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Criminal Law - The Principle of Harm and Its Application to Laws Criminalizing Prostitution

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NOTE

CRIMINAL LAW—THE PRINCIPLE OF HARM AND ITS APPLICATION TO LAWS CRIMINALIZING PROSTITUTION

INTRODUCTION

The past decade has witnessed a renascence of interest in criminal justice. As the rights of an accused have received more intense judicial scrutiny, multitudinous protections have been prescribed and delineated[1] with the concomitant establishment of unprecedented protections against abuse of procedure. Nor has the expansion of rights stopped at the prison gates. More and more constitutional claims of prisoners are being recognized,[2] and the case law in the field of corrections is expanding at a prolific rate. From arrest through incarceration, the criminal process is now closely monitored by the courts.[3]

The failure of the courts is that their monitoring of the criminal process begins so late—that it remains dormant until a confrontation has arisen between the state and a citizen. The requisite attention is not given to the substantive criminal law which determines, by delineating what conduct is and is not criminal, *what* confrontations can legitimately be created by the system and its agents. Thus what should be the most basic and

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[1]*E.g.*, Argersinger v. Hamlin, 407 U.S. 25 (1973); Chimel v. California, 395 U.S. 752 (1969); Spinelli v. United States, 393 U.S. 410 (1969); Duncan v. Louisiana, 391 U.S. 145 (1968); United States v. Wade, 388 U.S. 218 (1967); Miranda v. Arizona, 384 U.S. 436 (1966); Escobedo v. Illinois, 378 U.S. 478 (1964); Wong Sun v. United States, 371 U.S. 471 (1963); Mapp v. Ohio, 367 U.S. 643 (1961).

[2]The following areas are representative of those in which post-convicton claims are being sustained by the courts.

Limitations upon censorship of mail: Goodwin v. Oswald, 462 F.2d 1237 (2d Cir. 1972); Meola v. Fitzpatrick, 322 F. Supp. 878 (D. Mass. 1971); Palmigiano v. Travisono, 317 F. Supp. 776 (D.R.I. 1970).

Access to the press: Nolan v. Fitzpatrick, 451 F.2d 545 (1st Cir. 1971); Burnham v. Oswald, 342 F. Supp. 880 (W.D.N.Y. 1972).

Right to congregational worship: Sostre v. McGinnis, 442 F.2d 178 (2d Cir. 1971); Theriault v. Carlson, 339 F. Supp. 375 (N.D. Ga. 1972).

Conditions of confinement: Wright v. McMann, 460 F.2d 126 (2d Cir. 1972); Holt v. Sarver, 309 F. Supp. 362 (E.D. Ark. 1970).

Due process protections in disciplinary hearings: Clutchette v. Procunier, 328 F. Supp. 767 (N.D. Cal. 1971); Nolan v. Scafati, 306 F. Supp. 1 (D. Mass. 1969).

Rights upon revocaton of parole or probation: Gagnon v. Scarpelli, 93 S. Ct. 1756 (1973).

[3]For a discussion of the effectiveness of judicial control over prearrest confrontations which occur within the context of police field interrogation see Tiffany, *The Fourth Amendment and Police-Citizen Confrontations*, 60 J. CRIM. L.C. & P.S. 442 (1969).

preeminent constitutional question—"When is governmental intrusion into the private lives of citizens warranted?"—is being judicially ignored. The courts should be under a continuing duty to ask and to attempt to answer this fundamental question and, in so doing, to impose limits on the use of the criminal sanction. But with few exceptions[4] the United States Supreme Court has been unwilling to rule on the constitutionality of the substance, and not merely the procedure, of the criminal law.

The thesis of this note is that the fourteenth amendment, through its prohibition against arbitrary deprivations of life, liberty, and property, imposes not only procedural but also substantive limitations on the criminal justice system; that there are basic criteria to which the courts should look in evaluating the constitutionality of the substance of the criminal law; and that these criteria must be satisfied before conduct can be declared criminal and the machinery of the criminal process thereby set in motion. Specifically, conduct which does not meet the criterion of *legal* harm should not be declared criminal. The principle of legal harm will be developed, its elements set forth, and the validity of criminalization of prostitution evaluated in light of this principle.

The crime of prostitution is an appropriate subject for a harm analysis for several reasons. Not only has "[t]he debate over criminal laws forbidding certain varieties of sexual conduct . . . become the *locus classicus* of modern interest in the limits of criminal law,"[5] but also the opponents of prostitution assert with great vigor that prostitution causes several harms. But what makes prostitution particularly apropos is that although recently challenges to the constitutionality of prostitution laws have been brought[6] and sustained in several jurisdictions,[7] the constitu-

[4]In Robinson v. California, 370 U.S. 660 (1962), the Supreme Court held unconstitutional a provision which made it a crime "to be addicted to the use of narcotics." *Id.* at 660. However, in Powell v. Texas, 392 U.S. 514 (1968), the Court refused to extend the *Robinson* rationale and upheld a provision which made it a crime to "get drunk or be found in a state of intoxication in any public place . . . ." *Id.* at 517. The Court clarified its holding in *Robinson* by stating that the crucial issue is whether or not "the accused has committed some act . . . ." *Id.* at 533.

[5]H. PACKER, THE LIMITS OF THE CRIMINAL SANCTION 301 (1968).

[6]Unsuccessful challenges have been brought in Maryland and Indiana. In Cherry v. State, 18 Md. App. 252, 306 A.2d 634 (1973), where the male defendant had advertised in the *Washington Post* for prostitutes to entertain his clients under the guise of advertising a receptionist position, the court rejected overbreadth, vagueness, and freedom of speech arguments and sustained the constitutionality of MD. ANN. CODE art. 27 § 15(e) (1957) which prohibited solicitation for the purposes of prositution. In Wilson v. State, 278

tional issues thus far raised—equal protection,[8] right to privacy,[9] and freedom of speech[10]—fail to go to the heart of the constitutional infirmities which beset laws *criminalizing* prostitution. These arguments should be reserved for attacking *regulation* of, and not criminal prohibition of, prostitution.[11]

After a brief survey of the scope, function, and inadequacies of each theory which has been utilized in framing constitutional challenges to prostitution laws, the principle of harm, which will be shown to address the *critical* constitutional defect of laws criminalizing prostitution, will be applied to the harms most frequently alleged to be caused by prostitution. This analysis will show that criminalization of prostitution should not constitutionally be allowed to stand.

I. PRESENT CHALLENGES

A. *Equal Protection*

By far the most successful argument asserted in attempts to

N.E.2d 569 (Ind. 1972), *cert. denied*, 408 U.S. 928 (1972), the court rejected an equal protection challenge to its facially discriminatory law. In Sumpter v. State, 14 CRIM. L. REP. 2373 (Ind. Sup. Ct. 1974), the court upheld a statute making it a crime for women but not men to frequent or live in a house of ill fame. The court rejected arguments that the statute violated the equal protection clause and the prohibitions against establishment of religion, suffered from unconstitutional vagueness, and imposed punishment for a "status" rather than for criminal conduct.

[7]Successful challenges have been brought in three jurisdictions. In State v. Fields, No. 72-4788 Cr. (3d Jud. Dist. Ct. Alas., June 27, 1973), the court held ALASKA STAT. § 11.40.210 (1970), criminalizing prostitution, invalid on its face under the equal protection clause and ALASKA STAT. § 11.40.230 (1970), criminalizing solicitation for prostitution, discriminately enforced against females in contravention of the equal protection clause. In United States v. Moses, Nos. 17778-72 & 21346-72 (D.C. Super. Ct., Nov. 3, 1972), *appeal docketed*, No. 7042, D.C. Cir., Nov. 10, 1972 (abbreviated opinion reported in 41 U.S.L.W. 2298), the court held D.C. CODE ANN. § 22-2701 (1967), criminalizing solicitation for prositution, invalid as an unconstitutional invasion of the defendants' rights of privacy and freedom of speech. It furthermore found discriminatory enforcement of the provision against female offenders constituted a denial of equal protection. In State v. Woods, No. 443012 (Minneapolis Mun. Ct., Dec. 21, 1971), the court held MINNEAPOLIS ORD. 870.10 invalid on its face under the equal protection clause and void for vagueness.

