup>162</sup> ALA. CODE tit. 22, § 264 (1958); CONN. GEN. STAT. ANN § 19-94 (1960); CAL. HEALTH & SAFETY CODE § 3195; DEL. CODE ANN. tit. 16, § 703 (1953); FLA. STAT. § 384.07 (1961); IDAHO CODE ANN. § 39-603 (1961); IOWA CODE ANN. § 140.10 (1949); LA. REV. STAT. §§ 40:1063, :1064 (1950); MINN. STAT. ANN. § 144.12(7) (1961); MISS. CODE ANN. § 7078 (1952); MONT. REV. CODES ANN. § 69-1105 (1952); N.H. REV. STAT. ANN. § 579.18 (1955); N.J. REV. STAT. § 26:4-36 (Supp. 1961); N.M. STAT. ANN. § 12-3-8 (1953); OHIO REV. CODE ANN. § 3709.24 (Baldwin 1958); OKLA. STAT. ANN. tit. 63, § 548 (1949); ORE. REV. STAT. §§ 434.060-.080 (1960); VT. STAT. ANN. tit. 18, §§ 1093, 1098 (1959); VA. CODE ANN. § 32-96 (1950); WIS. STAT. ANN. § 143.05 (1957); WYO. STAT. ANN. § 35-178 (1957); cf. MASS. ANN. LAWS ch. 111, § 117 (1954) (treatment at state expense under whatever rules prescribed by department of public health). See also KANSAS CITY ORDS. § 23-49; MIAMI CODE ch. 24, § 18.

<sup>163</sup> ALA. CODE tit. 22, § 271 (1958); MICH. COMP. LAWS § 329.203 (1948); MONT. REV. CODES ANN. § 69-1105 (1952); N.J. REV. STAT. § 26:4-32 (1937); ORE. REV. STAT. § 434.070 (1960); TENN. CODE ANN. § 53-1104 (1955); VT. STAT. ANN. tit. 18, § 1095 (1959); VA. CODE ANN. § 32-94 (1950); W. VA. CODE ANN. § 1298(b) (1961).

<sup>164</sup> ALA. CODE tit. 22, § 265 (1958); DEL. CODE ANN. tit. 16, § 705 (1953); FLA. STAT. § 384.08 (1961); IDAHO CODE ANN. § 39-604 (1961); MONT. REV. CODES ANN. § 69-1108 (1952); N.J. STAT. ANN. § 26:4-49.8 (Supp. 1961); N.Y. PUB. HEALTH LAW § 2302 (prostitution, vagrancy and related offenses); N.C. GEN. STAT. § 130-97 (1958); OKLA. STAT. ANN. tit. 63, § 548 (1949); R.I. GEN. LAWS ANN. § 11-34-7 (1956); S.C. CODE § 32-595 (1952); S.D. CODE § 27.2404 (1939); TEX. REV. CIV. STAT. art. 4445, § 3 (1960); UTAH CODE ANN. § 26-6-40 (1953); VA. CODE ANN. § 32-104 (1950); WASH. REV. CODE § 70.24.030 (1958); W. VA. CODE ANN. § 1299 (1961); WYO. STAT. ANN. § 35-179 (1957).

<sup>165</sup> CONN. GEN. STAT. ANN. § 17-16 (1960); DEL. CODE ANN. tit. 16, § 705 (1953); FLA. STAT. § 384.08 (1961); IDAHO CODE ANN. § 39-604 (1961); MASS. ANN. LAWS ch. 111, § 121

a convicted prostitute unless she agrees to undergo active treatment for her disease.<sup>166</sup> Even without a pending criminal case, health officers in several states may obtain a warrant in court ordering examination and treatment of those who otherwise refuse to submit voluntarily.<sup>167</sup> Private physicians may also be under a statutory duty to report all cases of venereal disease coming to their attention in which the patient refuses to undergo treatment.<sup>168</sup> To avoid the possibility of an informal system of medical licenses to prostitutes, several legislatures have forbidden any public health officer to issue a certificate that the patient is free from venereal disease.<sup>169</sup> Infecting another with a venereal disease may also be made a violation.<sup>170</sup>

(1954); MONT. REV. CODES ANN. § 69-1108 (1952); N.C. GEN. STAT. § 130-97 (1958); N.D. CENT. CODE § 23-07-08 (1960); ORE. REV. STAT. § 434.170 (1960); S.C. CODE § 32-595.1 (1952); UTAH CODE ANN. § 26-6-40 (1953); WASH. REV. CODE § 70.24.030 (1958); WYO. STAT. ANN. § 35-179 (1957). *Contra*, MINN. STAT. ANN. § 144.12(7) (1961).

<sup>166</sup> CONN. GEN. STAT. ANN. § 53-226 (1960); IOWA CODE ANN. § 140.24 (1949); ME. REV. STAT. ANN. ch. 134, § 12 (1954); N.H. REV. STAT. ANN. § 579.18 (1955); N.D. CENT. CODE § 12-22-19 (1960); W. VA. CODE ANN. § 1313 (1961); TOLEDO CODE § 17-10-3; *cf.* CONN. GEN. STAT. ANN. § 53-241 (1960); N.C. GEN. STAT. § 130-98 (1958) (no prisoner released until treatment begun and bond posted to continue treatment).

<sup>167</sup> ILL. ANN. STAT. ch. 23, § 3464 (Smith-Hurd 1958); ME. REV. STAT. ANN. ch. 25, §§ 111, 112 (1954); MICH. COMP. LAWS § 329.205 (1948); NEV. REV. STAT. § 441.250 (1961) (*mandamus*); N.J. STAT. ANN. § 26:4-37 (Supp. 1961); N.Y. PUB. HEALTH LAW § 2301; TENN. CODE ANN. § 53-1110 (1955); VT. STAT. ANN. tit. 18, § 1094 (1959) (*semble*) (person restrained by health officer may seek restraining order); W. VA. CODE ANN. § 1308 (1961); WIS. STAT. ANN. § 143.05 (1957). In Alabama and Delaware health officers may issue their own warrants. ALA. CODE tit. 22, § 264 (1958); DEL. CODE ANN. tit. 16, § 704 (1953).

<sup>168</sup> ALA. CODE tit. 22, § 262 (1958); CONN. GEN. STAT. ANN. § 19-89 (1960); DEL. CODE ANN. tit. 16, § 702 (1953); FLA. STAT. § 384.06 (1961); IDAHO CODE ANN. § 39-602 (1961); IOWA CODE ANN. § 140.2 (1949); LA. REV. STAT. § 40:1065 (1950); MICH. COMP. LAWS § 329.202 (1948); MONT. REV. CODES ANN. § 69-1104 (1952); NEV. REV. STAT. § 202.140 (1961); N.C. GEN. STAT. § 130-95 (Supp. 1961); N.D. CENT. CODE § 23-07-02 (1960); S.C. CODE § 32-593 (1952); S.D. CODE § 27.2402 (1939); TENN. CODE ANN. § 53-1101 (1955); TEX. REV. CIV. STAT. art. 4445, § 1 (1960); UTAH CODE ANN. § 26-6-37 (1953); VT. STAT. ANN. tit. 18, § 1092 (1959); W. VA. CODE § 1300 (1961); WYO. STAT. § 35-177 (1957).

