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Victimless Crimes: A Proposal to Free the Courts

Robert C. Boruchowitz

Victimless "crimes"—acts that are presently outside the law but which have no readily identifiable victim—account for almost half of the cases handled by United States courts.¹ They include behavior which may reflect illness and which requires medical and therapeutic attention (such as drunkenness), as well as behavior condemned as varying from moral or social standards and leading to harmful behavior (such as vagrancy and curfew violations).

If the burden of regulating this type of behavior were removed from the criminal justice system, perhaps one half of the courts' current case load could be eliminated. Furthermore, persons caught in deviant conduct could receive help rather than imprisonment. The overcrowding of jails and the building of new facilities at costs as high as \$62,000 per prisoner,² would be made less necessary by removing from them the thousands of prisoners who have harmed no one and stolen nothing.

Much victimless behavior could be decriminalized, removed from the criminal statutes. Other acts considered more socially dangerous could be limited. Certain behavior could be handled administratively.

For example, sales of marijuana could be legal to persons of a certain age if sold by a licensed dealer, as alcohol is sold now. It might be possible to impose fines for some types of behavior without actually

bringing the case to court. In some cases, administrative agencies could provide remedies other than punishment.

Society may want to proscribe trading in vice, for example, running a brothel, without making prostitution by an individual illegal. Society may want to punish the procurer (or the narcotics syndicate operator) but not the prostitute (or the heroin user).

If society wishes to limit victimless behavior in order to protect persons (from the dangers of opiates, for example) the behavior should be decriminalized and subject to regulation. Laws which merely seek to regulate morals are ineffective, weaken the system of law, and ought to be repealed.

VAGRANCY

There are several major categories of victimless crime. We will examine these below, beginning with one of the oldest, vagrancy, a "crime" for which more than 100,000 persons were arrested in 1970.³

Vagrancy "is a crime of status or personal conditions: the most common elements are idleness, lack of visible means of support, and lack of a regular place of abode . . . Like loiterers and nocturnal juveniles, vagrants are considered probably criminals."⁴ Vagrancy originated as an offense in feudal England, in an effort to ensure a constant local labor supply. Vaguely-worded vagrancy statutes are used as a catch-all to

1. President's Commission on Law Enforcement and the Administration of Justice, *THE CHALLENGE OF CRIME IN A FREE SOCIETY*, 20 (1967).

2. *Wall Street Journal*, August 25, 1971, at 1.

3. *Papachristou v. City of Jacksonville*, 405 U.S. 156, 169, n. 15 (1972).

4. Moore, *Vagrancy and Related Offenses*, 4 *HARV. CIVIL RIGHTS L. REV.* 291, 292 (1969).



Elderly transients soak up the winter sunshine in the lion house of Chicago's Lincoln Park Zoo. Photo by Paul Sequeira.

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arrest political activists, persons merely suspected of past crimes, or persons who may be deemed undesirable.

Vagrancy statutes often work counter to the efforts of welfare and job training programs as it is difficult for convicted vagrants to find employment. Some recent welfare legislation makes vagrants eligible for job training and income maintenance programs and demonstrates "the availability of viable, less restrictive alternatives more rationally related to preventing crime among the poor."⁵ These statutes also raise questions regarding vagueness, equal protection and due process, as they proscribe a status that the criminal cannot always voluntarily abandon.

In the recently decided case of *Papachristou v. City of Jacksonville*, the supreme court held that the Jacksonville, Florida, ordinance prohibiting vagrancy was unconstitutional.⁶ The ordinance was ruled void for vagueness as it failed to give fair notice that the conduct was forbidden and because it encouraged arbitrary and erratic arrests and convictions. The ordinance punished normally innocent activities such as "night-walking" and living on the earnings of one's

5. Moore, *supra* note 9, at 305.

6. 405 U.S. 156 (1972).

wife or children as well as "wandering or strolling" without lawful purpose.

