

See: Minutes of Subcommittee on
Grading and Sentencing
4/5/70, p. 60, Vol. X, Tape #57

CRIMINAL LAW REVISION COMMISSION
311 Capitol Building
Salem, Oregon

ARTICLE 28. PROSTITUTION AND RELATED OFFENSES

Tentative Draft No. 1; February 1970

Reporter: Roger D. Wallingford

Subcommittee No. 2

ARTICLE 28. PROSTITUTION AND RELATED OFFENSES

Tentative Draft No. 1; February 1970

Section 1. Prostitution and related offenses; definitions. As used in this Article, unless the context requires otherwise:

(1) "Deviate sexual intercourse" means sexual conduct between persons not married to each other consisting of contact between the sex organs of one person and the mouth or anus of another.

(2) "Place of prostitution" means any place where prostitution is practiced.

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

(4) "Prostitution enterprise" means an arrangement whereby two or more prostitutes are organized to conduct prostitution activities.

(5) "Public place" means a place to which the general public has access, and includes, but is not limited to, hallways, lobbies and other parts of apartment houses and hotels not constituting rooms or apartments designed for actual residence, and highways, streets, schools, places of amusement, parks, playgrounds and premises used in connection with public passenger transportation.

(6) "Sexual conduct" means "sexual intercourse" and "deviate sexual intercourse".

(7) "Sexual intercourse" has its ordinary meaning and occurs upon any penetration, however slight; emission is not required.

COMMENTARY - PROSTITUTION OFFENSES; DEFINITIONS

A. Summary

These seven terms have been defined to clarify the sections on prohibited prostitutional activity. While "prostitution" is not separately defined, it clearly means the type of activity engaged in by a "prostitute" defined as "sexual conduct" for a fee.

"Prostitute" is defined to include both heterosexual and homosexual activity, i.e., the sex of the parties to an act of prostitution is immaterial.

The definition of "sexual intercourse" and "deviate sexual intercourse" are identical to those applied to the Article on Sexual Offenses.

The definition of "public place" restates that applied in the Article on Riot and Disorderly Conduct.

"Place of prostitution" refers to any "situs" where acts of prostitution are attempted or practiced.

A "prostitution enterprise" is defined to include a "string" or "group" of two or more prostitutes organized to engage in prostitution activities without a fixed operational situs.

B. Derivation

The definitions, while drafted to reflect contemporary trends in the law of prostitution, represent a restatement of the general law in that field. No particular models were relied upon in formulating the definitions of subsections (2), (3) and (4).

C. Relationship to Existing Law

These definitions are new to existing law.

Two significant departures from existing law will be fashioned by the applicability of the terms "prostitute" and "sexual conduct." The new law will encompass both male and female prostitutes, and the sexual activity prohibited will extend beyond ordinary sexual intercourse to deviate sexual behavior.

Section 2. Prostitution. A person commits the crime of prostitution if he engages in or offers or agrees to engage in sexual conduct in return for a fee.

Existing
Law

ORS

166.060 (d)

COMMENTARY - PROSTITUTION

A. Summary

The section covers all types of commercial sexual activity, whether heterosexual or homosexual. Since commercial prostitution makes available varied forms of abnormal sexual gratification, it would be unrealistic to confine coverage to "sexual intercourse" alone.

Traditionally, the term "prostitute" included only the female. Changing sexual mores in our society has wrought an alteration in this traditional view. In applying the proposed sections to persons of the same sex, and to the male prostitute, a more realistic appraisal of the problem is achieved.

The commercial character of the conduct prohibited is expressed in the term "for a fee." The Model Penal Code speaks in terms of sexual activity "as a business." The California and Illinois Codes use the term "for money." The Michigan and New York Codes use the term "for a fee." It was felt that "as a business" lacked clarity when applied to an isolated act of prostitution. The term "for money" may be unduly restrictive in view of other forms of valuable consideration that may bind the transaction.

B. Derivation

With minor changes, the proposed section is derived from New York Revised Penal Law section 230.00 and Michigan Revised Criminal Code section 6201.

C. Relationship to Existing Law

ORS 166.060. Vagrancy. "(1) The following described persons are guilty of vagrancy and shall be punished upon conviction by imprisonment in the county jail for a period not exceeding six months, or by a fine of not more than \$100, or both:

"(d) Every common prostitute."

In State v. Gustin, 244 Or 531, 419 P2d 429 (1966), the defendant was convicted of vagrancy by prostitution and appealed. The issue raised was whether a single act of solicitation establishes the fact that a person is a common prostitute.

The court quoted with approval Davis v. Sladden, 17 Or 259, 21 P 140 (1889), approved in Barnett v. Phelps, 97 Or 242, 191 P 502, 11 ALR 663 (1920):

"Said Appleton, C. J.: 'A prostitute is a female given to indiscriminate lewdness for gain; it is the practice of a female offering her body to an indiscriminate intercourse with men.'

"When, then, the word 'prostitute' is applied to a woman, it is meant that she is given to the practice of offering her body to promiscuous intercourse with men for gain. Adultery may be committed by one act of illicit intercourse, but the female to whom the word 'prostitute' can be applied has only gained that character by a long continuance in the vice of lewdness..." At 533.