<sup>169</sup> IOWA CODE ANN. § 140.30 (1949); MONT. REV. CODES ANN. § 69-1113 (1952) (except where impossible to use for solicitation to intercourse); N.J. REV. STAT. § 26:4-32 (1937); ORE. REV. STAT. § 43.070 (1960); TEX. REV. CIV. STAT. art. 4445, § 7 (1960); VT. STAT. ANN. tit. 18, § 1093 (1959); KANSAS CITY ORDS. § 23-49(f); *cf.* OKLA. STAT. ANN. tit. 63, § 544 (1949) (physician not to give certificate prior to cure).

<sup>170</sup> FLA. STAT. § 384.02 (1961); LA. REV. STAT. § 40:1062 (1950); N.J. STAT. ANN. § 26:4-42(e) (1937); N.M. STAT. ANN. § 12-3-6 (1953); N.Y. PUB. HEALTH LAW § 2307; N.D. CENT. CODE § 23-07-21 (1960); OKLA. STAT. ANN. tit. 63, § 543 (1949); ORE. REV. STAT. § 434.180(1) (1960); TENN. STAT. ANN. § 53-1107 (1955); TEX. PEN. CODE art. 704 (1) (1961); VT. STAT. ANN. tit. 18, § 1106 (1959); VA. CODE ANN. § 32-99 (1950); W. VA. CODE § 1314 (1961); KANSAS CITY ORDS. § 23-54; *cf.* MONT. REV. CODES ANN. § 69-1111 (1952); VA. CODE ANN. § 32-91 (1950); W. VA. CODE § 1305 (1961), which require a physician to report to the county health officer whenever a patient is exposing or is about to expose others to VD.

Such statutes have been attacked on constitutional grounds as a denial of liberty without due process of law, but they have been upheld when applied to prostitutes,<sup>171</sup> the keeper of a house of prostitution,<sup>172</sup> male vagrants,<sup>173</sup> one arrested as drunk and disorderly,<sup>174</sup> and a seller of liquor without a license,<sup>175</sup> as well as to persons found under other circumstances to be infected.<sup>176</sup> Breaking quarantine can constitutionally be made a punishable offense.<sup>177</sup>

#### IV. POLICE REGULATION

American procedural law gives relatively little power to officers to make arrests in misdemeanor cases, the most usual authorization going no further than to legalize arrests without warrant for misdemeanors committed in the presence of the arresting officer.<sup>178</sup> In all other misdemeanor cases a judicial warrant must be sought, which requires the production of witnesses in court who can testify directly to the fact of the commission of the offense.<sup>179</sup> As a result, control of prostitution is quite difficult for uniform-division police personnel. Patrons of prostitutes, who are themselves law violators in most states, do not seek police assistance unless they have been robbed or cheated by the woman or her confederates or unless perhaps they later find they have been infected with a venereal disease and still claim to identify the woman.<sup>180</sup> Prostitutes

<sup>171</sup> *City of Little Rock v. Smith*, 204 Ark. 692, 163 S.W.2d 705 (1942); *Ex parte Martin*, 83 Cal. App. 2d 164, 188 P.2d 287 (1948); *People ex rel. Baker v. Strautz*, 386 Ill. 360, 54 N.E.2d 441 (1944); *Ex parte Company*, 106 Ohio St. 50, 139 N.E. 204 (1922); *Ex parte Woodruff*, 90 Okla. Crim. 59, 210 P.2d 191 (1949).

<sup>172</sup> *Ex parte Clemente*, 61 Cal. App. 666, 215 Pac. 698 (1923).

<sup>173</sup> *State v. Hutchinson*, 246 Ala. 48, 18 S.2d 723 (1944). This case held that such vagrants could not be detained in jail unless the statute so authorized, which it did not under the particular circumstances.

<sup>174</sup> *Varholy v. Sweat*, 153 Fla. 571, 15 S.2d 267 (1943).

<sup>175</sup> *Ex parte Kilbane*, 67 N.E.2d 22 (Ohio Com. Pl. 1945).

<sup>176</sup> *In re McGee*, 105 Kan. 574, 185 Pac. 14 (1919); *Ex parte James*, 147 Tex. Crim. 430, 181 S.W.2d 83 (1944); *State ex rel. McBride v. Superior Court*, 103 Wash. 409, 174 Pac. 973 (1918). Customers of prostitutes can no doubt be comprehended within these cases. *But see Hill v. Hilbert*, 92 Okla. Crim. 169, 222 P.2d 166 (Okla. Ct. Crim. App. 1950), in which a man and a girl, arrested in his room, had pleaded guilty to occupying a room for an immoral purpose and were held in detention for a venereal disease examination. The court found the municipal court action arbitrary under the circumstances and granted habeas corpus.

<sup>177</sup> *State ex rel. Kennedy v. Head*, 182 Tenn. 249, 85 S.W.2d 530 (1945).

<sup>178</sup> MORELAND, *MODERN CRIMINAL PROCEDURE* 2-10 (1959).

<sup>179</sup> *Compare Giordenello v. United States*, 357 U.S. 480 (1958) and *People v. James*, 4 N.Y.2d 482, 151 N.E.2d 877, 176 N.Y.S.2d 323 (1958) with *State v. Currier*, 86 Ariz. 394, 347 P.2d 29 (1959) and *People v. Mosley*, 338 Mich. 559, 61 N.W.2d 785 (1953).

<sup>180</sup> Military personnel often volunteer or are required to indicate the source of infec-

and their pimps only rarely are so foolish as to solicit customers openly under the observation of a uniformed officer.

Consequently, it has been necessary, or has been felt necessary, in metropolitan areas to make use of plainclothes police whose exclusive assignment it is to frequent places where prostitutes make their contacts, to indicate tacitly their interest in sexual relations, to acquiesce in any proffer of sexual activity whether direct or veiled, and to let the woman go far enough that her purpose to engage in an act of sexual connection for money or indiscriminately is clear; at that point the arrest is made.<sup>181</sup> Such practices have been severely criticized,<sup>182</sup> and at certain times there have clearly been cases in which unscrupulous police have framed innocent women.<sup>183</sup> Although cases so developed by vice squad members probably do not actually fall within the definition of entrapment approved at the appellate level,<sup>184</sup> lower court judges who are unsympathetic with such police practices may well invoke the doctrine of entrapment as a reason for dismissing a case against a prostitute, secure in the knowledge that the prosecutor has no appeal.

If the laws legitimating arrest are restrictive and if undercover activities of the police are defeated in court by application of the entrapment doctrine, the result may be either relatively little police activity against prostitution so long as it remains under cover, or else a deliberate program of harassment arrests, in which police detain known or suspected prostitutes, female and homosexual, in custody at the precinct level, subject them to investigation to de-

tion. Cf. *People v. Head*, 146 Cal. App. 2d 744, 304 P.2d 761 (1956). Voluntary reports by doctors or those required by statute (note 168 *supra*) also assist in locating foci of VD infection. See Brewer, *supra* note 161, describing California practice.

<sup>181</sup> See, e.g., *People v. Mitchell*, 91 Cal. App. 2d 214, 205 P.2d 101 (1949) (pandering); *State v. Poague*, 245 Minn. 438, 72 N.W.2d 620 (1955) (prostitution).

