ALASKA LEGISLATURE COMMITTEE FILES 1987-1988 8672
4641 HJUD HB 28 - HB 30

713

5-0185L
Levy
2/17/87

Original sponsors: Donley and Gruenberg

IN THE HOUSE BY THE JUDICIARY COMMITTEE

CS FOR HOUSE BILL NO. 28 (Judiciary)

IN THE LEGISLATURE OF THE STATE OF ALASKA

FIFTEENTH LEGISLATURE - FIRST SESSION

A BILL

For an Act entitled: "An Act relating to municipal penalties for prostitution and promoting prostitution."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:

* Section 1. AS 29.25.070(a) is amended to read:

(a) For the violation of an ordinance, a municipality may by ordinance prescribe a penalty not to exceed a fine of $1,000 and imprisonment for 90 days. A home rule or general law municipality may prescribe a penalty requiring a court to impose a minimum sentence of imprisonment of up to 10 days and a fine not to exceed $1,000, as provided in an ordinance, for violation of an ordinance that prohibits prostitution. In this subsection, prostitution includes all conduct prohibited under AS 11.66.100 - 11.66.150 and also includes paying or agreeing to pay a fee in exchange for sexual conduct.

DRAFT

March 30, 1987

M E M O R A N D U M

To: Members, House Judiciary Committee

From: Representative Dave Donley

Re: Proposed Amendments for HB 28

HB 28, an act relating to municipal penalties for prostitution, is currently before the House Judiciary Committee.

In response to requests from constituents, the Municipality of Anchorage and other legislators, I am proposing four amendments to HB 28 for your consideration. The amendments are listed below with a short explanation of what they accomplish:

Amendment #1 - changes the mandatory minimums a municipality may impose for prostitution from a maximum of 90 days imprisonment to: 3 days for first offense, 10 days for second offense and 30 days for third or subsequent convictions.

Amendment #2 - changes the language of the bill to allow a municipality to impose similar penalties on pimps as it imposes on prostitutes and customers (johns).

Amendment #3 - changes the title of the bill to read "An act relating to municipal penalties for prostitution and promoting prostitution." (Necessary due to Amendment #2).

Amendment #4 - mandates that if a municipality chooses to adopt such an ordinance, they shall reimburse the state for additional costs incurred by the Department of Corrections and the court system.

Amendment #5 - defines the term "municipality" to include all forms of municipalities including home rule and general law. It is the opinion of the Legislative Counsel, Keith B. Levy, that this is not necessary, but since there has been some

discussion about this, we have included the amendment so as to avoid any possibility of confusion.

Enclosed please find a copy of each of these amendments and some background relevant to the proposed changes.

HB 28 is an important piece of legislation for my constituents, as prostitution is a very real problem in their neighborhoods. It is based on an example set by the city of Phoenix, where such penalties successfully reduced and all but eliminated prostitution problems.

If you would like to discuss this bill or I can answer any questions, please call me at 3892.

5-0185Bf
Levy

AMENDMENT

#1

Offered in the HOUSE

By Donley

TO: CSHB 28(C&RA)

Page 1, line 14:

Delete "90 days"

Insert "three days for a first conviction, 10 days for a second conviction, and 30 days for a third or subsequent conviction,"

5-0185Be
Levy

A M E N D M E N T

#2

Offered in the HOUSE By Donley

TO: CSHB 28(C&RA)

Page 1, lines 16 - 17:

Delete "engaging in or agreeing to engage in sexual conduct for a fee, and"

Insert "all conduct prohibited under AS 11.66.100 - 11.66.150 and also includes"

5-0185Be
Levy--

A M E N D M E N T

#3

Offered in the HOUSE

By Donley

TO: CSHB 28(C&RA)

Page 1, line 7, following "prostitution":

Insert "and promoting prostitution"

5-0185Bd
Levy

AMENDMENT

#4

Offered in the HOUSE By Donley

TO: CSHB 28(C&F

Page 1, following line 18:

Insert a new bill section to read

"* Sec. 2. AS 29.25 is amended by adding a new section to read:

Sec. 29.25.080. STATE'S COSTS. A municipality that adopts an ordinance providing for a minimum sentence of imprisonment for prostitution under AS 29.25.070(a) shall reimburse the state for actual costs incurred by the court system and the Department of Corrections as a result of the ordinance."

3/20/87

5-0185Ba ✓
Levy

A M E N D M E N T

#5

Offered in the HOUSE

By Donley

TO: CSHB 28 (C&RA)

(5) Page 1, line 12, following "A", insert:

"home rule or general law"

2/13/87

STATE OF ALASKA
THE LEGISLATURE

LEGISLATIVE AFFAIRS AGENCY

POUCH Y STATE CAPITOL
JUNEAU ALASKA 99811
907 465 3800

M E M O R A N D U M March 8, 1988

SUBJECT: Draft amendment to CSHB 28 (Judiciary)

TO: Representative John Sund, Chairman
House Judiciary Committee
ATTN: John Hartle

FROM: Jack Chenoweth
Legislative Counsel

The draft amendment is enclosed.

While preparing the amendment, I reviewed the structure of HB 28. Because the new provisions of section 1 of CSHB 28 (Judiciary) are specific to the crime of prostitution, in my view they should not be incorporated into existing AS 29.25.070(a), the subsection generally applicable to prescribe penalties for the violation of municipal ordinances. This subject being specific to one crime--or one general criminal topic--should be broken out and made a separate subsection.

I have done that in this amendment, at the same time correcting the cross-reference that appears in bill section 2.

If this amendment is adopted, existing AS 29.25.070(a) would be unchanged from the way it reads in current law. This has a second desirable effect insofar as there has been an intervening amendment to AS 29.25.070(a) since the report of CSHB 28 (Judiciary) in the first session. Consequently, the statement of current law appearing in AS 29.25.070(a) that now appears in CSHB 28 (Judiciary), and to which amendment is made, is no longer correct. By moving the new material, as you have asked that it be amended, into a new subsection (e), there is no need to be concerned about the intervening amendment to (a).

Enclosure

JBC:gc
WKG2:39

5-0185Lb
Chenoweth

A M E N D M E N T

Offered in the HOUSE

TO: CSHB 28 (Judiciary)

Page 1, lines 9 - 20:

Delete all material and insert:

"* Section 1. AS 29.25.070 is amended by adding a new subsection to read:

(e) A municipality that prohibits prostitution by ordinance may prescribe a penalty requiring a court to impose a minimum sentence of imprisonment of up to three days for a first conviction, 10 days for a second conviction, and 30 days for a third or subsequent conviction, and a fine not to exceed $1,000. The provisions of this subsection apply if the municipality's ordinance prohibiting prostitution

(1) includes all conduct prohibited by AS 11.66.100 - 11.-66.150; and

(2) defines prostitution as including the payment or agreement to pay a fee in exchange for sexual conduct."

Page 1, line 24, after "under":

Delete "AS 29.25.070(a)"

Insert "AS 29.25.070(e)"

A M E N D M E N T

Offered in the HOUSE

TO: CSHB 28 (Judiciary)

Page 1, line 12, following "municipality":

Insert "that adopts an ordinance prohibiting both paying and agreeing to pay a fee in exchange for sexual conduct"

5-0185Bb
Levy

AMENDMENT

Offered in the HOUSE

By Gruenberg

TO: CSHB 28(C&RA)

Page 1, line 6:

Delete "municipal penalties for"

Page 1, following line 8, insert a new bill section to read:

"* Section 1. AS 11.66 is amended by adding a new section to read:

Se 11.66.105. TESTING FOR CERTAIN DISEASES. A person convicted ~~arrested~~ ~~for~~ prostitution under AS 11.66.100 or a municipal ordinance prohibiting prostitution, including paying or agreeing to pay a fee for sexual conduct, shall be tested by the arresting law enforcement agency for venereal disease or acquired immune deficiency syndrome."

Number remaining bill section accordingly.

5-0185Bc
Levy

A M E N D M E N T

Offered in the HOUSE By Sund

TO: CSHB 28(C&RA)

Page 1, line 7, following "prostitution":

Insert "and promoting prostitution"

Page 1, line 14:

Delete "90 days"

Insert "three days for a first conviction, 10 days for a second conviction, and 30 days for a third conviction,"

Page 1, lines 16 - 17:

Delete "engaging in or agreeing to engage in sexual conduct for a fee, and"

Insert "all conduct prohibited under AS 11.66.100 - 11.66.150 and also includes"

2/20/87

5-0185Bd
Levy

A M E N D M E N T

Offered in the HOUSE By Donley

TO: CSHB 28(C&RA)

Page 1, following line 18:

Insert a new bill section to read

"* Sec. 2. AS 29.25 is amended by adding a new section to read:

Sec. 29.25.080. COSTS OF ENFORCEMENT. A municipality that adopts an ordinance providing for a minimum sentence of imprisonment for prostitution under AS 29.25.070(a) shall reimburse the state for actual costs incurred in the enforcement of the ordinance by the court system and the Department of Corrections."

STATE OF ALASKA
THE LEGISLATURE

LEGISLATIVE AFFAIRS AGENCY

POUCH Y STATE CAPITOL
JUNEAU, ALASKA 99811
907 465 3800

M E M O R A N D U M February 16, 1987

SUBJECT: Amendment to CSHB 28(C&RA)

TO: Representative Dave Donley
Chairman, Labor and Commerce Committee

FROM: Keith B. Levy KBL
Legislative Counsel

Enclosed is an amendment to CSHB 28(C&RA), making the provision allowing a municipality to impose mandatory sentences for prostitution expressly apply to home rule and general law municipalities. You have asked whether this amendment is necessary to make the provision apply to all municipalities. In my opinion it is not.

AS 29.71.800(13) defines the term municipality to include all forms of municipalities including home rule and general law municipalities. Therefore it is superfluous to amend the bill to refer to both kinds of municipalities.

It is true that AS 29.10.200 provides that only the sections of title 29 listed in that section apply as a limitation of power on home rule municipalities. The significance of this provision is that any section of title 29 not listed in AS 29.10.200 that limits the powers of a municipality does not apply to home rule municipalities. Since AS 29.25.070, the section amended in CSHB 28(C&RA), is not listed in AS 29.10.200, to the extent AS 29.25.070 limits the powers of a municipality it does not apply to a home rule municipality. However, since language added to AS 29.25.070 by your bill grants powers to a municipality rather than limiting those powers, it does apply to a home rule municipality.

This conclusion is born out by numerous other provisions of law which do not specifically refer to home rule municipalities, but clearly apply to them as grants of power even though not specifically mentioned as applicable to home rule municipalities in AS 29.10.200. For example, see AS 29.20.300

(school boards), AS 29.20.310 (utility boards), AS 29.20.360 (appointment of officials), and AS 29.20.370 (municipal attorneys) Accordingly, even without the enclosed amendment, CSHB 28(C&RA) would apply to home rule municipalities.

If I may be of further assistance, please advise.

KBL:mkr
m9/010

Enclosure

5-0185Ba ✓
Levy

A M E N D M E N T

Offered in the HOUSE

By Donley

TO: CSHB 28 (C&RA)

Page 1, line 12, following "A", insert:

"home rule or general law"

Amendment #1 to CS for House Bill No. 28 (C&RA)

by Gruenberg and
Donley

page 1, line 16 following "includes,"

Delete: [engaging in or agreeing to engage in sexual conduct for a fee, and]

Insert: all conduct prohibited under AS 11.66.100-.150 and also includes

Comment:

This will allow a municipality to impose similar penalties on pimps as it imposes on prostitutes.

Original sponsors: Donley and Gruenberg

IN THE HOUSE

CS FOR CS FOR HOUSE BILL NO. 28 (C&RA)

IN THE LEGISLATURE OF THE STATE OF ALASKA

FIFTEENTH LEGISLATURE - FIRST SESSION

A BILL

For an Act entitled: "An Act relating to municipal penalties for prostitution."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:

*Section 1. AS 29.25.070(a) is amended to read:

(a) For the violation of an ordinance, a municipality may by ordinance prescribe a penalty not to exceed a fine of $1,000 and imprisonment for 90 days. A municipality may prescribe a penalty requiring a court to impose a minimum sentence of imprisonment of up to 90 days and a fine not to exceed $1,000, as provided in an ordinance, for violation of an ordinance that prohibits prostitution. In this subsection, prostitution includes all conduct prohibited under AS 11.66.100 -.150 and also includes paying or agreeing to pay a fee in exchange for sexual conduct.

NOTES TO DECISIONS

Municipal ordinances not prohibited. — The enactment of this article does not prohibit municipal ordinances penalizing the solicitation of prostitutes by putative customers. Municipality of Anchorage v. Afualo, Ct. App. Op. No. 213 (File Nos. 7094, 7095), 657 P.2d 407 (1983).

There is nothing in this article which would support an inference that the legislature sought to encourage men to patronize prostitutes nor is there any indication in this article that the legislature sought statewide uniformity in regulating commercial sexual relations. Municipality of Anchorage v. Afualo, Ct. App. Op. No. 213 (File Nos. 7094, 7095), 657 P.2d 407 (1983).

Collateral references. — 63 Am. Jur. 2d, Prostitution, § 1 et seq.

27 C.J.S., Disorderly Houses, § 1 et seq.; 73 C.J.S., Prostitution, § 1 et seq.

Constitutionality and construction of pandering acts, 74 ALR 311.

Validity and construction of statute or ordinance prescribing solicitation for purposes of prostitution, lewdness, or assignation — modern cases, 77 ALR3d 519.

Sec. 11.66.100. Prostitution. (a) A person commits the crime of prostitution if the person engages in or agrees or offers to engage in sexual conduct in return for a fee.

(b) Prostitution is a class B misdemeanor. (§ 8 ch 166 SLA 1978)

NOTES TO DECISIONS

Common law. — The keeping of a bawdyhouse was a misdemeanor at common law, whereas fornication and prostitution were not. Eleazar v. United States, 16 Alaska 561, 241 F.2d 385 (9th Cir. 1956), decided under former AS 11.40.220.

This section is not irreconcilable with a municipal ordinance prohibiting the solicitation of prostitutes by putative customers. Municipality of Anchorage v. Afualo, Ct. App. Op. No. 213 (File Nos. 7094, 7095), 657 P.2d 407 (1983).

Actual payment of a fee is not required; an act of prostitution is complete when an offer is extended or an agreement made to engage in sexual conduct in return for a fee. Garibay v. State, Ct. App. Op. No. 221 (File No. 6246), 658 P.2d 1350 (1983).

Proof. — Customer's testimony that he agreed to purchase sexual favors for sum of $200, his testimony that he charged the purchase price using his VISA card, and the VISA charge slip itself, were all highly probative of whether an agreement or offer to engage in sexual conduct in return for a fee was in fact made. Garibay v. State, Ct. App. Op. No. 221 (File No. 6246), 658 P.2d 1350 (1983).

Collateral references. — Prostitution as vagrancy, 14 ALR 1501.

Entrapment to procure women for immoral purposes, 18 ALR 186; 66 ALR 478; 86 ALR 263.

Sec. 11.66.110. Promoting prostitution in the first degree. (a) A person commits the crime of promoting prostitution in the first degree if the person

(1) induces or causes a person to engage in prostitution through the use of force;

(2) as other than a patron of a prostitute, induces or causes a person under 16 years of age to engage in prostitution; or

(3) induces or causes a person in that person's legal custody to engage in prostitution.

(b) In a prosecution under (a)(2) of this section, it is not a defense that the defendant reasonably believed that the person induced or caused to engage in prostitution was 16 years of age or older.

(c) Except as provided in (d) of this section, promoting prostitution in the first degree is a class B felony.

(d) A person convicted under (a)(2) of this section is guilty of a class A felony. (§ 8 ch 166 SLA 1978; am §§ 1, 2 ch 50 SLA 1983)

Effect of amendments. — The 1983 amendment added "Except as provided in (d) of this section" to the beginning of subsection (c) and added subsection (d).

NOTES TO DECISIONS

For case construing former statute prohibiting importing or exporting females for immoral purposes, see State v. Adkerson, Sup. Ct. Op. No. 294 (File No. 520), 403 P.2d 673 (1965).

For case construing former procurement statute, see Johnson v. State, Sup. Ct. Op. No. 832 (File No. 1338), 501 P.2d 762 (1972).

Sentence for procurement upheld. — See Price v. State, Sup. Ct. Op. No. 1450 (File No. 2794), 565 P.2d 858 (1977).

For case construing former statute concerning necessary evidence for prostitution or seduction, see Johnson v. State, Sup. Ct. Op. No. 832 (File No. 1338), 501 P.2d 762 (1972).

Collateral references. — Transporting female for purpose of prostitution, 74 ALR 330.

Woman conniving or consenting to own transportation, 84 ALR 376.

Sec. 11.66.120. Promoting prostitution in the second degree. (a) A person commits the crime of promoting prostitution in the second degree if the person

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

(2) procures or solicits a patron for a prostitute.

(b) Promoting prostitution in the second degree is a class C felony. (§ 8 ch 166 SLA 1978)

NOTES TO DECISIONS

For case construing former statute prohibiting soliciting or procuring for purpose of prostitution, see Plas v. State, Sup. Ct. Op. No. 1904 (File Nos. 3529, 3530), 598 P.2d 966 (1979).

Instruction. — Trial court did not err in refusing to give instruction requiring state to prove that prostitution enterprise involved in case was of an ongoing nature. Garibay v. State, Ct. App. Op. No. 221 (File No. 6246), 658 P.2d 1350 (1983).

Collateral references. — Separate acts of taking earnings of or support from prostitute as separate or continuing offenses of pimping, 3 ALR4th 1195.

Sec. 11.66.130. Promoting prostitution in the third degree. (a) A person commits the crime of promoting prostitution in the third degree if, with intent to promote prostitution, the person

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

(2) as other than a patron of a prostitute, induces or causes a person 16 years of age or older to engage in prostitution;

(3) as other than a prostitute receiving compensation for personally rendered prostitution services, receives or agrees to receive money or other property pursuant to an agreement or understanding that the money or other property is derived from prostitution; or

(4) engages in conduct that institutes, aids, or facilitates a prostitution enterprise.

