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Victimless Crimes: The Threshold Question and Beyond

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VICTIMLESS CRIMES: THE THRESHOLD QUESTION AND BEYOND

I. Introduction

"Victimless crimes" have been defined as

> those nonforceful offenses where the conduct subjected to control is committed by adult participants who are not willing to complain about their participation in the conduct, and no direct injury is inflicted upon other persons not participating in the prescribed conduct.[1]

This definition reveals three aspects of such crimes. First, they proscribe consensual conduct between adult participants. Second, no person involved in the transaction is willing to act as a complaining witness. Finally, the conduct involves no direct injury to non-participants. These criteria of a victimless crime can be best illustrated by contrasting a victimless offense with a traditionally recognized criminal act. For example, in the case of a criminal assault, the basis of the state's legal reaction is unambiguous. An individual comes forward and demands redress of his grievances by pressing charges. However, an offense committed by consenting adult homosexuals presents a far different prosecutorial situation. There is no "complaining witness" to protest the conduct even though it may violate the criminal code.

In a sense, American criminal law recognizes this distinction by speaking in terms of two conceptually different types of prohibited conduct: that which is *malum in se* (evil in itself), and conduct which is *malum prohibitum* (evil because prohibited).[2] *Malum in se* conduct, such as murder, rape, arson, assault and like offenses, is universally considered criminal in the sense that the prohibition of such conduct clearly bears a direct relationship to the protection of the person and property of each member of society. But much of our criminal codes is concerned with conduct that is not universally considered evil. This *malum prohibitum* legislation does not protect distinct individual interests, but society nevertheless regards the conduct as sufficiently undesirable to subject it to the criminal sanction.

These observations represent the point of departure for the controversial debate concerning the appropriateness of victimless crimes. The necessity of *malum in se* legislation is not subject to challenge since no society can tolerate such behavior and survive. Similarly, certain *malum prohibitum* measures, traffic regulations, for example, are clearly dictated by a prudential concern for societal order. However, victimless crimes represent those *malum prohibitum* measures which are not limited to a morally neutral concern for necessary, functional order. Rather, victimless crimes are the legislative embodiment of society's moral evaluation of certain conduct. The traditional objects of such legislation

1 Decker, *The Consideration of an Absolute Defense or Mitigation in Crimes Without Victims,* 5 ST. MARY'S L.J. 40 (1973) [hereinafter cited as Decker].

2 The analysis of victimless crimes in terms of *malum prohibitum* acts is suggested in Smith and Pollack, *Crimes Without Victims,* SATURDAY REVIEW, Dec. 4, 1971, at 27 [hereinafter cited as Smith & Pollack].

have been prostitution, sexual relations, gambling, public drunkenness, and drug abuse.

Thus, victimless crimes are distinguished from other classes of *malum prohibitum* conduct by the degree to which they involve an element of legislated morality. This distinction raises the fourth and final characteristic of victimless crimes: they are crimes based on moral codes.[3] This use of the criminal sanction to punish immorality, a phenomenon H.L.A. Hart describes as "legal moralism," represents the central issue in the long and heated philosophical debate concerning victimless crimes.

II. The Concept of "Harm to Others"

There are two principal philosophical views concerning the proper connection between law and morals. The moralist school is best represented by Sir Arthur Patrick Devlin.[4] The opposing view is represented by the collective works of Jeremy Bentham, John Stuart Mill, and H.L.A. Hart,[5] who are characterized as utilitarians.

Devlin's moralist thesis views legal moralism as permissible on the very principle which underlies the justification of *malum in se* legislation; namely, that any society may take appropriate steps necessary to preserve its own existence. "A recognized morality," he asserts, "is as necessary to society's existence as a recognized government."[6] Thus, a shared morality is an essential characteristic of ordered society, and immorality—even immoral acts carried out in private—jeopardize society's existence. Accordingly, Devlin concludes that society is justified in legislating morality.