<sup>182</sup> PLOSCOWE, *op. cit. supra* note 135, at 251-54; MURTAGH & HARRIS, *CAST THE FIRST STONE* 245-49, 265-71 (1957); cf. WOLFENDEN REPORT 90-92.

<sup>183</sup> MURTAGH & HARRIS, *op. cit. supra* note 182, at 232-37; WATERMAN, *PROSTITUTION AND ITS REPRESSION IN NEW YORK CITY* 61-63 (1932); cf. MODEL PENAL CODE 278-79 comment on § 207.5 (Tent. Draft No. 4, 1955).

<sup>184</sup> In theory entrapment should consist of the implantation of a criminal purpose in a mind not otherwise predisposed to commit the crime, provided that the legislature is deemed to have intended that such persons should not be covered. *Sorrells v. United States*, 287 U.S. 435 (1932). Merely to provide an opportunity to one otherwise inclined to commit the crime and concerned only lest he be caught is not to commit entrapment. *Sherman v. United States*, 356 U.S. 369 (1958); *Whiting v. United States*, 296 F.2d 512 (1st Cir. 1961); cf. *Kelly v. United States*, 194 F.2d 150 (D.C. Cir. 1952) (entrapment of alleged homosexual).

termine if there are any specific charges outstanding against them, have them physically examined for venereal disease, and if they are free from it to turn them loose with a warning. In one major metropolitan area a confidential investigation revealed that in one precinct 3,047 arrests were made for prostitution in a six-month period, of which only 75 resulted in formal prosecution. The objective of such a practice is to make conditions difficult for prostitutes to the point they cannot conveniently or economically ply their trade. It may be that the present powers granted to the police are too restricted, and that prostitution cannot be controlled unless increased police powers are conferred by the legislature, but absent such legislation it must be realized that such illegal activities consciously undertaken by the police, no matter how laudable the goal may appear, result in a breakdown of respect for law enforcement agencies and pose a grave threat to civil liberties.<sup>185</sup> It may be for this reason that legislatures appear reluctant to take from the courts and from prosecuting agencies the primary responsibility for repression of prostitution.

#### V. MEDICAL AND PSYCHIATRIC VALIDITY OF THE LEGAL NORMS

Whether one's basic premise be religious puritanism, humanitarianism or concern for public health, the logical conclusion is that organized prostitution is immoral to an offensive degree, condemns women to a degrading existence which will make social derelicts of them within a relatively short period of time and is a major source of disease. The United States, with other civilized nations, has determined that repression is the only acceptable policy to be embodied in legislation.<sup>186</sup>

<sup>185</sup> It should be noted that the doctrine of entrapment does little to control this type of illegal activity, since harassment arrests are not intended to result in prosecutions. Nor are exclusionary rules of evidence of much use, since little in the way of testimony in prostitution cases can be denominated the result of an illegal search or seizure by the officers.

<sup>186</sup> See U.N. DEP'T OF ECONOMICS & SOCIAL AFFAIRS, STUDY ON PERSONS AND TRAFFIC IN PROSTITUTION 50-57 (ST/SOA/SD/8) (U.N. Pub. Sales No. 59.IV.5) (1959); LEAGUE OF NATIONS, ADVISORY COMMISSION FOR THE PROTECTION AND WELFARE OF CHILDREN AND YOUNG PEOPLE, TRAFFIC IN WOMEN AND CHILDREN COMMITTEE, ABOLITION OF LICENSED HOUSES (League of Nations Pub. No. 1934.IV.7). One of the most recent efforts abroad to repress prostitution is that of Japan, whose new law may be found in translation in MINISTRY OF JUSTICE, SUPPLEMENT TO THE CONSTITUTION AND CRIMINAL STATUTES OF JAPAN 1 (1960). Experience under the new legislation is described in MINISTRY OF JUSTICE, THE ADMINISTRATION OF THE ANTI-PROSTITUTION LAW IN JAPAN (1960). Experiences in other countries are set out in 13 INT'L REV. OF CRIM. POLICY, (ST/SOA/Ser.M/13) (U.N. Pub. Sales No. 58.IV.4) (1958).

To adopt a policy of repression, however, is not necessarily to adopt a workable and humane scheme of repression. The simple authorization of penal sanctions means little, except that legislators may return home with a feeling that the problem has been solved and assure their constituents that they are active in the cause against sin. So long as traditional law enforcement methods are utilized, application of such laws is almost completely in the hands of local police, who can adopt a hands-off policy as long as too flagrant activity does not take place, or who can even convert the legal prohibitions into a system of extra-legal regulation whereby the periodic payment of fines amounts to an informal "license fee."<sup>187</sup> There is also little effective control over illegal arrest practices on the part of the police through which they harass or intimidate prostitutes, or even force their entry into syndicated prostitution.

But assuming adequate, honest law enforcement, it is still in order to examine how far the standards of definition and measures of control selected by the legislatures are valid from a social, medical or psychiatric viewpoint, when applied to the persons and classes toward whom such legislation is directed.

(a) *The female prostitute.* No single factor is sufficient to explain prostitution as a social phenomenon or to account for its practice by an individual. Nevertheless, there are enough factors present in enough cases of prostitution that some insight can be gained into the sources of the impulse toward prostitution and the approaches toward combating it.

The most common assumption by those who have sought to repress the traffic in women and to rehabilitate prostitutes is that

<sup>187</sup> "Particularly, it was widely felt that the present system whereby a prostitute is repeatedly brought before the courts and automatically disposed of on pleading guilty and paying a fine of forty shillings, which she regards as an indirect and not very onerous form of taxation or license, is making a farce of the criminal law." WOLFENDEN REPORT 85.

"Ten cities report that they have a *system of fines* for disorderly houses or houses of prostitution, in each city carried out in a manner slightly different from all the rest. For example, in Baltimore, 'The keepers of such houses are reported once a year, indicted and tried; fines are imposed in the discretion of the court.' Dallas, Texas, 'Arrests are made by policemen; cases are tried in corporation court, which assesses all fines.' Kansas City, Mo., 'Warrants are issued monthly by the city attorney, and fines are levied by the police judge.' Mansfield, O., 'By arresting the keepers of the houses.' New Haven, Conn., 'Proprietors are arrested; usual fine \$100, or three to six months in jail, or both.' Peoria, Ill., 'Fined every three months; keepers \$25 and costs, inmates \$5 and costs.'" MINNEAPOLIS VICE COMMISSION, REPORT 60 (1911).

the primary cause of prostitution is poverty; girls are forced into a life of prostitution by their parents or enter it reluctantly as the only way available to maintain themselves or their families. Although this may have been true to a degree in the past throughout the world, including the United States,<sup>188</sup> contemporary psychiatric insights cast some doubt whether economic factors alone have ever been sufficient to account for prostitution; in any event, grinding poverty seems not to account for the usual case of prostitution in the United States today. This is not to deny, however, that economic factors may reinforce other factors predisposing a woman to prostitution; "no other way of life offers comparable financial reward to a woman without training or skill."<sup>189</sup> But in most instances the entry by a woman into a life of prostitution must be explained because "prostitution is a way of life consciously chosen because it suits a woman's personality in particular circumstances."<sup>190</sup> Mental abnormality is a constant concomitant of prostitution.