(b) Promoting prostitution in the third degree is a class A misdemeanor. (§ 8 ch 166 SLA 1978)

NOTES TO DECISIONS

Editor's notes. — The cases cited in the notes below were decided under former AS 11.40.260, 11.40.300, 11.40.330, 11.40.410, and 11.40.420.

Common law. — The keeping of a bawdyhouse was a misdemeanor at common law. Eleazar v. United States, 16 Alaska 561, 241 F.2d 385 (9th Cir. 1956).

Lessor may be guilty as keeper. — If a man leases his house to a woman to be kept as a bawdyhouse for purposes of prostitution, and it is kept for such purposes, with his knowledge, he is guilty as keeper. Rosencranz v. United States, 155 F. 38 (9th Cir. 1907).

As well as agent of lessor. — The agent of an owner, who rents a house knowing that it is to be used as a house of prostitution, and that it is so used, may be found guilty as a keeper. Rosencranz v. United States, 155 F. 38 (9th Cir. 1907).

For case construing former statute prohibiting employment in a house of prostitution or living on the earnings of a prostitute, see Johnson v. State, Sup. Ct. Op. No. 832 (File No. 1338), 501 P.2d 762 (1972).

For case construing former statute prohibiting importing or exporting females for immoral purposes, see State v. Adkerson, Sup. Ct. Op. No. 294 (File No. 520), 403 P.2d 673 (1965).

For case construing former statute prohibiting pimping, see Johnson v. United States, 260 F. 783 (9th Cir. 1919).

For case construing former statute prohibiting a male's living with or on the earnings of a prostitute, see Dunn v. State, Sup. Ct. Op. No. 409 (File No. 735), 426 P.2d 993 (1967).

Collateral references. — 27 C.J.S., Disorderly Houses, §§ 1 to 18; 73 C.J.S., Prostitution, §§ 6, 7.

Constitutionality of statute conferring on chancery courts power to abate bawdyhouses as nuisances, 5 ALR 1474; 22 ALR 542; 75 ALR 1298.

Number of females who reside in house or resort thereto for immoral purposes as affecting disorderly character thereof, 12 ALR 529.

Entrapment to commit offense as to house of prostitution or as to pandering, 52 ALR2d 1194.

Construction of provision of pandering statute as to placing a female in charge or custody of another, 54 ALR2d 1178.

Sec. 11.66.140. Corroboration of certain testimony not required. In a prosecution under AS 11.66.110 — 11.66.130, it is not necessary that the testimony of the person whose prostitution is alleged to have been compelled or promoted be corroborated by the testimony of any other witness or by documentary or other types of evidence. (§ 8 ch 166 SLA 1978).

NOTES TO DECISIONS

For case construing former rule as to corroboration of prostitute's testimony, see Johnson v. State, Sup. Ct. Op. No. 832 (File No. 1338), 501 P.2d 762 (1972).

For cases construing former statute providing that common fame was competent evidence in a prosecution for keeping a bawdyhouse, see Botts v. United States, 155 F. 50 (9th Cir. 1907); Hall v. United States, 155 F. 52 (9th Cir. 1907).

Sec. 11.66.150. Definitions. In AS 11.66.100 — 11.66.150, unless the context requires otherwise,

(1) "place of prostitution" means any place where a person engages in sexual conduct in return for a fee;

(2) "prostitution enterprise" means an arrangement in which two or more persons are organized to render sexual conduct in return for a fee;

(3) "sexual conduct" means genital or anal intercourse, cunnilingus, fellatio, or masturbation of one person by another person. (§ 8 ch 166 SLA 1978)

Cross references. — For definition of terms used in this title, see AS 11.81.900.

Article 2. Gambling Offenses.

STATE OF ALASKA
THE LEGISLATURE
LEGISLATIVE AFFAIRS AGENCY

POUCH Y STATE CAPITOL
JUNEAU, ALASKA 99811
907 465 3800

M E M O R A N D U M February 16, 1987

SUBJECT: Constitutionality of testing for venereal disease and A.I.D.S. (CSHB 28 (C&RA) am)

TO: Representative Max Gruenberg

FROM: Keith B. Levy KBL
Legislative Counsel

Enclosed is an amendment to CSHB 28(C&RA) requiring people arrested for prostitution to be tested for venereal disease and A.I.D.S. This amendment may be unconstitutional under the Fourth Amendment to the United States Constitution and Article I, sec. 14, of the Constitution of the State of Alaska. Both of those sections provide:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated.

It has been held that taking blood from an individual is a search within the meaning of the Fourth Amendment and may not be done, constitutionally, without probable cause to believe a crime has been committed. There are, of course, limited exceptions to the probable cause requirement, and in certain instances such testing may not be unconstitutional. In light of time constraints and the fact that your amendment does not indicate what the purpose of the testing is and what the test results are to be used for, I am unable to say conclusively whether the amendment is unconstitutional. You should be aware, however, that if enacted, this provision will almost certainly be challenged.

If you would like further research into this issue, please advise.

KBL:lb
0211

Testify - minors

STATE OF ALASKA

DEPARTMENT OF CORRECTIONS

STEVE COWPER, GOVERNOR

REPLY TO:

POUCH T
JUNEAU, ALASKA 99811
PHONE: (907) 465-3376

March 19, 1987

The Honorable Dave Donley
Alaska State Legislature
P.O. Box V
Juneau, AK 99811

Dear Representatiave Donley:

The Department of Corrections supports the proposed amendment to CSHB 28, which requires municipalities adopting ordinances providing for a minimum sentence of imprisonment for prostitution under AS 29.25.070(a) to pay for the actual costs incurred by the Department to incarcerate the offenders.

If the amendment is adopted, please accept the attached fiscal note as a revision to those previously submitted by the Department.

Sincerely,

Susan E Knighton

Susan Knighton
Legislative Liaison

STATE OF ALASKA 1987 LEGISLATIVE SESSION
FISCAL NOTE

REQUEST:

Bill Version : HB28
Publish Date :

Revision Date: 3/19/87
Title : "An act relating to municipal penalties for prostitution."
Sponsor : Representative Donley
Requestor : House Committee and Regional Affairs

Agency Affected : Department of Corrections
BRU :
Components :

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY 87	FY 88	FY 89	FY 90	FY 91	FY 92
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL	0	0	0	0	0	0
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	0	0	0	0	0	0
CAPITAL	0	0	0	0	0	0
REVENUE	0	0	0	0	0	0

FUNDING: (Thousands of Dollars)

GENERAL FUND	0	0	0	0	0	0
FEDERAL FUNDS						
OTHER						
TOTAL						

POSITIONS:

FULL-TIME	0	0	0	0	0	0
PART-TIME						
TEMPORARY						

ANALYSIS : (Attach a separate page if necessary)

The bill as amended will allow the Department to charge municipalities for actual costs incurred.

Knighton

Prepared by : Susan Knighton, Research Analyst IV — Phone : 465-3376
Division : Administrative Services — Date : 3/19/87

Approved by Commissioner : Susan Humphrey-Barnett — Date : 3/19/87
Agency : Department of Corrections

Distribution (by preparer) :
- Legislative Finance
- Legislative Sponsor
- Requestor
- Office of Management and Budget
- Impacted Agency(ies)
- Senate Secretary

STATE OF ALASKA 1987 LEGISLATIVE SESSION
FISCAL NOTE

Bill Version : HB28
Publish Date :

REQUEST:

Revision Date:
Title : "An Act relating to municipal penalties for prostitution."
Sponsor : Repr. Donley
Requestor : House Community and Reg. Afrs.

Agency Affected : Department of Law
BRU : Prosecution
Components :

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY 87	FY 88	FY 89	FY 90	FY 91	FY 92
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	-0-	-0-	-0-	-0-	-0-	-0-
CAPITAL						
REVENUE						

FUNDING: (Thousands of Dollars)

GENERAL FUND	-0-	-0-	-0-	-0-	-0-	-0-
FEDERAL FUNDS						
OTHER						
TOTAL						

POSITIONS:

FULL-TIME	-0-	-0-	-0-	-0-	-0-	-0-
PART-TIME						
TEMPORARY						

ANALYSIS : (Attach a separate page if necessary)

Please see attached analysis.

Prepared by : Richard L. Pegues, Director
Phone : 465-3672
Division : Administrative Services
Date : 1/21/87

Approved by Commissioner : Ronald W. Lorensen, Acting Attorney General
Date : 1/21/87
Agency : Department of Law

Distribution (by preparer) :
Legislative Finance
Legislative Sponsor
Requestor
Office of Management and Budget
Impacted Agency(ies)
Senate Secretary

CONTINUATION of FISCAL NOTE ANALYSIS

For Bill/Resolution No. HB28

This bill amends AS 29.25.070(a) by providing that municipalities may, under local ordinance, prescribe penalities for prostitution that require a court to impose a minimum sentence equal to the maximum penalty allowed by existing statute, or a $1,000 fine and imprisonment for 90 days. In this respect, the bill appears to encourage municipalities to seek the maximum allowable penalty in all instances.

Prosecution of municipal ordinance violations is a local responsibility, and such prosecution is not handled by the Department of Law. Consequently, enactment of this bill will not have a fiscal impact on the Department of Law.

The cost of imprisoning violators of municipal ordinances, in state corrections institutions, is reimbursed to the state by the respective municipalities. This reimbursement includes normal, day-to-day operating costs and a pro rata share of lease costs, where the state is using a leased facility. The reimbursement does not, however, include any charge for the state's capital expenses in building and furnishing new corrections facilities. To the extent that encouraging maximum periods of imprisonment may contribute to prison overcrowding, the unreimbursed expense to the state may be very great. This issue should be addressed by the Department of Corrections in a separate fiscal note.

STATE OF ALASKA 1987 LEGISLATIVE SESSION
FISCAL NOTE

FEB 16 1987

Bill Version: HB 28
REQUEST: Publish Date:

Revision Date:
Title: An act relating to municipal penalties for prostitution
Sponsor: Donley & Gruenberg
Requestor: House Judiciary Committee

Agency Affected: Alaska Court System
BRU: Trial Courts
Components:

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY 87	FY 88	FY 89	FY 90	FY 91	FY 92
Personal Services	. . . .	. . . .	. . . .	. . . .	. . . .	. . . .
Travel	. . . .	. . . .	. . . .	. . . .	. . . .	. . . .
Contractual	. . . .	15.0	15.0	15.0	15.0	15.0
Supplies	. . . .	. . . .	. . . .	. . . .	. . . .	. . . .
Equipment	. . . .	. . . .	. . . .	. . . .	. . . .	. . . .
Land & Structures	. . . .	. . . .	. . . .	. . . .	. . . .	. . . .
Grants & Claims	. . . .	. . . .	. . . .	. . . .	. . . .	. . . .
TOTAL OPERATING	0.0	15.0	15.0	15.0	15.0	15.0
CAPITAL	. . . .	. . . .	. . . .	. . . .	. . . .	. . . .
REVENUE	. . . .	. . . .	. . . .	. . . .	. . . .	. . . .

FUNDING: (Thousands of Dollars)

General Funds	0.0	15.0	15.0	15.0	15.0	15.0
Federal Funds	. . . .	. . . .	. . . .	. . . .	. . . .	. . . .
Other	. . . .	. . . .	. . . .	. . . .	. . . .	. . . .
TOTAL	0.0	15.0	15.0	15.0	15.0	15.0

POSITIONS:

Full-time	. . . .	. . . .	. . . .	. . . .	. . . .	. . . .
Part-time	. . . .	. . . .	. . . .	. . . .	. . . .	. . . .
Temporary	. . . .	. . . .	. . . .	. . . .	. . . .	. . . .

ANALYSIS: (Attach a separate page if necessary)

If ordinances prescribing the increased penalties were enacted in Anchorage and Fairbanks, it is assumed that at least 60 additional jury trials would be conducted. Although the impact on judicial and clerical resources could be absorbed, costs would be incurred for the additional juror fees ($10,000) and also to pay bailiffs ($5,000).

Prepared by: Karla Forsythe, General Counsel — Phone: 264-8230
Division: Alaska Court System — Date: 2-11-87

Approved by: Stephanie J. Cole, Deputy Director — Date: 2-11-87
Agency: Alaska Court System

Distribution (by preparer):
Legislative Finance
Legislative Sponsor
Requestor
Office of Management & Budget
Impacted Agency(ies)
Senate Secretary

STATE OF ALASKA 1987 LEGISLATIVE SESSION
FISCAL NOTE

REQUEST:

Bill Version: CSHB-28
Publish Date: 2/6/87

Revision Date:
Title: "An Act relating to municipal penalities for prostition."
Sponsor: Reps. Donley & Gruenberg
Requestor: Judiciary

Agency Affected: Dept. of Corrections
BRU:
Components:

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY 87	FY 88	FY 89	FY 90	FY 91	FY 92
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	0	0	0	0	0	0
CAPITAL	0	0	0	0	0	0
REVENUE	0	0	0	0	0	0

FUNDING: (Thousands of Dollars)

GENERAL FUND						
FEDERAL FUNDS						
OTHER						
TOTAL	0	0	0	0	0	0

POSITIONS:

FULL-TIME	0	0	0	0	0	0
PART-TIME						
TEMPORARY						

ANALYSIS: (Attach a separate page if necessary)

Susie H. Riley

Prepared by: Susie H. Riley/Program Budget Analysis Phone: 465-3376
Division: Administrative Services Date: 2/13/87
Acting
Approved by Commissioner: William W. Ladwig Date: 2/16/87
Agency: Department of Corrections

Distribution (by preparer):
Legislative Finance
Legislative Sponsor
Requestor
Office of Management and Budget
Impacted Agency(ies)
Senate Secretary

STATE OF ALASKA 1987 LEGISLATIVE SESSION
FISCAL NOTE

REQUEST:

Bill Version : HB28
Publish Date :

Revision Date:
Title : "An act relating to municipal penalties for prostitution."
Sponsor : Representative Donley
Requestor : House Committee & Reg. Affairs

Agency Affected : Department of Corrections
BRU :
Components :

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY 87	FY 88	FY 89	FY 90	FY 91	FY 92
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL	186.7	186.7	186.7	186.7	186.7	186.7
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	186.7	186.7	186.7	186.7	186.7	186.7
CAPITAL						
REVENUE						

FUNDING: (Thousands of Dollars)

GENERAL FUND	186.7	186.7	186.7	186.7	186.7	186.7
FEDERAL FUNDS						
OTHER						
TOTAL						

POSITIONS:

FULL-TIME						
PART-TIME						
TEMPORARY						

ANALYSIS : (Attach a separate page if necessary)

SEE ATTACHED

Knighton

Prepared by : Susan Knighton, Research Analyst IV — Phone : 465-3376
Division : Administrative Services — Date : March 2, 1987

Approved by Commissioner : Susan Humphrey-Barnett (Deborah Lashaway for) — Date : 3/2/87
Agency : Department of Corrections

Distribution (by preparer):
- Legislative Finance
- Legislative Sponsor
- Requestor
- Office of Management and Budget
- Impacted Agency(ies)
- Senate Secretary

CONTINUATION of FISCAL NOTE ANALYSIS

For Bill/Resolution No. HB28

This bill amends AS 29.25.070(a) by providing that municipalities may prescribe a penalty requiring the court to impose a minimum sentence of imprisonment of up to 90 days.

The Department of Corrections is currently housing approximately 12 sentenced inmates per year for the offense of prostitution. The average sentence received is 90 days and 60 actual jail days with all good time received. This results in a cost to the State of $32,011. (12 inmates x 60 days x $44.46/day)

During 1986, approximately 110 persons were arrested and booked for the offense of prostitution. These cases are not routinely prosecuted because of the short sentences being imposed by the courts. During 1986, only 12 of the 110 arrested were given jail sentences and the average sentence length was 90 days.

This bill proposes that more active prosecution of these cases will take place if the courts must impose a mandatory sentence of 90 days. To evaluate the effects of these stiffer sentences, we have calculated the fiscal impact of a 50 percent conviction rate, 75% conviction rate and 100% conviction rate.

50% Conviction Rate:

55 inmates sentenced to 90 days	=	3,300
Total Cost = 3300 days x $44.46	=	146,718
Increased Cost	=	114,707

75% Conviction Rate:

82 inmates sentenced to 90 days	=	4,920
Total Cost = 4920 days x $44.46	=	218,743
Increased Cost	=	186,732

100% Conviction Rate:

112 inmates sentenced to 90 days	=	6,720
Total Cost = 6720 days x $44.46	=	298,771
Increased Cost	=	266,760

The 75% Conviction Rate scenerio has been used on the attached fiscal note. These persons will most likely be housed in Community Residential Centers or Restitution Centers.

STATE OF ALASKA 1987 LEGISLATIVE SESSION
FISCAL NOTE

REQUEST:

Bill Version : HB28
Publish Date :

Revision Date: 3/19/87
Title : "An act relating to municipal penalties for prostitution."
Sponsor : Representative Donley
Requestor : House Committee and Regional Affairs

Agency Affected : Department of Corrections
BRU :
Components :

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY 87	FY 88	FY 89	FY 90	FY 91	FY 92
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL	0	0	0	0	0	0
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	0	0	0	0	0	0
CAPITAL	0	0	0	0	0	0
REVENUE	0	0	0	0	0	0

FUNDING: (Thousands of Dollars)

GENERAL FUND	0	0	0	0	0	0
FEDERAL FUNDS						
OTHER						
TOTAL						

POSITIONS:

FULL-TIME	0	0	0	0	0	0
PART-TIME						
TEMPORARY						

ANALYSIS : (Attach a separate page if necessary)

The bill as amended will allow the Department to charge municipalities for actual costs incurred.