The court in Gustin held that since the stipulation disclosed but a single offer of illicit intercourse, the evidence had failed to sustain the charge. The court construed the word "common" used to describe the word "prostitute" in the statute as emphasizing the fact that the statute was directed against women who are given to the practice of offering themselves for promiscuous intercourse with men.

In State v. Perry, 249 Or 76, 436 P2d 252 (1968), defendant appealed a conviction of the crime of vagrancy in being a common prostitute. Defendant contended that ORS 166.060 (d) was unconstitutionally vague, providing no standard by which the status of a "common prostitute" may be determined.

The court pointed out that ORS 166.060 (d) does not proscribe and make punishable a specific act of prostitution; it defines the crime in terms of the defendant's status or condition. The court held that vagrancy may be established by proof of a single act. In discussing the term "common," the court commented:

"The feature which distinguishes a prostitute from other women who engage in illicit intercourse is the indiscrimination with which she offers herself to men for hire. The term 'common' is frequently used to describe this indiscrimination, and thus the term becomes a redundancy in the expression 'common prostitute'." At 81-82.

The court then held that to the extent language in State v. Gustin could be interpreted to mean that evidence showing more than one act is necessary to establish a crime under ORS 166.060 (d), it was rejected.

The court closed its decision with a critical analysis of ORS 166.060 (d) as applied to the crime of prostitution:

"The complexities created by the enactment of ORS 166.060 (d) as a crime of personal condition as distinguished from a crime of action present serious questions of their constitutionality as well as difficult problems of procedure and evidence and should prompt the legislature to heed the advice of Professor Sherry in Vagrants, Rogues and Vagabonds -- Old Concepts in Need of Revision, 48 Calif L Rev 537, 567 (1960):

"'In these circumstances the time is surely at hand to modernize the vagrancy concept or, better yet, to abandon it altogether for statutes which will harmonize with notions of a decent, fair and just administration of criminal justice and which will at the same time make it possible for police departments to discharge their responsibilities in a straightforward manner without the

evasions and hypocrisies which so many of our procedural rules force upon them. This may be done by drafting legislation having to do with conduct rather than status, legislation which will describe the acts to be proscribed with precision and which will be free of the hazy penumbra of medieval ideas of social control characteristic of existing law'."

By proposing adoption of section 2, the Commission recommends repeal of ORS 166.060 (d).

Research material on the subject of prostitution is voluminous; conflicting moral and legal considerations are abundant. While most of the civilized world continues to condemn prostitution, it is generally recognized that so long as the demand exists it will continue to prosper. Sustained prohibitory admonitions by church and state have failed to reform the supply or abate the demand.

In spite of prostitution's persistent will to survive, the arguments favoring continued penal legislation in the area are persuasive. Conflicting views are represented by the following authorities:

Barnes & Teeters, New Horizons in Criminology 92-96 (3d ed 1959).

Block, Crime in America 273 (1961).

25 Law and Contemporary Problems 223 (1960).

Watson, Psychology for Lawyers 155 (1960).

The Commission is not convinced that the advocates of tolerated prostitution have formulated socially acceptable alternatives to prohibitory legislation. The proposed draft, therefore, is designed to maintain the existing pattern of the law in the United States.

<p>Section 3. <u>Promoting prostitution.</u> A person commits</p> <p>the crime of promoting prostitution if, with intent to</p> <p>promote prostitution, he knowingly:</p> <p>(1) Owns, controls, manages, supervises or otherwise maintains a place of prostitution or a prostitution enterprise; or</p> <p>(2) Induces or causes a person to engage in prostitution or to remain in a place of prostitution; or</p> <p>(3) Receives or agrees to receive money or other property, other than as a prostitute being compensated</p> <p>for personally rendered prostitution services, pursuant to an agreement or understanding that the money or other property is derived from a prostitution activity; or</p> <p>(4) Engages in any conduct that institutes, aids or facilitates an act or enterprise of prostitution.</p>	<p>(Existing</p> <p>(Law</p> <p>(ORS</p> <p>(167.230</p> <p>(167.225</p> <p>(167.105</p> <p>(167.110</p> <p>(167.115</p> <p>(167.120</p> <p>(167.125</p> <p>(167.130</p> <p>(167.135</p> <p>(167.140</p> <p>(465.110-990</p> <p>(434.070</p> <p>(174.110 (2)</p> <p>(167.240</p>
--	---

COMMENTARY - PROMOTING PROSTITUTION

A. Summary

This section creates a single comprehensive offense covering conduct characteristic of prostitution carried on as a commercial enterprise. Section 3 is designed to reach the typical "panderer," "pimp" and "madam."

The word "promote" is defined to mean, "2. to further the growth or establishment of (something). 3. to work actively and stir up interest for the accomplishment of (something)." (Webster's New World Dict.(1968)).