[8]Equal protection issues were raised in State v. Fields, No. 72-4788 Cr. (3d Jud. Dist. Ct. Alas., June 27, 1973), United States v. Moses, Nos. 17778-72 & 21346-72 (D.C. Super. Ct., Nov. 3, 1972), Wilson v. State, 278 N.E.2d 569 (Ind. 1972), and State v. Woods, No. 443012 (Minneapolis Mun. Ct., Dec. 21, 1971).

[9]Right of privacy issues were raised in State v. Fields, No. 72-4788 Cr. (3d Jud. Dist. Ct. Alas., June 27, 1973); and United States v. Moses, Nos. 17778-72 & 21346-72 (D.C. Super. Ct., Nov. 3, 1972).

[10]Freedom of speech issues were raised in Cherry v. State, 18 Md. App. 252, 306 A.2d 634 (1973); United States v. Moses, Nos. 17778-72 & 21346-72 (D.C. Super. Ct., Nov. 3, 1973).

[11]Regulation of prostitution consists of legalization by the state accompanied by reten-

invalidate prostitution laws has been that the challenged law in some manner contravenes the equal protection clause of the fourteenth amendment. Three courts have found that a challenged prostitution law treated those similarly situated differently and thus worked a denial of equal protection.[12] Such disparate treatment generally results in one of two ways: (1) a statute may be discriminatory on its face by defining prostitution as an offense by a *female*, thereby precluding prosecution of male prostitutes;[13] or (2) a statute neutral on its face may be discriminately enforced against female prostitutes.[14]

While all the courts which have struck down contested prostitution laws have done so either totally or partially on equal protection grounds, the limitation of equal protection challenges should be recognized. The equal protection clause provides no basis for a prohibition of all laws which criminalize prostitution, but only a basis for ensuring that laws criminalizing prostitution are drafted and enforced without discrimination.

B. *Right of Privacy*

Prostitution laws are also being challenged as representing an infringement of the right of privacy, although to date only one court has recognized the applicability of this argument to prosti-

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tion of authority to license, tax, require periodic health inspections, and, in the case of houses of prostitution, to regulate the hours of operaton. NEV. REV. STAT. § 244.345(8) (1971) legalizes prostitution in counties with populations under 200,000 and confers upon those counties authority to issue licenses for houses of prostitution. Regulation and criminalization of prostitution raise different constitutional questions. Because the concern and scope of this note is exclusively the criminal law, laws which regulate but do not proscribe prostitution will not be considered.

[12]State v. Fields, No. 72-4788 Cr. (3d Jud. Dist. Alas., June 27, 1973); United States v. Moses, Nos. 17778-72 & 21346-72 (D.C. Super. Ct., Nov. 3, 1972); and State v. Woods, No. 433012 (Minneapolis Mun. Ct., Dec. 21, 1971). For a thorough discussion of equal protection arguments as a basis for the invalidation of prostitution laws, see Rosenbleet & Pariente, *The Prostitution of the Criminal Law*, 11 AM. CRIM. L. REV. 373 (1973).

[13]Examples of such facially discriminatory laws are those held invalid in State v. Fields, No. 72-4788 Cr. (3d Jud. Dist. Ct. Alas., June 27, 1973) and in State v. Woods, No. 433012 (Minneapolis Mun. Ct., Dec. 21, 1971). ALASKA STAT. § 11.40.210 (1970) provided, "Prostitution includes the giving or receiving of the body by a female for sexual intercourse for hire." MINNEAPOLIS ORD. 870.10 provided, "No female shall offer or submit her body indiscriminately for sexual intercourse whether or not for a consideration."

[14]D.C. CODE ANN. § 22-2701 (1967), which provided, "It shall not be lawful for any person to invite, entice, persuade, or to address for the purpose of inviting, enticing or persuading any person or persons sixteen years of age or over . . . for the purpose of prostitution, or any other immoral or lewd purpose . . ." was found in United States v. Moses, Nos. 17778-72 & 21346-72 (D.C. Super. Ct., Nov. 3, 1972), to be neutral on its face but discriminatorily enforced against the female offender.

tution laws.[15] While commercialized sex between unmarried adults may eventually be included within the scope of the right of privacy,[16] it is doubtful that many courts will be willing to rest the invalidation of laws criminalizing prostitution on this ground in the near future. This is particularly true in light of the Supreme Court's recent obscenity decisions holding that an activity which would be protected if indulged in within the privacy of one's home will be accorded less protection in a commercial situation.[17]

Right of privacy challenges, unlike equal protection challenges, would, if successful, result in total prohibition of laws criminalizing prostitution. However, the usefulness of right of privacy arguments for present challenges to prostitution laws is limited by the as yet fairly narrow and undeveloped scope of the right.[18]

C. *Freedom of Speech*

Statutes which proscribe solicitation for the purpose of prostitution have been attacked on the ground that they abridge the

[15]United States v. Moses, Nos. 17778-72 & 21346-72 (D.C. Super. Ct., Nov. 3, 1972) slip op. at 31. The argument was raised in State v. Fields, No. 72-4788 Cr. (3d Jud. Dist. Ct. Alas., June 27, 1973), but the equal protection issue was held to be dispositive of the case and the right of privacy issue was not considered.

[16]Eisenstadt v. Baird, 405 U.S. 438 (1972) is a step in this direction. In upholding the right of unmarried individuals to receive contraceptives, the Court stressed that the right of privacy recognized in Griswold v. Connecticut, 381 U.S. 479 (1965) is not limited to the marital relationship. 405 U.S. at 453.

[17]United States v. 12 200-Ft. Reels of Super 8mm. Film, 413 U.S. 123, 128 (1973); Paris Adult Theatre I v. Slaton, 413 U.S. 49, 57 (1973); United States v. Reidel, 402 U.S. 351, 354-55 (1971).

[18]The Supreme Court has recognized the right of privacy in matters relating to abortion (Roe v. Wade, 410 U.S. 113 (1973)); contraception (Griswold v. Connecticut, 381 U.S. 479 (1965); Eisenstadt v. Baird, 405 U.S. 438, 453 (1972)); marriage (Loving v. Virginia, 388 U.S. 1, 12 (1967)); family relationships (Prince v. Massachusetts, 321 U.S. 158, 166 (1944)); and childrearing and education (Pierce v. Society of Sisters, 268 U.S. 510, 535 (1925); Meyer v. Nebraska, 262 U.S. 390 (1923)). For a discussion of post-*Griswold* federal court decisions which address the ninth amendment, see Rhoades & Patula, *The Ninth Amendment: A Survey of Theory and Practice in the Federal Courts Since Griswold v. Connecticut*, 50 DENVER L.J. 153 (1973).

The now famous case of Roe v. Wade, 410 U.S. 113 (1973), has raised the question whether invalidation of laws which contravene the right of privacy will be based on the doctrine of substantive due process. Significant in this respect are the Court's words, "This right of privacy, may it be founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action, as we feel it is, or . . . in the Ninth Amendment's reservation of rights to the people . . . ." *Id.* at 153. One effect of a shift to due process might well be abandonment of the need for showing a "compelling state interest" and a lack of a "less restrictive alternative"; both must be shown under the ninth amendment approach before the state can override the fundamental right involved. Under

first amendment's guarantee of freedom of speech.[19] This claim has much merit and chance of success in the three jurisdictions which prohibit solicitation for prostitution but not prostitution itself;[20] however, in those jurisdictions which define the act itself as a crime and make solicitation to commit a crime a punishable offense, the doctrine will be of little use.

None of the arguments currently utilized in framing challenges to the constitutionality of prostitution laws[21] address the crucial issue in criminalization of prostitution. For whenever state intrusion into the private lives of its citizens is accompanied by potential imposition of the criminal sanction, questions of a very peculiar nature must be asked.