Prepared by : Susan Knighton, Research Analyst IV
Phone : 465-3376
Division : Administrative Services
Date : 3/19/87

Approved by Commissioner : Susan Humphrey-Barnett
Date : 3/19/87
Agency : Department of Corrections

Distribution (by preparer):
- Legislative Finance
- Legislative Sponsor
- Requestor
- Office of Management and Budget
- Impacted Agency(ies)
- Senate Secretary

STATE OF ALASKA

DEPARTMENT OF CORRECTIONS

STEVE COWPER, GOVERNOR

REPLY TO:

POUCH T
JUNEAU, ALASKA 99811
PHONE: (907) 465-3376

March 19, 1987

The Honorable Dave Donley
Alaska State Legislature
P.O. Box V
Juneau, AK 99811

Dear Representatiave Donley:

The Department of Corrections supports the proposed amendment to CSHB 28, which requires municipalities adopting ordinances providing for a minimum sentence of imprisonment for prostitution under AS 29.25.070(a) to pay for the actual costs incurred by the Department to incarcerate the offenders.

If the amendment is adopted, please accept the attached fiscal note as a revision to those previously submitted by the Department.

Sincerely,

Susan E Knighton

Susan Knighton
Legislative Liaison

ALASKA WOMEN'S LOBBY

POST OFFICE BOX 10-1571, ANCHORAGE, ALASKA 99510

February 16, 1987

Honorable John Sund, Chairman
House Judiciary Committee
P.O. Box V
Juneau, Alaska 99811

Dear Chairman Sund and members of the Committee:

The Alaska Women's Lobby would like to express it's opposition to the bill before you today, HB 28, which would allow municipalities the option of imposing mandatory minimum sentences for prostitution.

At a time when the state is moving away from the concept of mandatory and presumptive sentencing and towards the need for judicial discretion in sentencing, we believe it would be a mistake to allow municipalities to begin setting mandatory minimum sentences on violations of municipal ordinaces. It was only in the past legislative session that municipalities were granted the ability to impose more than a thirty day sentence for ordinance violation. That change was much deliberated. This change will open the door to municipalities imposing minimum sentences on ordinances. This option is not currently available under the municipal code.

Mandatory minimum sentences are currently imposed by statute only for DWI, driving with a suspened license and first and second degree murder. Judges must impose the mandatory minimum, there are no exceptions. Even presumptive sentences include aggravating and mitigating factors.

This bill would result in the mandatory incarceration of women who sell their sexual services but does not focus on those who exploit these women. If anything passage of this bill will increase the power of the pimp over the prostitute.

The committee substitute has included those who pay for the services of a prostitute. The Alaska Women's Lobby has in the past supported changes in state statutes to include this as a crime in the interest of equal protection, but the inclusion of patrons of prostitutes in this bill does not make it more desirable.

If increased penalties are to be imposed then the focus of those increased penalties should be on those who promote prostitution and exploit prostitutes. Focus needs to be directed at the problem of under-age prostitutes both male and female and those adults who encourage and exploit these youth. Attention needs to be directed at those who knowingly

solict the services of underage prostitutes.

Municipalities might want to instead consider the option of decriminalization and regulation as a means to deal with the problems associated with prostitution such as the public health risks of sexually transmitted disease and the nuisance factors such as the garish neon signs associated with this "industry" and let the courts deal with the serious criminal aspects of child prostitution.

Thank you for considering these views.

Sincerely,

Sherrie Markin Goll

Sherrie Markin Goll
for the Alaska Women's Lobby

REPRESENTATIVE DAVE DONLEY
ALASKA STATE LEGISLATURE
DISTRICT ELEVEN - SPENARD

P.O. BOX V, JUNEAU 99811
(907) 465-3892

CHAIRMAN
LABOR AND COMMERCE COMMITTEE

MEMBER
STATE AFFAIRS COMMITTEE
HEALTH, EDUCATIONAL AND SOCIAL SERVICES COMMITTEE
INTERNATIONAL TRADE SUB-COMMITTEE

May 1, 1987

M E M O R A N D U M

Chairman Sund

To: Members, House Judiciary Committee

From: Representative Dave Donley DD

Re: Proposed Amendments for HB 28

HB 28, an act relating to municipal penalties for prostitution, is currently before the House Judiciary Committee.

In response to requests from constituents, the Municipality of Anchorage and other legislators, I am proposing four amendments to HB 28 for your consideration. The amendments are listed below with a short explanation of what they accomplish:

Amendment #1 - changes the mandatory minimums a municipality may impose for prostitution from a maximum of 90 days imprisonment to: 3 days for first offense, 10 days for second offense and 30 days for third or subsequent convictions.

Amendment #2 - changes the language of the bill to allow a municipality to impose similar penalties on pimps as it imposes on prostitutes and customers (johns).

Amendment #3 - changes the title of the bill to read "An act relating to municipal penalties for prostitution and promoting prostitution." (Necessary due to Amendment #2).

Amendment #4 - mandates that if a municipality chooses to adopt such an ordinance, they shall reimburse the state for additional costs incurred by the Department of Corrections and the court system.

Amendment #5 - defines the term "municipality" to include all forms of municipalities including home rule and general law. It is the opinion of the Legislative Counsel, Keith B. Levy, that this is not necessary, but since there has been some

INTERIM IN ANCHORAGE
1024 WEST SIXTH AVENUE • ANCHORAGE, ALASKA 99501 • (907) 561-8234

discussion about this, we have included the amendment so as to avoid any possibility of confusion.

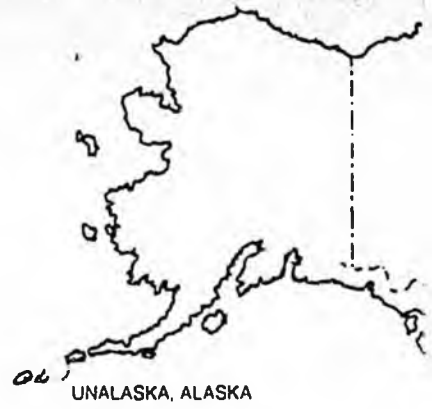
Enclosed please find a copy of each of these amendments and some background relevant to the proposed changes.

HB 28 is an important piece of legislation for my constituents, as prostitution is a very real problem in their neighborhoods. It is based on an example set by the city of Phoenix, where such penalties successfully reduced and all but eliminated prostitution problems.

If you would like to discuss this bill or I can answer any questions, please call me at 3892.

CITY OF UNALASKA
P.O. BOX 89 112
UNALASKA, ALASKA 99685
(907) 581-1251
"Capital of the Aleutians"
DEPARTMENT OF PUBLIC SAFETY

FEB 23 1987



February 9, 1987

Representative Adelheid Herrman
P.O. Box 63
Naknek, Alaska 99633

Dear Representative Herrman:

I recently had opportunity to review a Bill proposed by Representative Donley: House Bill #28, "An Act Relating to Municipal Penalties for Prostitution."

The response I prepared for my City Manager presented my perception of the rationale behind the bill and was somewhat negative. In a more recent phone conversation with Representative Donley, the intent of his legislative action was clarified. It is, as I now understand, intended to impact relatively serious problems experienced in the Anchorage/Fairbanks municipalities.

Inasmuch as these municipalities have their own prosecutorial staff and, as House Bill #28 proposes that the suggested ordinance change be optional for municipalities, I now view the bill more favorably. I would recommend support of House Bill #28.

Sincerely,

Peter G. Davis, Director
Department of Public Safety

PGD:plb

Alaska State Legislature

P. O. BOX V
JUNEAU, ALASKA 99811
(907) 465-2828

DISTRICT 10
2600 Denali; Suite 501
ANCHORAGE, ALASKA 99503
(907) 276-7943

FEB 2[illegible] 1987

MEMBER
Community and Regional Affairs
Special Committee on Telecommunications
Finance Sub-Committee for Labor

Anchorage Caucus, House Chair

Representative Virginia M. Collins

To: All Representatives

From: Representative Virginia Collins

Date: February 24, 1987

Re: Co-sponsorship of legislation relating to the patronizing of a prostitute

---

Enclosed please find a copy of proposed legislation relating to patronizing a prostitute and a copy of AS 11.66.100-150 (Prostitution and Related Offenses). Alaska has laws on engaging in and promoting of prostitution, but none addressing the problem of those who patronize a prostitute.

Section 11.66.105 would make patronizing a prostitute under the age of sixteen (16) a class A felony--the same class of crime as that for those promoting prostitution of anyone under 16 years of age.

Section 11.66.107 would make patronizing a prostitute 16 years of age or older a class B misdemeanor. "Patronizing" also applies to those entering or remaining in a place of prostitution with the intent to engage in sexual conduct other than as a prostitute.

I plan on introducing this legislation Wednesday, March 11, 1987. If you are interested in co-sponsorship, please contact my staff at 465-2828.

IN THE HOUSE

HOUSE BILL NO.

IN THE LEGISLATURE OF THE STATE OF ALASKA

FIFTEENTH LEGISLATURE - FIRST SESSION

A BILL

For an Act entitled: "An Act relating to patronizing a prostitute."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:

* Section 1. AS 11.66 is amended by adding new sections to read:

Sec. 11.66.105. PATRONIZING A PROSTITUTE IN THE FIRST DEGREE. (a) A person commits the crime of patronizing a prostitute in the first degree if the person offers or agrees to pay another person under 16 years of age a fee to engage in sexual conduct.

(b) Patronizing a prostitute in the first degree is a class A felony.

Sec. 11.66.107. PATRONIZING A PROSTITUTE IN THE SECOND DEGREE. (a) A person commits the crime of patronizing a prostitute in the second degree if the person

(1) offers or agrees to pay another person 16 years of age or older a fee to engage in sexual conduct; or

(2) enters or remains in a place of prostitution with the intent to engage in sexual conduct other than as a prostitute.

(b) Patronizing a prostitute in the second degree is a class B misdemeanor.

(b) Criminal possession of explosives is a

(1) class A felony if the crime intended is murder in any degree or kidnapping;

(2) class B felony if the crime intended is a class A felony;

(3) class C felony if the crime intended is a class B felony;

(4) class A misdemeanor if the crime intended is a class C felony;

(5) class B misdemeanor if the crime intended is a class A or class B misdemeanor. (§ 7 ch 166 SLA 1978)

Collateral references. — 31 Am. Jur. 2d, Explosions and Explosives, §§ 121-130.

35 C.J.S., Explosives, § 12.

Possession of bomb, molotov cocktail, or similar device as criminal offense, 42 ALR3d 1230.

Sec. 11.61.250. Unlawful furnishing of explosives. (a) A person commits the crime of unlawful furnishing of explosives if the person furnishes an explosive substance or device to another knowing that the other intends to use the substance or device to commit a crime.

(b) Unlawful furnishing of explosives is a class C felony. (§ 7 ch 166 SLA 1978)

Chapter 65. Offenses Against Public Convenience.

Secs. 11.65.010 — 11.65.020. [Renumbered as AS 30.50.020 and 30.50.010.]

Sec. 11.65.030. Tampering with posted notices. [Repealed, § 21, ch. 166, SLA 1978.]

Chapter 66. Offenses Against Public Health and Decency.

Article

1. Prostitution and Related Offenses (§§ 11.66.100 — 11.66.150)
2. Gambling Offenses (§§ 11.66.200 — 11.66.280)

Article 1. Prostitution and Related Offenses.

Section

100. Prostitution
110. Promoting prostitution in the first degree
120. Promoting prostitution in the second degree
130. Promoting prostitution in the third degree
140. Corroboration of certain testimony not required
150. Definitions

NOTES TO DECISIONS

Municipal ordinances not prohibited. — The enactment of this article does not prohibit municipal ordinances penalizing the solicitation of prostitutes by putative customers. Municipality of Anchorage v. Afualo, Ct. App. Op. No. 213 (File Nos. 7094, 7095), 657 P.2d 407 (1983).

There is nothing in this article which would support an inference that the legislature sought to encourage men to patronize prostitutes nor is there any indication in this article that the legislature sought statewide uniformity in regulating commercial sexual relations. Municipality of Anchorage v. Afualo, Ct. App. Op. No. 213 (File Nos. 7094, 7095), 657 P.2d 407 (1983).

Collateral references. — 63 Am. Jur. 2d, Prostitution, § 1 et seq.

27 C.J.S., Disorderly Houses, § 1 et seq.; 73 C.J.S., Prostitution, § 1 et seq.

Constitutionality and construction of pandering acts, 74 ALR 311.

Validity and construction of statute or ordinance proscribing solicitation for purposes of prostitution, lewdness, or assignation — modern cases, 77 ALR3d 519.

Sec. 11.66.100. Prostitution. (a) A person commits the crime of prostitution if the person engages in or agrees or offers to engage in sexual conduct in return for a fee.

(b) Prostitution is a class B misdemeanor. (§ 8 ch 166 SLA 1978)

NOTES TO DECISIONS

Common law. — The keeping of a bawdyhouse was a misdemeanor at common law, whereas fornication and prostitution were not. Eleazar v. United States, 16 Alaska 561, 241 F.2d 385 (9th Cir. 1956), decided under former AS 11.40.220.

This section is not irreconcilable with a municipal ordinance prohibiting the solicitation of prostitutes by putative customers. Municipality of Anchorage v. Afualo, Ct. App. Op. No. 213 (File Nos. 7094, 7095), 657 P.2d 407 (1983).

Actual payment of a fee is not required; an act of prostitution is complete when an offer is extended or an agreement made to engage in sexual conduct in return for a fee. Garibay v. State, Ct. App. Op. No. 221 (File No. 6246), 658 P.2d 1350 (1983).

Proof. — Customer's testimony that he agreed to purchase sexual favors for sum of $200, his testimony that he charged the purchase price using his VISA card, and the VISA charge slip itself, were all highly probative of whether an agreement or offer to engage in sexual conduct in return for a fee was in fact made. Garibay v. State, Ct. App. Op. No. 221 (File No. 6246), 658 P.2d 1350 (1983).

Collateral references. — Prostitution as vagrancy, 14 ALR 1501.

Entrapment to procure women for immoral purposes, 18 ALR 186; 66 ALR 478; 86 ALR 263.

Sec. 11.66.110. Promoting prostitution in the first degree. (a) A person commits the crime of promoting prostitution in the first degree if the person

(1) induces or causes a person to engage in prostitution through the use of force;

(2) as other than a patron of a prostitute, induces or causes a person under 16 years of age to engage in prostitution; or

(3) induces or causes a person in that person's legal custody to engage in prostitution.

(b) In a prosecution under (a)(2) of this section, it is not a defense that the defendant reasonably believed that the person induced or caused to engage in prostitution was 16 years of age or older.

(c) Except as provided in (d) of this section, promoting prostitution in the first degree is a class B felony.

(d) A person convicted under (a)(2) of this section is guilty of a class A felony. (§ 8 ch 166 SLA 1978; am §§ 1, 2 ch 50 SLA 1983)

Effect of amendments. — The 1983 amendment added "Except as provided in (d) of this section" to the beginning of subsection (c) and added subsection (d).

NOTES TO DECISIONS

For case construing former statute prohibiting importing or exporting females for immoral purposes, see State v. Adkerson, Sup. Ct. Op. No. 294 (File No. 520), 403 P.2d 673 (1965).

For case construing former procurement statute, see Johnson v. State, Sup. Ct. Op. No. 832 (File No. 1338), 501 P.2d 762 (1972).

Sentence for procurement upheld. — See Price v. State, Sup. Ct. Op. No. 1450 (File No. 2794), 565 P.2d 858 (1977).

For case construing former statute concerning necessary evidence for prostitution or seduction, see Johnson v. State, Sup. Ct. Op. No. 832 (File No. 1338), 501 P.2d 762 (1972).

Collateral references. — Transporting female for purpose of prostitution, 74 ALR 330.

Woman conniving or consenting to own transportation, 84 ALR 376.

Sec. 11.66.120. Promoting prostitution in the second degree. (a) A person commits the crime of promoting prostitution in the second degree if the person

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

(2) procures or solicits a patron for a prostitute.

(b) Promoting prostitution in the second degree is a class C felony. (§ 8 ch 166 SLA 1978)

NOTES TO DECISIONS

For case construing former statute prohibiting soliciting or procuring for purpose of prostitution, see Plas v. State, Sup. Ct. Op. No. 1904 (File Nos. 3529, 3530), 598 P.2d 966 (1979).

Instruction. — Trial court did not err in refusing to give instruction requiring state to prove that prostitution enterprise involved in case was of an ongoing nature. Garibay v. State, Ct. App. Op. No. 221 (File No. 6246), 656 P.2d 1350 (1983).

Collateral references. — Separate acts of taking earnings of or support from prostitute as separate or continuing offenses of pimping. 3 ALR4th 1195.

Sec. 11.66.130. Promoting prostitution in the third degree. (a) A person commits the crime of promoting prostitution in the third degree if, with intent to promote prostitution, the person

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

(2) as other than a patron of a prostitute, induces or causes a person 16 years of age or older to engage in prostitution;

(3) as other than a prostitute receiving compensation for personally rendered prostitution services, receives or agrees to receive money or other property pursuant to an agreement or understanding that the money or other property is derived from prostitution; or

(4) engages in conduct that institutes, aids, or facilitates a prostitution enterprise.

(b) Promoting prostitution in the third degree is a class A misdemeanor. (§ 8 ch 166 SLA 1978)

NOTES TO DECISIONS

Editor's notes. — The cases cited in the notes below were decided under former AS 11.40.260, 11.40.300, 11.40.330, 11.40.410, and 11.40.420.

Common law. — The keeping of a bawdyhouse was a misdemeanor at common law. Eleazar v. United States, 16 Alaska 561, 241 F.2d 385 (9th Cir. 1956).

Lessor may be guilty as keeper. — If a man leases his house to a woman to be kept as a bawdyhouse for purposes of prostitution, and it is kept for such purposes, with his knowledge, he is guilty as keeper. Rosencranz v. United States, 155 F. 38 (9th Cir. 1907).

As well as agent of lessor. — The agent of an owner, who rents a house knowing that it is to be used as a house of prostitution, and that it is so used, may be found guilty as a keeper. Rosencranz v. United States, 155 F. 38 (9th Cir. 1907).