The mens rea requirement applicable to all conduct covered by section 3 is an "intent to promote prostitution." Within the scope of section 3 a person promotes prostitution if he knowingly:

- (1) Provides premises or persons for prostitution purposes; or
- (2) Causes or induces a person to engage in prostitution; or
- (3) Operates or assists in the management of a house of prostitution; or
- (4) Procures or solicits patrons for prostitutes; or
- (5) Receives or agrees to receive money or other property on the understanding that it is derived from prostitution; or
- (6) Transports a person or prostitute into or within the state with the intent of promoting prostitution; or
- (7) Does any other act with the intent of facilitating prostitution.

Section 4 of this Article, compelling prostitution, covers specific aspects of promoting prostitution which are considered to be aggravating factors serving to increase the severity of the offense.

Subsection (1) covers both the fixed situs and "call girl" type of prostitution activity. It extends to anyone actively participating in such an operation.

Subsection (2) is aimed at the "panderer," defined as "One who solicits for prostitutes or lewd women." (Black's Law Dictionary, p. 1265 (1951)). To "pander" has also been defined as "To entice or procure a female, by promises, threats, fraud, or artifice; to enter any place in which prostitution is practiced, for the purpose of prostitution." (See Boyle v. State, 110 Ark 318, 161 SW 1049). It should be noted that this Article does not restrict the word "prostitute" or prostitution generally to the female.

Subsection (3) is directed at the person who knowingly derives a profit from prostitutional activity. It is more restricted in scope than the usual "living off the earnings of a prostitute" statute. Traditional "pimping" statutes penalize "living or deriving support or maintenance in whole or in part from the earnings or proceeds of [a female person's prostitution]." (See Cal Pen Code 266h).

Such legislation is criticized by the Model Penal Code commentator:

"It is obvious that such laws were evolved to help prosecutors convict men believed to be engaged in promoting prostitution, often of their wives, if there were sufficient evidence the man might be convicted of soliciting for the woman. But where evidence of soliciting or other actual complicity in prostitution is lacking, conviction can be had on proof merely that she supports him 'in whole or in part.'

"Such legislation is insupportable in principle and goes well beyond any pragmatic justification which might be urged for it. In no other instance is criminal liability based on the bare fact that one is supported by another person who gains his livelihood illegally." (MPC Commentary, Tent. Draft # 9, p. 180 (1959)).

Subsection (3) therefore requires both a knowing receipt of money or other property upon an agreement or understanding that such benefit is derived from prostitution, and an intent to promote prostitution.

Subsection (4) is designed to reach conduct that, in effect, aids and abets an act or enterprise of prostitution. This would include procuring prostitutes for patrons and procuring patrons for prostitutes. It would also reach transportation of persons for purposes of prostitution.

The federal Mann Act (18 USC 2421, 2422, 2423 (1951)) provides a felony penalty for anyone who transports a female across state lines for "prostitution, or debauchery or for any other immoral purpose." There is also substantial state legislation punishing the transportation of females into the state for purposes of prostitution. (See Md Ann Code Gen Laws, art 27, 528 (1952), "through or across" the state).

A different issue arises in connection with intrastate or local transportation, where the transporter knows or suspects that the purpose of the trip involves prostitution, e.g., a cab driver delivering a fare to a house of prostitution. A relatively disinterested person should not have to curtail his normal business practices on the basis of knowledge of another person's illicit pursuits. An exemption from criminal liability should apply where the transporter does not directly or indirectly promote or directly profit from prostitution activity.

Subsection (4) therefore requires an intent to promote prostitution, excluding from coverage legitimate activity incidental or collateral to acts or enterprises of prostitution.

It is not the intention of section 3, particularly in regard to subsections (2) and (4), to reach the patron of a prostitute who, in paying a fee and engaging in sexual conduct, may "cause a person to engage in prostitution," or "engages in...conduct that institutes, aids or facilitates an act...of prostitution."

B. Derivation

The section is taken, with certain modifications, from Model Penal Code section 251.2 (2) (a) through (h).

C. Relationship to Existing Law

There are eight penal statutes in the Oregon criminal code directed at the exploitation of prostitution:

ORS 167.105: Keeping a bawdyhouse. One year, \$500 fine.

ORS 167.110: Common fame as evidence of bawdyhouse; rights of lessor.

ORS 167.115: Placing wife in house of prostitution. Wife is a competent witness against her husband. 10 years.

ORS 167.120: Living with, receiving earnings of, or soliciting for a prostitute. 15 years.

ORS 167.125: Procuring female to engage in prostitution. Five years, \$5,000 fine.

ORS 167.130: Transporting female for prostitution purposes. Five years, \$10,000 fine.

ORS 167.135: Procuring or transporting female under 18 for prostitution purposes. 10 years, \$10,000 fine.

ORS 167.140: Sufficiency of female's testimony in prosecution for encouraging prostitution. Must be corroborated by other evidence. Does not apply to ORS 167.120.

ORS 465.110 through 465.990: Provide for the abatement of houses of prostitution as a nuisance. Violation of an injunction is punishable as contempt.

ORS 434.070: Includes prostitutes and other lewd persons as members of the class which may be required to submit to examination by the State Health Officer. It also prohibits issuance of a certificate to a prostitute indicating freedom from venereal disease.

ORS 174.110 (2): Provides that as used in the statutory laws of this state, words used in the masculine gender may include the feminine and the neuter.