Justice Douglas, writing for a unanimous court (Powell, J. and Rehnquist, J. not participating) called these activities part of the "amenities of American life" which contribute to feelings of independence, creativity, and self-confidence. He stated that these activities have "honored the right to be non-conformists" and "dignified the right of dissent".⁷ Vagrancy ordinances, he continued, give unfettered discretion to the police in dealing with the poor and unpopular. A vagrancy prosecution "may be merely the cloak for a conviction which could not be obtained on the real but undisclosed grounds for the arrest".⁸

Justice Felix Frankfurter, dissenting in *Winters v. New York*, which struck down a statute used to punish a magazine, said:

Definiteness (in vagrancy statutes) is designedly avoided so as to allow the net to be cast at large, to enable men to be caught who are vaguely undesirable in the eyes of police and prosecution . . .⁹

Vagrancy statutes often require that the accused make an explanation of his behavior to police or to the court. This can lead to a violation of the Fifth Amendment privilege against self-incrimination, and it is contrary to the holding of the Supreme Court in *Miranda v. Arizona* that arrested persons need not answer questions posed by the police.¹⁰

Professor Anthony Amsterdam states: "More than any other legislation on the books, these (vagrancy laws) are the weapons of the establishment for keeping the untouchables in line."¹¹

Papachristou may lead to elimination of

7. *Id.* at 164.

8. *Id.* at 169.

9. *Winters v. New York*, 333 U.S. 507, 540 (1947).

10. *Miranda v. Arizona*, 384 U.S. 436 (1966).

11. Amsterdam, *Federal Constitutional Restrictions on the Punishment of Crimes of Status, Crimes of General Obnoxiousness, Crimes Displeasing to Police Officers, and the Like*, 3 CRIM. L. BULL. 205, 233-241 (1967). There are other rights and freedoms involved as well. Several courts have held that an arrest for grounds under an unconstitutional vagrancy statute, does not necessarily invalidate a subsequent search. See, e.g., *Ricehill v. Brewer*, 459 F. 2d (8th Cir. 1972); *Klingler v. U.S.*, 409 F. 2d 299 (8th Cir. 1969), cert. denied 396 U.S. 859 (1969).

ROBERT C. BORUCHOWITZ compiled the research for this article while he was a Herbert Harley Fellow of the American Judicature Society. He is a graduate of the Northwestern University Law School class of 1973.



most vagrancy prosecutions. Other categories of victimless crime remain, providing markets for organized crime and causing injustice to individuals. One of these categories is gambling.

GAMBLING

Gambling has been described as "the greatest source of revenue for organized crime."¹² Annual revenues from illegal gambling may exceed \$7 billion,¹³ much of which is invested in "legitimate" business operations. Gambling statutes are only sporadically enforced. But many poor persons are arrested, if sometimes only for harassment purposes, on city and state gambling charges. Almost 70 per cent of persons arrested for gambling are black.¹⁴

As with other categories of victimless crime, prohibiting gambling does not work. Several states, including New York, New Jersey and New Hampshire, have legalized lotteries. Nevada features Las Vegas and other centers of legalized gambling. In New York, where off track betting is legal, the president of the city-run Off Track Betting Corporation would like to divert to a city-managed program the estimated \$600 million wagered per year on the numbers game, and to halt the estimated \$78 million illegal profits and \$40 million paid in bribes to police and others.¹⁵