Certain data suggest that a substantial number of prostitutes, particularly those in houses of prostitution or those picked up for streetwalking, are mentally deficient. A Massachusetts study in 1914 indicated that of 300 prostitutes, 51 percent were feeble-minded and 3 percent classified in the terminology of the time as insane. Of the 135 classified as "normal" most were of "distinctly inferior intelligence" and only six of the 300 had really good

<sup>188</sup> LEAGUE OF NATIONS, ADVISORY COMMITTEE ON SOCIAL QUESTIONS, ENQUIRY INTO MEASURES OF REHABILITATION OF PROSTITUTES, PT. I, PROSTITUTES: THEIR EARLY LIVES 46-50 (League of Nations Pub. No. 1938.IV.11) [hereinafter cited as LEAGUE OF NATIONS ENQUIRY]. The League of Nations study found that prostitution tended to be a hereditary occupation without social stigma in certain parts of India. *Id.* at 54. In pre-war Japan adoption laws were often misused so that children from an early age were trained to be prostitutes. Steiner, *Postwar Changes in the Japanese Civil Code*, 25 WASH. L. REV. 286, 307 (1950). A recent popularly-written account suggests that this may occasionally take place in the United States. HARRIS, *THEY SELL SEX* 94-104 (Paperback ed. 1960).

<sup>189</sup> BRITISH MEDICAL ASSOCIATION, *HOMOSEXUALITY AND PROSTITUTION* 55 (1955); cf. LEAGUE OF NATIONS ENQUIRY 65. GREENWALD suggests, at 142, that, at least in the case of the call girl, stress on economic factors as a reason for prostitution is chiefly a rationalization. GLOVER takes a similar position at 259, as does I. DEUTSCH, *PSYCHOLOGY OF WOMEN* 258 (1944). Of course, if the woman is addicted to narcotics, she may turn to prostitution as the only available way to obtain the money needed to feed her habit. Cf. MURTAGH & HARRIS, *op. cit. supra* note 182, at 39-57. The addiction itself is usually symptomatic of neurosis. Nyswander, *Drug Addictions*, in 1 AMERICAN HANDBOOK OF PSYCHIATRY 614, 617 (Arieti ed. 1959).

<sup>190</sup> WOLFENDEN REPORT 79.

minds.<sup>191</sup> A report submitted to the League of Nations Advisory Commission on Social Questions in 1935-1936 by the Children's Bureau of the Department of Labor, based on New York experience, listed 13 out of 50 prostitutes as feeble-minded, 11 borderline, 9 dull normal and only 3 of superior intelligence.<sup>192</sup> Women in this group are more easily exploited than those of normal or above-normal intelligence.

In other instances the woman may suffer from a marked mental disorder. This is relatively unusual, however, for a person in such condition that institutionalization is immediately indicated is probably in no condition psychologically to engage in prostitution. For example, psychotic disorder in schizophrenia, particularly paranoid schizophrenia, is in fact protective against prostitution; "the individual is turned against social relations and contacts with others, is very frequently delusional concerning sexual matters and becomes celibate as a matter of delusional necessity. . . . The paranoid mechanism when well-developed is not hospitable to love, even on a commercialized basis."<sup>193</sup> In less advanced cases, alternating moods of elation and depression (cyclothymia) may be conducive to commercialized prostitution because of "the increased psychomotor activity, the impulsiveness, the lack of coherent thinking and the morbid euphoria of the patient."<sup>194</sup> Syphilitic paresis may also increase the degree of promiscuity which perhaps was the original source of the disease.<sup>195</sup> In all of these instances an arrested prostitute who has been diagnosed as having such marked mental disorder will most probably be committed to a mental institution and will therefore no longer be in a position to engage in her trade.

However, such advanced cases represent the culmination of severe personality disorders which at much earlier stages reveal themselves in promiscuity and prostitution. Classical psychology explained prostitution as a compromise between two basic instincts, that of self-preservation and that of propagation of the species, "whereby one party is willing, for a monetary considera-

<sup>191</sup> Thompson, *Psychiatric Aspects of Prostitution Control*, 101 AM. J. PSYCHIATRY 677-78 (1945).

<sup>192</sup> LEAGUE OF NATIONS ENQUIRY 88. Those who become call girls may be of somewhat higher intelligence. GREENWALD 145.

<sup>193</sup> Thompson, *supra* note 191, at 678-79.

<sup>194</sup> *Id.* at 679.

<sup>195</sup> *Ibid.*



tion, to cater to the sexual pleasure of the other, in such a way that neither party does anything in the interests of preserving the species."<sup>196</sup> Such a rigid, conceptual explanation is no longer accepted among psychiatrists. Current explanations include those based on the frigidity which most prostitutes manifest,<sup>197</sup> or on their latent<sup>198</sup> or actual homosexuality.<sup>199</sup> But these in turn seem symptomatic manifestations of some more deep-seated personality deviation, which in general may be characterized as a marked psychic immaturity.

Agoston<sup>200</sup> characterizes prostitution as a reaction at the most infantile mental level in which "the prostitute, denying her true identity, offers a pseudo-personality for hire and, with the rented pseudo-personality, proceeds to a completely infantile regression."<sup>201</sup> Prostitution involves not only an indiscriminate and promiscuous, but also a purposely unselective, choice of partners. "There is involved a kind of defiant intent to show that 'anyone at all will do, no matter who, as long as he pays'."<sup>202</sup> Agoston then lists other relevant attributes of prostitution:

- "(3) Not only is the sexual intercourse paid for, but the manner of payment is calculated to emphasize that the relation exists only for material ends and has nothing to do with love or affection.
- "(4) This is borne out by the usually brief duration of the relationship and
- "(5) By the contempt which each partner feels for the other. . . .
- "(6) It is borne out also by the 'incognito' of those participating in an act of prostitution . . . . It is characteristic of this incognito partnership that no real curiosity exists

<sup>196</sup> Agoston, *Some Psychological Aspects of Prostitution: The Pseudo-Personality*, 26 INT'L J. OF PSYCHOANALYSIS 62, 63 (1945).

<sup>197</sup> PODOLSKY, *What Drives the Prostitute?*, 21 GP No. 2, p. 122 (Feb. 1960).

<sup>198</sup> Wengraf, *Fragment of an Analysis of a Prostitute*, 5 J. CRIM. PSYCHOPATH. 247 (1943); *Prostitution*, 5041 BRIT. MEDICAL J. 399 (Aug. 17, 1957).

<sup>199</sup> GREENWALD 118-20.

<sup>200</sup> Agoston, *supra* note 196, at 63.

<sup>201</sup> *Id.* at 66. The regression might appear at least superficially to be the oral-anal phase, in which "money livelihood and material security assume prime importance in place of the dynamism of maturity based on object love and devotion." *Id.* at 65. But this is false, for the prostitute always squanders and gives away her money. She eats and drinks hugely, but not with real enjoyment. It is a state of "infantile, polymorphous perversions" characterized by a sense of "magic" power by which she brings about male activity without her really participating, plus security. *Id.* at 65-66.