ORS 167.240: Prohibits inducing a minor to visit a house of prostitution. Penalty:

(1) If a minor, \$100 fine and six months in MacLaren School for Boys. (For minor visiting house of prostitution).

(2) If a corporation, \$1,000 fine.

(3) Any other person, \$250 fine and one year in jail.

ORS 167.225: Taking away female under 16 years of age without consent of parents for purpose of marriage, concubinage or prostitution. Two years and \$500 fine.

The wide disparity in these penalty provisions is not supported by any persuasive rationale. The 15 year penalty for living with or soliciting for a prostitute seems unusually severe when the deleterious effect of that conduct is measured against other prohibited conduct carrying lesser penalties.

The Commission recommends repeal of the following statutes by adoption of section 3: ORS 167.105, 167.120, 167.125, 167.130 and 167.240.

State v. McGinnis, 56 Or 163, 108 P 132 (1910), held that section 1932, B & C Comp, as amended [now ORS 167.105], directed at keeping a bawdyhouse, denounced acts either of omission or commission, and that if the owner of a structure leased it for purposes of prostitution, or knew that it was being so used and interposed no objection, he is guilty under the statute.

State v. Underwood, 79 Or 338, 155 P 194 (1916), held that an indictment for soliciting another on behalf of a prostitute must allege the name or identity of the prostitute so that the defendant could rebut the evidence of her alleged unlawful occupation.

In State v. Goesser, 203 Or 315, 280 P2d 354 (1955), defendant female was convicted under ORS 167.120 for receiving earnings of a common prostitute. The Court reversed on the grounds that the statute was directed solely to the conduct of a male panderer, as indicated by the language "any man". In view of this decision, the Legislative Assembly in 1955 amended ORS 167.120 to read "any person".

State v. McCowan, 203 Or 551, 280 P2d 976 (1955), held that "in a prosecution for receiving the earnings of a common prostitute, the alleged prostitute is not an 'accomplice' within meaning of the statute providing that conviction cannot be had on testimony of an 'accomplice' unless it is corroborated, since she could not be indicted and punished under the same statute which was employed against the defendant."

State v. Norris, 82 Or 680, 162 P 859 (1917), held that within section 2078, OL [now ORS 167.230], defining the crime of soliciting, procuring or enticing a child under 18 years to have sexual intercourse, the words "procure," "solicit," and "entice" each import an initial, active and wrongful effort. ORS 167.230 prohibits the procuring of a child under 18 years for immoral purposes. It would seem to cover procuring a minor for prostitution and placing such minor in a house of prostitution. The penalty is 20 years.

State v. Brown, 245 Or 245, 421 P2d 692 (1966), held that, under ORS 167.130, the failure of the transported female to consummate an act of sexual intercourse was not a valid defense, stating, "The performance or nonperformance of a separate offense by the female, while it may have been relevant in the jury's consideration of the entire transaction, is not a necessary element of the crime charged."

The proposed draft makes no substantive change in existing law. It does combine in one offense various aspects of commercialized prostitution that are presently covered in separate statutes with widely divergent penalties. The Commission believes that a more realistic penalty structure will produce more effective prosecution in the area of commercialized prostitution.

Section 4. Compelling prostitution. A person
commits the crime of compelling prostitution if he
knowingly:

(1) Uses force or intimidation to compel another
to engage in prostitution; or

(2) Induces or causes a person under the age of 18 to engage in
prostitution; or

(3) Induces or causes his spouse, child or stepchild to engage in
prostitution.

(
(Existing
(<u>Law</u>
(
(ORS
(167.125
(167.115
(167.135
(167.230
(

COMMENTARY - COMPELLING PROSTITUTION

A. Summary

Section 4 particularizes three forms of promoting prostitution that are considered aggravating factors serving to increase the seriousness of the offense. It covers coercive conduct characterized by force or duress, conduct that exploits the immature and that which victimizes a dependent person.

Subsection (1) reflects the view that a prostitute's voluntary participation in the prohibited activity is a factor to be considered in measuring the culpability of the "promoter." The social and psychological pressures that draw a person into a life of prostitution are complex and varied. While it is true that penal legislation will never provide a fully effective deterrent to voluntary prostitution, the law should continue to apply forceful deterrents against the use of coercion in this area.

Subsection (2) affirms certain public policy positions:

- (1) The immature deserve particular protection in the area of sexually motivated offenses.
- (2) As maturity increases, there is a concomitant increase in resistance to personal engagement in prostitution.
- (3) The harmful effects of a life of prostitution are cumulative and progressive; involvement at an early age makes reform and rehabilitation more difficult.

The induction of a marriage partner into prostitution has traditionally been severely penalized. Subsection (3) extends the scope of such coverage to include children and stepchildren, since it is apparent that the public policy rationale is equally applicable to this class of persons. If the child is forced into prostitution, or is less than 18 years old, the provisions of subsections (1) and (2) would also apply.

Section 4 is not intended to apply to the patron of a prostitute, but is directed to the third party promoter. If a patron uses force or intimidation to compel a prostitute to engage in sexual conduct, the elements of rape are present. The term "induces or causes," used in subsections (2) and (3) is not intended to cover a patron who pays a fee to a prostitute in return for sexual favors.