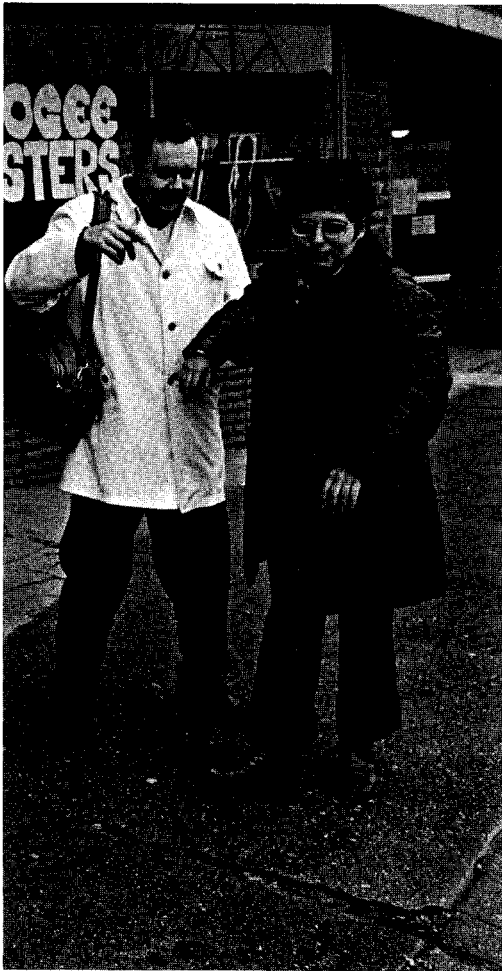
Some state legislatures question whether further legalization would reduce the role of organized crime or the amounts of money

12. Morris, "The Law is a Busybody", *New York Times Magazine*, April 1, 1973, at 60.

13. *Id.*

14. *Id.* at 68.

15. *Id.* at 60.



Public drunkenness is not confined to skid row.
Photo by Paul Sequeira.

*Violations
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spent on gambling by lower income persons. However, states probably will continue to legalize gambling if only to increase state revenues. In the process, police efforts to stop gambling can be reduced, and, if the states can run systems that are as attractive to bettors as the existing illegal ones, revenue for organized crime will be reduced.

DRUNKENNESS

Violations of drunkenness statutes account for about one-third of all arrests in the United States.¹⁶ About one-half of all persons in prison in the U.S. "have committed no crime other than being drunk in public view."¹⁷ Yet the Institute on Alcohol Abuse and Alcoholism holds that alcoholism is a sickness and not a crime¹⁸ and the President's Commission on Law Enforcement and the Administration of Justice has recommended that drunkenness not be a criminal offense.¹⁹

Six states have eliminated their drunkenness statutes. In Minnesota, there is now a receiving center where alcoholics are registered, examined for medical problems and sent to bed.²⁰ In Philadelphia, persons who are publicly drunk can be released without any court proceeding if a relative calls for them.²¹

In New York's Bowery, the Vera Foundation and the police work together to find drunks and persuade them to go to the Bowery infirmary. In the first three years of the program, intoxication arrests in the area were reduced by 97 per cent. The director says the project is more humane and that some alcoholics are returned to a "useful life". He contends that the criminal system never returns any.²²

Removing drunkenness from the criminal process would also remove authority for police to apprehend citizens who are pub-

16. *Bloch and Geis*, MAN, CRIME AND SOCIETY 328, 329 (1970).

17. Wall Street Journal, *supra* note 2.

18. Fuller, "Drunks", National Observer, October 2, 1971, at 1.

19. The President's Commission on Law Enforcement and the Administration of Justice Task Force Report, DRUNKENNESS, 4 (1967).

20. Fuller, *supra* note 24.

21. Wall Street Journal, *supra* note 1, at 18.

22. *Id.*

licly drunk. But as in the Vera project, plainclothes officers might help to persuade people to come to a rehabilitation center. Police could be charged with the duty of transporting to hospitals or special treatment centers persons found publicly incapacitated by alcohol or drugs.

One man in Washington, D.C. has been arrested 70 times for drunkenness, and six other persons have been arrested 1,409 times and served a total of 125 years in prison.²³ The U.S. Court of Appeals ruled that the often-arrested defendant suffered from the disease of alcoholism and could not be imprisoned for drunkenness.²⁴ But in *Powell v. Texas*, the Supreme Court in a 5-4 decision refused to free a 67-year-old man who had been jailed 73 times for drunkenness.²⁵ The majority rejected the idea that public drunkenness is a condition and not an act.