II. THE PRINCIPLE OF HARM

Jerome Hall, one of the foremost scholars of criminal law, divided propositions about criminal law into three categories: principles, doctrines, and rules;[22] those which are of the widest generalization and universally applicable to all crimes are denominated principles.[23]

> [T]he principles of criminal law consist of seven ultimate notions expressing: (1) *mens rea*, (2) act (effort), (3) the "concurrence" (fusion) of *mens rea* and act, (4) harm, (5) causation, (6) punishment,

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a due process approach, a less stringent "balancing test" would likely be substituted. "The right of personal privacy includes the abortion decision, but that . . . right is not unqualified and must be considered against important state interests in regulation." *Id.* at 154.

[19]The claim was rejected in Cherry v. State, 18 Md. App. 252, 306 A.2d 634 (1973), but was sustained in United States v. Moses, Nos. 17778-72 & 21346-72 (D.C. Super. Ct., Nov. 3, 1972).

[20]The District of Columbia, Michigan, and Nevada are the only jurisdictions which prohibit solicitation for prostitution but not prostitution itself. The relevant statutory provisions are D.C. CODE ANN. § 22-2701 (1967), held invalid in United States v. Moses, Nos. 17778-72 & 21346-72 (D.C. Super. Ct., Nov. 3, 1972); MICH. COMP. LAWS ANN. § 750.448 (1968), *as amended*, MICH. COMP. LAWS ANN. § 750.448 (1969); NEV. REV. STAT. § 207.030(b) (1971).

[21]The cruel and unusual punishment clause of the eighth amendment was asserted in United States v. Moses, Nos. 17778-72 & 21346-72 (D.C. Super. Ct., Nov. 3, 1972), as a basis for invalidating D.C. CODE ANN. § 22-2701 (1967), which prohibits solicitation for the purposes of prostitution. The court did not address the issue but rested its decision on other grounds. In *Ex parte* Carey, 57 Cal. App. 297, 207 P. 271 (1922), the defendant unsuccessfully raised the plea of cruel and unusual punishment in response to the imposition of an indeterminate sentence following her conviction for solicitation for prostitution. For a discussion of the utility of the cruel and unusual punishment clause in framing challenges to prostitution laws, see Rosenbleet & Pariente, *supra* note 12, at 379-80.

[22]J. HALL, GENERAL PRINCIPLES OF CRIMINAL LAW 17 (2d ed. 1960).

[23]*Id.* at 17, 22.

> and (7) legality. . . . [T]he principles of criminal law, excepting . . . "punishment" and "legality" refer to essential elements of "crime" . . . .[24]

Unlike most of the above principles, which have been well developed and well integrated into criminal theory, the principle of harm has been largely ignored. The briefest examination of American criminal law theory confirms the contention of the well-known legal theorist G. O. W. Mueller that "[t]he principle of harm is the most underdeveloped concept in our criminal law."[25] In failing to take account of the principle of harm, American jurisprudence has failed to recognize what should be one of the primary limitations on the power of government to make conduct criminal.

Perhaps the genesis of the problem can be traced to the extent to which framers of both state and federal constitutions concentrated on procedural safeguards, foregoing, for the most part, specific substantive limitations on the kinds of conduct which could be declared criminal.[26] H. L. A. Hart points out that the framers, in lieu of supplying substantive limitations, relied primarily on the legislature's sense of justice and, secondarily, on the courts' use of due process to prevent an arbitrary application of the criminal sanction when the legislature's sense of justice somehow went awry.[27] It is debatable whether the reliance on the legislature or on the courts in this instance was more misplaced. Both appear to have almost totally abrogated responsibility in first, developing, and secondly, abiding by principles of criminal liability consonant with constitutional mandates. Hart summarizes the problem:

> Closely and vitally related to the failure of American courts to develop adequate principles of criminal liability . . . has been their failure to come to grips with the underlying constitutional issues involved. This failure is the more surprising because of the obvious concern of the Constitution to safeguard the use of the method of the criminal law—especially, but not exclusively, on the procedural

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[24] *Id.* at 18.

[25] Mueller, *Criminal Theory: An Appraisal of Jerome Hall's Studies in Jurisprudence and Criminal Theory*, 34 IND. L.J. 206, 220 (1959).

[26] Of ex post facto laws, an obvious exception, H.L.A. Hart says, "the principles of just punishment implicit in such clauses have relevance in other situations than that only of condemnation under an after-the-fact enactment—a wider relevance than courts have yet recognized." Hart, *The Aims of the Criminal Law*, 23 LAW & CONTEMP. PROB. 401, 411 n.27 (1958).

[27] *Id.* at 411.

> side . . . . What sense does it make to insist upon procedural safeguards in criminal prosecutions if anything whatever can be made a crime in the first place?[28]

That one may not be deprived of "life, liberty, or property without due process of law" has traditionally meant that one may not be deprived arbitrarily of the same. Concern over arbitrariness explains the reverence with which the principle of legality is viewed and the enshrined positions of the guarantees of notice and trial by jury. But if no set principles are used in defining criminal conduct, if criminality is determined solely by undefinable, constantly changing public notions of morality, is this not an arbitrary imposition of punishment and deprivation of liberty without due process of law? As Justice Harlan wrote in his dissent in *Poe v. Ullman*:

> [T]he full scope of the liberty guaranteed by the Due Process Clause cannot be found in or limited by the precise terms of the specific guarantees elsewhere provided in the Constitution. . . . It is a rational continuum which, broadly speaking, includes a freedom from all substantial arbitrary impositions and purposeless restraints . . . .[29]

If due process is to have any meaning at all as a check on the police power, its protection must extend to the very heart of the criminal system and first and foremost provide constitutional limits on what conduct may be declared criminal. If it is to be no more than protection against arbitrary procedure in a system whose prime characteristic is arbitrariness, it is a hollow guarantee indeed.

A. *Morality: A Legitimate State Interest*

Discussions of "victimless crimes" have traditionally been carried on within the context of the age-old debate over the legitimacy and propriety of governmental regulation of morality. This approach is both misleading and ineffective. It is misleading because it obscures the fact that the real issue is not regulation of morality but criminalization of nonharmful conduct.[30] It is inef-

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[28] *Id.* at 430-31. Hart's thesis is that a sanction which imports blame is misused when it is applied to conduct which is not blameworthy. Although he concerns himself with conduct which is not blameworthy because the actor lacks a criminal state of mind, many of his criticisms of the failure of American courts to develop adequate principles of criminal liability and to recognize and attempt to resolve the underlying constitutional issues are directly applicable to the courts' treatment of conduct which is not blameworthy because of the lack of any resultant objective harm.

[29] Poe v. Ullman, 367 U.S. 497, 543 (1961) (Harlan, J., dissenting).

[30] "What truly distinguishes the offenses commonly thought of as 'against morals' is

fective because, while the propriety of governmental regulation of morality is a question which has been discussed, debated, and disposed of by many legal philosophers,[31] the regulation of morality as a component of the police power has been long accepted by American courts.[32] In the words of Eugene Rostow, "Men often say that one cannot legislate morality. I should say that we legislate hardly anything else."[33]

The argument should not be that government should not regulate morality, but rather that applications of the criminal law should be restricted to that aspect of morality which concerns a harm committed.[34] This argument addresses the real issue: When can the government's general authority to regulate morality be exercised without transgressing constitutional norms? The answer should be that morals may be regulated by means of the criminal sanction when, and only when, a breach of the moral code would imminently cause a cognizable harm to a legally protected interest of another.

B. *The Elements of Legal Harm*

1. Invasion of a Legally Protected Interest

Upon first glance harm appears to be a normative concept, neither lending itself to legal analysis nor to a systematized application within a legal context. Indeed, few legal theorists have ventured to define the term.

Hall and Mueller have defined harm as implying "interests or values which have been destroyed, wholly or in part,"[35] and as "the violation of [an] intangible, legally protected interest . . . ."[36] The latter definition is preferable because of the impor-

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not their relation to morality but the absence of ordinary justification for punishment by a nontheocratic state." Schwartz, *Morals Offenses and the Model Penal Code*, 63 COLUM. L. REV. 669 (1963).

[31]*See* P. DEVLIN, THE ENFORCEMENT OF MORALS (1965); L. FULLER, THE MORALITY OF LAW (1969); Fuller, *Positivism and Fidelity to Law—A Reply to Professor Hart*, 71 HARV. L. REV. 630 (1958); Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593 (1958); Hart, *Social Solidarity and the Enforcement of Morality*, 35 U. CHI. L. REV. 1 (1967).