For case construing former statute prohibiting employment in a house of prostitution or living on the earnings of a prostitute, see Johnson v. State, Sup. Ct. Op. No. 832 (File No. 1338), 501 P.2d 762 (1972).

For case construing former statute prohibiting importing or exporting females for immoral purposes, see State v. Adkerson, Sup. Ct. Op. No. 294 (File No. 520), 403 P.2d 673 (1965).

For case construing former statute prohibiting pimping, see Johnson v. United States, 260 F. 783 (9th Cir. 1919).

For case construing former statute prohibiting a male's living with or on the earnings of a prostitute, see Dunn v. State, Sup. Ct. Op. No. 409 (File No. 735), 426 P.2d 993 (1967).

Collateral references. — 27 C.J.S., Disorderly Houses, §§ 1 to 18; 73 C.J.S., Prostitution, §§ 6, 7.

Constitutionality of statute conferring on chancery courts power to abate bawdyhouses as nuisances, 5 ALR 1474; 22 ALR 542; 75 ALR 1298.

Number of females who reside in house or resort thereto for immoral purposes as affecting disorderly character thereof, 12 ALR 529.

Entrapment to commit offense as to house of prostitution or as to pandering, 52 ALR2d 1194.

Construction of provision of pandering statute as to placing a female in charge or custody of another, 54 ALR2d 1178.

Sec. 11.66.140. Corroboration of certain testimony not required. In a prosecution under AS 11.66.110 — 11.66.130, it is not necessary that the testimony of the person whose prostitution is alleged to have been compelled or promoted be corroborated by the testimony of any other witness or by documentary or other types of evidence. (§ 8 ch 166 SLA 1978).

NOTES TO DECISIONS

For case construing former rule as to corroboration of prostitute's testimony, see Johnson v. State, Sup. Ct. Op. No. 832 (File No. 1338), 501 P.2d 762 (1972).

For cases construing former statute providing that common fame was competent evidence in a prosecution for keeping a bawdyhouse, see Botts v. United States, 155 F. 50 (9th Cir. 1907); Hall v. United States, 155 F. 52 (9th Cir. 1907).

Sec. 11.66.150. Definitions. In AS 11.66.100 — 11.66.150, unless the context requires otherwise,

(1) "place of prostitution" means any place where a person engages in sexual conduct in return for a fee;

(2) "prostitution enterprise" means an arrangement in which two or more persons are organized to render sexual conduct in return for a fee;

(3) "sexual conduct" means genital or anal intercourse, cunnilingus, fellatio, or masturbation of one person by another person. (§ 8 ch 166 SLA 1978)

Cross references. — For definition of terms used in this title, see AS 11.81.900.

Article 2. Gambling Offenses.

applies to the offense of felon in possession of a concealable firearm. State v. LaPorte, Ct. App. Op. No. 306 (File Nos. 7220, 7285), 672 P.2d 466 (1983).

Conviction upheld. — A person may be convicted of being a felon in possession of a concealable firearm while the predicate conviction is on appeal and the sentence stayed. Berg v. State, Ct. App. Op. No. 564 (File No. A-666), 711 P.2d 553 (1985).

Conviction and sentence upheld. — See Afcan v. State, Ct. App. Op. No. 572 (File No. A-703), 711 P.2d 1198 (1986).

Conviction and sentence for kidnapping, assault in the first degree, misconduct involving weapons in the first degree and robbery in the first degree were affirmed. See Wortham v. State, Sup. Ct. Op. No. 414 (File No. 7353), 689 P.2d 1133 (1984).

Sentence upheld. — See Gilbreath v. State, Ct. App. Op. No. 278 (File No. 7097), 668 P.2d 1354 (1983).

Applied in Shaw v. State, Ct. App. Op. No. 313 (File No. 7561), 673 P.2d 781 (1983).

Cited in State v. Frazier, Ct. App. Op. No. 460 (File No. A-415), 698 P.2d 1212 (1985); Ackermann v. State, Ct. App. Op. No. 600 (File No. A-931), 716 P.2d 5 (1986); State v. Frazier, Sup. Ct. Op. No. 061 (File No. S-972), 719 P.2d 261 (1986).

Sec. 11.61.210. Misconduct involving weapons in the second degree.

NOTES TO DECISIONS

Sentence affirmed. — See Afcan v. State, Ct. App. Op. No. 572 (File No. A-703), 711 P.2d 1198 (1986).

Chapter 66. Offenses Against Public Health and Decency.

Article 1. Prostitution and Related Offenses.

Sec. 11.66.110. Promoting prostitution in the first degree.

NOTES TO DECISIONS

Precluding mistake of age as defense. — Subsection (b) of this section, which expressly dispenses with mistake of age as a defense to promoting prostitution in the first degree, does not violate due process of law. Bell v. State, Ct. App. Op. No. 288 (File No. 5821), 668 P.2d 829 (1983).

Under the Revised Alaska Criminal Code, it is defendant's intentional procurement of a person under the age of 16 years for prostitution that renders him liable for first-degree promoting, regardless of his actual awareness of that person's age. Bell v. State, Ct. App. Op. No. 288 (File No. 5821), 668 P.2d 829 (1983).

The act of procuring another for purposes of prostitution is malum in se, without regard to the age of the person procured, and, thus, in a prosecution for procuring a person under the age of 16 years, the intent to procure satisfies the minimal constitutional requirement of criminal intent. Bell v. State, Ct. App. Op. No. 288 (File No. 5821), 668 P.2d 829 (1983).

Promoting prostitution and managing prostitution enterprise. — Punishment for inducing or causing a person under the age of 16 to engage in prostitution (AS 11.66.110(a)(2)) and for managing, supervising, controlling or owning a prostitution enterprise (AS 11.66.120(a)(1)) did not violate double jeopardy since the offenses proscribed by the two statutes in-

volve different intents and different conducts and differing societal interests are furthered. Bell v. State, Ct. App. Op. No. 288 (File No. 5821), 668 P.2d 829 (1983).

Sec. 11.66.120. Promoting prostitution in the second degree.

NOTES TO DECISIONS

Promoting prostitution and managing prostitution enterprise. — Punishment for inducing or causing a person under the age of 16 to engage in prostitution (AS 11.66.110(a)(2)) and for managing, supervising, controlling or owning a prostitution enterprise (AS 11.66.120(a)(1)) did not violate double jeopardy since the offenses proscribed by the two statutes involve different intents and different conducts and differing societal interests are furthered. Bell v. State, Ct. App. Op. No. 288 (File No. 5821), 668 P.2d 829 (1983).

Sec. 11.66.130. Promoting prostitution in the third degree.

NOTES TO DECISIONS

Quoted in Bell v. State, Ct. App. Op. No. 288 (File No. 5821), 668 P.2d 829 (1983).

Sec. 11.66.140. Corroboration of certain testimony not required.

NOTES TO DECISIONS

Cited in Bell v. State, Ct. App. Op. No. 288 (File No. 5821), 668 P.2d 829 (1983).

Sec. 11.66.150. Definitions.

NOTES TO DECISIONS

Quoted in Bell v. State, Ct. App. Op. No. 288 (File No. 5821), 668 P.2d 829 (1983).

Chapter 70. Miscellaneous Provisions.

Secs. 11.70.010 — 11.70.030. Intent to defraud; use of evidence by person on charge of perjury; intoxication as defense. [Repealed, § 21, ch 166, SLA 1978. For current law, see AS 11.46.990(10), 11.81.630.]

Editor's notes. — The repeal line above is set out to correct an error in the main pamphlet.

MAR 5 1987

Spenard Action Committee

2308 West 47th Street • Anchorage, Alaska 99517
Phone (907) 243-7768

February 25th. 1987

To State Representatives:

John Sund
Dave Donley
Max Gruenberg
(and all concerned)

HB28 is, in our opinion, a very important piece of legislation to effect only cities in Alaska that feel they need the form of leeway offered by this bill. I would seriously ask you to contact Lt. Mike Frazier or Lt. Wayne Brown of the Phoenix Police Department, (602) 262-6747. They can give you the kind of the information I'm sure you would appreciate. As they stressed to me, their enactment of manditory minimum sentences for prostitution, (I have enclosed a copy of that ordinance for your convience), is considered the one step, by far, the most important tool for their reduction of prostitution in their city. Before they implemented this ordinance prostitution arrests numbered 35-40 a night, now the figures are more like 0-1 as a norm. They have no more houses of prostitution either and do feel somewhat this may have helped lower their overall crime statistics, but cannot, of course, prove positive this is the case.

They also stressed the fact other cities like Tucson and Mesa now have quite a problem with prostitution and this probably in part, is due because Pheonix does have this ordinance in the books and they don't.

We are also asking for mandatory testing for AIDS on these convicted prostitutes and the 5 day minimum sentences will keep them off the streets until tests are completed. With this newest of threats facing us all we surly cannot afford to be nonchalant about how we handle crimes of this nature any longer. The growing industry of adult facilities here in Anchorage will stress to the limit the amount of patience this community will endure much longer.

We ask you to adjudicate this piece of legislation as expeditiously as possible.

Thank you for your consideration.

Sincerly,

Dave Erlich, Chairman S.A.C.

subsection (a) of this section. No sale or transfer of possession of any vapor releasing substances that contain a toxic substance as defined in subsection (a) of this section shall be made except by a person who is at the time of sale actively employed by or engaged in operating a bona fide commercial establishment at a fixed location.

(c) Nothing contained in this section shall be applicable to the transfer of any vapor releasing substances containing toxic substances as defined in subsection (a) of this section from a parent to a child, from a guardian to his ward, from an employer to employee, from a teacher to a student or in any other similar relationship when such transfer is for a lawful and bona fide purpose.

(d) Every bona fide commercial establishment selling vapor releasing substances as defined in subsection (b) of this section shall conspicuously display a sign of not less than 11 x 14 inches in size which states: "Warning: Deliberate Inhalation of Spray Paint Vapors Can Be Dangerous". Such printed warning shall be easily legible.

(e) This section is limited to such coating substances as are dispensed by the use of aerosol spray devices.

(f) Anyone who willfully violates any of the provisions of this section shall be guilty of a misdemeanor. (Ord. No. G-1291 § 1.)

ARTICLE IV. Offenses Involving Morals.

DIVISION 1. Prostitution and Fornication.[18]

Sec. 23-52. Prostitution and related offenses.

(a) A person is guilty of a misdemeanor who:

(1) Offers to, agrees to, or commits an act of prostitution;

(2) Solicits or hires another person to commit an act of prostitution;

(3) Is in a public place or place open to public view and manifests an intent to commit an act of prostitution;

(4) Aids or abets the commission of any of the acts prohibited by this section.

(b) Definitions:

(1) Prostitution is the act of performing sexual activity for hire by a male or female person.

(2) Sexual activity means vaginal or anal intercourse, fellatio, cunnulingus, analingus, masturbation, sodomy or bestiality.

[18]Charter reference – As to City's authority to regulate prostitutes, and fornication, see Ch. IV, § 2(34).

(c) Penalty:

1. A person convicted of a violation of subsection (a) of this section is guilty of a Class 1 misdemeanor punishable by imprisonment for a term of not less than five (5) days nor more than six months and, in the discretion of the court, a fine not to exceed one thousand dollars ($1000).

2. Upon a second conviction, a person convicted of a violation of subsection (a) of this section is guilty of a Class 1 misdemeanor punishable by imprisonment for a term of not less than thirty (30) days nor more than six months and, in the discretion of the court, a fine not to exceed One Thousand Dollars ($1000).

3. Upon a third conviction, a person convicted of a violation of subsection (a) of this section is guilty of a Class 1 misdemeanor punishable by imprisonment for a term of not less than sixty (60) days nor more than six (6) months and, in the discretion of the Court, a fine not to exceed One Thousand Dollars ($1000).

4. Upon a fourth or subsequent conviction, a person convicted of a violation of subsection (a) of this section is guilty of a Class 1 misdemeanor punishable by imprisonment for a term of not less than one hundred eighty (180) days and, in the discretion of the Court, a fine not to exceed One Thousand Dollars ($1000).

5. In no case shall a person convicted of a violation of subsection (a) of this section be eligible for suspension or commutation of sentence unless such person is placed on probation with the condition that the minimum mandatory term of imprisonment be served. (Ord. No. G-1521, § 1; Ord. No. G-1813, § 1; Ord. No. G-1868, § 6; Ord. No. G-2287, §§ 1,2.)

Sec. 23-53. Prostitutes–Solicitation.

Any prostitute, or other person soliciting for a prostitute or for a place of prostitution, or any male person who is an habitue of a place of prostitution, or who shall solicit persons to visit or patronize a prostitute or place of prostitution or make such solicitation upon the streets or in any public place in the City shall be guilty of a misdemeanor. (Code 1962, § 27-56.)

Sec. 23-54 through 23-56. Repealed. (Ord. No. G-1521, § 1.)

HB 28 Prostitution Bill allowing manditory sentences:

I am in favor_____

I am not in favor_____
Reasons? _____
_____
_____

HB 30 Conspiracy dealing with prostitution and narcotics:

I am in favor_____

I am not in favor_____
Reasons?_____
_____
_____

Spenard Action Committee

2308 West 47th Street • Anchorage, Alaska 99517
Phone (907) 243-7768

March 11, 1987

Representitives of the House:

My name is Dave Erlich, I am chairman of the Spenard Action Committee representing thousands of concerned citizens in the Anchorage area.

Over the past 10 years Anchorage has seen a rapid rise in all areas of crime, especially narcotics and prostitution to name a couple. We are currently trying to deal with our problems on a local level through various methods.

Our only concerns in Juneau are HB28 dealing with prostitution which allows each local community the authority to impose manditory minimum sentences up to 90 days and fines up to $1,000.00 at their descretion. It will not impact communities that do not need this legislation only those that wish to inact a local ordinance dealing with the problems. It is a bill which works outside Alaska and we feel, as do the local police, it will help our situation.

HB30 is a bill dealing with conspiracy for prostitution and narcotics. We need to deal with the individual who most profits from these crimes and are usually not directly involved with the crimes themselves.

If you support these two bills or do not would you please send back the questioneer with your answers to us.

Thank you for your cooperation in this matter.

Sincerly,

Dave Erlich

Dave Erlich
Chairman, Spenard Action Committee

STATE OF ALASKA

DEPARTMENT OF CORRECTIONS

STEVE COWPER, GOVERNOR

REPLY TO:

POUCH T
JUNEAU, ALASKA 99811
PHONE: (907) 465-3376

February 20, 1987

FEB 23 1987

The Honorable John Sund
Chair
House Judiciary Committee
P.O. Box V
Juneau, AK 99811

Dear Representative Sund:

This letter is in response to a request for information from John Hartle of your staff regarding a comparison of reimbursements by municipalities versus actual cost of prisoner care. The current rate of reimbursement to the State by municipalities is either negotiated as part of our lease agreement (as with the Municipality of Anchorage) or is determined by a letter of agreement, as with the Cities of Ketchikan, Fairbanks, and Juneau. The following information shows the actual costs and the amounts billed and reimbursed, by institution and jurisdiction, for prisoner care in fiscal 1986:

COST OF CARE

City of Anchorage

	No. Inmate Days	Daily Cost of Care	Total Cost of Care FY86	Amount Billed
Anch. Annex	20,984	$96.11	$2,016,772	$ 929,591
Meadow Creek	1,408	71.53	100,714	62,374
Hiland Mt.	1,130	71.53	80,829	50,081
Goose Bay	9,799	77.45	758,933	434,074
Palmer	1,237	72.82	90,078	54,799
Wildwood	527	69.44	36,595	23,324
3rd Avenue	309	83.72	25,869	13,667
	35,394		$3,109,790	$1,567,910

Major Medical and Statewide Services: 35,394 mandays x $11.36	402,076	
Total Cost to DOC	3,511,866	
Amount Deducted by Municipality for Rent		279,569
Amount Paid by Municipality		1,288,341
Cost of Services less Reimbursement by City of Anchorage	$2,223,525	

City of Fairbanks

Fairbanks C.C. 2,352 mandays x $75.37/day	$ 177,270
Plus Medical/Statewide Services 2,352 mandays x $11.36/day	26,719
Total Cost to DOC	203,989
Less Amount Reimbursed by City of Fairbanks	- 151,382
Cost of Services less Reimbursement	$ 52,607

City of Juneau

Lemon Creek C.C. 1,532 mandays x $91.59/day	$ 140,316
Plus Medical/Statewide Services 1,532 mandays x $11.36/day	17,404
Total Cost to DOC	157,720
Less Amount Reimbursed by City of Juneau	- 131,155
Cost of Services less Reimbursement	$ 26,564

City of Ketchikan

Ketchikan C.C. 438 mandays x $128.40/day	$ 56,239
Plus Medical/Statewide Services 438 mandays x $11.36/day	4,976
Total Cost to DOC	61,215
Less Amount Reimbursed by City of Ketchikan	- 11,816
Cost of Services less Reimbursement	$ 49,399

If you have any further questions, please do not hesitate to call.