Justice Marshall, writing for the court, was concerned about total decriminalization. He noted the opportunity to "sober up" which a brief jail term provides. He added that the duration of penal incarceration has an outside limit; civil commitment does not. He feared that to overturn Powell's conviction would subject indigent alcoholics to the risk of indefinite incarceration under the same conditions they faced in jail.²⁶

PUNISHING STATUS

Justice Fortas argued in dissent (joined by Justices Douglas, Brennan and Stewart) that a criminal penalty is imposed by the Texas statute on a chronic alcoholic for a condition—public intoxication—which is a characteristic part of his disease.²⁷ The dissent was based on *Robinson v. California*²⁸ which ruled unconstitutional a statute making it a misdemeanor to be addicted to

the use of narcotics. The court held that this statute inflicted a cruel and unusual punishment as it punished mere status.

The 5-4 decision in *Powell* would have gone the other way if the appellant had shown that he was unable to stay off the streets when drunk, for, according to Justice White (who concurred), in that case the conviction for public drunkenness would have violated the Eighth Amendment. Justice White, extending the reasoning of *Robinson*, stated that the use of narcotics by an addict "must be beyond the reach of the criminal law"²⁹ and chronic alcoholics should not be punished for drinking or being drunk. He noted that many alcoholics have no other home than streets, parks and flophouses, and for them merely to be drunk is to commit the crime of public drunkenness, and as applied to them, the statute is unconstitutional. On this distinction, many cases should successfully rely.

While courts debate the merits of decriminalization, legislatures have acted to provide funds to support research and assistance to alcoholics. A bill "to provide a comprehensive federal program for the prevention and treatment of alcoholism" was enacted by Congress in 1970.³⁰ The legislation finances state-established clinics for the treatment and education of alcoholics.

DOWN AND OUT

The problem of alcoholism will not be solved either by criminal process or by social welfare agencies' provision of overnight shelter. And alcoholism is not the only problem at which drunkenness statutes seem to be aimed. The problem is much more complex, leading to an examination of social, political and economic factors that tend to create a population of "down and out" people in deteriorating areas of major cities.

One of the most published authors on drunkenness, Raymond Nimmer, has argued that drunkenness should be decriminalized even if alternative systems of detoxification

23. *Id.*

24. Convictions of chronic alcoholics for violations of public intoxication statutes have been invalidated on Eighth Amendment grounds in at least two circuits. See, e.g., *Easter v. District of Columbia*, 361 F. 2d 50 (D.C. Cir. 1966); *Powell v. Texas*, 392 U.S. 514, 569 (1967) (Fortas, J. dissenting).

25. 392 U.S. 514 (1967).

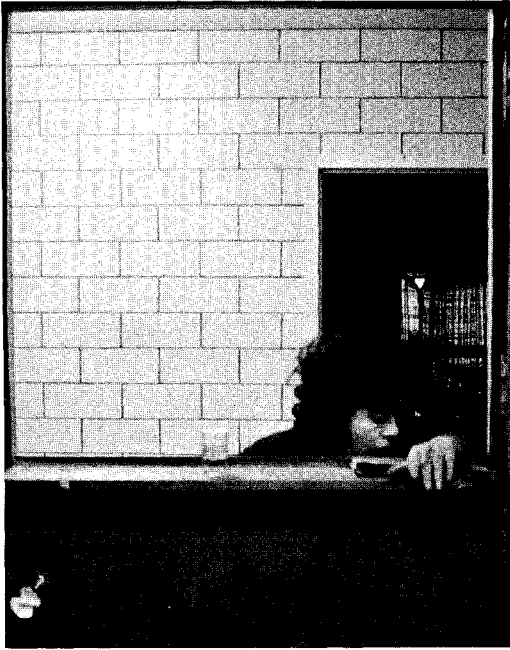
26. *Id.* at 528.

27. *Id.* at 554.

28. *Robinson v. California*, 370 U.S. 660 (1962).

29. 392 U.S. at 549 (1967).

30. 42 U.S.C. 2688J-2 (1970), 4551 et seq.



An 18-year-old user waits at the dispensary window of a methadone clinic. Photo by Paul Sequeira.