<sup>202</sup> *Id.* at 63; cf. GREENWALD 129.

regarding the identity of the other partner. . . . Prostitution is intercourse of genitals only, but not of persons."<sup>203</sup>

Not only do the partners remain unknown to each other, but each masks himself or herself behind a pseudo-personality, by which awareness of guilt is avoided. This pseudo-personality is evinced not only by the incognito aspects of the act itself, but also by the fictional identity and background, usually romantic, which the individual relates about himself or herself and by the air of false toughness which is always present.<sup>204</sup> The very opposite is usually true. Prostitutes are in fact shy and sentimental about love, motherhood and the like, and are often prudish in their reactions to pelvic examinations. In short, "prostitution is a temporary, compromise-solution of an anxiety, by means of the 'I am not I' mechanism. . . . In other words, those who participate in prostitution resolve their anxiety on the principle that 'so long as I am hard-boiled, insincere, unemotional, not bound by ties to my partner, sexual intercourse is not sexual intercourse'."<sup>205</sup>

Lichtenstein<sup>206</sup> in a recent study suggests that "a gross disturbance of the sense of identity is often associated with, if not a prerequisite of, prostitution."<sup>207</sup> His basic thesis is that identity is found in non-procreative sexuality; "identification is a concept designed to make it understandable how the 'inside' (subject) becomes capable of 'relating' to what is 'outside' (object)."<sup>208</sup>

"Man thus makes use of nonprocreative sexuality in a unique way: he becomes an instrument for the fulfilment of another one's needs, needs which are conveyed and perceived as primitive modalities of sensory interaction within a symbiotically structural *Urwelt*."<sup>209</sup>

<sup>203</sup> Agoston, *supra* note 196, at 63.

<sup>204</sup> "In the guise of toughness, both parties assume a pose of being money-mad or pleasure-hungry. The female prostitute emphasizes that the intercourse is purely a business proposition. She is always in haste because other guests are waiting; she lets her partner know that she does not expect tenderness, but that if the guest would like some, she can furnish that, too, for extra pay . . . . The man expresses false toughness by showing off, assuming the pose of a tough guy, who for his money can take his pick among women, and who can change off among them as he pleases, and cares about nothing but his pleasure . . . ." *Id.* at 63-64.

<sup>205</sup> *Id.* at 64.

<sup>206</sup> *Identity and Sexuality*, 9 J. AM. PSYCHOANALYTIC A. 179 (1961).

<sup>207</sup> *Id.* at 217.

<sup>208</sup> *Id.* at 197.

<sup>209</sup> *Id.* at 209.

If the woman cannot apprehend such a symbiosis, if she feels that to enter into a close, personal, sexual relationship with a man is to risk her very being, then her sexual relations must be put on a strictly commercial, business-like basis, *i.e.*, become something other than "real" sexual intercourse, be something in which her "real self" does not participate.<sup>210</sup>

"While submitting sexually to a man, the prostitute permits the man to treat her as an extension of himself, negating completely her individual separateness, and thus her 'real self' . . . . She endeavors to share this symbiotic fantasy of the man by setting 'inner limits' as to the meaning of the sexual act. By the 'business ritual' between her and the male partner she emphasizes that she is no longer a 'person,' but a 'thing' or an 'organ' of the man. This strict isolation protects her against the danger of 'emotional symbiosis' which would threaten her with complete dissolution or adoption in the other one."<sup>211</sup>

Glover is somewhat similar in his analysis; prostitution exhibits regressive characteristics, represents a primitive phase in sexual development and is a type of sexual backwardness.<sup>212</sup> In Freudian analysis the very young child has both auto-erotic impulses and erotic impulses directed toward the parent of the opposite sex. But the latter arouse unconscious guilt and anxiety reactions, the result of which is usually the development of an idealistic and affectionate relationship with such parent. This is the so-called latency period. But as adult sexuality makes its appearance after puberty, it is necessary that the cleavage between

<sup>210</sup> Lichtenstein's analysis is illustrated throughout by the case of one "Anna S," whose terminology of "real self" is used. She described her reaction to sex relations to be that "she was not *really* in it, that she *really* did not participate in it." She would try hard to think of something that had nothing to do with the present sexual experience. "[S]he would rush into some activity that would take her mind off the experience." *Id.* at 218. Greenwald observed the same reaction in one of his cases: "After all it's not sex; it's like I'm a wastebasket for a man to dump his passion in. Often when I'm with a man, I felt as if I was sitting on a mantel watching two strangers." GREENWALD 133. *Cf. Prostitution, supra* note 198, at 399: "Their behaviour, too, seems designed to prove to themselves that sexual emotions have no value—a sort of inverted puritanism."

<sup>211</sup> Lichtenstein, *supra* note 206, at 225-26; *cf. Prostitution, supra* note 198, at 400: "A feature common to all the prostitutes was that they had a thinly veiled hostility to men and fear of being dominated by them. This was also a feature of other girls who seemed in danger of future prostitution—mercenary girls whose lack of feeling allowed them to be contemptuous gold diggers, and girls who associated with coloured men because they found them less possessive and dominating than white men."

<sup>212</sup> GLOVER 252.

erotic and nonerotic love be overcome so that there may be a directing of both sexual urges and mental love-feelings toward the same person. The prostitute, as well as her client, or the homosexual, male or female, fails to achieve this resolution.

"The client, the 'strange man' who pays for her favours, is the deteriorated image of her father; at the same time, [the prostitute] registers her violently jealous disapproval of her mother's marriage by, as it were, debasing her own feminine currency."<sup>213</sup>

Her sexual promiscuity is also an unconscious protective device, at least in part, in that it denies that there "was a one and only parental object of infantile love"; it also "represents unconsciously a *search* for the one and only (forbidden) love."<sup>214</sup> The usual willingness of a prostitute to satisfy sadistic or masochistic perversions is also indicative of a regressive substitution of earlier infantile forms of sexuality for more adult practices.

Whether one of these or some other explanation be adopted, it seems clear that almost without exception women engaging in prostitution show symptoms resulting from anxiety, inability to relate, inability to conform, lack of an adequate perception of reality and lack of controls, which indicate varying kinds of psychological defense mechanisms, like projection, reaction formation and repression, against their sense of isolation and immaturity.<sup>215</sup> So long as such defenses are effective the woman will continue her way of life and will not be amenable to reform.<sup>216</sup> If they break down, or if there is a particularly severe fit of depression, which all prostitutes apparently suffer in one degree or another at frequent intervals,<sup>217</sup> the woman may well commit suicide.<sup>218</sup> In some cases

<sup>213</sup> *Id.* at 250; cf. DEUTSCH, *op. cit. supra* note 189, at 261-62.

<sup>214</sup> GLOVER 251.

<sup>215</sup> GREENWALD 131-41.

<sup>216</sup> BRITISH MEDICAL ASSOCIATION, *op. cit. supra* note 189, at 55: "Unfortunately the confirmed prostitute is difficult to help owing to her unwillingness to change her mode of life. Social and moral welfare workers seem agreed that, short of conversion, there is no effective method of reclaiming the confirmed prostitute, since no other way of life offers comparable financial reward to a woman without training or skill. Moreover, a woman to whom this way of life is acceptable is rarely willing to submit to the discipline of a more conventional existence." GLOVER, at 266, suggests that the "moral indignation" expressed by magistrates is an encouragement to recidivism, a position also taken by DEUTSCH, *op. cit. supra* note 189, at 263-64.