Sincerely,

William W. Ladwig

William W. Ladwig
Acting Commissioner

WWL:SR:lc
cc: John Hartle

Clean up Sponsor

Introduced: 1/19/87
Referred: Community & Regional
Affairs and Judiciary

IN THE HOUSE BY DONLEY AND GRUENBERG

HOUSE BILL NO. 28

IN THE LEGISLATURE OF THE STATE OF ALASKA

FIFTEENTH LEGISLATURE - FIRST SESSION

A BILL

For an Act entitled: "An Act relating to municipal penalties for prostitution."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:

* Section 1. AS 29.25.070(a) is amended to read:

(a) For the violation of an ordinance, a municipality may by ordinance prescribe a penalty not to exceed a fine of $1,000 and imprisonment for 90 days. A municipality may prescribe a penalty requiring a court to impose a minimum sentence of imprisonment of up to 90 days and a fine not to exceed $1,000, as provided in an ordinance, for violation of an ordinance that prohibits prostitution and is substantially similar to AS 11.66.100.

mandatory minimum

6 Dec

Women's lobby - oppose bill - Laurie Bell

STATE OF ALASKA 1987 LEGISLATIVE SESSION
FISCAL NOTE

REQUEST: Bill Version: HB 28
Publish Date:

Revision Date:
Title: An act relating to municipal penalties for prostitution
Sponsor: Donley & Gruenberg
Requestor: House Judiciary Committee

Agency Affected: Alaska Court System
BRU: Trial Courts
Components:

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY 87	FY 88	FY 89	FY 90	FY 91	FY 92
Personal Services	. . . .	. . . .	. . . .	. . . .	. . . .	. . . .
Travel	. . . .	. . . .	. . . .	. . . .	. . . .	. . . .
Contractual	. . . .	15.0	15.0	15.0	15.0	15.0
Supplies	. . . .	. . . .	. . . .	. . . .	. . . .	. . . .
Equipment	. . . .	. . . .	. . . .	. . . .	. . . .	. . . .
Land & Structures	. . . .	. . . .	. . . .	. . . .	. . . .	. . . .
Grants & Claims	. . . .	. . . .	. . . .	. . . .	. . . .	. . . .
TOTAL OPERATING	0.0	15.0	15.0	15.0	15.0	15.0
CAPITAL	. . . .	. . . .	. . . .	. . . .	. . . .	. . . .
REVENUE	. . . .	. . . .	. . . .	. . . .	. . . .	. . . .

FUNDING: (Thousands of Dollars)

General Funds	0.0	15.0	15.0	15.0	15.0	15.0
Federal Funds	. . . .	. . . .	. . . .	. . . .	. . . .	. . . .
Other	. . . .	. . . .	. . . .	. . . .	. . . .	. . . .
TOTAL	0.0	15.0	15.0	15.0	15.0	15.0

POSITIONS:

Full-time	. . . .	. . . .	. . . .	. . . .	. . . .	. . . .
Part-time	. . . .	. . . .	. . . .	. . . .	. . . .	. . . .
Temporary	. . . .	. . . .	. . . .	. . . .	. . . .	. . . .

ANALYSIS: (Attach a separate page if necessary)

If ordinances prescribing the increased penalties were enacted in Anchorage and Fairbanks, it is assumed that at least 60 additional jury trials would be conducted. Although the impact on judicial and clerical resources could be absorbed, costs would be incurred for the additional juror fees ($10,000) and also to pay bailiffs ($5,000).

Prepared by: Karla Forsythe, General Counsel — Phone: 264-8230
Division: Alaska Court System — Date: 2-11-87

Approved by: Stephanie J. Cole, Deputy Director — Date: 2-11-87
Agency: Alaska Court System

Distribution (by preparer):
Legislative Finance
Legislative Sponsor
Requestor
Office of Management & Budget
Impacted Agency(ies)
Senate Secretary

STATE OF ALASKA 1987 LEGISLATIVE SESSION
FISCAL NOTE

Bill Version : HB28
Publish Date :

REQUEST:

Revision Date:
Title : "An Act relating to municipal penalties for prostitution."
Sponsor : Repr. Donley
Requestor : House Community and Reg. Afrs.

Agency Affected : Department of Law
BRU : Prosecution

Components :

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY 87	FY 88	FY 89	FY 90	FY 91	FY 92
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	-0-	-0-	-0-	-0-	-0-	-0-
CAPITAL						
REVENUE						

FUNDING: (Thousands of Dollars)

GENERAL FUND	-0-	-0-	-0-	-0-	-0-	-0-
FEDERAL FUNDS						
OTHER						
TOTAL						

POSITIONS:

FULL-TIME	-0-	-0-	-0-	-0-	-0-	-0-
PART-TIME						
TEMPORARY						

ANALYSIS : (Attach a separate page if necessary)

Please see attached analysis.

Prepared by : Richard L. Pegues
Richard L. Pegues, Director
Phone : 465-3672
Division : Administrative Services
Date : 1/21/87

Approved by Commissioner : Ronald W. Lorensen
Acting Attorney General
Date : 1/21/87
Agency : Department of Law

Distribution (by preparer) :
Legislative Finance
Legislative Sponsor
Requestor
Office of Management and Budget
Impacted Agency(ies)
Senate Secretary

CONTINUATION of FISCAL NOTE ANALYSIS

For Bill/Resolution No. HB28

This bill amends AS 29.25.070(a) by providing that municipalities may, under local ordinance, prescribe penalities for prostitution that require a court to impose a minimum sentence equal to the maximum penalty allowed by existing statute, or a $1,000 fine and imprisonment for 90 days. In this respect, the bill appears to encourage municipalities to seek the maximum allowable penalty in all instances.

Prosecution of municipal ordinance violations is a local responsibility, and such prosecution is not handled by the Department of Law. Consequently, enactment of this bill will not have a fiscal impact on the Department of Law.

The cost of imprisoning violators of municipal ordinances, in state corrections institutions, is reimbursed to the state by the respective municipalities. This reimbursement includes normal, day-to-day operating costs and a pro rata share of lease costs, where the state is using a leased facility. The reimbursement does not, however, include any charge for the state's capital expenses in building and furnishing new corrections facilities. To the extent that encouraging maximum periods of imprisonment may contribute to prison overcrowding, the unreimbursed expense to the state may be very great. This issue should be addressed by the Department of Corrections in a separate fiscal note.

Offered: 2/6/87
Referred: Judiciary

5-0185B

Original sponsors: Donley and Gruenberg

IN THE HOUSE

BY THE COMMUNITY AND REGIONAL AFFAIRS COMMITTEE

CS FOR HOUSE BILL NO. 28 (C&RA)

IN THE LEGISLATURE OF THE STATE OF ALASKA

FIFTEENTH LEGISLATURE - FIRST SESSION

A BILL

For an Act entitled: "An Act relating to municipal penalties for prostitution."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:

* Section 1. AS 29.25.070(a) is amended to read:

(a) For the violation of an ordinance, a municipality may by ordinance prescribe a penalty not to exceed a fine of $1,000 and imprisonment for 90 days. A municipality may prescribe a penalty requiring a court to impose a minimum sentence of imprisonment of up to 90 days and a fine not to exceed $1,000, as provided in an ordinance, for violation of an ordinance that prohibits prostitution. In this subsection, prostitution includes engaging in or agreeing to engage in sexual conduct for a fee, and paying or agreeing to pay a fee in exchange for sexual conduct.

(1) Corrections fiscal note

(2) Call, Gloria - Women's lobby oppose bill

(3) mitigating/aggravating considerations

(4) leave discretion w/ judges

Ed McGrath → oppose bill → deal w/ prostitutes in a more civilized way - Use Amsterdam issue

STATE OF ALASKA 1987 LEGISLATIVE SESSION
FISCAL NOTE

REQUEST:

Bill Version : CSHB-28
Publish Date : 2/6/87

Revision Date:
Title : "An Act relating to municipal penalities for prostition."
Sponsor : Reps. Donley & Gruenberg
Requestor : Judiciary

Agency Affected : Dept. of Corrections
BRU :
Components :

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY 87	FY 88	FY 89	FY 90	FY 91	FY 92
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	0	0	0	0	0	0
CAPITAL	0	0	0	0	0	0
REVENUE	0	0	0	0	0	0

FUNDING: (Thousands of Dollars)

GENERAL FUND						
FEDERAL FUNDS						
OTHER						
TOTAL	0	0	0	0	0	0

POSITIONS:

FULL-TIME	0	0	0	0	0	0
PART-TIME						
TEMPORARY						

ANALYSIS : (Attach a separate page if necessary)

Susie H. Riley

Prepared by : Susie H. Riley / Program Budget Analysis Phone : 465-3376
Division : Administrative Services Date : 2/13/87
Acting
Approved by Commissioner : William W. Ladwig Date : 2/16/87
Agency : Department of Corrections

Distribution (by preparer) :
Legislative Finance
Legislative Sponsor
Requestor
Office of Management and Budget
Impacted Agency(ies)
Senate Secretary

STATE OF ALASKA 1987 LEGISLATIVE SESSION
FISCAL NOTE

Bill Version : CSHB 28 (C&RA)
Publish Date :

REQUEST:

Revision Date: Feb. 12, 1987
Title : "An Act relating to municipal penalties for prostitution."
Sponsor : House C&RA Committee
Requestor : House Judiciary Committee

Agency Affected : Department of Law
BRU : Prosecution
Components :

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY 87	FY 88	FY 89	FY 90	FY 91	FY 92
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	-0-	-0-	-0-	-0-	-0-	-0-
CAPITAL						
REVENUE						

FUNDING: (Thousands of Dollars)

GENERAL FUND	-0-	-0-	-0-	-0-	-0-	-0-
FEDERAL FUNDS						
OTHER						
TOTAL						

POSITIONS:

FULL-TIME	-0-	-0-	-0-	-0-	-0-	-0-
PART-TIME						
TEMPORARY						

ANALYSIS : (Attach a separate page if necessary)

Please see attached analysis.

Richard L. Pegues

Prepared by : Richard I. Pegues, Director
Phone : 465-3672
Division : Administrative Services
Date : Feb. 12, 1987

Richard L. Pegues (FOR)

Approved by Commissioner: Grace Berg Schaible, Atty. Gen.
Date : Feb. 12, 1987
Agency : Department of Law

Distribution (by preparer):
Legislative Finance
Legislative Sponsor
Requestor
Office of Management and Budget
Impacted Agency(ies)
Senate Secretary

CONTINUATION of FISCAL NOTE ANALYSIS

For Bill/Resolution No. CSHB 28 (C&RA)

This bill amends AS 29.25.070(a) by providing that municipalities may, under local ordinance, prescribe penalities for prostitution that require a court to impose a minimum sentence equal to the maximum penalty allowed by existing statute, or a $1,000 fine and imprisonment for 90 days. In this respect, the bill appears to encourage municipalities to seek the maximum allowable penalty in all instances.

Prosecution of municipal ordinance violations is a local responsibility, and such prosecution is not handled by the Department of Law. Consequently, enactment of this bill will not have a fiscal impact on the Department of Law.

The cost of imprisoning violators of municipal ordinances, in state corrections institutions, is reimbursed to the state by the respective municipalities. This reimbursement includes normal, day-to-day operating costs and a pro rata share of lease costs, where the state is using a leased facility. The reimbursement does not, however, include any charge for the state's capital expenses in building and furnishing new corrections facilities. To the extent that encouraging maximum periods of imprisonment may contribute to prison overcrowding, the unreimbursed expense to the state may be very great. This issue should be addressed by the Department of Corrections in a separate fiscal note.

(5)

HOUSE COMMITTEE REPORT

Date referred: 1/19/87

FURTHER REFERRALS: Judiciary

DATE: 02/04/87

The Community and Regional Affairs Committee has considered HB 28

"An Act relating to municipal penalties for prostitution."

RECOMMENDS:

[X] replace with CSHB28 (C&RA)

[ ] attached amendment(s)

[X] the same title

[ ] a new title

- [X] do pass
- [ ] do not pass
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The Unnecessary Crime of Conspiracy

Phillip E. Johnson*

The literature on the subject of criminal conspiracy reflects a sort of rough consensus. Conspiracy, it is generally said, is a necessary doctrine in some respects, but also one that is overbroad and invites abuse. Conspiracy has been thought to be necessary for one or both of two reasons. First, it is said that a separate offense of conspiracy is useful to supplement the generally restrictive law of attempts. Plotters who are arrested before they can carry out their dangerous schemes may be convicted of conspiracy even though they did not go far enough towards completion of their criminal plan to be guilty of attempt.[1] Second, conspiracy is said to be a vital legal weapon in the prosecution of "organized crime," however defined.[2] As Mr. Justice Jackson put it, "the basic conspiracy principle has some place in modern criminal law, because to unite, back of a criminal purpose, the strength, op-

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1. The most cogent statement of this point is in Note, 14 U. OF TORONTO FACULTY OF LAW REV. 56, 61-62 (1956): "Since we are fettered by an unrealistic law of criminal attempts, overbalanced in favour of external acts, awaiting the lit match or the cocked and aimed pistol, the law of criminal conspiracy has been employed to fill the gap." *See also* MODEL PENAL CODE § 5.03, Comment at 96-97 (Tent. Draft No. 10, 1960); 1 NAT'L COMM'N ON REFORM OF FEDERAL CRIMINAL LAWS, WORKING PAPERS 397 (1970) [hereinafter cited as WORKING PAPERS]; Note, *The Conspiracy Dilemma: Prosecution of Group Crimes or Protection of Individual Defendants*, 62 HARV. L. REV. 276, 283-84 (1948).

2. A presidential commission has declared that new substantive criminal laws are not needed to combat organized crime, because "[t]he laws of conspiracy have provided an effective substantive tool with which to confront the criminal groups." PRESIDENT'S COMM'N ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, THE CHALLENGE OF CRIME IN A FREE SOCIETY 200 (1967). In preparing a new Federal Criminal Code, the National Commission on Reform of Federal Criminal Laws considered conspiracy as part of the general problem of dealing with organized crime. *See* 1 WORKING PAPERS, *supra* note 1, at 381.

portunities and resources of many is obviously more dangerous and more difficult to police than the efforts of a lone wrongdoer."[3] To deal with such dangerous criminal combinations the government must have the benefit of special legal doctrines which make conviction easier and punishment more severe.

The overbreadth of conspiracy and its potential for abuse have been extensively discussed in the literature. One principal theme of criticism, best illustrated by Mr. Justice Jackson's opinion in *Krulewitch v. United States*,[4] emphasizes the difficulties which the ordinary criminal defendant may face when charged with conspiracy. The advantages which conspiracy provides the prosecution are seen as disadvantages for the defendant so serious that they may lead to unfair punishment unfairly determined.[5] Critics taking this approach typically propose to trim conspiracy doctrine just enough to provide protection for defense interests without disturbing those rules deemed genuinely important for effective law enforcement. The leading reform proposal of this type is the conspiracy section of the American Law Institute's Model Penal Code,[6] some of whose reforms were incorporated in the proposed Federal Criminal Code now before the Senate Subcommittee on Criminal Laws and Procedures of the United States.[7]

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3. Krulewitch v. United States, 336 U.S. 440, 448-49 (1949) (Jackson, J., concurring).

4. 336 U.S. 440, 445 (1949) (Jackson, J., concurring).

5. *Id.* at 449-58 (Jackson, J., concurring). This point is developed further in Note, *The Conspiracy Dilemma: Prosecution of Group Crimes or Protection of Individual Defendants*, 62 HARV. L. REV. 276 (1948), and in *Developments in the Law—Criminal Conspiracy*, 72 HARV. L. REV. 920 (1959) [hereinafter cited as *Developments*].

6. MODEL PENAL CODE § 5.03 (Proposed Official Draft, 1962).

7. Because the conspiracy provisions of the proposed Federal Criminal Code are a principal focus of this Article, a note on its history is in order. The proposed code was originally drafted by the National Commission on Reform of Federal Criminal Laws, under the chairmanship of Edmund G. Brown, former Governor of California. Proposals originally made to the Commission by its consultants, with extended commentaries, were printed in the two volumes of the Commission's *Working Papers*. WORKING PAPERS, *supra* note 1. The Commission then published a study draft with brief comments. NAT'L COMM'N ON REFORM OF FED. CRIMINAL LAWS, STUDY DRAFT OF A NEW FEDERAL CRIMINAL CODE (1970) [hereinafter cited as STUDY DRAFT]. After further consideration, a final report containing a revised draft code and brief comments was transmitted to the President and Congress. NAT'L COMM'N ON REFORM OF FED. CRIMINAL LAWS, FINAL REPORT (1971) [hereinafter cited as FINAL REPORT]. The Subcommittee on Criminal Laws and Procedures of the Senate Judiciary Committee proceeded to hold hearings on the proposals contained in the *Final Report* and published a committee print of the proposed code, the most current version of the proposed code as of this writing. SUBCOMM. ON CRIMINAL LAWS AND PROCEDURES OF SENATE COMM. ON THE JUDICIARY, 93D CONG., 1ST SESS., CRIMINAL JUSTICE REFORM ACT OF 197- (1972) [hereinafter cited as COMMITTEE PRINT]. The Commission's Staff Director was Professor Louis B. Schwartz of the University of Pennsylvania Law School. The consultant for the conspiracy and or-

The other major line of criticism stresses the dangers that conspiracy law raises for first amendment freedoms. Prosecutions of political dissidents, including labor organizers,[8] Communist Party leaders,[9] and contemporary radicals,[10] typically have been conspiracy prosecutions. The law of conspiracy is intended, after all, to make it easier to impose criminal punishment on members of groups that plot forbidden activity. Insofar as it accomplishes this end, it unavoidably increases the likelihood that persons will be punished for what they say rather than for what they do, or for associating with others who are found culpable. Critics who are alarmed at the resulting threat to freedom of speech and freedom of association typically have proposed new constitutional doctrines derived from the first amendment to curtail the use of conspiracy charges in cases having some "political" element.[11]

Unfortunately, the proposals for legislative or constitutional reforms of conspiracy law are inadequate. It will not do simply to reform conspiracy legislatively by removing its most widely deplored overextensions, or to reform it judicially by engrafting new doctrines derived from the first amendment. Such measures are appropriate for improving a doctrine that is basically sound, but in need of some adjustment at the edges. The law of criminal conspiracy is not basically sound. It should be abolished, not reformed.

The central fault of conspiracy law and the reason why any limited reform is bound to be inadequate can be briefly stated. What conspiracy adds to the law is simply confusion, and the confusion is inherent in the nature of the doctrine. The confusion stems from the fact that conspiracy is not only a substantive inchoate crime in itself, but the touchstone for invoking several independent procedural and substantive doctrines. We ask whether a defendant agreed with another person to commit a crime initially for the purpose of determining whether he may be convicted of the offense of conspiracy even when the crime itself has not yet been committed. If the answer to that question is in the affirmative, however, we find that we have also an-

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nized crime provisions was Professor Robert Blakely of Notre Dame Law School, ow Chief Counsel to the Subcommittee on Criminal Laws and Procedures

8. The application of criminal conspiracy laws to combinations of workingmen eking to raise their wages or improve their working conditions is discussed at some ngth in Sayre, *Criminal Conspiracy*, 35 HARV. L. REV. 393 (1922).