*Criminal sanctions,
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applied to addicts,
constitute cruel
and unusual
punishment.*

have not been developed.³¹ He notes that arrests for intoxication are a response to skid row deviancy and that the real problem is the "entire, complex symptomatology of skid row." He points out that vagrancy and loitering statutes are interchangeable with drunkenness statutes when applied to persons on skid row and would be applied if drunkenness statutes were unavailable. The skid row problem is not simply one of alcoholism, and many skid row denizens do not drink.

The existing system must not be continued. Arrestees are often placed in overcrowded, dirty cells, where they are fed poorly, receive little medical care, and are unprotected from assault and robbery. Alternative systems, including detoxification programs and rehabilitation, would be a substantial improvement.

JUVENILE LAW

Juvenile behavior is often regulated quite differently than adult behavior.³² Some statutes prescribe different punishments for juveniles or make certain acts illegal only if committed by juveniles. Some children without parent or guardian or who are objects of cruelty or neglect also fall into the juvenile court jurisdiction although their problems are not necessarily criminal in nature.³³

Many authorities believe that minors should not be subjected to court proceedings for acts which, if performed by adults, would not constitute a violation of law. They argue that "harmful consequences for children have resulted from the informal, private and protective nature of the juvenile court."³⁴

Many states, including California, give the courts authority over a child who exhibits "delinquent tendencies" such as refusing to obey parents or teachers or who "for any cause is in danger of leading an

31. Nimmer, *Arrest for Public Drunkenness*, 54 JUDICATURE 335, 336 (1971).

32. *In re Gault*, 387 U.S. 1 (1967), concerned an act which if committed by an adult would result in a maximum \$50.00 fine or two months in jail, but if by a juvenile could result in detention until the age of 21.

33. New York Times, April 2, 1973, at 1, col. 6.

34. Garfield, *Juveniles Law—A Potential for California Change*, 2 PAC. L. J. 737, 739 (1973).

idle, dissolute, lewd or immoral life.”³⁵ This latter phrase has been challenged as unconstitutional because of vagueness.³⁶

These laws allow harassment of minors by police who may apply them when unable to prove commission of a crime. Also, informal probation procedures may put under supervision a minor for whom there are really no legitimate grounds for custody.³⁷

The law does not effectively rehabilitate minors. “Delinquent tendencies” accounted for 60 per cent of juvenile recidivism in a 1969 California survey.³⁸ There is evidence that processing juvenile delinquents in a court of law and placing them in the same living facility as juvenile criminals causes them to think of themselves as criminals and alienates them further from the law. Also, juvenile arrest records can be serious handicaps in later life.³⁹

Repeal of juvenile delinquency laws might lead to increased arrests for criminal activity. Police might seek to use other criminal laws to arrest troublemakers, and serious offenses would be handled not as cases of delinquency but as crimes.

Some probation officers find that non-judicial agencies are unable to deal with delinquent minors. Glenda L. Garfield maintains in a recent law review article that some young people are “incorrigible” or “out of control.” She believes that there is a need for a law to give juvenile authorities jurisdiction to compel the minor to follow a proposed diversion remedy.⁴⁰

Amendments to the law might preclude juvenile court adjudication until a program

of probationary family treatment has been tried on a voluntary basis. All drug use and possession cases could be diverted. Neighborhood and juvenile conference committees and youth service agencies are possible alternative solutions.⁴¹

DRUG USE

Current laws prohibit the possession of various drugs, even if the possessor is guilty of no other crime. Possession of heroin is a felony. Federal and most state laws have reduced possession of marijuana to a misdemeanor.

Some have argued that criminal sanctions for mere use, particularly when applied to addicts, constitute cruel and unusual punishment.⁴² Former Attorney General Ramsey Clark suggests that civil commitment for addicts and alcoholics “that gives some supervisory power over an individual but avoids the stigma of criminal charges may be substituted entirely for criminal prosecution or applied in modified forms for pre-trial purposes.”⁴³ Others contend that a free society should permit individual drug use.