In contrast,[7] the basis of the utilitarian argument is contained in John Stuart Mill's celebrated maxim: "The only purpose for which power can rightfully be exercised over any member of a civilized society against his will is to prevent harm to others."[8] In contemporary jurisprudence, this principle has found its most notable exposition in H.L.A. Hart's seminal work, *Law, Liberty, and Morality*.[9] But, Hart is only one example of Mill's continuing influence in modern legal thought.[10]

Moreover, Mill's impact has not been limited to philosophical circles. An

3 The National Council on Crime and Delinquency has expressly defined victimless crime as "crime based on moral codes in which there is no victim apart from the person who committed it." Reported in NEWSWEEK, Nov. 29, 1971, at 83.

4 *See, e.g.*, P. DEVLIN, THE ENFORCEMENT OF MORALS (1959) [hereinafter cited as DEVLIN].

5 *See generally* J. BENTHAM, PRINCIPLES OF MORALS AND LEGISLATION (Harrison ed. 1948); J.S. MILL, ON LIBERTY (1859); H.L.A. HART, LAW, LIBERTY, AND MORALITY (1963).

6 DEVLIN, *supra* note 4, at 13-14.

7 For an extensive analysis of the moralist/utilitarian debate, *see* Comment, *Private Consensual Adult Behavior: The Requirement of Harm to Others in the Enforcement of Morality*, 14 U.C.L.A.L. REV. 581 (1967). *See also* Blackshield, *The Hart-Devlin Controversy in 1965*, 5 SYDNEY L. REV. 441 (1967).

8 J.S. MILL, ON LIBERTY chapter I.

9 *See also* Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593 (1958); Hart, *Social Solidarity and the Enforcement of Morals*, 35 U. CHI. L. REV. 1 (1967).

10 *See, e.g.*, H. PACKER, THE LIMITS OF THE CRIMINAL SANCTION (1968) [hereinafter cited as PACKER.]

excellent example is Great Britain's famous *Wolfenden Report,*[11] concerning homosexual offenses and prostitution which clearly reflects Mill's "harm to others" emphasis. The Report emphasized that the proper function of law

> is to preserve public order and decency, to protect the citizen from what is offensive or injurious, and to provide sufficient safeguards against exploitation and corruption of others. . . . It is not . . . the function of law to intervene in the private lives of citizens, or to seek to enforce any particular pattern of behavior. . . .[12]

In the United States, the Reporters of the American Law Institute similarly proposed a limitation on the enforcement of morality in the 1955 Model Penal Code.[13] The recommendation was that "all sexual practices not involving force, adult corruption of minors, or public offense" should be excluded from criminal proscription. This proposal was based on the premise, among others, that "no *harm* to the secular interests of the community is involved."[14]

Hence, Mill's notion that "harm to others" is a prerequisite to the imposition of the criminal sanction has become a basic concept in the criticism of victimless crimes. Professor Herbert L. Packer[15] suggests that the "harm to others" formula has two uses that justify its inclusion as a limiting criterion for the invocation of the criminal sanction. First, it is a way to insure that a given form of conduct is not subjected to the criminal sanction purely or even primarily because it is thought to be immoral. It accomplishes this by forcing an inquiry into the specific social "harm" sought to be avoided by the legislation.[16] Second, it focuses attention on whether it is more "harmful" to prohibit the conduct than to allow it.[17] These two uses, concludes Professor Packer, establish the "harm to others" test as a threshold question concerning the appropriate limits of the criminal sanction.[18]

As Packer's comments imply, any critical discussion of victimless crimes must proceed beyond the threshold question of requisite harm to a second level of inquiry. This second level poses the ultimate legal question raised by the victimless crimes' debate. This ultimate concern is not whether a society should legislate morality, but rather what are the appropriate limits of public policy.[19] Even assuming that the harm resulting from a particular act philosophically and pragmatically justifies the imposition of legal penalties, it must still be shown that this imposition does not contravene constitutionally protected rights.[20]

In review, the "harm to others" debate between the moralist and utilitarian schools raises three important analytical criteria with which to examine victimless