9. *See, e.g.*, Dennis v. United States, 341 U.S. 494 (1951); Yates v. United ates, 354 U.S. 298 (1957).

10. The most famous examples are United States v. Spock, 416 F.2d 165 (1st r. 1969); United States v. Dellinger, 472 F.2d 340 (7th Cir. 1972).

11. *See, e.g.*, Spock v. United States, 416 F.2d 165, 184-92 (1st Cir. 1969) (Coffin, J., dissenting in part); Filvaroff, *Conspiracy and the First Amendment*, 121 U. PA. REV. 189 (1972); Note, *Conspiracy and the First Amendment*, 79 YALE L.J. 872 970).

swered a number of other questions that would otherwise have to be considered independently. Where there is evidence of conspiracy, the defendant may be tried jointly with his criminal partners and possibly with many other persons whom he has never met or seen, the joint trial may be held in a place he may never have visited, and hearsay statements of other alleged members of the conspiracy may be used to prove his guilt. Furthermore, a defendant who is found guilty of conspiracy is subject to enhanced punishment and may also be found guilty of any crime committed in furtherance of the conspiracy, whether or not he knew about the crime or aided in its commission.

Each of these issues involves a separate substantive or procedural area of the criminal law of considerable importance and complexity. The essential vice of conspiracy is that it inevitably distracts the courts from the policy questions or balancing of interests that ought to govern the decision of specific legal issues and leads them instead to decide those issues by reference to the conceptual framework of conspiracy. Instead of asking whether public policy or the interests of the parties requires a particular holding, the courts are led instead to consider whether the theory of conspiracy is broad enough to permit it. What is wrong with conspiracy, in other words, is much more basic than the overbreadth of a few rules. The problem is not with particular results, but with the use of a single abstract concept to decide numerous questions that deserve separate consideration in light of the various interests and policies they involve.

Although it is true that the confusion that conspiracy introduces into the law has an overall tendency to benefit the prosecution, sometimes it has the opposite effect. Occasionally, use of a conspiracy charge converts a relatively simple case into a monstrosity of conceptual complexity, giving the defense substantial grounds for an appeal. Furthermore, eliminating the substantive crime of conspiracy would not necessarily require the elimination of all the procedural rules that are now associated with it: at most it would require only that the rules be reconsidered on their own merits. In fact, many of these procedural rules are even now applicable in all criminal cases, whether conspiracy is charged or not.[12]

The pages that follow will discuss the many roles of conspiracy in the criminal law[13] and will argue that each of the problems with which

12. Not all the difficulties posed by [the procedural rules associated with conspiracy] are intrinsic to conspiracy as an offense, however much it is believed by prosecutors that it is by virtue of indictment for conspiracy that the advantages are gained. The same rules as to joinder and venue, the same rules of evidence, will normally apply although the prosecution is for substantive offenses, in which joint complicity is charged.

MODEL PENAL CODE § 5.03, Comment at 98 (Tent. Draft No. 10, 1960).

13. This Article does not attempt to discuss the role of conspiracy in civil law or in antitrust law. Although violation of the Sherman Antitrust Act may be a mis-

conspiracy purports to deal could better be resolved by reference to other doctrines and principles. Conspiracy became the monster it now is by a process of judicial improvisation. Whatever may have been the justification for this patchwork process, the problems it meant to remedy can now be resolved by more specific doctrines with a firmer basis in policy. Hence it is particularly disappointing that the proposed Federal Criminal Code, like its predecessor the Model Penal Code, retains a general conspiracy doctrine. Both codes make an attempt at reform,[14] but one may doubt whether these efforts will accomplish very much. The reforms touch mainly upon matters that are of little importance, while the major sources of abuse are left untouched. Moreover, the history of conspiracy to date, which is one of almost constant expansion,[15] gives little reason to hope that any partial retrenchment will be lasting.

An analysis of conspiracy divides naturally into two parts: conspiracy as a set of substantive rules, and conspiracy as a set of procedural rules. The procedural rules associated with conspiracy doctrine are probably more important as a practical matter, although they purport to be no more than adjuncts to the substantive rules. Most of the theoretical discussion of conspiracy and most of the attempts to defend the doctrine, however, center upon the substantive rules.

The following discussion will concern itself primarily with federal law, although the arguments are equally relevant to questions of state law. Conspiracy prosecutions are especially prevalent in the federal courts, and most of the leading appellate cases are federal cases. In addition, the complete revision of the Federal Criminal Code now in progress offers an unusual opportunity to reappraise a basic doctrine that is no longer either necessary or desirable.

I.

The Substantive Doctrines of Conspiracy

The existing law of conspiracy contains several distinct substantive doctrines. Conspiracy is an inchoate crime, supplementing the law of

demeanor, 15 U.S.C. § 2 (1970), a complete discussion of the broad questions of economic and social policy peculiar to antitrust law is beyond the scope of an article on criminal conspiracy. *See Developments, supra* note 5, at 1000-08.

14. The degree to which the proposed Federal Criminal Code rejects the reforms proposed in the Model Penal Code in favor of existing conspiracy laws is discussed *infra* in note 25 and in text accompanying notes 35-37, 46-52, 59-63, 81-82, 98-103, and 107-111.

15. As Mr. Justice Jackson stated, borrowing from Cardozo, the history of conspiracy exemplifies the "tendency of a principle to expand itself to the limits of its logic." Krulewitch v. United States, 336 U.S. 440, 445 (1949) (Jackson, J., concurring).

attempt where more than one person is involved in plotting or preparing a crime. One is guilty of conspiring to commit a particular crime if, with the intention or purpose of furthering its commission,[16] he agrees[17] with some other person to commit it.[18] Some jurisdictions require in addition that one or more of the conspirators have performed some overt act in furtherance of the criminal agreement, but this additional requirement adds little. Practically any act will do, including

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16. Considerable support exists in the case law for the proposition that the intent must be "corrupt" or "wrongful," *i.e.*, that good motives or ignorance of the law might be a defense even if the object of the agreement were criminal. *See* People v. Powell, 63 N.Y. 88, 92 (1875); Commonwealth v. Benesch, 290 Mass. 125, 135, 194 N.E. 905, 910 (1935); Landen v. United States, 299 F. 75, 78-79 (6th Cir. 1924); W. LAFAVE & A. SCOTT, CRIMINAL LAW § 61, at 468-470 (1972). The degree to which this so-called "corrupt motive" or "Powell doctrine" has won acceptance in the federal courts is uncertain. Judge Learned Hand rejected it in a dictum. Mack v. United States, 112 F.2d 290, 292 (2d Cir. 1940). The Supreme Court has not decided the question. Both the Model Penal Code and the proposed Federal Criminal Code reject it. MODEL PENAL CODE § 5.03(1) (Proposed Official Draft, 1962); MODEL PENAL CODE § 5.03, Comment at 113-16 (Tent Draft No. 10, 1960); COMMITTEE PRINT, *supra* note 7, at § 1-2A5(a); 1 WORKING PAPERS, *supra* note 7, at 387-89.

17. The case law has not been successful in rigorously defining the nature of the forbidden "agreement." Mr. Justice Jackson claimed that "[t]he modern crime of conspiracy is so vague that it almost defies definition." Krulewitch v. United States, 336 U.S. 440, 446 (1949) (Jackson, J., concurring). *See generally Developments*, *supra* note 5, at 925-35. Because the existence of the agreement need not be proved directly, but may be implied from proof of concerted action by the defendants, it might be more accurate to define the crime in terms of adherence to a joint criminal venture rather than agreement to commit a crime. Hence Mr. Justice Holmes defined a conspiracy as "a partnership in criminal purposes." United States v. Kissel, 218 U.S. 601, 608 (1910). The proposed Federal Criminal Code defines conspiracy as follows:

> A person is guilty of criminal conspiracy if he knowingly agrees with one or more persons *to enter into a relationship* having as its objective or objectives to engage in or cause the performance of conduct constituting, in fact, one or more crimes, and he or one or more of such persons engages in or causes the performance of conduct to effect an objective or objectives of the relationship.

COMMITTEE PRINT, *supra* note 7, at § 1-2A5(a) (emphasis added). The requirement of an agreement here is superfluous; it adds nothing to the concept of knowingly entering into a relationship.

18. Because an agreement requires at least two persons, the case law has enforced a requirement of "plurality." Under this requirement, *A* could not be convicted of conspiring with *B* if *B* for some reason could not be convicted of conspiring with *A*. For example, if *B* merely pretended to agree, never intending to carry out the criminal venture, then *A* had to be acquitted, however serious his own intent. *See Developments*, *supra* note 5, at 926; W. LAFAVE & A. SCOTT, CRIMINAL LAW § 62, at 488-94 (1972). Both the Model Penal Code and the proposed Federal Criminal Code reject the plurality requirement. MODEL PENAL CODE § 5.04 (Proposed Official Draft, 1962); COMMITTEE PRINT, *supra* note 7, at § 1-2A5(b). Rejection of the plurality requirement can be justified on the ground that it is irrelevant to the culpability of *A* that *B* has some defense peculiar to himself, although it is ironic to find the law reformers taking the position that liability for conspiracy under existing law is not broad

seemingly innocent conduct that carries the conspiracy no closer to accomplishing its object than the agreement itself. Moreover, an act by one alleged conspirator suffices for all.[19]

Conspiracy is also a device for expanding the substantive criminal law and for enhancing punishment. In theory, at least, the object of a conspiracy need not be a crime: it is criminal to conspire to commit a civil wrong, or to do anything else that is immoral or dangerous to the public health and safety.[20] Even where the object of the agreement is criminal, the penalty for conspiracy may be higher than the penalty for the completed crime; for instance in some jurisdictions conspiracy to commit a misdemeanor is a felony.[21] Furthermore, if conspirators actually carry out the crime they agree to commit, they may be convicted and sentenced for both the conspiracy and for the substantive crime.[22] All these rules are said to be based on the theory that combinations of wrongdoers are more dangerous than individual offenders. Hence, the argument goes, wrongful conduct by such combinations should be criminally punished even when the same acts would be excused if performed by an individual; likewise, group criminal conduct calls for enhanced punishment.[23]

Finally, conspiracy provides a means of expanding the law of complicity in crime. It is difficult to convict leaders of organized

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enough.

19. *Developments, supra* note 5, at 945-49; W. LAFAVE & A. SCOTT, CRIMINAL LAW § 62, at 476-78 (1972).

20. The doctrine that agreements to accomplish "immoral," "wrongful," or "unlawful" noncriminal objectives are punishable is traced to its historical roots and criticized in Sayre, *Criminal Conspiracy*, 35 HARV. L. REV. 393, 395-409 (1922). Although this common law rule has fallen into disuse in modern times, it survives in such statutes as California Penal Code section 182, which punishes those who conspire "to commit any act injurious to the public health, to public morals, or to pervert or obstruct justice, or the due administration of the laws." CAL. PEN. CODE § 182 (West 1970).

21. *See, e.g.*, CAL. PEN. CODE § 182.1 (West 1970). For a list of state statutes, see MODEL PENAL CODE § 5.05, Comment at 176-78 (Tent. Draft No. 10, 1960). Under federal law, if the object of the conspiracy is a misdemeanor, the penalty for the conspiracy may not exceed that for the misdemeanor. 18 U.S.C. § 371 (1970).

22. Callanan v. United States, 364 U.S. 587, 593 (1961).

23. Group association for criminal purposes often, if not normally, makes possible the attainment of ends more complex than those which one criminal could accomplish. Nor is the danger of a conspiratorial group limited to the particular end toward which it has embarked. Combination in crime makes more likely the commission of crimes unrelated to the original purpose for which the group was formed. In sum, the danger which a conspiracy generates is not confined to the substantive offense which is the immediate aim of the enterprise.

Id. at 593-94. This argument is frequently termed the "group danger" or "general danger" rationale. *See* MODEL PENAL CODE § 5.03, Comment at 98-99 (Tent. Draft No. 10, 1960); Goldstein, *Conspiracy to Defraud the United States*, 68 YALE L.J. 405, 413-14 (1959); *Developments, supra* note 5, at 923-25.

crime because they direct the affairs of the organization from a distance, carefully avoiding direct involvement in the specific acts of unlawful betting, drug selling, or the like from which they derive their income. If their power to direct the entire enterprise can be proved, however, they can be convicted of conspiring to violate the gambling or drug laws without proof that they participated directly in placing bets or selling drugs. Furthermore, each participant in a conspiracy is criminally liable for all the crimes committed by any of the participants in furtherance of the common enterprise, even if he would not otherwise be liable as an accessory.[24] Conspiracy thus permits any member of a large-scale organization to be punished for all the crimes committed by its members.

One rarely sees a defense of existing conspiracy law as it has just been described. For example, no informed body of opinion today supports the rule that a conspiracy may be criminally punishable even if its object is only a civil wrong, or some other form of conduct that would not be criminal if undertaken by an individual.[25] Arguably, some conduct which does not threaten the interests of society when a lone individual engages in it should nevertheless be prohibited when carried on by a group. Indeed, certain forbidden acts, such as agreements by competitors to fix prices, by definition require concerted action. It hardly follows, however, that courts should have the authority to declare concerted activity criminal whenever they find it immoral, wrongful, or violative of some principle of tort or contract law. It seems impossible to reconcile such discretionary criminal liability with the constitutional prohibition against overly broad or vague criminal statutes.[26] Constitutional problems aside, there is simply no need for a modern, comprehensive penal code to place such broad legislative authority in the courts. The legislature can easily enact more specific statutes stating the types of concerted activity to be held criminal.

In federal law, this "unlawful purpose" doctrine has been imple-

24. Pinkerton v. United States, 328 U.S. 640, 646-47 (1946).

25. The Model Penal Code and the proposed Federal Criminal Code both reject this rule. MODEL PENAL CODE § 5.03 (Proposed Official Draft, 1962); MODEL PENAL CODE § 5.03, Comment at 102-04 (Tent. Draft No. 10, 1960); COMMITTEE PRINT, *supra* note 7, at § 1-2A5(a); 1 WORKING PAPERS, *supra* note 1, at 389-90; W. LAFAVE & A. SCOTT, CRIMINAL LAW § 62, at 471-74 (1972); G. WILLIAMS, CRIMINAL LAW: THE GENERAL PART § 226 (2d ed. 1961); J. Goldstein, *Conspiracy to Defraud the United States*, 68 YALE L.J. 405, 441-48 (1959); Sayre, *Criminal Conspiracy*, 35 HARV. L. REV. 393 (1922).

26. In *Musser v. Utah*, the Supreme Court indicated that a Utah statute punishing conspiracies "to commit acts injurious to public morals" would be held unconstitutional unless the Utah courts construed it narrowly. 333 U.S. 95 (1948). On remand, the Utah Supreme Court declined to give the statute a narrowing construction and declared it unconstitutionally vague and overbroad. State v. Musser, 118 Utah 537, 223 P.2d 193 (1950).

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mented in the offense of "conspiracy to defraud the United States."[27] The courts have held that agreements to defraud the government are punishable even when the particular method of fraud contemplated by the conspirators would not have been criminal if committed by a single person.[28] This offense evolved through judicial improvisation in a period when there were few specific federal statutes aimed at fraudulent practices.[29] Today, when there are too many specific prohibitions rather than too few, it is plainly obsolete. The proposed Federal Criminal Code accordingly punishes only agreements to commit or to cause the commission of crimes.[30]

Statutes which punish conspiracy to commit a misdemeanor as a felony, or otherwise punish the agreement to commit a crime more severely than the crime itself, are probably also obsolete. The theory underlying such statutes is the "group danger" rationale: that persons who combine to commit petty crimes are more dangerous than those who commit them individually.[31] The individual prostitute or bettor certainly poses less of a threat to the interests of society than the organizer of a gambling or prostitution business, but a general conspiracy doctrine is an inexcusably clumsy way to provide increased punishment for the latter. Conspiracy makes the individual prostitute or bettor just as much a felon as the professional manager, since both agree to commit the offense in question. Moreover, one does not have to be involved in any continuing criminal activity to be a conspirator. Two boys planning to joyride in an automobile are just as much conspirators as two organized crime chieftains managing a large scale gambling operation. One would expect any modern penal code revision to relate the penalty for conspiracy directly to the penalty for the most serious substantive offense contemplated in the agreement,[32] and to provide in specific sections for increased penalties for persons who

27. If two or more persons conspire either to commit any offense against the United States, *or to defraud the United States, or any agency thereof in any manner or for any purpose*, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

18 U.S.C. § 371 (1970) (emphasis added).

28. *See generally* Goldstein, *Conspiracy to Defraud the United States*, 68 YALE L.J. 405 (1959).

29. *Id.* at 440.

30. COMMITTEE PRINT, *supra* note 7, at § 1-2A5; FINAL REPORT, *supra* note 7, at § 1004 & Comment at 71.

31. *See* note 23 *supra*.

32. *See* MODEL PENAL CODE § 5.05(1) (Proposed Official Draft, 1962); COMMITTEE PRINT, *supra* note 7, at § 1-2A5(g). The proposed California Penal Code revision, however, makes conspiracy "to commit misdemeanors involving separate victims" a felony of the fifth degree, punishable by imprisonment of up to three years. STATE OF CALIFORNIA JOINT LEGISLATIVE COMM. FOR REVISION OF THE PENAL CODE, THE CRIMINAL CODE § 735(c) (1971).

organize or direct minor crimes on a continuing basis.[33]

In other respects the substantive rules of conspiracy cannot be so easily dismissed. Conspiracy retains great vitality today as a device for establishing one defendant's complicity in the crimes of another, as a means to obtain enhanced penalties through consecutive sentencing, as an alternative to prosecution for the specific substantive offenses committed by the conspirators, and as an inchoate or preparatory crime. Yet each of these roles of conspiracy could well be abolished without adversely affecting any legitimate law enforcement interests, and with a net gain in the clarity and simplicity of the criminal law.