The National Commission on Marijuana and Drug Abuse has recognized that “for drug-dependent persons, the only legitimate role of the criminal justice system is to function as an entry mechanism into a treatment system.”⁴⁴ The commission recommended mandatory treatment of all charged with possession of a narcotic (not including marijuana) and no punishment more severe than a \$500 fine. The Consumers Union Report on Licit and Illicit Drugs has recommended that policies be revised so that no narcotics addict need get his drugs from the black market.⁴⁵ Professor Norval Morris argues that dangerous drugs, including cocaine, amphetamines and LSD, should be controlled and illicit sellers punished.

35. CAL. WELFARE AND INST. CODE §601 (1972).

36. Garfield, *supra* note 42, at 738.

37. *Id.* at 746.

38. *Id.* at 747.

39. See, e.g., CAL. WELFARE AND INST. CODE §828 (1972), which permits certain disclosures.

40. Some probation officers feel that the ability to remove a youth from society is the only means capable of making a juvenile “straighten up.” However, they also recognize that many juveniles are on probation for nothing more than drug use. As a result, many parole and probation officials favor handling these offenders outside the court system. One former parole officer described as “one of the saddest” parts of his job working with men who had spent 20 years in jails for addiction and drug-related behavior. Letter to the author from Nolan S. B. Ahn, a former parole officer in Los Angeles County, California and currently the General Director of the Y.M.C.A. in Kauai, Hawaii.

41. T.N.C. v. The Superior Court of the City and County of San Francisco, 4 Cal. 3d 767, 775, 484 P.2d 981, 985 (1971). See also *Review of Selected 1972 California Legislation*, 4 PAC. L. J. 211, 543 (1973).

42. See, e.g., Comment, *The Constitution and the Narcotics Addict*, 11 SANTA CLARA LAW 140 (1970).

43. R. CLARK, *CRIME IN AMERICA* 311 (1970).

44. New York Times, March 23, 1973, at 1, col. 1.

45. Morris, *supra* note 18, at 60.

Criminal sanctions have made narcotics a dangerous but highly profitable business. Individuals can make hundreds of thousands of dollars on a single shipment and the trade involves businessmen, gangsters, police and governments around the world.⁴⁶

The use of mood-altering drugs is accepted by American society, but irrational distinctions are drawn by the law. Liquor and psychoactive pills are condoned, but heroin, LSD, and marijuana are outlawed.

*Private choice should prevail
where the danger is
to individual health
rather than to society.*

The President's Commission, which found no direct relationship between the use of drugs and crime, recommended that:

When the risk associated with a type of drug dependence does not involve drug-influenced behavior, but is rather limited to possible danger to individual health . . . private normative choices should prevail.⁴⁷

The decriminalization of drug *use* need not imply the decriminalization of drug *selling*. Persons who sell heroin illegally could be punished while addicts are treated at medical centers.⁴⁸ (A distinction must be drawn, however, between the addict-seller and the organized crime operator.) Use of non-addictive drugs could be legalized. The sale of drugs could be permitted by licensed dealers or perhaps even by tobacco companies, who might issue warnings similar to those on cigarette packages.

The current use of criminal law accompanied by tough government threats is an oversimplified and misdirected attempt to

meet the societal problems surrounding drug use. And, as with other victimless crimes, the law may be used to punish conduct other than that proscribed by the statute.

SEXUAL BEHAVIOR

American law makes criminal a variety of unconventional sexual behavior. Fornication, adultery, homosexuality, prostitution and other often vaguely defined sexual conduct are prohibited by state laws. Forty-eight states (Illinois and Connecticut are the exceptions) proscribe private consensual homosexual activity.⁴⁹

The Model Penal Code advocates decriminalization of most sexual behavior now considered criminal. Fornication is not criminal in most nations. Adultery is not a crime in England, Japan, the Soviet Union or Uruguay. Furthermore, American laws in this area are usually unenforced, and there is some indication that they "may lend themselves to discriminatory enforcement where the parties involved are of different races or where a political figure is involved."⁵⁰

Professor Norval Morris has written:

Sending police officers to solicit homosexual advances or to spy upon public toilets is a perversion of public policy that wastes resources, inspires ridicule and degrades the police precisely when their professional character needs reinforcement.⁵¹

Legalized prostitution, combined with some regulatory legislation, would make possible required health inspections, control annoying and sometimes dangerous public solicitations, and deprive some elements of organized crime of their influence by curtailing official corruption.⁵²

Sexual behavior laws also serve to punish non-violent abnormal behavior. In a recent Canadian case, *Klippert v. The Queen*,⁵³ the judges sentenced to prison for

46. See R. MC COY, *THE POLITICS OF HEROIN IN SOUTHEAST ASIA* (1972). Some persons contend that politicians and officials tolerate heroin sales as a means of keeping the poor and oppressed unrebelling.

47. *New York Times*, March 23, 1973, at 19, col. 1.

48. In California, civil commitments for treatment of narcotic addicts may be initiated by any interested person and may last as long as ten years. CAL. WELFARE AND INST. CODE §§3100, 3201 (1972).

49. See C.G.S.A. §53a, Part VI, General Comments (1971); ILL. REV. STAT. ch. 38, §11 (1961).

50. MODEL PENAL CODE, Tent. Draft No. 4, §§2-7, Comment (1961).

51. Morris, *supra* note 20, at 61.

52. *Wall Street Journal*, *supra* note 4, at 18.

53. *Klippert v. The Queen*, 1967 Can S.C.R. 822 (1967).

what amounted to a life sentence a homosexual man on the basis of future homosexual activity in which he might engage, even without violence. While there is a need to protect society from habitual perpetrators of violent sexual crimes, the category of abnormal sex offender has in practice become "a dangerous wastebasket, into which could be thrown all varieties of sexually deviating individuals."⁵⁴

LAW AND MORALITY

There has been much debate concerning the legal enforcement of morals. It has centered around the right of the state to prescribe what it determines to be immoral behavior.

One author wrote:

Society itself is under a constant evolution, through a purely natural and spontaneous process, and with it the concepts of public and moral order . . . In a 'democratic state' . . . public order will not be affected very seriously by the toleration of immoral acts.⁵⁵

John Stuart Mill in *On Liberty*⁵⁶ stated that:

The only purpose for which power can be rightfully exercised over any member of the civilized community against his will is to prevent harm to others. His own good, either physical or moral, is not a sufficient warrant.

A great philosophical debate has been waged between H. L. A. Hart and Bernard Devlin. Hart wrote, "There is no evidence that the preservation of a society requires the enforcement of its moralities 'as such'."

Lord Devlin responded:

I do not assert that *any* deviation from the society's shared morality threatens its existence any more than I assert that *any* subversive activity threatens its existence. I assert that they are both activities which are capable in their nature of threatening the existence of society so that neither can be put beyond the law.⁵⁷

54. Schur, *OUR CRIMINAL SOCIETY* 222 (1969).

55. Caron, *The Legal Enforcement of Morals and the So-called Hart-Devlin Controversy*, 15 *MCGILL L. J.* 9, 35 (1969).

56. MILL, *ON LIBERTY* (1859).

57. We can only refer briefly here to this great debate. The major works involved are HART, *LAW, LIBERTY AND MORALITY* (1963); Devlin, *THE ENFORCEMENT OF MORALS* (1965).

Categorizing certain "immoral" behavior as criminal invites blackmail, as do laws concerning homosexuality. Many other types of behavior can be decriminalized, without agreement on the substantive moral issues, to avoid problems of blackmail and unenforceability. A strong argument can be made that government should not seek to interfere with citizens' private lives and behavior. But even without considering the morality and philosophy involved, legislatures can, because of practical considerations, encourage toleration of "immoral acts."