<sup>217</sup> GREENWALD 139.

<sup>218</sup> "Violent, unprepared, non-introduced intercourse, such as takes place in prostitution, elicits fear of death each time it occurs. Therefore a single, definitive death

she may seek help; since the root of the problem is found in the inadequate psychic development of the woman, therapy may prove as effective in the case of a prostitute as it might in a case in which symptoms appear in some other form.<sup>219</sup>

Of what significance are these considerations in evaluating the system of legal controls applicable to the prostitute herself? If the causes of a particular instance of prostitution are in fact economic, a sentence of fine or imprisonment perfunctorily rendered will do nothing to relieve the economic pressures which brought about the entry of the woman into prostitution in the first place. If the assumption be that psychic disorder underlies most cases of prostitution, one might logically ask why substantive insanity doctrines are not invoked. The answer is found in part in that the statement of doctrine itself, particularly as embodied in the M'Naghten Rules, does not apply in the usual case, for the woman is aware of what she is doing and that what she is doing is illegal and unacceptable to society.<sup>220</sup> The so-called "irresistible impulse" test likewise is dubious of application.<sup>221</sup> The Durham rule<sup>222</sup> comes closer to fitting her condition, though in actuality one may hardly expect a prostitute misdemeanor to raise the issue and present the relevant psychiatric data which might make the defense a sufficient one; a defendant that sensitive to her psychic dilemma would seem ripe for probation conditioned on the obtaining of psychiatric assistance. The test set out in the *American Law Institute Model Penal Code* would probably not apply because of the caveat that "the terms 'mental disease or defect' do not include an abnormality manifested only by repeated criminal or otherwise anti-social conduct."<sup>223</sup> In any event, a wholesale discharge of prostitute defendants on grounds of insanity would mean nothing unless the hospitalization and therapy to follow were ade-

by suicide is preferable to the frequently repeated sense of dying in prostitution." Agoston, *supra* note 196, at 66.

<sup>219</sup> Cf. Agoston, *supra* note 196, at 67; GREENWALD 174-76; Goitein, *The Potential Prostitute: The Role of Anorexia in the Defence Against Prostitution Desires*, 3 J. CRIM. PSYCHOPATH. 359 (1942). See also ANONYMOUS, STREETWALKER 173-78 (1960).

<sup>220</sup> WEIHOFFEN, MENTAL DISORDER AS A CRIMINAL DEFENSE 59-81 (1954). See DEUTSCH, *op. cit. supra* note 189, at 263-64, which suggests that the moral codes of society do not inhibit and have no influence whatever on prostitutes, though they are of course aware of society's attitude toward their conduct.

<sup>221</sup> WEIHOFFEN, *op. cit. supra* note 220, at 81-103.

<sup>222</sup> *Durham v. United States*, 214 F.2d 682 (D.C. Cir. 1954).

<sup>223</sup> MODEL PENAL CODE § 4.01(2) (Proposed Final Draft No. 1, 1961).

quate and gave some hope of rehabilitation;<sup>224</sup> usually they are not and do not. Whether the taxpayer is willing to shoulder such a burden is also doubtful. If as an alternative the women are turned back on the streets, efforts at venereal disease control are likely to be substantially reduced in effectiveness. Continued application of criminal penalties thus seems inevitable.

But if such an approach is taken, it must be understood that it will in fact constitute no deterrent. Puritan-minded reformers aside, no one seems seriously to contend that fear of punishment will prevent a woman from becoming a prostitute or that a fine or period of imprisonment as such will reform her. On the contrary, if a sense of isolation or immaturity is the cause of the prostitution, harsh, mechanical imposition of punishment will reinforce the basic drives and will tend to confirm the woman in her career.<sup>225</sup> If an authoritarian approach is to be successful at all, it must be through its application to adolescent pre-prostitutes and sexual delinquents who, if reached through special juvenile proceedings and provided with adequate supervision, may at least in some instances be salvaged before becoming prostitutes.<sup>226</sup> If these measures are ineffective, then disease prevention is the only by-product of the application of criminal penalties, and this might better be accomplished through administrative, civil or quasi-criminal proceedings than through the gristmill of metropolitan criminal courts.

(b) *The male prostitute.* Problems inherent in the treatment and disposition of male prostitutes are not substantially different from those which arise in connection with any homosexual, except perhaps for the nature of the solicitation and the disease-spreading

<sup>224</sup> The same criticism can be levied against application of the sexual psychopath laws in force in twenty states. See WEIHOFEN, *op. cit. supra* note 220, at 195-206; Guttmacher & Weihofen, *Sex Offenses*, 43 J. CRIM. L., C. & P.S. 153, 164-74 (1952). If persons so committed actually received therapeutic treatment likely to produce an adjustment or readjustment to society, prostitutes and other sex offenders might well be committed under such statutes almost as a matter of course. But in fact they are likely to receive no treatment; the almost limitless incarceration which follows commitment not only is unfair and wasteful, but borders on a denial of due process of law. Cf. *In re Maddox*, 351 Mich. 358, 88 N.W.2d 470 (1958), in which transfer to and confinement in a state penitentiary of a sexual psychopath originally committed to a state hospital for the criminally insane were held unconstitutional. Also cf. *White v. Reid*, 126 F. Supp. 867 (D.D.C. 1954).

<sup>225</sup> Cf. MURTAGH & HARRIS, *op. cit. supra* note 182, at 280-302; DEUTSCH, *op. cit. supra* note 189, at 263-64.

<sup>226</sup> WOLFENDEN REPORT 93-94; LEAGUE OF NATIONS ENQUIRY, Pts. III-IV, 125, 130 (1939); GLOVER 257-59.

potential of the active, indiscriminate practitioner.<sup>227</sup> Active repression of public solicitation is probably necessary, if for no other reason than to protect the sensibilities of the public.<sup>228</sup> But whether punitive treatment is of any utility in curing the underlying difficulty is as doubtful as in the case of the female prostitute.

Whether homosexuality is a disease in the usual sense of the word is a matter concerning which there is a difference of opinion, chiefly at the semantic level of what is meant by "disease";<sup>229</sup> there seems general agreement that it is psychogenic. Efforts have been made in the past to explain homosexuality in terms of heredity,<sup>230</sup> but this explanation has relatively few adherents today. Although there is no general agreement on the terminology by which the etiology of homosexuality is to be described, there is general agreement that it represents an arrested or regressive development of sexuality.<sup>231</sup> At times overt homosexuality indicates a regression to the phase of orality.<sup>232</sup> Usually, however, it represents a failure to resolve satisfactorily the oedipal complex. Undue identification with the mother may rule out normal heterosexual relations because all women are unconsciously identified with her and sexual connection would therefore be in essence incestuous. Unless the subject achieves complete sublimation of the sexual drive he will be driven to homosexual relationships, which are the only sexual relationships in which no substantial guilt feelings arise. This identification with the mother may take the form of wishing to receive gratification in the same way as she, so that passive participation in sodomy is chosen.<sup>233</sup> Or the deviation may take a

<sup>227</sup> There may be a greater danger of blackmail [*cf.* WOLFENDEN REPORT at 39-41; PLOSCOWE, *SEX AND THE LAW*, 209-10 (1951)] than in the case of the female prostitute, and there is also perhaps a greater possibility of mugging and robbery by those posing as homosexual "fags."