A. Conspiracy as a Rule of Complicity

One who enters into a conspiratorial relationship is liable for every reasonably foreseeable crime committed by every other member of the conspiracy in furtherance of its objectives, whether or not he knew of the crimes or aided in their commission.[34] The Model Penal Code rejected this rule, leaving one conspirator's responsibility for the criminal conduct of another to its general provision on complicity.[35] Early drafts of the proposed Federal Criminal Code took the same position,[36] but the most current draft provides specifically that "a person may be convicted of an offense based upon the conduct of another person when . . . the offense charged was committed in furtherance of a criminal conspiracy and was a reasonably foreseeable consequence of it."[37]

At first glance, the conspiracy-complicity rule seems to add little to the law of complicity or accessorial liability. No one would question that all the persons who plot together to commit a crime are guilty of the crime if one or more of them commits it. Some authorities limit the accomplice's liability to those crimes of the principal which he intended to assist or encourage.[38] Many other authorities, however, have indulged in the legal fiction that one intends the natural and probably consequences of his acts, and thus have held the

33. *See, e.g.*, MODEL PENAL CODE § 251.2(2) (Proposed Official Draft, 1962) (promoting prostitution is a felony under certain circumstances); COMMITTEE PRINT, *supra* note 7, at § 2-9F3 (participating in an illegal prostitution business is a felony).

34. Pinkerton v. United States, 328 U.S. 640 (1946); Anderson v. Superior Court, 78 Cal. App. 2d 22, 177 P.2d 315 (1947). *See also Developments*, *supra* note 5, at 994-1000.

35. MODEL PENAL CODE § 2.06 (Proposed Official Draft, 1962). *See also* MODEL PENAL CODE § 2.04, Comment at 20-23 (Tent. Draft No. 1, 1953).

36. FINAL REPORT, *supra* note 7, at § 401 & Comment at 33; STUDY DRAFT, *supra* note 7, at § 401 & Comment at 30.

37. COMMITTEE PRINT, *supra* note 7, at § 1-2A6.

38. The Model Penal Code adopts this view. MODEL PENAL CODE § 2.06(3) (Proposed Official Draft, 1962). "Whether or to what extent this position involves departure from existing law, it is most difficult to say." MODEL PENAL CODE § 2.06, Comment at 24 (Tent. Draft No. 1, 1953).

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PENAL CODE § 2.06,

accomplice for the crimes of the principal which he should have foreseen but perhaps did not.[39] In any case, the felony murder doctrine imposes liability for unintended consequences in the most common situations: every member of a robbery or burglary gang is liable for any killing committed by any member in the course of the robbery or burglary.[40]

The difficulty lies not in the conspiracy-complicity rule itself, but in the tendency of courts to regard a conspiracy as an ongoing business relationship of indefinite scope and duration, and to consider the conspirators, as one dissenting opinion put it, as "general partners in crime."[41] For example, the defendant in *Anderson v. Superior Court*[42] referred several pregnant women to an abortionist and received a portion of his fees. For this the court held her to have entered into a conspiracy with him to commit abortions generally, and to be liable for subsequent abortions in which she played no part. In the famous case of *United States v. Bruno*,[43] the circuit court of appeals ruled that a single, immense conspiracy to distribute narcotics included smugglers, middlemen, and retail sellers operating in two different parts of the country. Although the defendants were charged only with conspiracy, in theory the holding implied that each smuggler was guilty of every retail sale and each retailer of every act of smuggling, a pyramiding of liability that seems to be justified by no conceivable penological principle.

The fundamental conceptual error that leads to such absurd results, however, is not the conspiracy-complicity rule itself but rather

39. The conflict of authority on this question is ably discussed in W. LAFAVE & A. SCOTT, CRIMINAL LAW § 65, at 515-17 (1972), and in G. WILLIAMS, CRIMINAL LAW: THE GENERAL PART §§ 133-36 (2d ed. 1961). LaFave and Scott observe that "[t]he established rule, as it is usually stated by courts and commentators, is that accomplice liability extends to acts of the principal in the first degree which were 'a natural and probably consequence' of the criminal scheme the accomplice encouraged or aided." W. LAFAVE & A. SCOTT, *supra*, at 515-16. Both treatises describe the Model Penal Code position as the better view. W. LAFAVE & A. SCOTT, *supra*, § 65, at 517; G. WILLIAMS, *supra*, § 136, at 402.

40. *See* W. LAFAVE & A. SCOTT, CRIMINAL LAW § 65, at 517 (1972). The felony murder rule is more frequently condemned for transforming accidental killings into murders than for imposing accessorial liability for deliberate killings, probably because murder is ms such a likely consequence of robbery. *See id.* at § 71. If each robber were not liable for the killings committed by every other, in many cases none of them could be convicted of murder because the prosecution would be unable to prove which one fired the fatal shot.

41. Pinkerton v. United States, 328 U.S. 640, 651 (1946) (Rutledge, J., dissenting).

42. 78 Cal. App. 2d 22, 177 P.2d 315 (1947). The suggestion in the opinion that a conspirator is liable for crimes committed by others before he joined the conspiracy was disavowed in People v. Weiss, 50 Cal. 2d 535, 327 P.2d 527 (1958).

43. United States v. Bruno, 105 F.2d 921 (2d Cir. 1939), *rev'd on other grounds*, 308 U.S. 287 (1939).

the assumption that all the major and minor participants in a criminal enterprise are guilty of the same conspiracy. Once it is established that all participants conspired generally to further all the crimes of the organization, it is not surprising that they each should be held responsible for all of the crimes actually committed in furtherance of that agreement. Reforms which would abolish the conspiracy-complicity rule without also abandoning the principle that all participants in a conspiracy are guilty of the same crime of conspiracy are basically inconsistent. The discussion of *People v. Luciano*[44] in the Model Penal Code commentary exemplifies this inconsistency:

> Luciano and others were convicted of sixty-two counts of compulsory prostitution, each count involving a specific instance of placing a girl in a house of prostitution, receiving money for so doing or receiving money for the earnings of a prostitute, acts proved to have been done pursuant to a combination to control commercialized vice in New York City. The liability was properly imposed with respect to these defendants, who directed and controlled the combination: they commanded, encouraged and aided the commission of numberless specific crimes. But would so extensive a liability be just for each of the prostitutes or runners involved in the plan? . . . A court would and should hold that they all are parties to a single, large, conspiracy; this is itself, and ought to be, a crime. But it is one crime. Law would lose all sense of proportion if in virtue of that one crime, each were held accountable for thousands of offenses that he did not influence at all.[45]

But if each prostitute and runner is a party to a "single, large, conspiracy," why should each not also be liable for the individual crimes which that conspiracy existed to further? Extended liability of this sort flows from the basic absurdity of considering each of the pawns to be conspiring with the king to play the chess game.

The Model Penal Code commentary does not refer in the passage quoted to the "unilateral" theory of conspiracy adopted by the Code, but such a theory could have been used to limit the liability of the minor participants in the *Luciano* conspiracy. The Code defines conspiracy in terms of one person agreeing with another, rather than two or more persons entering into an agreement.[46] This semantic change

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44. People v. Luciano, 277 N.Y. 348, 14 N.E.2d 433, 1 N.Y.S.2d — (1938), *cert. denied*, 305 U.S. 620 (1938).

45. MODEL PENAL CODE § 2.04, Comment at 21 (Tent. Draft No. 1, 1953).

46. MODEL PENAL CODE § 5.03(1) (Proposed Official Draft, 1962):

> *Definition of Conspiracy.* A person is guilty of conspiracy with another person or persons to commit a crime if with the purpose of promoting or facilitating its commission he:
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> (a) agrees with such other person or persons that they or one or more of them will engage in conduct which constitutes such crime or an attempt or solicitation to commit such crime; or

was intended, among other things, to make it possible to find each of the members of a criminal enterprise guilty of a different conspiracy, depending upon what he *individually* agreed to do.[47] For example, a court might find that the individual prostitutes conspired with Luciano only to commit their own acts of prostitution, but that Luciano conspired with all of them to operate the entire business. On the facts of the *Bruno* case, a court might find that the smugglers conspired to commit the retail sales but the retail sellers did not conspire to commit the smuggling.[48] On the other hand, it might very well find that all the parties in the chain of distribution conspired to operate the entire chain, just as it could under the old, "bilateral" or "multilateral" definition of conspiracy. All that would be necessary to justify such a finding is evidence that the parties were aware of the scope of the operation and intended to assist the business as a whole.[49] The approving citation of *Blumenthal v. United States*[50] by the Model Penal Code commentary indicates that such a purpose might not be difficult to find. In *Blumenthal*, a salesman who agreed to sell illegally part of a lot of whiskey was held to have conspired to sell the whole lot because "he knew the lot to be sold was larger and thus that he was aiding in a larger plan."[51]

The proposed Federal Criminal Code does not adopt the unilateral approach of the Model Penal Code. Instead, it defines the act of conspiring as agreeing "to enter into a relationship" having criminal ob-

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(b) agrees to aid such other person or persons in the planning or commission of such crime or of an attempt or solicitation to commit such crime.

47. Another consequence of this approach "is to make it immaterial to the guilt of a conspirator whose culpability has been established that the person or all of the persons with whom he conspired have not been or cannot be convicted." MODEL PENAL CODE § 5.03, Comment at 104 (Tent. Draft No. 10, 1960).

48. With the conspiratorial objectives characterized as the particular crimes and the culpability of each participant tested separately, it would be possible to find in a case such as *Bruno*—considering for the moment only each separate chain of distribution—that the smugglers conspired to commit the illegal sales of the retailers but that the retailers did not conspire to commit the importing of the smugglers. Factual situations warranting such a finding may easily be conceived: the smugglers might depend upon and seek to foster their retail markets while the retailers might have many suppliers and be indifferent to the success of any single source. The court's approach in *Bruno* does not admit of such a finding, for in treating the conspiratorial objective as the entire series of crimes involved in smuggling, distributing and retailing it requires either a finding of no conspiracy or a single conspiracy in which all three links in the chain conspired to commit all of each other's crimes.

Id. at 121-22.

49. *See id.* at 123-24. *See also* MODEL PENAL CODE § 5.03(2) (Proposed Official Draft, 1962) (quoted at note 108 *infra*).

50. 332 U.S. 539 (1947), cited in MODEL PENAL CODE § 5.03, Comment at 124 (Tent. Draft No. 10, 1960).

51. 332 U.S. at 559.

jectives,[52] thus emphasizing the overall relationship and its objectives rather than the separate culpability of each member.

The difference in the wording of the two codes is of doubtful significance because the unilateral theory is unreliable as a means of limiting the scope of conspiratorial liability. A far better way to determine the scope of one individual's liability for the conduct of another would be to abandon conspiracy altogether, with its notions of business enterprises and general partnerships, and look instead to the policies underlying the specific criminal prohibitions at issue. Of course, smugglers of narcotics necessarily foster and encourage retail sales of the narcotics which they smuggle, but Congress must have been aware of this truism when it set the penalty for narcotics smuggling. Of course, each prostitute contributed to the financial health of the Luciano empire, and each seller of part of a carload of whiskey contributed to the sale of the whole lot. But these elementary propositions of business economics have nothing to do with criminal culpability. Absent the confusing concepts that conspiracy introduces, the courts probably would not even consider holding each participant for the crimes of the entire enterprise.

The outrageous extensions of criminal liability inferrable from such cases as *Luciano*, *Bruno*, and *Blumenthal* only rarely raise practical problems. In none of those cases were minor participants actually sentenced for every misdeed associated with the enterprise; the courts found single large conspiracies in order to legitimate joinder of offenses and offenders under the procedural rules of conspiracy, an issue discussed in Part II of this Article. Even in a case such as *Anderson v. Superior Court*, where liability for substantive offenses was directly at issue, one would like to think that the sentencing judge did not carry the appellate court's theory to its logical conclusion by imposing consecutive sentences for every abortion.[53] But it is no defense of an absurd doctrine to suggest that sensible judges are likely to disregard it in practice.

B. Conspiracy and Cumulative Punishment

At common law, conspiracy, like attempt, was said to "merge" into the completed substantive offense so that conspirators could be convicted either of agreeing to commit a crime or of committing it, but not of both.[54] The modern rule is otherwise. Because collective criminal action is thought to create a greater public danger than indi-

52. *See* note 17 *supra*.

53. The *Anderson* case involved a pre-trial challenge to the validity of the indictment. 78 Cal. App. 2d 22, 177 P.2d 315 (1947).

54. *See* Callanan v. United States, 364 U.S. 587, 589-90 (1961); W. LaFave & A. Scott, Criminal Law § 62, at 494 (1972).

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vidual crime,[55] the Supreme Court held in *Callanan v. United States*[56] that conspirators may be convicted and sentenced consecutively for both the crime and the agreement to commit it.

The *Callanan* rule is subject to the same objections as the rule which makes conspiracy to commit a misdemeanor a felony. Undoubtedly some criminal combinations are more dangerous than individual criminals, but it takes more than agreement between two persons to create a dangerous combination. The Supreme Court undoubtedly had organized professional criminals in mind when it invoked the group danger rationale to support consecutive sentencing in the *Callanan* case,[57] but its rule is equally applicable to two boys who agree to steal a car.

A legislature revising its penal code today can choose among more discriminating means of providing enhanced punishment for particularly dangerous offenders.[58] Early drafts of the proposed Federal Criminal Code included a specific offense of "Organized Crime Leadership," which punished those who direct or finance "criminal syndicates" or who aid such syndicates in certain specified ways.[59] Providing enhanced punishment in this manner gives the defendant the benefit of a jury trial on the question of whether his own criminal conduct was a part of organized crime. The latest drafts of the Code have dropped the discrete offense of organized crime leadership, providing instead that a sentencing judge may impose "upper-range imprisonment" for any crime upon persons whom he finds to be "dangerous special offenders." This category includes, among other offenders,[60] those who commit a felony "in furtherance of a conspiracy with three or more other coconspirators to engage in a pattern of criminal

55. *See* note 23 *supra*.

56. 364 U.S. 587 (1961). *See also* Pinkerton v. United States, 328 U.S. 640 (1946).

57. The prosecution in *Callanan* was for conspiracy to obstruct commerce by extorting money and for the actual extortion, both violations of the federal Hobbs Anti-Racketeering Act. 364 U.S. at 587-88.

58. Of course, no such device is necessary if the legislature simply sets the penalty for every offense at a level appropriate for the most dangerous offenders, leaving the differentiation between the dangerous and the nondangerous to the unguided and uncontrolled discretion of sentencing judges.

59. The *Study Draft* defines a criminal syndicate as

> an association of ten or more persons for engaging on a continuing basis in crimes of the following character: illicit trafficking in narcotics or other dangerous substances, liquor, weapon[s], or stolen goods; gambling; prostitution; extortion; engaging in a criminal usury business; counterfeiting; bankruptcy or insurance frauds by arson or otherwise; and smuggling.

STUDY DRAFT, *supra* note 1, at § 1005.

60. The category also includes organized criminals, offenders with two prior felony convictions, professional criminals, mentally abnormal aggressive offenders, and offenders who used a firearm or destructive device in the commission of the offense. COMMITTEE PRINT, *supra* note 7, at § 1-4B2.

conduct," if they "initiate, organize, plan, finance, direct, manage, or supervise all or part of such conspiracy or conduct or give or receive a bribe or use force as all or part of such conduct."[61] Leaving this issue to the sentencing process means that the defendant's participation in organized crime may be proved by hearsay evidence and without the safeguards or burdens of a jury trial. The sentencing provisions of the Model Penal Code also provide for extended terms of imprisonment for persistent offenders, multiple offenders, dangerous mentally abnormal offenders, and "professional criminals."[62]

Sentencing provisions of this type do away with the need to allow cumulative punishment for conspiracy and a substantive offense, or even the need to allow any consecutive sentencing at all. When the legislature provides unusually long terms of imprisonment for professional criminals, and takes pains to define that term carefully, it makes nonsense of the whole arrangement to allow the same or greater punishment to be imposed through consecutive sentencing upon a small-time robber who holds up two or three gas stations before he is caught, or upon two small-time robbers who agree to hold up one gas station and do it. Yet the most current draft of the proposed Federal Criminal Code would do just that. It explicitly authorizes consecutive sentences that exceed the maximum "upper-range" punishment for any of the individual crimes, in addition to permitting consecutive punishment for the conspiracy and the completed crime.[63] The drafters of the Code included new sentencing provisions that make conspiracy and consecutive sentencing obsolete as a means of enhancing punishment, but it seems that they could not bear to throw the old tools away.

C. *Conspiracy as an Alternative to Prosecution for the Substantive Crime*

When a prosecutor does not desire cumulative punishment, he

61. COMMITTEE PRINT, *supra* note 7, at § 1-4B2(b)(v).

62. MODEL PENAL CODE § 7.03 (Proposed Official Draft, 1962). The court may find an adult offender to be a professional criminal if "the circumstances of the crime show that the defendant has knowingly devoted himself to criminal activity as a major source of livelihood" or the "defendant has substantial income or resources not explained to be derived from a source other than criminal activity." *Id.*

63. *See* COMMITTEE PRINT, *supra* note 7, at § 1-4A5, which provides for a "joint sentence" for multiple offenders that "may be for a term which is longer than the longest term that is authorized for any of the offenses but shall not exceed seventy-five per centum of the total of the terms that are authorized for each of the offenses." The National Commission on Reform of Federal Criminal Laws proposed that the code not allow consecutive sentences for a conspiracy and for its completed objective, and that the total of consecutive sentences for substantive offenses be generally limited to the maximum upper-limit term for the most serious offense committed. Apparently, dissenting Commissioners convinced the Senate Subcommittee to reject these proposals. *See* FINAL REPORT, *supra* note 7, at § 3204 & Comment at 293-94, § 1004 & Comment at 72-73.

may still charge a defendant with conspiracy as an alternative to prosecution for the substantive offense. He may do so in order to take advantage of the procedural rules associated with conspiracy, the subject of Part II of this Article. He may also, however, feel that the very generality and vagueness of the concept of conspiracy makes a conspiracy conviction easier to obtain than a conviction for complicity in substantive offenses.