ENFORCEMENT

The courts are clogged and police forces are burdened by the insistence on prosecuting victimless crimes. Enforcement of a public morality impairs police efficiency in safeguarding life and protecting property. Many policemen believe they could better deal with serious crime if there were fewer laws and fewer categories of crimes. They are strong advocates of reform of victimless crime laws, particularly on prostitution. But the *Wall Street Journal* notes that other laws, such as gambling laws, tend to corrupt policemen by encouraging bribery.⁵⁸ The former chairman of New York City's Board of Corrections would like to eliminate victimless crime categories so that organized crime's corruptive influence could be cut and so that young people's respect for police would be restored.⁵⁹

*"It is impossible
to regulate behavior
that you prohibit."*

Public respect is undermined since police who are developing cases in these areas must rely on informers, undercover work, electronic bugging and decoys. Many problems of illegal search and seizure arise from police efforts to obtain evidence from

58. *Wall Street Journal*, *supra* note 4, at 1.

59. *Id.* at 18.

persons trying to destroy or hide drugs. Professor Edwin Schur, discussing the entrapment techniques often used by police to obtain evidence, says, "If engaged in on a wide enough basis, they may help to create an acceptance of systematic spying in certain sectors of our social life."⁶⁰ In addition to respect for police, respect for the system of law is undermined by these statutes, and by inconsistencies within state laws.

CAUSES AND CURES

Some states have conducted scientific research into victimless crimes, particularly drug use and sexual behavior. California directs the department of mental hygiene to conduct scientific research into the "causes and cures" of sexual deviation.⁶¹ Similar research efforts should be strengthened and expanded into other areas. If it is determined that certain "immoral" activities are weakening the social structure, it would be better to deal with these problems through expanded social and medical services, rather than through criminal law processes.

Some suggest that removing minor offenses from the courts may result in "all that small-minded bureaucratic horror which is attributed to lower court judges but is even worse in lower court administration."⁶² It is the courts' and the legislatures' responsibility to ensure that any new administrative agencies will be responsive to the needs of the community.

The theory that victimless crimes should be handled by civil agencies suggests a reference here to the problems of civil commitment. The *Robinson* opinion and others have suggested that involuntary civil confinement of addicts for treatment would be constitutional.⁶³ But such confinement challenges due process concepts, as the state can deprive persons of their liberty indefinitely without a criminal trial. Many existing civil commitment procedures have few if any procedural safeguards.

Of course, not all decriminalization would require civil commitment procedures. Much victimless behavior could simply be eliminated from the criminal statutes.

In a recent article, Professor Norval Morris argued for better regulation of vice and self-injury. His theory is, "It is impossible to regulate behavior that you prohibit."⁶⁴ He cites administrative law regulation of food quality, building codes, guns and cars as examples of wise efforts by government to protect citizens from self-injury. (He does not discuss the harmful or ineffective results of much of the licensing and regulation to which he refers. Food processors have heavy influence on food quality regulation; auto manufacturers exert strong power in auto safety and pollution rulings; building codes are often unenforced or discriminatorily enforced.)

Morris notes that criminal sanctions act as a tariff, making profitable the supply of illegal goods and services by driving up prices and discouraging competition. However, licensing in many fields, such as taxicabs, often only makes it difficult and expensive to get a license, and does not provide any safeguards to the public.

In certain areas, legalization with no strings attached may be the better answer. Possession and use of narcotics or marijuana could be made legal; persons suffering from overdoses of drugs or alcohol can be helped home or to a doctor, just as police assist other persons who are sick or injured.

Half of the people in American prisons and half of the cases in American courts are there as a result of behavior in which no one was injured. Delay in providing justice in other cases could be significantly reduced and more just treatment could be given to the perpetrators of victimless "crimes" if these kinds of behavior were decriminalized and removed from the criminal courts to other public and private agencies whose underlying purpose would be to help, not to punish. ●

60. Schur, *OUR CRIMINAL SOCIETY* 43 (1969).

61. CAL. WELFARE AND INST. CODE §8050 (1972).

62. McDonald, *supra* note 5, at 43.

63. See *Jackson v. Indiana*, 406 U.S. 175 (1972); Wexler, *Therapeutic Justice*, 57 MINN. L. REV. 289 (1972).

64. Morris, *supra* note 18, at 60.