<sup>228</sup> This differs in no appreciable way from the question of persistent female soliciting, and the Royal Commission so treated it. WOLFENDEN REPORT 83.

<sup>229</sup> *Cf.* WOLFENDEN REPORT 13-16; GLOVER 230-31.

<sup>230</sup> Friedman, *Sexual Deviations*, 1 *AMERICAN HANDBOOK OF PSYCHIATRY* 589, 594 (Arieti ed. 1959); GUTTMACHER, *SEX OFFENSES* 37-39 (1951); KINSEY, POMEROY & MARTIN, *SEXUAL BEHAVIOR IN THE HUMAN MALE* 660-63 (1948).

<sup>231</sup> The basis of such explanations is, of course, the Freudian concept of the bisexuality of infants, followed by psychic development through the oral, anal and latent periods to maturity. See WATSON, *PSYCHIATRY FOR LAWYERS* 103-82 (mimeo. 1960); GLOVER at 176-86; Freyhan, *Homosexual Prostitution: A Case Report*, 19 *Del. S. Medical J.*, No. 5, 92, May 1947.

<sup>232</sup> Particularly in fellatio and cunnilingus. Female homosexuality is often explained in this way. Friedman, *op. cit. supra* note 230, at 595-60; WATSON, *op. cit. supra* note 231, at 120. There may also be anality. *Id.* at 138-39.

<sup>233</sup> Friedman, *op. cit. supra* note 230, at 595.

narcissistic form in which the subject assumes a role in which he can give the gratification to others which he either received or wished to receive from the mother, thus gratifying himself in the process.<sup>234</sup> The partner selected in such a case may well be adolescent, in that the initiating partner perceives in the adolescent the subject himself at an earlier age in relation to the mother. In other instances non-resolution of the oedipal complex may involve identification with the father coupled with hostility toward the mother, in which case active homosexual acts may be anticipated. Or there may be hostility toward the father which is acted out through symbolic castration of the father in the form of the other partner to the act. However, as Glover points out,<sup>235</sup> overt homosexuality always involves an unconscious triangularity, so that satisfactory explanations in any given case cannot probably be made in terms of a single relationship only.

If the correct explanation of homosexual tendencies lies in psychogenics, then such tendencies will vary widely from person to person, and therefore no absolute division of subjects into complete homosexuals and non-homosexuals can be carried out. Kinsey suggests a heterosexual-homosexual rating scale<sup>236</sup> ranging from exclusively heterosexual (0) to exclusively homosexual (6), and finds that there is correlation between such a rating and actual frequency of homosexual activity. Such correlation has significance in the area of treatment, but it also has utility in evaluating the substantive rules themselves. For example, many latent homosexuals may go through life without any actual homosexual relations, but if they are seduced, particularly in adolescence, they may thereafter engage regularly in such activities, thus fixing the pattern of their sexual activity.<sup>237</sup> Latent homosexuality is probably preferable in every respect to active homosexuality, so that there is justification in reaching at least for purposes of segregation those who are likely to seduce young latent homosexuals. At the same time, it should be recognized that many such latent homosexuals are themselves seductive to the seducer, in some instances overtly so, which has bearing in determining the culpability of the seducer. This latent homosexuality has significance in one

<sup>234</sup> Friedman, *op. cit. supra* note 230, at 596; WATSON, *op. cit. supra* note 231, at 158.

<sup>235</sup> GLOVER 222-23.

<sup>236</sup> KINSEY, POMEROY & MARTIN, *op. cit. supra* note 230, at 638.

<sup>237</sup> GLOVER 227.



other respect. Members of vice squads specializing in apprehending homosexuals may themselves be latent homosexuals.<sup>238</sup>

Do criminal penalties, including those levied against the male prostitute, serve to deter or to reform him? The answer is probably no. As in the case of the female prostitute, if the acts for which the person has been arrested and charged are symptomatic of a deepseated personality disorder, arrest and imprisonment are not likely to cure the underlying disorder or to discourage like manifestations in others similarly affected. In the case of the homosexual there is reason to believe that punitive treatment obscures the chances of a mature adjustment. Since homosexuality represents an adaptation of oedipal guilt feelings, there is ordinarily no guilt feeling about the homosexual act itself. The only approach to successful therapy is to arouse such guilt feelings about the homosexuality and then to endeavor to help the subject toward an adequate resolution of the oedipal conflict. Assuming some actual or latent anxiety in the subject's mind about his homosexual proclivities, punitive treatment is likely to cause him to project his feelings of guilt onto society, thus diminishing the chances of successful therapy.<sup>239</sup> In other cases, if the homosexual conduct for which the arrest has been made appears early in the career of one who is still a latent homosexual, ensuing imprisonment which denies him the opportunity to have heterosexual relations may prove a further impetus toward homosexuality, since frustration often activates such latent tendencies.<sup>240</sup> The chief role which the criminal law machinery can play is to provide opportunities for psychiatric assistance, preferably while the individual is on probation, and to provide special treatment facilities for adolescents in danger of becoming homosexuals.<sup>241</sup> The sole justification for special treatment of the promiscuous male prostitute

<sup>238</sup> "Many homosexuals comment that one of their most frightening problems is the likelihood that they will try to seduce a plain-clothesman from the vice squad. With angry bitterness, they point out that these individuals are themselves 'queers' who are afraid of their impulses, and so they go around 'catching' other homosexuals by entrapment. The homosexual's perception is very often correct, inasmuch as he does feel seductiveness and empathy emanating from such a detective. The detective, on the other hand, uses his unconscious feelings and wishes to lead him to the homosexual and to invite him to make a pass. Using this unconscious lead, the enforcement officer invites the homosexual to expose himself and then arrests him." WATSON, *op. cit.* *supra* note 231, at 93-94; *cf.* WOLFENDEN REPORT at 43-44.

<sup>239</sup> GLOVER 238-39.

<sup>240</sup> *Id.* at 227-28.

<sup>241</sup> WOLFENDEN REPORT 65-71.

lies in protecting the young from seduction, in preventing annoyance to the public at large and in controlling venereal disease which such persons may under some circumstances transmit.

(c) *The pander*. Of all the groups reached by the penal law, penal sanctions are most appropriately and usefully levied against those who pander. The pander facilitates entry into and practice of prostitution, male and female; his forcible removal therefore reduces the number of recruiters of those who are only latent prostitutes into the ranks of the confirmed. The convicted pander probably will not be reformed, and the cause of his activity may in fact be in part psychological,<sup>242</sup> but at least he will be kept out of circulation for a time, and upon his release he will probably be an object of considerable police interest in his future activities. Pandering statutes are also the weapon most likely to reach those who seek to syndicate prostitution and coordinate it with other illegal activities.