Where the prosecution is of organized criminals of the traditional variety, this advantage seems more apparent than real. It is true that the leaders of large gambling or narcotics enterprises are careful to keep their distance from the individual criminal acts of their employees, so that it may be easier to prove their connection with the overall enterprise than their direct participation in any specific criminal act.[64] Once a defendant is shown to be the leader of a criminal enterprise, however, any rational view of the law of complicity would hold him guilty of the narcotics sales or gambling transactions committed under his general supervision, however indirect his participation may have been. Moreover, once it is established that a particular defendant is one of the leaders of a continuing commercial criminal operation, there are inevitably specific criminal acts with which he may be charged. In fact, many of the greatest triumphs of organized crime prosecution have been achieved without the use of a conspiracy charge.[65]

A vague charge of agreement to commit crime, not directly tied to specific criminal conduct, seems most useful to the prosecution in quite another type of case: the political conspiracy. The leaders of a revolutionary political party, or even of a movement involving some degree of civil disobedience, are frequently believed to approve or encourage criminal activity, although the Government may be unsure of exactly what they have done that is illegal. The famous prosecution of Dr. Benjamin Spock and four other opponents of the military draft provides a classic example of this type of case.[66] Spock,

64. *See, e.g.*, United States v. Aviles, 274 F.2d 179 (2d Cir. 1960). In *Aviles*, alleged Mafia leader Vito Genovese was convicted of conspiracy to import and distribute narcotics. The opinion observes:

> Although there is no proof that Vito Genovese ever himself handled narcotics or received any money, it is clear from what he said and from his presence at meetings of the conspirators and places where they met and congregated that he had a real interest and concern in the success of the conspiracy. We find upon all the evidence that there is ample proof of Genovese's participation in the conspiracy as one of its principal directing heads.

Id. at 188.

65. *See, e.g.*, People v. Luciano, 277 N.Y. 348, 14 N.E.2d 433, 1 N.Y.S.2d — *cert. denied*, 305 U.S. 620 (1938) (Lucky Luciano convicted of 62 counts of compulsory prostitution); Capone v. United States, 56 F.2d 927 (7th Cir. 1932) (Al Capone convicted of income tax evasion); Hoffa v. United States, 385 U.S. 293 (1966) (James R. Hoffa convicted of attempting to bribe jurors).

66. United States v. Spock, 416 F.2d 165 (1st Cir. 1969). *See also* the prose-

Coffin, Goodman and Ferber were convicted of a single conspiracy whose alleged objectives were to counsel and aid other persons to refuse or evade their military obligations, to destroy or discard their draft cards in violation of Selective Service Regulations, and to "unlawfully, willfully and knowingly hinder and interfere, by any means, with the administration of the Universal Military Training and Service Act."[67] The Government's evidence showed that Spock participated in drafting a statement entitled "A Call to Resist Illegitimate Authority," which Coffin and Goodman signed. Goodman published his own statement as well, which like the "Call" could be interpreted as exhorting and encouraging others to refuse to obey the Selective Service Law and Regulations, and he participated with Spock and Coffin at a press conference to publicize the "Call." Ferber organized a "draft card burning and turn-in" in Boston at about the same time (thus establishing venue in Boston for the trial), and brought the turned-in cards to a subsequent demonstration in Washington, D.C., in which all four of the convicted defendants participated. On this occasion more cards were collected, and an unsuccessful attempt was made to present all the cards to the Attorney General.

The Government could have charged the defendants with separate violations of the Selective Service Act for their participation in each statement and demonstration, but it did not. Had it done so, more than one trial would have been necessary, but the issues would have been relatively clear. By charging a general conspiracy to interfere with the draft, and by using the defendants' specific actions primarily as evidence of an underlying agreement to further draft resistance, the Government attempted to make the whole something more than the sum of its parts. It refused to specify what evidence it relied on to establish the requisite illegal purpose, and apparently shifted its position whenever the defendants concentrated their fire on any single element in the evidence. Commenting on the difficulty that so vague a charge must have created for the defendants and for the jury, the court of appeals noted only that "the government's vacillation about which part of the evidence it relied upon cannot, without some special showing, be taken to have prejudiced the defendants. On the contrary, the government is entitled to rely on whatever agreement is shown by the evidence."[68] As a result, the jury may have convicted the defendants of the conspiracy without agreeing on what it was that they agreed to do.

The confusion that the prosecution introduced into the trial by charging conspiracy worked to its disadvantage on appeal. Although

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cutions of Communist Party leaders cited in note 9 *supra*.

67. 416 F.2d at 168.

68. *Id.* at 174 n.21.

the majority found that the "Call" counselled unlawful draft resistance,[69] and that Spock was instrumental in both drafting and promoting it,[70] it concluded that he should have been acquitted because his *other* statements did not explicitly endorse illegal as well as legal methods of draft resistance.[71] The majority also directed Ferber's acquittal because he was not a party to the "Call" or to the press conference that the majority regarded as establishing the agreement.[72] Yet, of all the convicted defendants, Ferber seems to have been most deeply involved in illegal conduct as opposed to speech; to quote the majority's own words, "[h]is activities were limited to assisting in the burning and surrender of draft cards."[73] As one knowledgeable commentator observed, such obscure distinctions among defendants are only to be expected in view of the cloudy doctrines that the court felt it had to apply.[74]

The *Spock* case is a good example of the morass the prosecution creates when it charges a defendant with conspiring to adhere to a vaguely criminal scheme rather than with committing specified criminal acts. Of course, this type of charge is beneficial to the prosecution when the defendant seems to have a general disposition towards unlawful behavior but has not done anything specifically wrong. It is also useful when other persons have committed acts that are clearly criminal, but the defendant's responsibility for those acts is unsubstantiated.

A familiar feature of the current political scene is the demonstration or march in which some participants destroy property, resist arrest, or commit other unlawful acts. After the demonstration, law enforcement officials may wish to prosecute its organizers or prominent spokesmen, who themselves may have engaged in no disruptive activity, on the theory that they plotted and encouraged the destructive acts of others. Because incitement-to-riot statutes reach only explicit incitement of immediate violence,[75] some prosecutors have found a con-

69. *Id.* at 176.

70. *Id.* at 168, 178.

71. *Id.* at 178-79. This conclusion is particularly surprising in view of the majority's earlier conclusion that Spock adopted a "soft sell" approach because direct urging of draft violations would be a "poor psychological practice." *Id.* at 172 n.16.

72. 416 F.2d at 179. The majority reversed the convictions of Goodman and Coffin because the trial judge erred in submitting special interrogatories to the jury rather than leaving it free to return only a general verdict. *Id.* at 180-83. The dissent would have reversed all four convictions on the ground that the Government should not have been permitted to use a conspiracy prosecution against a public combination of amorphous membership advocating both lawful and unlawful actions. *Id.* at 184-92 (Coffin, J., dissenting in part).

73. *Id.* at 179. Destroying one's draft card as a political protest is a punishable act. United States v. O'Brien, 391 U.S. 367 (1968).

74. Nathanson, *Freedom of Association and the Quest for Internal Security: Conspiracy from Dennis to Dr. Spock*, 65 NW. U.L. REV. 153, 190-91 (1970).

75. *See, e.g.*, CAL. PEN. CODE § 404.6 (West 1972):

spiracy theory more promising as a means of convicting organizers or speechmakers who can be proved to have advocated or encouraged lawbreaking only from a distance or in a vague or ambiguous manner.[76]

It is not my purpose here to add to the literature on the ever-fascinating question of the scope of first amendment protection for those who advocate violence or other criminal behavior, or who lead demonstrations which involve unlawful behavior.[77] My point is rather that wherever one chooses to strike the balance between the values of public order and free political expression, a prosecution for conspiracy has an inherent tendency to confuse the issues. A statute which penalizes advocacy of violence at a demonstration or organizing a disruptive demonstration unmistakably emphasizes first amendment issues. It also evidences a clear legislative choice that can be measured against first amendment standards. When a general conspiracy statute is used to achieve essentially the same result, the prosecutor rather than the legislature makes the initial decision on where first amendment protection ends and criminal activity begins. Moreover, the use of advocacy as circumstantial evidence of an underlying criminal agreement, rather than as the criminal act itself, obscures the fact that it is speech that is being punished. This consideration explains why some judges and commentators feel that special rules should be derived from the first amendment to restrain the use of conspiracy in cases involving political advocacy.[78] But surely it would be better to abolish conspiracy altogether, unless it fills some other important and legitimate function, rather than to add complex restraints to an already complex doctrine.

Every person who with the intent to cause a riot does an act or engages in conduct which urges a riot, or urges others to commit acts of force and violence, or the burning and destroying of property, and at a time and place and *under circumstances which produce a clear and present and immediate danger* of acts of force or violence or the burning or destroying of property, is guilty of a misdemeanor.

Id. (emphasis added).

76. Many examples of such prosecutions reported in the press have not reached the appellate courts. For one that did, see Castro v. Superior Court, 9 Cal. App. 3d 675, 88 Cal. Rptr. 500 (1970), in which the conspiracy issues are thoroughly discussed in the opinions. Use of conspiracy prosecutions in this context was advocated in Note, *Mass Demonstrations and Criminal Conspiracies*, 16 HAST. L. REV. 465 (1965). Federal prosecutors have used 18 U.S.C. § 2101 (1970), which punishes interstate travel or use of interstate commerce facilities for the purpose of inciting or promoting a riot; they have also charged demonstrators with conspiracy to violate this section. *See* United States v. Dellinger, 472 F.2d 340 (7th Cir. 1972) (the "Chicago 8" conspiracy case growing out of the riots at the 1968 Democratic National Convention).

77. *See, e.g.*, Brandenburg v. Ohio, 395 U.S. 444 (1969); Dennis v. United States, 341 U.S. 494 (1951); Schenk v. United States, 249 U.S. 47 (1919).

78. *See* United States v. Spock, 416 F.2d 165, 184-92 (1st Cir. 1969) (Coffin, J., dissenting in part); Note, *Conspiracy and the First Amendment*, 79 YALE L.J. 872 (1970).

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D. *Conspiracy as an Inchoate Crime*

Conspiracy is also an inchoate or preparatory crime, permitting the punishment of persons who agree to commit a crime even if they never carry out their scheme or are apprehended before achieving their objective. It is in this role that the crime of conspiracy has been most strongly defended. Indeed, almost the only justification offered by the drafters of the Model Penal Code and the proposed Federal Criminal Code for retaining the offense was the need to punish groups which engage in preparatory conduct which cannot be reached by the law of attempt.[79]

The Model Penal Code commentary offers perhaps the most carefully stated justification for a doctrine of conspiracy that "reaches further back into preparatory conduct than attempt":

> *First*: The act of agreeing with another to commit, like the act of soliciting, is concrete and unambiguous; it does not present the infinite degrees and variations possible in the general category of attempts. The danger that truly equivocal behavior may be misinterpreted as preparation to commit a crime is minimized; purpose must be relatively firm before the commitment involved in agreement is assumed.
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> *Second*: If the agreement was to aid another to commit a crime or it otherwise encouraged its commission, it would establish complicity in the commission of the substantive offense. . . . It would be anomalous to hold that conduct which would suffice to establish criminality, if something else is done by someone else, is insufficient if the crime is never consummated. This is a reason, to be sure, which covers less than all the cases of conspiracy, but that it covers many is the point.
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> *Third*: In the course of preparation to commit a crime, the act of combining with another is significant both psychologically

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79. The Model Penal Code commentary states:

> We have no doubt . . . that in its aspect as inchoate crime—that is, as a basis for preventive intervention by the agencies of law enforcement and for the corrective treatment of persons who reveal that they are disposed to criminality . . . —a penal code properly provides that conspiracy to commit crime is itself a criminal offense.

MODEL PENAL CODE § 5.03, Comment at 97 (Tent. Draft No. 10, 1960). The commentary does not argue so confidently for any other use of conspiracy, although the Code does not strictly confine conspiracy to a limited role in punishing uncompleted crimes. The *Final Report of the National Commission on Reform of Federal Criminal Laws* suggests that the Commission viewed conspiracy solely as an inchoate offense. *See* FINAL REPORT, *supra* note 7, at § 1004 & Comment at 72. Both sets of commentators recognized, however, that conspiracy would continue to have important procedural aspects and would be charged even when the conspirators had achieved all their criminal objectives: hence the care they took in drafting provisions concerning the scope and duration of conspiracies. MODEL PENAL CODE § 5.03, Comment at 135-39 (Tent. Draft No. 10, 1960); FINAL REPORT, *supra* note 7, at § 1004 & Comment at 73.

> and practically, the former since it crosses a clear threshold in arousing expectations, the latter since it increases the likelihood that the offense will be committed. Sharing lends fortitude to purpose. The actor knows, moreover, that the future is no longer governed by his will alone; others may complete what he has had a hand in starting, even if he has a change of heart.[80]

Unfortunately, this entire argument is based on an unsound premise. The commentary seems to be justifying the Code's conspiracy provision not as a supplement to its own attempt section[81] (which is substantially identical to the attempt section of the proposed Federal Criminal Code),[82] but as a supplement to the traditional law of attempt which the Model Penal Code rejected.[83]

One of the most important traditional limitations upon attempt prosecutions has been the proximity doctrine, which requires that one go beyond "mere preparation" and come somewhere near success in order to be guilty of attempting to commit a crime. The proximity doctrine seems to have originated in 1855 in the famous English case of *Regina v. John Eagleton*.[84] Eagleton was a baker who contracted with the guardians of his parish to provide loaves of bread of a certain weight for the "out-door poor." He delivered the loaves directly to the paupers, and received in return from them tickets which he turned in to an officer of the board of guardians. Upon receiving the tickets, the officer credited Eagleton in his account book with the amount due, but the guardians did not actually make payment until some future date specified in the contract. After Eagleton had turned in a number of tickets but before any payment was made, the guardians discovered that he had been delivering underweight loaves, and they caused him to be prosecuted for attempting to obtain money by false promises. Until they actually made full payment in cash, the guardians retained a right to deduct from the total sum any damages for breach of contract. Eagleton's counsel argued to the Court of Criminal Appeal that this reservation made the fact of ultimate payment so contingent or

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80. MODEL PENAL CODE § 5.03, Comment at 97 (Tent. Draft No. 10, 1960). The commentators probably were not wholly convinced by their own argument. Two pages later they quoted Professor Abraham Goldstein on the "group danger" rationale:

> More likely, empirical investigation would disclose that there is as much reason to believe that a large number of participants will increase the prospect that the plan will be leaked as that it will be kept secret; or that the persons involved will share their uncertainties and dissuade each other as that each will stiffen the other's determination.

Id. at 99, quoting Goldstein, *Conspiracy to Defraud the United States*, 68 YALE L.J. 405, 413-14 (1959).

81. MODEL PENAL CODE § 5.01 (Proposed Official Draft, 196[illegible]

82. COMMITTEE PRINT, *supra* note 7, at § 1-2A4.

83. *See* text accompanying notes 93-97 *infra*.

84. 169 Eng. Rep. 826 (Crim. App. 1855).

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speculative that his client could not be convicted of attempt. Writing for a unanimous court, Baron Parke admitted that the judges had "great doubt on this part of the case," but concluded that the conviction for attempt was proper because the defendant had performed the last act on his part that was necessary to obtain the money. If there had remained anything further for him to do, "as the making out a further account or producing the vouchers to the Board," then his actions would not have been "sufficiently proximate" to the completed crime.[85]

The "last act" rule of the *Eagleton* case never became the law of England, although some authorities have supposed otherwise.[86] Later in the same year, the same court cited *Eagleton* in upholding the conviction for attempted counterfeiting of a man who had obtained dies engraved for manufacturing Peruvian coins, although he had not made any coins or even obtained all the necessary supplies.[87] Since that time, the courts of several nations have spent innumerable hours trying to specify how one can determine when a defendant's actions have gone beyond "mere preparation" and become "sufficiently proximate" to the completed act for conviction of attempt, with the result that considerable confusion has been added to the original uncertainty. The Model Penal Code commentary discerned six formulations in the case law, and proposed a seventh itself.[88] Less important than the various formulations are the results that obtained in some famous cases. An English court held that a jeweler who faked a robbery for the purpose of defrauding his insurer was not guilty of attempting to obtain money by false pretenses, because he had not yet filed a claim.[89] A New York court held that a gang of armed robbers who were apprehended as they drove around the city in search of a particular payroll clerk they intended to rob were not guilty of attempted robbery because they had not yet found the clerk.[90] A California court reversed the conviction for attempted theft of a swindler who tried to induce his victim to withdraw his money from the bank in the course of a "bunco" scheme known as the "Jamaica switch." Because the victim luckily met his wife in the bank and did not withdraw his savings, the swindler's acts amounted only to preparation.[91]

85. *Id.* at 835.
86. *See* MODEL PENAL CODE § 5.01, Comment at 39 & nn. 76 & 77 (Tent. Draft No. 10, 1960).
87. Regina v. Roberts, 169 Eng. Rep. 836 (Crim. App. 1855).
88. MODEL PENAL CODE § 5.01, Comment at 39-48 (Tent. Draft No. 10, 1960).
89. Rex v. Robinson, [1915] 2 K.B. 342.
90. People v. Rizzo, 246 N.Y. 334, 158 N.E. 888 (1927).
91. People v. Orndorff, 261 Cal. App. 2d 212, 67 Cal. Rptr. 824 (1968). Readers unfamiliar with the "Jamaica switch" will find it described in the opinion. *Id.* at 214-15, 67 Cal. Rptr. at 825. The result in the case could probably be better