B. Derivation

The basic structure of the section is derived from proposed California Revised Penal Code section 1805. (See Tentative Draft No. 2; June 1968).

C. Relationship to Existing Law

Existing law was discussed in the commentary to section 4, promoting prostitution. The conduct covered in this section is presently prohibited by four Oregon statutes:

ORS 167.125: Coercing female to engage in prostitution. Five year maximum.

ORS 167.115: Placing wife in house of prostitution. Ten year maximum.

ORS 167.135: Procuring female under 18 for prostitution. Ten year maximum. ORS 167.225: Taking away female under 16 years of age without consent of parents for purpose of prostitution. Two year maximum.

It is recommended that these four statutes be repealed by adoption of section 4. ORS 167.225 includes within its prohibition "for purposes of marriage [and] concubinage", which will be covered by the Articles on Sexual Offenses and Offenses Against the Family.

Under the proposed Article on Prostitution, these offenses would not be limited to females, i.e., it would be a crime to coerce a male into prostitution, or to cause a minor male to engage in prostitution. The term "spouse" is used in subsection (3) to make it clear that both husband and wife, and father and mother, are considered to be within the prohibition.

Section 5. Promoting and compelling prostitution; corroboration. A person shall not be convicted under section 3 or 4 of this Article solely on the uncorroborated testimony of the person whose prostitution he is alleged to have promoted or compelled.

Existing Law
ORS
167.140
136.550

COMMENTARY - PROMOTING AND COMPELLING PROSTITUTION;
CORROBORATION

A. Summary

Section 5 continues and expands the corroboration requirement presently found in certain felony prostitution statutes. The corroboration requirement is not usually applied in other areas of sexual misconduct. See, Commentary, Sexual Offenses Article.

The proposed draft on Sexual Offenses does not include a corroboration requirement. The false complainant presents a problem in all areas of sexual offenses, including prostitution. The Commission believes, however, that a corroboration requirement for prostitution offenses does not create an unjustifiable inconsistency. Certain distinctions may legitimately be drawn between promoting and compelling prostitution and other victim oriented sexual offenses. For example, there is a commercialized aspect to prostitution that promotes illicit sexual conduct for profit; the thrust of social disapproval is directed not at the isolated sexual act, but towards the deleterious environment in which it thrives.

The ordinary complainant in a sex case has been victimized by an isolated criminal act; corroborating evidence is often sparse or nonexistent. To make out the crime of promoting or compelling prostitution an additional affirmative act must be

shown--the act of prostitution itself. It is not an unreasonable burden upon the state to prove by independent evidence that an act of prostitution did, in fact, occur.

Since the crime of attempt, in the Article on Inchoate Crimes, relates to the substantive offense attempted, the corroboration rule would apply equally to an attempt to promote or compel prostitution.

B. Derivation

The section is derived from New York Revised Penal Law section 230.35.

C. Relationship to Existing Law

ORS 167.140. Sufficiency of female's testimony in prosecution for encouraging prostitution. Upon a trial for inveigling, enticing or taking away an unmarried female for the purpose of prostitution, the defendant cannot be convicted upon the testimony of the female injured unless she is corroborated by other evidence tending to connect the defendant with the commission of the crime.

State v. McCowan, 203 Or 551, 280 P2d 976 (1955), held that this section did not apply to ORS 167.120, Living with, receiving earnings of, or soliciting for a prostitute.

ORS 136.550 requires that the testimony of an accomplice be corroborated by other evidence tending to connect the defendant with the commission of the crime.

State v. Barnett, 86 Adv Sh 131, 436 P2d 821 (1968), held that only those who could be punished for the crime for which accused is tried are accomplices.

A prostitute would therefore not be an accomplice to the crime of promoting or compelling prostitution.

State v. Caldwell, 241 Or 355, 405 P2d 847 (1965), held that evidence adequate to support a conviction is not essential to constitute corroboration; it is sufficient to meet the requirements of the statute if it fairly and legitimately tends to connect the defendant with the commission of the crime.

The proposed corroboration rule broadens existing law by extending its application to all prostitution offenses. This, in effect, would overrule the holding in State v. McCowan. If a corroboration rule has any justification in the area of prostitution offenses, no logical basis exists for the distinction drawn by ORS 167.140.

Adoption of section 5 would repeal ORS 167.140.
ORS 136.550 would be unaffected by its adoption.

Section 6. Evidence. (1) On the issue of whether a place is a place of prostitution as defined in subsection (2) of section 1 of this Article, its general repute and repute of persons who reside in or frequent the place shall be competent evidence.

<u>Existing Law</u>
ORS
167.110
167.115
139.320

(2) In any prosecution under this Article, spouses are competent and compellable witnesses for or against either party.

COMMENTARY - EVIDENCE

A. Summary

Section 6 makes a wife a compellable witness as is done by the Oregon nonsupport statute (ORS 167.625). By virtue of the provisions of ORS 139.320, a wife or husband may testify, without mutual consent, against the other in cases of unlawful acts committed against the minor child of either.

B. Derivation

With substantial change, the section is derived from Model Penal Code section 251.2 (6).