[32]Lochner v. New York, 198 U.S. 45, 53 (1905); Boston Beer Co. v. Massachusetts, 97 U.S. 25, 33 (1877). *But see* United States Dep't of Agriculture v. Moreno, 413 U.S. 528, 535 n.7 (1973).

[33]Rostow, *The Enforcement of Morals*, 18 CAMB. L.J. 174, 197 (1960).

[34]Comment, *Private Consensual Adult Behavior: The Requirement of Harm to Others in the Enforcement of Morality*, 14 U.C.L.A.L. REV. 581, 582 (1967). *See* J. HALL, GENERAL PRINCIPLES OF CRIMINAL LAW 158 (1947 ed.).

[35]J. HALL & G. MUELLER, CRIMINAL LAW AND PROCEDURE 90 (2d ed. 1965).

[36]*Id.*

tance of limiting definitions of harm to the destruction in whole or in part of *legally protected*[37] interests. By so limiting its meaning, harm becomes a workable, legally significant concept, removed from the normative, subjective sphere. It makes clear that in analyzing the external effect of a legally prohibited act, the harm requirement will not be fulfilled merely by asserting that the effect is in some way undesirable to some individual or individuals. The harm requirement is only satisfied when legally protected interests have been infringed. The determination of which interests are to be given legal protection is one made continuously both by the courts and the legislatures.

2. Harm to Others

John Stuart Mill once wrote:

> [T]he only purpose for which power can be rightfully exercised over any member of a civilised community, against his will, is to prevent harm to others. His own good, either physical or moral, is not a sufficient warrant.[38]

His words have sparked much heated debate; the sides have been chosen and the battlelines formed.[39] The issue, however, should not be decided in the abstract according to one's philosophical disposition, but rather by rigorous adherence to legal analysis. Within the framework of the principle of harm there are two separate issues: (1) Can the harm requirement be satisfied if the only injury resulting from a given act is to the individual performing the act? and (2) Is *all* harm to others punishable?

The answer to the former question turns upon whether one has any interests which are legally protected against infringement by oneself. Laws making it a crime to commit suicide are the most obvious example of laws which implicitly assert that one's interests (*i.e.*, in life) are protected from such infringement.

If one accepts the basic premise that the sole purpose of according legal protection to various interests is to provide sanctions for unwanted interference with those interests, the faulty logic of maintaining that one has interests which are legally protected against infringement by oneself is easily highlighted. By

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[37]*See generally* Eser, *The Principle of "Harm" in the Concept of Crime: A Comparative Analysis of the Criminally Protected Legal Interests*, 4 DUQUESNE U.L. REV. 345 (1965-66).

[38]J. MILL, *On Liberty*, in UTILITARIANISM, LIBERTY, AND REPRESENTATIVE GOVERNMENT 95-96 (1951).

[39]*See* note 31 *supra*.

definition *whenever* the interference with one's interests stems from an act which one performs oneself, the interference is not unwanted. Since there can be no harm without interference with legally protected interests, the harm requirement can never be fulfilled outside of the context of harm to others.

Generally courts avoid having to rule on the constitutionality of legislation which has as its only purpose the protection of the individual from himself by holding that the statute challenged on this ground does in fact cause harm to others.[40] However, as H. L. Packer has pointed out, "The question is one of the remoteness and probability of the harm."[41] Therefore, the second issue, *what* harm to others is punishable, must be resolved by considering the requirement of imminence set forth below.[42]

3. Factually Demonstrable Harm

One of the most important criteria which must be met before harm can appropriately be subjected to the criminal sanction is that harm must be harm in *fact*. Given the courts' failure to recognize and require harm as an element of every crime, it is not surprising the extent to which they have been willing, when they have considered harm at all, to satisfy themselves with mere presumptions of harm.[43]

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[40]People v. Schmidt, 54 Misc. 2d 702, 283 N.Y.S.2d 290, 292 (Erie County Ct. 1967); People v. Bielmeyer, 54 Misc. 2d 466, 282 N.Y.S.2d 797, 799-800 (City Ct. Buffalo 1967); State *ex rel.* Colvin v. Lombardi, 104 R.I. 28, 31, 241 A.2d 625, 627 (1968).

American Motorcycle Ass'n v. Davids, 11 Mich. App. 351, 158 N.W.2d 72 (1968) is one of the few cases which held that a criminal statute whose only purpose is to protect the individual from himself is unconstitutional. The court struck down a statute requiring motorcyclists to wear crash helmets on the grounds that it violated the due process, equal protection, and right of privacy protections of the ninth and fourteenth amendments. The court's response to the attorney general's contention that the state has an interest in the viability of its citizens and can legislate to keep them healthy and self-supporting was that "this logic could lead to unlimited paternalism." *Id.* at 75.

[41]H. PACKER, *supra* note 5, at 266.

[42]*See* text accompanying notes 56-58 *infra*.

[43]In Guarro v. United States, 237 F.2d 578 (D.C. Cir. 1956), where the defendant was prosecuted for assault after he touched a policeman's genitals, the victim denied any emotional injury. However, the court said that no specific proof of emotional injury was required. "[I]t would seem that a sexual touching is a sufficiently offensive act to constitute an assault. Nor should the fact that an experienced policeman denies emotional injury alter the situation." *Id.* at 580. *But see* Commonwealth v. Leis, 355 Mass. 189, 243 N.E.2d 898 (1969), where the defendants challenged their convictions for unlawful possession of marijuana on due process grounds, asserting that the law was irrational and unreasonable because there was no evidence that marijuana endangered the health, safety, welfare, or morals of the community. In reaching its conclusion that the statute was reasonable the court found "harm" by examining the results of several scientific studies. *Id.* at 194 nn.11 & 12, 243 N.E.2d at 903 nn. 11 & 12. It is important to note that

Of those jurists who have concerned themselves with the principle of harm, Orville Snyder has been the most adamant about the need for factual harm:

> The principle, "implicit in the concept of ordered liberty," that only conduct causing or threatening public harm can be made a crime and that public harm is a matter of fact, which must be susceptible of factual demonstration, is the fundamental limitation on legislative power and of the essence of law as a means of protecting freedom. While it is not the function of the courts to second-guess legislatures on the wisdom of making or not making conduct in fact harmful a crime, the question of whether conduct is or is not harmful in fact . . . is open . . . . The answer is not to be extracted from the exegesis of an abstract morality, from social-welfare generalities . . . nor is the touchstone . . . what public opinion demands. The answer is to be found in a public evidential inquiry into such matters as, What and who are affected? How are they affected? To what extent are they affected? In what is this harmful? How is this a public harm?[14]

Snyder's admonititions aside, factual establishment of the presence or absence of harm is admittedly difficult because of the very definition of harm, the impairment of legally protected interests or values. Interests and values are, by their nature, often intangible, and the measurement of their infringement or destruction not susceptible to quantification. However, to accept Hall's premise that harm in those crimes where there is no physical injury (*e.g.*, libel, kidnapping, perjury) may be stated in terms of intangibles such as harm to reputation, public safety, or institutions[15] is *not* to say that there is no necessity for factual proof in such situations.

Who has the burden of proving the existence or nonexistence of factual harm? Given the lattitude accorded the legislature in its exercises of the police power, the answer is fairly clear. The judgments of the legislature enjoy a presumption of constitutionality even though unsupported by evidence, and the burden of proof generally falls on the challenger.[16] Evidence on the record supporting a particular provision is not a condition precedent to the courts' upholding it upon challenge. However, while the bur-

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the court chose to focus on those studies which did support the allegation of harm to the public health, rather than simply to hold that a showing of harm was not necessary to support the provision.

[14]O. SNYDER, AN INTRODUCTION TO CRIMINAL JUSTICE 764 (1953).

[15]J. HALL, *supra* note 22, at 217.

[16]United States v. Carolene Prods. Co., 304 U.S. 144, 154 (1938).

den of proof would remain on the challenger, a showing of a lack of factual harm should result in mandatory invalidation of the provision.