(d) *The pimp*. Criminal penalties are as appropriate against the pimp who is an active exploiter of the prostitute or who subjects her to physical maltreatment<sup>243</sup> as they are against the pander or any person committing aggravated assault. But insofar as the definition includes receiving or living off the earnings of a prostitute, it should be recognized that the conduct reached does not in fact amount to that which facilitates prostitution or encourages the woman's entry into a life of prostitution. Psychiatric data suggest that one who becomes pimp, ponce or *souteneur* to a prostitute is himself most probably suffering from the same basic form of regression or infantilism as the prostitute herself. The pimp-receiver who physically maltreats his woman reflects sado-masochistic tendencies which bespeak a faulty resolution of the oedipal conflict; it is activity which the woman invites and indeed requires because of her own masochistic tendencies.<sup>244</sup> In many instances the receiver is a latent or occasional homosexual who

<sup>242</sup> "In the same way we can see in the brothel-keeper's mode of existence a sexual mockery of family life. Indeed, I regard it as an essential part of the investigation of tolerated prostitution to have as complete an analysis as possible, not only of the prostitute and her client, but of the brothel-keeper and all her (or his) satellites. Unfortunately, reliable investigations of this sort are not available." GLOVER 258; cf. Karpman, *Emotional Background of White Slavery: Toward the Psychogenesis of So-Called Psychopathic Behavior*, 39 J. CRIM. L., C. & P.S. 1 (1948).

<sup>243</sup> MURTAGH & HARRIS, *CAST THE FIRST STONE* 138-39 (1957); 1 DEUTSCH, *PSYCHOLOGY OF WOMEN* 267 (1944). See also ANONYMOUS, *STREETWALKER* 159-69 (1960).

<sup>244</sup> Friedman, *op. cit. supra* note 230, at 601-03.

enters into a protective relationship with the woman to reassure himself that he is not homosexual; hyperactive sexuality between the receiver and the prostitute is not a common phenomenon.<sup>245</sup> In other instances the relationship suggests a conscious or unconscious acceptance of reversed social and, in net effect, sexual roles; the woman is the active breadwinner and the man is the protected, supported individual. Whatever the explanation, there is substantial agreement that the woman herself most commonly initiates the relationship and very often breaks it off at will in order to choose a new protector;<sup>246</sup> such a relationship is extremely necessary to her because of her own psychic inadequacies. To imprison the receiver disrupts the relationship, but if the term of imprisonment is brief it will almost inevitably be resumed, and will perhaps be reinforced by the protective attitude that both are being unfairly picked on. Even if the man and woman do not resume the original protective relationship, each will almost certainly develop similar relationships with others. Thus in this instance, too, criminal penalties as such do little to reduce the incidence of the activity singled out for punishment.

(e) *Those who facilitate prostitution.* Persons within this category probably act more in the hope of gain, particularly at the expense of persons like prostitutes who have neither the ability<sup>247</sup> nor the desire to resist overcharging, than because of any psychic predisposition toward such activity. Since the motivation is economic the most effective deterrent is likely to be economic also. In evaluating the use of penal law sanctions here one needs to balance off the effect of whatever social stigma is inherent in the fact of prosecution and conviction itself against the efficacy of non-penal proceedings. On the whole one may conclude that loss of a license or permit to do business, or the padlocking of premises used for prostitution, is more of a deterrent than the comparatively small fine which is all that is authorized or likely to be imposed as the aftermath of a criminal prosecution.

(f) *The customer.* Prostitution exists because there is a demand for it; in theory, if the demand were eliminated the institution would decline in significance or disappear entirely.<sup>248</sup> The

<sup>245</sup> GREENWALD 147-48, 155-59.

<sup>246</sup> WOLFENDEN REPORT 99-100; Agoston, *supra* note 196, at 66.

<sup>247</sup> GREENWALD 18-19, 28-29.

<sup>248</sup> See Dr. Kinsey's statements in ABORTION IN THE UNITED STATES 58-59 (Calderone ed. 1958).

demand, however, continues to a degree in modern society, not subject entirely to control through social disapproval, particularly in metropolitan areas in which the conduct of any given individual is not likely to come to the attention of or be particularly a matter of concern on the part of others. Legislatures, therefore, continue to invoke criminal penalties directly or indirectly against the customer. Insofar as patronage of prostitutes is an accepted local custom, legal doctrine will not accomplish much in practice; if the statutes come to be enforced, then perhaps those who seek sexual outlets in the form of intercourse with prostitutes will be at least hampered in their search for sexual companionship. But psychology suggests that under ordinary, peacetime urban conditions those who habitually resort to prostitutes do so not as a matter of custom or habit, but rather because of deep-seated psychic maladjustment, the same basic kind of regression or infantilism from which the prostitute herself most probably suffers; "*the prostitute satisfies a psychopathological demand.*"<sup>249</sup> Psychodynamic theory thus suggests that inadequate resolution of the conflicting tendencies which characterize the period preceding puberty may manifest itself as prostitution, homosexuality, patronage of prostitutes or receiving the earnings of a prostitute, singly or in combination. Penal sanctions deter no more in one case than in the others; if they prove futile in one context they will almost inevitably prove futile in the others. Based on the material earlier set forth, one may reasonably conclude that the customer will not be deterred by the threat of or reformed by the application of criminal penalties. But as has also been indicated above, arrests of customers are made in most instances with no expectation that an actual criminal prosecution will be carried through, but only as an inducement to the male to cooperate in convicting the woman. Not only does this reinforce the man's pattern of conduct by reducing such anxiety or guilt reactions as he may have, but it also reinforces the woman's hostility toward society when she finds that the man, whom she no doubt consciously or unconsciously realizes to be in a similar situation and psychic state to her own, goes free while she is made to suffer; her projection of her own guilt feel-

<sup>249</sup> GLOVER 249. See also BRITISH MEDICAL ASSOCIATION, HOMOSEXUALITY AND PROSTITUTION 53-54 (1955); Gibbens & Silberman, *The Clients of Prostitutes*, 36 BRIT. J. OF VENEREAL DISEASE 113 (1960); KINSEY, POMEROY & MARTIN, *op. cit. supra* note 230, at 606-09.

ings onto society is thereby reinforced and the development of subjective guilt feelings which are an absolute prerequisite to her own therapy is substantially hindered.<sup>250</sup> About all that can be said for punishment of the customer is that both prostitute and customer perforce need to be cautious in their negotiations and that this may be incentive for the male to engage in extra-marital sexual relations with women with whom he is already in contact in some other context.<sup>251</sup> Society's only effective step in controlling the customer is to do what it can to encourage normal sexual adjustment, which if successful will eliminate both the potential customer and the potential prostitute.

#### SUMMARY

If a cure for the causes of prostitution and related offenses is to be found and applied, it will most probably be through activities which can best be classified as administrative: the efforts of social workers to prevent the rupture of family relationships and to aid children of broken homes and those who are physically or mentally handicapped, the control measures against disease taken by public health officers, the therapy administered by staff members of mental hospitals and outpatient clinics and the supervisory functions of probation and parole officers. The maximum justifiable scope of penal sanctions is to enforce indirectly the preventive and remedial activities of administrative organs, to bring with the least overt coercion possible those who should and can be helped into contact with those who can help them, and to keep the number of disease-bearing contacts as small as possible. Application of penal law for other than these purposes is either a neutral factor in the solution of the underlying problem or an affirmative hindrance to such solution.

<sup>250</sup> See the materials cited in note 225 *supra*.

<sup>251</sup> Lack of either outlet may force him to express his maladjustment in less desirable forms of sexual conduct like pedophilia or even rape. Cf. Friedman, *op. cit. supra* note 230, at 596-97, 603-04; WATSON, *op. cit. supra* note 231, at 155.