C. Relationship to Existing Law

Special evidentiary rules governing admission of reputation of alleged houses of prostitution, as well as the competency of spousal testimony, is common legislation in the field of prostitution. (E.g., Ohio Rev Code Ann 2905.25 (1953); Ga Code Ann 26-6206 (1953); Wis Stat 944.35 (1957)).

Abrogation of the common law rule excluding spousal testimony has special utility in prosecuting pimps and panders who not infrequently are married to the prostitute. See Wyatt v. United States, 263 F2d 304 (5th Cir 1959), sustaining admissibility of the wife's testimony, without the aid of a statute, on the grounds that even under common law a wife could testify against her husband as to offenses of which she was the victim. There was no evidence in the case that Wyatt's prostitute wife was anything but a willing collaborator with him.

The species and quantum of proof necessary to sustain a conviction under this statute has been twice discussed by the Oregon court:

State v. Thomas, 56 Or 170, 108 P 135 (1910), "Though the character of the house [of ill-fame] and the right to its possession depended upon evidence of common fame, such general reputation, if believed beyond a reasonable doubt, was sufficient to establish the averments of the indictment."

State v. Gold, 133 Or 635, 290 P 1093 (1930), "Evidence of possession of premises by defendant charged with maintaining house of prostitution held sufficient to take case to jury. Acts of defendant charged, in exercising authority over premises and directing and discharging employees, implied that she was in possession."

ORS 167.115, relating to placing a wife in a house of prostitution, states: "In all prosecutions under this section a wife is a competent witness against her husband."

ORS 44.040: Confidential communications. "(a) ...A wife shall not be examined for or against her husband without his consent."

State v. Luper 49 Or 605, 91 P 444 (1907), held that ORS 44.040 providing that neither husband nor wife shall be examined as to any communication made by one to the other does not apply to criminal proceedings.

ORS 139.320: Husband or wife as witness. "In all criminal actions in which the husband is the party accused, the wife is a competent witness...; but neither husband nor wife in such cases shall be compelled or allowed to testify in such cases unless by consent of both of them... provided, that in all cases of...other unlawful act committed against any minor child of either or both of the parties,...husband or wife shall be allowed to testify against the other."

In State v. LeFils, 209 Or 666, 307 P2d 1048 (1957), the Supreme Court construed ORS 139.320 as it relates to compelling a non-consenting wife to testify over her husband's objections:

"The effect of this statute is 'to remove the subject matter from the field of incompetency of witnesses as at common law and to transfer it to the field of privilege', (State v. Dennis, 177 Or 73, 97, 159 P2d 838, 161 P2d 670 (1945))...except in the instances mentioned in the provisos to this statute, either party may be a witness when the other is the accused, if both have actively consented...Had the legislature intended that the witness-spouse should be compellable in the proviso, the word 'competent' or the word 'compelled' would have been used..."

Another instance of removal of this privilege is found in ORS 167.625, Special rules of evidence for nonsupport actions:

"(3) No provisions of law prohibiting the disclosure of confidential communications between husband and wife apply. A wife is a competent and compellable witness."

The application of a corroboration requirement in prostitution cases imposes an additional burden of proof upon the state. Prostitution offenses, unlike most crimes against property or the person, often involve unwilling and uncooperative witnesses. Fear, self-interest, misguided loyalty and misplaced confidence often serve to thwart successful prosecution of prostitutional activity.

The Commission believes that a rule of evidence excluding spousal testimony unless both parties consent fails to properly serve social justice in the area of prostitution. Subsection (2) therefore makes spousal testimony in prostitution cases both competent and compellable.

Adoption of subsection (2) will require an amendment to ORS 139.320 to reflect this policy. Its adoption will also overrule State v. LeFils insofar as that case is applicable to prostitution prosecutions.

The Commission also recommends repeal of ORS 167.110, which is restated by subsection (1) of section 6.

TEXT OF REVISIONS OF OTHER STATES

TEXT OF MODEL PENAL CODE

Section 251.2. Prostitution and Related Offenses.

(1) Prostitution. A person is guilty of prostitution, a petty misdemeanor, if he or she:

(a) is an inmate of a house of prostitution or otherwise engages in sexual activity as a business; or

(b) loiters in or within view of any public place for the purpose of being hired to engage in sexual activity.

"Sexual activity" includes homosexual and other deviate sexual relations. A "house of prostitution" is any place where prostitution or promotion of prostitution is regularly carried on by one person under the control, management or supervision of another. An "inmate" is a person who engages in prostitution in or through the agency of a house of prostitution. "Public place" means any place to which the public or any substantial group thereof has access.

(2) Promoting Prostitution. A person who knowingly promotes prostitution of another commits a misdemeanor or felony as provided in Subsection (3). The following acts shall, without limitation of the foregoing, constitute promoting prostitution:

(a) owning, controlling, managing, supervising or otherwise keeping, alone or in association with others, a house of prostitution or a prostitution business; or

(b) procuring an inmate for a house of prostitution or a place in a house of prostitution for one who would be an inmate; or

(c) encouraging, inducing, or otherwise purposely causing another to become or remain a prostitute; or

(d) soliciting a person to patronize a prostitute;
or

(e) procuring a prostitute for a patron; or

(f) transporting a person into or within this state with purpose to promote that person's engaging in prostitution, or procuring or paying for transportation with that purpose; or

TEXT OF MODEL PENAL CODE (CONT'D.)