4. Imminent Harm

It must be emphasized that it will often be possible to find *some* harm, some infringement of a legally protected interest, which if traced back far enough can be found to originate with a given act. Thus discussions of harm should not be carried on in terms of a sharp dichotomy—harm or no harm.[47] The issue is whether the harm in question is a proper subject of the criminal law. The resolution of this issue involves a great interplay between Hall's principles of harm and causation.[48]

Harm to others may be one of two kinds—direct or indirect. The former is always punishable; the latter may or may not be. What is needed is a principle to separate punishable from nonpunishable indirect harm—a principle which could provide a consistent, *nonarbitrary* test, whose operation would meet the due process requirements of rationality and regularity in the application of the laws. That the proximity of an act to its resultant harm is the crucial criterion in separating punishable from nonpunishable harm is shown by an examination of attempt law.

a. *Attempt Law*

The problems and issues of attempt law are a microcosm of the problems and issues involved in the principle of harm. According to Hall, the doctrine of criminal attempt represents "a major explication of the fundamental principle stipulating the commission of external harm."[49]

The presence and the nature of the harm in inchoate offenses such as attempt, solicitation, conspiracy, and possession of burglar's tools, has been a matter of much debate.[50] If it is said that such offenses contain no harm, the basis for infliction of punishment must be the moral culpability of the actor. But if moral culpability of the actor as evidenced in crime-directed behavior suffices, why the emphasis in attempt law to distinguish between states of preparation, which are held to be nonpunishable, and attempts, which are held to be punishable? In both instances equivalent moral culpability and antisocial behavior can be found.

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[47]Hall, *Perennial Problems of the Criminal Law*, 1 HOFSTRA L. REV. 15, 23 (1973).

[48]*See* note 24 *supra*.

[49]J. HALL, *supra* note 34, at 95-96.

[50]J. HALL, *supra* note 22, at 217-18 & n.18.

> If *all* conduct "in the direction" of certain harms were penalized, the . . . problem would disappear. But only the criminal attempt, not the preparation, is punishable. The plain implication of that must be explored.[51]

The remoteness or proximity of the harm from the actor's conduct is the distinguishing element between preparation and attempt in both case law[52] and statutory codifications.[53] For the defendant to be liable for attempt there "must be a dangerous proximity to success"[54] or "an act or omission constituting a substantial step in a course of conduct planned to culmimate in [the actor's] commission of the crime."[55] Attempt law, then, separates those harms which are punishable from those which are not by examining the attenuation of the relationship between the act and its resulting harm, by asking the question, "How far removed from the act or tangentially connected to the act is the harm in question?"

b. *The Test of Imminence*

A criterion similar to that applied in attempt law to distinguish culpable from nonculpable conduct should be applied to other determinations of criminal liability. A principle conveniently termed "imminence" would (1) accurately represent criteria considered in imposition of liability for attempt, a major area of the law where the harm is intangible, and (2) serve a function in determinations of criminal liability analogous to that of proximate cause in determinations of civil liability.

The imminence principle would focus attention on the question, "Is the harm imminently forthcoming from the act?" Application of the principle would answer the crucial question, "Is the harm involved of a nature which should be subject to criminal sanctions or is it too removed in time and space from the act engendering it?"

The answer to the latter question is, of course, ultimately a policy determination, as are proximate cause determinations in

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[51]J. HALL, *supra* note 34, at 101.

[52]In Commonwealth v. Kennedy, 170 Mass. 18, 48 N.E. 770 (1897), Justice Holmes said for the court, "As the aim of the law is not to punish sins, but is to prevent certain external results, the act done must come pretty near to accomplishing that result before the law will notice it." *Id.* at 20, 48 N.E. at 770.

[53]"A person commits criminal attempt if . . . he intentionally engages in conduct constituting a substantial step toward commission of the offense." COLO. REV. STAT. ANN. § 40-2-101 (Supp. 1971), *amending* COLO. REV. STAT. ANN. § 40-25-1 (1963).

[54]Hyde v. United States, 225 U.S. 347, 388 (1912) (Holmes, J., dissenting).

[55]MODEL PENAL CODE § 5.01 (Proposed Official Draft 1962).

civil liability. Of importance here, however, is that proximate cause determinations have been the task of the *courts*; the imminence principle also envisions active participation of the courts in deciding what conduct should be made criminal—an all too new role.

What should the test of imminence be? It is not necessary nor even desirable that the test be narrowly drawn; it must be flexible and capable of application in a wide variety of circumstances. It is significant that the guidelines for proximate cause determinations of civil liability have been drawn in such a way as to give the courts wide latitude.[56]

A test which is reflective of the above considerations and which would at once provide the courts with the necessary guidelines, yet leave them free to make independent determinations based on the merits of the individual case, is, "Is there a direct and causal sequence between the act and the resulting harm, such that the chain of causation can be perceived and evaluated, and the harm determined thereby not to be too remote nor the relationship between the act and the harm too attenuated?" The crucial part of the test is that there be a perceivable chain of causation. If the chain must be assumed, liability cannot attach.

Having posited the imminence principle as a workable criterion for distinguishing punishable from nonpunishable harm, a test of its general applicability is in order. For purposes of analysis crimes can be separated into two broad categories: (1) result-oriented crimes, where the act prohibited is itself the harm to be prevented, and (2) simple conduct crimes. With crimes of the first category application of the principle is easy. By definition, once the elements of the crime are satisfied, the harm has occurred. For example, "[a] person is guilty of criminal homicide if he . . . causes the death of another human being."[57] The act (causing death) is contemporaneous with the specific harm (interference with the interest in life). Thus result-oriented crimes contain a built-in satisfaction of the imminence requirement.

In the second category of cases, where the conduct prohibited is not itself the harm to be prevented, each crime must be individually examined to ascertain whether or not harm is imminently forthcoming from the prohibited act. A simple chart demonstrates that even where the harm sought to be prevented is intan-

[56]*See, e.g.*, Palsgraf v. Long Island R.R., 248 N.Y. 339, 162 N.E. 99 (1928).
[57]MODEL PENAL CODE § 210.1 (Proposed Official Draft 1962).

gible, penal codes by and large restrict liability to instances where the harm is imminent:

	Crime	Imminent Harm
(1)	perjury	obstruction of justice
(2)	libel	harm to reputation
(3)	treason	overthrow of state[58]
(4)	assault	psychic harm, apprehension
(5)	bribery	corruption of public officers

A glaring exception to this general rule is crimes commonly termed "crimes against morals." Such crimes represent a sphere where none of the usual principles of criminal liability are applied and where none of the usual considerations which result in making conduct criminal are present.

III. THE HARM IN PROSTITUTION

Having established the fundamental nature of the principle of harm and that harm should be an essential element of every crime, the question, "What is the harm in prostitution?" will now be explored. The asserted harms in prostitution will be examined in light of the principle that for conduct to be punishable, it must satisfy the four elements of legal harm: (1) a factually demonstrable (2) invasion of a legally protected interest (3) of another (4) imminently caused by the conduct.

The harms which are alleged to be caused by prostitution and thereby justify its prohibition are: (1) prostitution provides an opportunity for the commission of crimes which may be ancillary to prostitution; (2) prostitution provides a breeding ground for the activities of organized crime; (3) prostitution is a significant factor in the spread of venereal disease; (4) prostitution results in the subjection of citizens to offensive public solicitation; and (5) prostitution contributes to the destruction of public morals.

A. *Opportunities for Commission of Ancillary Crimes*

Does the act or practice of prostitution imminently cause harm in fact by providing an increased opportunity for the commission of other crimes? It is often argued that prostitution should be suppressed because its commission is inevitably connected with the commission of other crimes such as beatings and

[58]Note the imminence requirement built into the crime of treason by the requirement of an overt act. U.S. CONST. art. III, § 3.

theft. The first step in the analysis is the determination of the presence or absence of a legally protected interest to serve as the basis of harm. Arguably, a legally protected interest is present in the form of the general security of the community; no doubt concern for the general security underlies *every* criminal prohibition, each of which protects the general security from destruction in a specific way.