(g) leasing or otherwise permitting a place controlled by the actor, alone or in association with others, to be regularly used for prostitution or the promotion of prostitution, or failure to make reasonable effort to abate such use by ejecting the tenant, notifying law enforcement authorities, or other legally available means;
or

(h) soliciting, receiving, or agreeing to receive any benefit for doing or agreeing to do anything forbidden by this Subsection.

(4) Presumption from Living off Prostitutes. A person, other than the prostitute or the prostitute's minor child or other legal dependent incapable of self-support, who is supported in whole or substantial part by the proceeds of prostitution is presumed to be knowingly promoting prostitution in violation of Subsection (2).

(6) Evidence. On the issue whether a place is a house of prostitution the following shall be admissible evidence: its general repute; the repute of the persons who reside in or frequent the place; the frequency, timing and duration of visits by non-residents. Testimony of a person against his spouse shall be admissible to prove offenses under this Section.

#

TEXT OF ILLINOIS CRIMINAL CODE OF 1961

§ 11-14. Prostitution

(a) Any person who performs, offers or agrees to perform any of the following acts for money commits an act of prostitution:

- (1) Any act of sexual intercourse; or
- (2) Any act of deviate sexual conduct.

(b) Penalty.

A person convicted of prostitution shall be fined not to exceed \$200 or imprisoned in a penal institution other than the penitentiary not to exceed one year, or both. 1961, July 28, Laws 1961, p. 1983, § 11-14.

§ 11-15. Soliciting for a Prostitute

(a) Any person who performs any of the following acts commits soliciting for a prostitute:

- (1) Solicits another for the purpose of prostitution; or
- (2) Arranges or offers to arrange a meeting of persons for the purpose of prostitution; or
- (3) Directs another to a place knowing such direction is for the purpose of prostitution.

(b) Penalty.

A person convicted of soliciting for a prostitute shall be fined not to exceed \$200 or imprisoned in a penal institution other than the penitentiary not to exceed one year, or both. 1961, July 28, Laws 1961, p. 1983, § 11-15.

§ 11-16. Pandering

(a) 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.

(b) Penalty.

A person convicted of pandering by compulsion shall be imprisoned in the penitentiary from one to 10 years. A person convicted of pandering other than by compulsion shall be imprisoned in a penal institution other than the penitentiary not to exceed one year or in the penitentiary from one to 5 years. 1961, July 28, Laws 1961, p. 1983, § 11-16.

§ 11-19. Pimping

(a) Any person who receives money or other property from a prostitute, not for a lawful consideration, knowing it was earned in whole or in part from the practice of prostitution, commits pimping.

(b) Penalty.

A person convicted of pimping shall be fined not to exceed \$500 or imprisoned in a penal institution other than the penitentiary not to exceed one year, or both. 1961, July 28, Laws 1961, p. 1983, § 11-19.

TEXT OF CALIFORNIA TENTATIVE DRAFT

Section 1800. Prostitution.

Any person who solicits another to engage in or who engages in any sexual conduct with another for money is guilty of prostitution. In any prosecution for an offense under this chapter, the sex of the parties concerned is immaterial.

Prostitution is a petty misdemeanor.

Section 1803. Promoting Prostitution.

A person is guilty of promoting prostitution who:

(1) owns, controls, manages, supervises or otherwise keeps, alone or in association with others, a place of prostitution or a prostitution enterprise; or

(2) knowingly solicits, induces or causes a person to commit or engage in prostitution or to reside in or occupy a place of prostitution; or

(3) accepts or receives money or other property pursuant to an agreement or understanding with any person whereby he participates or is to participate in the proceeds of prostitution activity.

Promoting prostitution is a felony of the third degree.

TEXT OF CALIFORNIA TENTATIVE DRAFT (CONT'D.)

Section 1804. Abetting Prostitution.

A person is guilty of abetting prostitution who:

- (1) solicits a person to patronize a prostitute; or
- (2) procures a prostitute for a patron; or
- (3) knowingly and for the purpose of prostitution, transports any person into, out of or within the state, or who procures or pays for the transportation of any person into, out of or within the state for the purpose of prostitution; or
- (4) knowingly permits prostitution in any premises under his possession or control or fails to make reasonable effort to halt or abate such use.

Abetting prostitution is a misdemeanor.

Section 1805. Compelling Prostitution.

A person is guilty of compelling prostitution who:

- (1) by force, threat or duress compels another to engage in prostitution; or
- (2) causes or aids a person under the age of eighteen to commit or engage in prostitution; or
- (3) causes or aids his wife, child or any person whose care, protection or support he is responsible for, to commit or engage in prostitution.

Compelling prostitution is a felony of the third degree.

TEXT OF CALIFORNIA TENTATIVE DRAFT (CONT'D.)

Section 1806. Evidence.

On the issue whether a premise is a place of prostitution the following shall be admissible evidence: its general repute and the repute of the persons who reside in or frequent the place. In a prosecution for any offense defined in this chapter, the privileges defined in Evidence Code Sections 970, 971 and 980 do not apply.

#

TEXT OF NEW YORK REVISED PENAL LAW

§ 230.00 Prostitution

A person is guilty of prostitution when such person engages or agrees or offers to engage in sexual conduct with another person in return for a fee.

Prostitution is a violation. L.1965, c. 1030, eff. Sept. 1, 1967.

Amended, September 1969, to Class B misdemeanor.

§ 230.15 Promoting prostitution; definitions of terms

The following definitions are applicable to this article:

1. "Advance prostitution." A person "advances prostitution" when, acting other than as a prostitute or as a patron thereof, he knowingly causes or aids a person to commit or engage in prostitution, procures or solicits patrons for prostitution, provides persons or premises for prostitution purposes, operates or assists in the operation of a house of prostitution or a prostitution enterprise, or engages in any other conduct designed to institute, aid or facilitate an act or enterprise of prostitution.

2. "Profit from prostitution." A person "profits from prostitution" when, acting other than as a prostitute receiving compensation for personally rendered prostitution services, he accepts or receives money or other property pursuant to an agreement or understanding with any person whereby he participates or is to participate in the proceeds of prostitution activity. L.1965, c. 1030, eff. Sept. 1, 1967.

TEXT OF NEW YORK REVISED PENAL LAW (CONT'D.)

§ 230.20 Promoting prostitution in the third degree

A person is guilty of promoting prostitution in the third degree when he knowingly advances or profits from prostitution.

Promoting prostitution in the third degree is a class A misdemeanor. L.1965, c. 1030, eff. Sept. 1, 1967.

§ 230.25 Promoting prostitution in the second degree

A person is guilty of promoting prostitution in the second degree when he knowingly:

1. Advances or profits from prostitution by managing, supervising, controlling or owning, either alone or in association with others, a house of prostitution or a prostitution business or enterprise involving prostitution activity by two or more prostitutes; or

2. Advances or profits from prostitution of a person less than nineteen years old.

Promoting prostitution in the second degree is a class D felony. L.1965, c. 1030, eff. Sept. 1, 1967.

§ 230.30 Promoting prostitution in the first degree

A person is guilty of promoting prostitution in the first degree when he knowingly:

1. Advances prostitution by compelling a person by force or intimidation to engage in prostitution, or profits from such coercive conduct by another; or

2. Advances or profits from prostitution of a person less than sixteen years old.

Promoting prostitution in the first degree is a class C felony. L.1965, c. 1030, eff. Sept. 1, 1967.

§ 230.35 Promoting prostitution; corroboration

A person shall not be convicted of promoting prostitution or of an attempt to commit the same solely on the uncorroborated testimony of a person whose prostitution activity he is alleged to have advanced or attempted to advance, or from whose prostitution activity he is alleged to have profited or attempted to profit. L.1965, c. 1030, eff. Sept. 1, 1967.

#

TEXT OF MICHIGAN REVISED CRIMINAL CODE

[Prostitution]

Sec. 6201. (1) A person commits the crime of prostitution if he engages in or agrees or offers to engage in sexual conduct with another person in return for a fee.

(2) Prostitution is a Class B misdemeanor.

[Promoting Prostitution: Definition of Terms]

Sec. 6220. The following definitions are applicable in the following three sections:

(a) A person "advances prostitution" if, acting other than as a prostitute or a patron of a prostitute, he knowingly causes or aids a person to commit or engage in prostitution, procures or solicits patrons for prostitution, provides persons or premises for prostitution purposes, operates or assists in the operation of a house of prostitution or a prostitution enterprise, or engages in any other conduct designed to institute, aid, or facilitate an act or enterprise of prostitution.

(b) A person "profits from prostitution" if, acting other than as a prostitute receiving compensation for personally-rendered prostitution services, he accepts or receives money or other property pursuant to an agreement or understanding with any person whereby he participates or is to participate in the proceeds of prostitution activity.

[Promoting Prostitution in the First Degree]

Sec. 6221. (1) A person commits the crime of promoting prostitution in the first degree if he knowingly:

(a) Advances prostitution by compelling a person by force or intimidation to engage in prostitution, or profits from such coercive conduct by another; or

(b) Advances or profits from prostitution of a person less than 17 years old.

(2) Promoting prostitution in the first degree is a Class B felony.

[Promoting Prostitution in the Second Degree]

Sec. 6222. (1) A person commits the crime of promoting prostitution in the second degree if he knowingly:

(a) Advances or profits from prostitution by managing, supervising, controlling or owning, either alone or in association with others, a house of prostitution or a prostitution business or enterprise involving prostitution activity by 2 or more prostitutes; or

(b) Advances or profits from prostitution of a person less than 20 years old.

(2) Promoting prostitution in the second degree is a Class C felony.

TEXT OF MICHIGAN REVISED CRIMINAL CODE (CONT'D.)

[Promoting Prostitution in the Third Degree]

Sec. 6223. (1) A person commits the crime of promoting prostitution in the third degree if he knowingly advances or profits from prostitution.

(2) Promoting prostitution in the third degree is a Class A misdemeanor.

#