Although a legally protected interest is perhaps present, the cause in fact requirement is unsatisfied. There is nothing about an act of intercourse for hire which *in itself* makes the commission of other crimes likely. The harm embodied in the ancillary crimes is a byproduct of the environment to which society consigns prostitution, not a harm caused by that conduct itself. The irrationality of criminalizing prostitution to decrease theft or assault is obvious if one realizes that it is precisely *because* prostitution is criminalized that such crimes are not reported when committed within the context of prostitution.[59] If anything, then, criminalization of prostitution serves as an incentive and shield for the would-be thief or assailant. Armed with the knowledge that his or her victim will be reluctant to report the illegal incident, the actor, whether the patron or the prostitute, is encouraged rather than deterred.

More basically, there may be a limit on the extent to which a state may proscribe one kind of conduct with the purpose of eradicating a different kind of conduct. In *Stanley v. Georgia*[60] the Supreme Court found an overstepping of that limit by the state legislature and held:

> [The legislature] may no more prohibit mere possession of obscene matter on the ground that it may lead to anti-social conduct than it may prohibit the possession of chemistry books on the ground that they may lead to the manufacture of home-made spirits.[61]

In holding invalid their respective prostitution laws, both the Washington, D.C., Superior Court in *United States v. Moses*[62] and an Alaska district court in *State v. Fields*[63] examined the ancillary crimes argument. Both courts, in finding the harm not

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[59]James & Burnstin, *Prostitution in Seattle*, 6 WASH. STATE BAR NEWS 7-8 (Aug.-Sept. 1971).

[60]394 U.S. 557 (1969).

[61]*Id.* at 567.

[62]Nos. 17778-72 & 21346-72 (D.C. Super. Ct., Nov. 3, 1972).

[63]No. 72-4788 Cr. (3d Jud. Dist. Ct. Alas., June 27, 1973).

only unsubstantiated but also unsound constitutionally as a basis for criminalization, cited *Stanley*. The court in *Fields* said:

> [P]rosecution of future criminality presumed to be associated with certain types of offenses or offenders may not only have little empirical support, but is incompatible with our constitutional system of due process and equal protection of the laws.[64]

And in *Moses* the court said:

> If indeed there is evidence that prostitution is sometimes coincident with certain crimes, there is also ample indication that the extension of the criminal law to soliciting significantly hinders application of legal sanctions to those very crimes. By the most fundamental precepts of our law, it is to those violent acts that such sanctions must directly be addressed. Endorsement of an alleged state interest which precisely inverts this proscriptive emphasis would be a perversion of justice . . . .[65]

B. *The Encouragement of Organized Crime*

Does the act or practice of prostitution imminently cause harm in fact by providing a breeding ground for the activities of organized crime? The drafters of the *Model Penal Code* seriously considered following Britain's example of decriminalizing prostitution and retaining only public solicitation as a crime; one of the determinative factors in their decision not to do so was the belief that "call-houses" were an important part of the financial machine of the underworld and closely linked to "rackets" such as narcotics.[66]

This contention has much in common with the previously discussed assertion that prostitution causes an increased opportunity for the commission of other crimes. The allegation that prostitution provides a breeding ground for the activities of organized crime *may*, like the allegation that prostitution results in an increase in other crimes, confuse the effects of prostitution with those of *illegalized* prostitution. The San Francisco Committee on Crime has stated that "[i]t is . . . probable that if prostitution were not a crime, it would not be organized."[67]

Even assuming that the presence of organized crime in a given activity is not a function of the illegality of the activity, the

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[64]*Id.*, slip op. at 9.

[65]United States v. Moses, Nos. 17778-72 & 21346-72 (D.C. Super. Ct., Nov. 3, 1972), slip op. at 22.

[66]Schwartz, *supra* note 30, at 682.

[67]THE SAN FRANCISCO COMMITTEE ON CRIME, A REPORT ON NON-VICTIM CRIME IN SAN FRANCISCO 32 (1971).

harm requirement is still not met because invasion of the interest in the general security through encouragement of organized crime can be factually rebutted. The President's Commission on Law Enforcement and Administration of Justice reported in 1967 that the role of organized crime in prostitution is both small and declining[68] and its findings have been corroborated by two other recent studies.[69] Significantly, the drafters of the *Model Penal Code* formulated their position without the benefit of the above information—all three studies were published after the completion of the *Proposed Official Draft* in 1962.[70]

In conclusion, the assertion that prostitution causes harm by providing a breeding ground for organized crime fails to satisfy that element of legal harm of a *factually* demonstrable invasion of a legally protected interest. Not only can it not be factually established that prostitution itself and not illegalized prostitution is tied to organized crime, but the presence of organized crime cannot be factually established at all. On the contrary, a substantial body of evidence tends to disprove its presence.

C. *Transmission of Venereal Disease*

Does the act or practice of prostitution imminently cause harm in fact by the transmission of venereal disease? Such a contention has been a continuously proffered justification for criminalization of prostitution.[71] The community no doubt has

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[68]PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, THE CHALLENGE OF CRIME IN A FREE SOCIETY 189 (1967).

[69]Sherwin & Winick, *Debate: Should Prostitution Be Legalized?*, SEXUAL BEHAVIOR, Jan. 1972, at 72; Esselstyn, *Prostitution in the United States*, 376 ANNALS 123, 127 (1968).

[70]The court in *Moses* took judicial notice of the reports cited in notes 67-69 *supra* in holding the possible connection of organized crime with prostitution insufficient to justify an invasion of the defendants' rights of privacy and freedom of speech through prohibition of solicitation for prostitution. After citing yet another study which heralded the decline of prostitution as an underworld activity and also highlighted underworld involvement in more profitable activities such as labor control (DAVIS, *Prostitution*, in CONTEMPORARY SOCIAL PROBLEMS 262 (1961)), the court said:

> While this Court naturally expresses no view on the relationship of organized crime with organized labor, it is a conceivable affiliation no less logically plausible than that of organized crime and prostitution. However, one would expect to find few serious proponents of the abolition of labor unions in order to prevent their potential domination by criminal syndicates. Courts have, in fact, long held that society should regulate illegal conduct directly, rather than prohibit other activities on the ground that those activities are somehow, in some cases, connected with illegality.

United States v. Moses, Nos. 17778-72 & 21346-72 (D.C. Super. Ct., Nov. 3, 1972), slip op. at 19.

[71]J. WARREN, THIRTY YEARS' BATTLE WITH CRIME 141-42 (1875); MODEL PENAL CODE § 207.12, Comment at 171-75 (Tent. Draft No. 9, 1959).

a legally protected interest in the state of its health; protection of "the general health, safety, and welfare" has long been recognized as a component of the police power.[72] Analysis can proceed to whether or not such interest is in fact invaded by prostitution.

In reaching its decision to retain prostitution as a crime in the *Model Penal Code*, the American Law Institute put considerable weight on the alleged impairment of community health caused by prostitution.[73] However, in arriving at their conclusions that "[p]rostitution is an important source of venereal disease"[74] and that "non-commercial 'promiscuity' appears to be less dangerous [in this respect] than commercial prostitution"[75] the Institute relied upon data gathered from studies conducted three decades ago on the causes of venereal disease in army populations.[76]

Fortunately more recent and representative data are available. An extensive 3-year study in Seattle, Washington, based in part upon a medical examination of every prostitute arrested, found syphilis to be almost nonexistent among prostitutes and the rate of gonorrhea to be between 5 and 6 percent.[77] The Public Health Service of the Department of Health, Education and Welfare found that of over 13,600 females diagnosed with infectious syphilis, less than 3 percent were prostitutes.[78]

Two other sources suggest a relatively constant rate of venereal disease among prostitutes of less than 5 percent.[79] Furthermore, as the court in *Moses* noted, the conclusions of experts that there is no significant link between prostitution and the spread of venereal disease may easily be corroborated inferentially: while the 15 to 30-year-old age group accounts for 84 percent of all reported cases of venereal disease, the 30 to 60-year-old age group accounts for 70 percent of all visits to prostitutes.[80]

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[72]"According to settled principles the police power of a State must be held to embrace, at least, such reasonable regulations . . . as will protect the public health and the public safety." Jacobson v. Massachusetts, 197 U.S. 11, 25 (1904).

[73]MODEL PENAL CODE § 207.12, Comment at 171-75 (Tent. Draft No. 9, 1959).

[74]*Id.* at 171.

[75]*Id.* at 175.

[76]*Id.* at 171 n.10, 173 n.20, 174 n.21.

[77]James & Burstin, *supra* note 59, at 9.

[78]United States v. Moses, Nos. 17778-72 & 21346-72 (D.C. Super. Ct., Nov. 3, 1972), slip op. at 15, *citing* DEPT. OF HEALTH, EDUCATION AND WELFARE, PUBLIC HEALTH SERVICE, per J. Millar, M.D., Chief, Veneral Disease Branch, Center for Disease Control, Atlanta, Ga. (June 1, 1972).

[79]Sherwin & Winick, *supra* note 69; Honolulu Star Bulletin, Mar. 23, 1972, at B-8.

[80]James & Burstin, *supra* note 59, at 8.

What conclusions can be drawn from the above data? First, because the incidence of venereal disease among prostitutes is approximately 5 percent, it can be assumed that approximately 5 percent of all persons who patronize prostitutes will thereby acquire venereal disease. But is a legally protected interest of a patron invaded by the acquisition of venereal disease from a consensual act of intercourse? This question must be answered in the negative because, as previously established, the harm requirement cannot be satisfied if the only injury resulting from a given act is to the individual performing that act.

However, the possibility exists that the patron who acquires venereal disease from a prostitute will transmit that disease to another, who may in turn transmit it to another, and so on. While at no point will there be legally cognizable harm to any individuals who acquire venereal disease from a consensual act of intercourse, at some point the contagion may reach a dimension where it can be said to invade the broad interest in community health.

Does the prostitute who infects a patron who in turn infects other members of the community cause harm to the interest in community health? The existence of venereal disease can be factually demonstrated and its widespread existence invades a legally protected interest. Therefore only one element of legal harm still remains to be fulfilled: Is the invasion of the interest imminently forthcoming from the act?

There is a perceivable chain of causation, composed of a series of acts of intercourse, between the act by which the patron was first infected and the ensuing infection of numerous members of the community—which widespread infection constitutes the harm. Thus it could be maintained that the prostitute who infected the patron, who in turn transmitted the disease to other members of the community, caused harm to the interest in community health. But it could just as logically be maintained that the patron who first transmitted venereal disease to the prostitute, who transmitted it to a patron, who in turn transmitted it to other members of the community, caused the harm to the interest in community health. With whom should the chain of causation be said to originate?

Is there validity to the argument that the harm should be attributed to prostitutes as a matter of policy—on the grounds that they account for a great volume of indiscriminate sexual activity? The problem with this argument is that it fails to focus accurately on the harm involved. The harm is widespread vener-

eal disease and it is caused by indiscriminate sexual activity by one who has venereal disease. Even if it is conceded that prostitutes may contribute more than their *proportional* share to the spread of venereal disease, the fact remains that they only cause a very small fraction—approximately 5 percent—of all venereal disease.

Therefore,a criminal provision which prohibits all prostitution in order to prevent the harm of venereal disease bears no reasonable relation to the end it is designed to serve, and consequently is an invalid exercise of the police power. The Supreme Court stated long ago:

> The courts are not bound by mere forms, nor are they to be misled by mere pretenses. They are at liberty—indeed, are under a solemn duty—to look at the substance of things, whenever they enter upon the inquiry whether the Legislature has transcended the limits of its authority. If, therefore, a statute purporting to have been enacted to protect the public health, the public morals, or the public safety, has no real or substantial relation to those objects . . . it is the duty of the courts to so adjudge, and thereby give effect to the Constitution.[81]

Most importantly for purposes of a harm analysis, the finding that provisions criminalizing prostitution bear no substantial relationship to the object they are designed to protect—community health—means that although there may be a perceivable chain of causation between the prohibited conduct and some resulting harm, the relationship between the act and the resulting harm is too attenuated to fulfill the imminence requirement.

The harm alleged to be caused by prostitution to community health fails to satisfy the criteria of legal harm and thus fails to provide the necessary justification for criminalization.

D. *Subjection of Citizens to Offensive Solicitation*

Does the act or practice of prostitution imminently cause harm in fact by the subjection of citizens to offensive public solicitation? The determination of harm in this instance is a matter of some difficulty since it is unclear whether or not a legally protected interest is involved. The issue is twofold: first, whether the public's sensibilities are ever a legally protected interest; and secondly, even if they are sometimes legally protected, whether

[81]Mugler v. Kansas, 123 U.S. 623, 661 (1887).

or not they are protected when the only interference stems not from acts, but speech.

That the public's sensibilities receive some protection may be shown by an examination of the internal division of penal codes. Such crimes as prostitution, open lewdness, and disseminating obscene materials are often subsumed under the appellation "Public Indecency."[82] The crime of open lewdness is based squarely on protection of the sensibilities of others; statutes prohibiting open lewdness make it a crime to do "any lewd act which [the actor] knows is likely to be observed by others who would be affronted or alarmed."[83]

Despite consensus on the permissibility of protecting public sensibilities from offensive *acts*, first amendment issues arise when protection is attempted to be invoked against offensive speech. The Supreme Court has made it clear that the right of an individual to be shielded from speech which he may deem offensive is severely limited by the right of others to enjoy the freedom of speech guaranteed by the first amendment.[84]

But even assuming that public sensibilities are a legally protected interest and that offensive public solicitation for the purposes of prostitution causes an invasion of that interest, the issue remains whether the *practice* of prostitution is the cause in fact of the harm which results from such solicitation. The answer is that it is not the cause in fact. Publicly soliciting customers for one's business is by no means an intrinsic part of doing business; were prostitution not illegal, the multifarious mechanisms for procuring business available to the average commercial enterprise would likewise be available to prostitutes. Great Britain has recognized the separability of prostitution and solicitation for prostitution and deals with whatever problems are caused by the latter directly. It continues to apply criminal sanctions to offensive public solicitation while preserving the noncriminal status of prostitution itself[85] in keeping with the recommendations of the *Wolfenden Report*[86] that private sexual behavior between consenting adults should not be criminalized.

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[82]MODEL PENAL CODE, art. 251 (Proposed Official Draft, 1962).

[83]*Id.* § 251.1.

[84]Cantwell v. Connecticut, 310 U.S. 296 (1940).

[85]Street Offenses Act, 7 & 8 ELIZ. 2, c. 57 (1959).

[86]COMMITTEE ON HOMOSEXUAL OFFENSES AND PROSTITUTION, REPORT, CMND No. 247 at 25 (1957).

Because prostitution and public solicitation for prostitution are separate and severable, the harms occasioned by the latter should not be attributed to the former. No invasion of the interest denominated the public's sensibilities is caused by prostitution itself; therefore, this asserted harm cannot serve as a basis for criminalization of prostitution, but only for criminalization of offensive public solicitation.

A statute which prohibited all public solicitation, whether or not offensive, would not only encounter serious first amendment problems,[87] but would suffer from the defect of not satisfying the requirements of legal harm. Statutory prohibitions of solicitation should be drafted to incorporate the requirement that to be punishable, solicitation must in fact invade the public sensibilities. Furthermore, "[i]n order to curb effectively the use of undesirable police techniques, it might also be desirable to provide that a conviction for public solicitation should require evidence that the *person solicited* was offended thereby . . . ."[88]

Under such a statute,[89] present enforcement practices for prostitution could not continue. Unlike the majority of offenses which involve a complaint by a harmed citizen, "morals offenses" are enforced by the costly practice[90] of police posing as potential customers; "[i]n these cases, the policemen holding themselves out as potential customers seeking solicitation can scarcely claim to have been offended or harrassed [sic] by any conversation their subterfuge elicited."[91]

An alternative method of dealing with harm caused by offensive public solicitation is through presently existing breach of the peace or disorderly conduct statutes. The court in *Moses* suggests this approach.[92] Statutes or ordinances which

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[87]United States v. Moses, Nos. 17778-72 & 21346-72 (D.C. Super. Ct., Nov. 3, 1972), slip op. at 24-26.

[88]H. PACKER, *supra* note 5, at 331.

[89]Such a statute could be worded:

> A person commits an offense if he addresses another in a manner designed to, or likely to, and which does offend that other, for the purpose of engaging that other in a sexual act for hire.

[90]A publication prepared by the Alliance for a Safer New York suggests that present enforcement practices of prostitution laws result in a yearly loss to the nation of $10 million. "On a per case basis it is one of the most expensive non-victim crimes to 'control.' San Francisco estimates run to about $270,000 a year, or $175 per arrest." ALLIANCE FOR A SAFER NEW YORK, CRIMES WITH NO VICTIMS 35 (1972).

[91]United States v. Moses, Nos. 17778-72 & 21346-72 (D.C. Super. Ct., Nov. 3, 1972), slip op. at 23.

[92]*Id.* at 25.

> make it unlawful to provoke a breach of the peace by acting in a manner as to annoy, disturb, obstruct or be offensive to others, [focus] narrowly on the problem of the individual grievously offended by certain language. . . . [An] advantage of this or some alternative "disorderly conduct" statute is that . . . the individual citizen as complainant ascertains the offense, rather than . . . a police officer . . . whose quality of performance is measured by the number of successful prosecutions flowing from his efforts.[93]

In summary, the allegation that the practice of prostitution causes harm by subjecting citizens to offensive public solicitation is unfounded in that prostitution is distinct from solicitation and is not the cause in fact of whatever impairment of legally protected interests is caused by the latter. While some solicitation for prostitution may be criminally prohibited, the principle of harm requires that the criminal prohibition include only that solicitation which causes an invasion of the legally protected interest of the public's sensibilities.

E. *Destruction of Morals*

Does the act or practice of prostitution imminently cause harm in fact by contributing to the destruction of morals? Of all the harms alleged to be caused by prostitution, this requires the most careful scrutiny. Not only is it probable that this alleged harm is foremost in the minds of those who advocate criminalization of prostitution,[94] but it is a "harm" which is inevitably approached and analyzed incorrectly. The court's treatment of this alleged harm in *Moses* is illustrative of the problem; although it recognized the primacy of the alleged harm in the mind of the legislature, it phrased the issue in misleading and ultimately ineffectual terms:

> The inordinate overextension of this statute, so disproportional with any of the potential evils occasioned by solicitation for prostitution, contributes to the inevitable deduction that the government's primary concern here is to suppress prostitution because it is "immoral." Having reached what this Court believes to be the central, if tacit, state interest in these cases, it must now consider the broad question of the right of government to regulate morality.[95]

As emphasized above,[96] the real issue is not whether, but

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[93]*Id.*

[94]MODEL PENAL CODE § 207.12, Comment at 171 (Tent. Draft No. 9, 1959).

[95]United States v. Moses, Nos. 17778-72 & 21346-72 (D.C. Super. Ct., Nov. 3, 1972), slip op. at 28.

[96]*See* text accompanying notes 30-34 *supra*.

when, government may regulate morality. Because of the many instances in which morals receive, if not direct protection, at least indirect protection through the overlap of moral and legal prohibitions (*e.g.*, prohibitions against taking the life of another), this analysis will presume morality to be a legally protected interest. Attention will be focused on the issue of whether or not prostitution imminently causes a factually demonstrable invasion of that interest.

The first obstacle to resolution of this issue is the difficulty of determining exactly what constitutes the interest. It begs the question merely to assert that "morals" means the public morals[97]—whose morals are to be the standard? In *In re Davis*[98] a California court struggled with a similar issue in reviewing a conviction under a statute which made it a crime "wilfully and wrongfully" to commit any act "which openly outrages public decency."[99] In attempting to decide what constitutes a violation of "public decency" the court asked:

> "[W]ho is the public?" . . . That answer is a great deal easier to give in a homogeneous society, in times of well established precepts of morality and manners, such as Victorian England, than today . . . . When the statute speaks of "public decency" does it presuppose some kind of consensus among the majority of the public as to what is and what is not "decent" and, if that assumption is wrong, to which segment of the public is the trier to look?[100]

In a complex and pluralistic urban society a term as amorphous as morals cannot easily be ascribed meaning.

Even if one uses as the standard whatever the majority, through the medium of the penal code, says the public morals are, the problem remains to determine when those morals have been destroyed, wholly or in part, by a given act. To maintain that harm may be presumed from the simple act of disobedience of the mandate would be to ignore an essential element of legal harm—that it be factually demonstrable.

Does prostitution, as is frequently maintained, in some manner cause a public harm? The danger of an allegation of "public harm" is that it often serves as "an intellectual smokescreen hiding a lack of analysis."[101] "Society has no interests over and above

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[97]Comment, *supra* note 34, at 582 n.4.

[98]242 Cal. App. 2d 645, 51 Cal. Rptr. 702 (Cal. App. 1966), *vacated*, 245 Cal. App. 2d 376, 53 Cal. Rptr. 810 (1966).

[99]CAL. PENAL CODE § 650½ (West 1970).

[100]242 Cal. App. 2d 645, 652, 51 Cal. Rptr. 702, 706-07 (Cal. App. 1966).

[101]Comment, *supra* note 34, at 592.

the interests of its constituent members. To say that society is harmed can only mean that some number of individuals are harmed."[102] Therefore, in every allegation of a public harm there must be some ascertainable member or members of the public who are harmed. Asserting the existence of a public harm thus does not destroy the need to demonstate factually who is harmed and in what manner.

In this case it is impossible to identify an effect on anyone's morals except possibly those of the participants. But can the morals of the participants be *legally* harmed? The requirement of harm to others necessitates answering this question in the negative. The morals of the participants are not interests which are legally protected against actions taken by themselves.

It can be seen that attempts to establish harm by destruction or impairment of the interest denominated "general morals" are deficient by virtue of an inability to establish a factually demonstrable invasion of a legally protected interest. However, this is not the only weakness in the argument that deviation from community notions of morality results in destruction of public morals. The question which highlights the most fallible point in such an argument is, assuming that there *is* harm, "Is harm imminently forthcoming from the act?"

Applying the test, "Is there a direct and causal sequence between the act and the resulting harm, such that the chain of causation can be perceived and evaluated, and the harm thereby determined not to be too remote nor the relationship between the act and the harm too attenuated?" to the alleged harm, no chain of causation between the act of intercourse and the destruction of general morals can be perceived. And, as established above, if the chain of causation is so attenuated that it must be assumed, liability cannot attach.

The harm to morals alleged to be caused by the practice of prostitution fails to meet the requirements of legal harm in two major respects: (1) there is no factually demonstrable invasion of a legally protected interest; and (2) even if the assumption is made that the practice of prostitution affects the community's interest in general morals, the alleged harm is not imminently forthcoming from the act, but rather is remote and only tangentially connected thereto. Therefore, the harm to morals alleged to

[102] *Id.*

result from the practice of prostitution fails and criminal liability cannot be imposed.

CONCLUSION

Perhaps in a country as prone to examine its criminal doctrine as its constitutional doctrine—and to examine the former within the context of the latter—the crime of prostitution would long ago have been eliminated. Application of the principle of harm to the criminalization of prostitution demonstrates that none of the harms alleged to be caused by prostitution meet the criteria of legal harm. A rigorous adherence to the principle of harm would achieve both a reconciliation of prostitution with fundamental principles of criminal liability and a greater harmony of constitutional and criminal doctrines.

It is entirely too easy to forget that American pride in having a government of laws and not of men is a sham if those laws are not founded on reason, sound principles of liability, and, ultimately, the Constitution itself. Recognition and application of the principle of harm would bring the body of criminal law back into concord with the most fundamental of constitutional mandates—that one may not *arbitrarily* be deprived of life, liberty, or property. A criminal code which ignores this fundamental precept, which makes nonharmful conduct criminal, should not be allowed to stand. It is the duty and responsibility of the courts to ensure that such codes do *not* stand and their acceptance of this responsibility has been too long delayed.

The historic concern of American courts to provide procedural safeguards for those threatened with loss of their liberty is laudable. It is not enough. If the full scope of liberty guaranteed by the fourteenth amendment is to be realized, the courts must recognize that due process of law is properly a safeguard of not only the procedure, but also the substance of the criminal law.

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