11 COMMITTEE ON HOMOSEXUAL OFFENSES AND PROSTITUTION, REPORT, C.M.D. No. 247 (1957) (WOLFENDEN REPORT).
12 *Id.* at 9-10.
13 MODEL PENAL CODE (Tent. Draft No. 4, 1955).
14 *Id.* at § 207.5, comment.
15 PACKER, *supra* note 10.
16 *Id.* at 267.
17 *Id.*
18 *Id.*
19 *See, e.g.,* Newhaus, *Sense and Nonsense About Victimless Crimes,* CHRISTIAN CENTURY, March 7, 1973, at 282 [hereinafter cited as Newhaus].
20 *See, e.g.,* Eser, *The Principle of "Harm" in the Concept of Crime: A Comparative Analysis of Criminally Protected Interests,* 4 DUQUESNE U. L. REV. 345, 413 (1966).

crimes. First, it forces an inquiry into precisely what bad effects are feared; that is the harm to others. Second, it focuses attention on the effects of subjecting the conduct to criminal prohibition. Finally, and most importantly from the civil liberties perspective, it raises the critical question concerning the appropriate limits of public policy as defined by the Constitution. The balance of this note will pursue these issues through a discussion of specific problem areas in victimless crimes.

III. Addressing the Threshold Question

A. *The Objectives of Victimless Crime Statutes: Unfulfilled Goals*

Prostitution is one of the perennial focal points of the victimless crimes debate. Among the asserted "bad effects" justifying legal measures against the oldest profession are its promotion of secondary crime and the link between prostitution and venereal disease. The advocates of legal proscription also cite the positive interests fostered by such laws. These interests basically reduce to a humanistic concern for the prostitute, the exploited customer, and the prostitute's children.[21]

However, an examination of the actual impact of prostitution laws points to the fact that prohibitive legislation has not effectively met any of these objectives. As John Decker points out, "When prostitution is suppressed by the penal law, it is not eliminated, it is merely dispersed into other areas."[22] As a result, prostitutes continue to be assaulted and beaten.[23] Drug addiction[24] and venereal disease[25] continue to an alarming degree. The children of the prostitute are seldom given adequate care.[26]

Nor does prohibition effect a reduction in secondary crime. Prostitutes themselves often commit crimes against their customers, in some instances resulting in beatings and murders.[27] A study of New York streetwalkers, for example, showed that 40 per cent of those arrested had records of previous arrests for crimes besides prostitution, including drug offenses, burglary, larceny, robbery, and homicide.[28]

Laws prohibiting the use of drugs are plagued by similar difficulties. As in the case of prostitution, the rigorous enforcement of drug laws is often counterproductive in controlling actual direct injury to the individual and society. For example, the causal connection between the prohibition of drug traffic, illicit street prices, and secondary crime have been well-documented.[29]

21 *See* Decker, *supra* note 1, at 48.
22 *Id.*
23 *See* George, *Legal, Medical and Psychiatric Considerations in the Control of Prostitution,* 60 MICH. L. REV. 717, 718 (1962).
24 *See* Thornton, *Organized Crime in the Field of Prostitution,* 46 J. CRIM. L.C. & C.S. 775 (1956).
25 *See* M. PLOSCOWE, SEX AND THE LAW 264 (1951).
26 *See* Lindsay, *Prostitution—Delinquency's Time Bomb,* 16 CRIME & DELINQUENCY 153 (1970).
27 *See* Decker, *supra* note 1, at 48 and references therein.
28 *See* E. KIESTER, CRIMES WITH NO VICTIMS 37-38 (1972) [hereinafter cited as KIESTER].
29 AMERICAN BAR ASSOCIATION SPECIAL COMMITTEE ON CRIME PREVENTION AND CONTROL, REPORT. NEW PERSPECTIVES ON URBAN CRIME 26 (1972) [hereinafter cited as ABA REPORT]; *see also* Decker, *supra* note 1, at 47.

Moreover, the laws against prostitution, drugs, and gambling have created a situation in which a tremendous organized crime industry thrives on satisfying a customer demand that cannot be met legitimately.[30] This observation can be supported historically by citing the effect of the prohibition imposed by the eighteenth amendment.[31] Not only was the law virtually ineffective in reducing per capita alcohol consumption,[32] but it created an extensive bootlegging industry which served as the basis of organized crime throughout the era.[33]

These criticisms variously express the fact that the passage and enforcement of many victimless crimes laws actually *create* victims by forcing the activities underground into an atmosphere which is conducive to secondary crime. In other words, the basic problem is not the bad effect of the conduct in question, but the intolerable effect of its prohibition. Thus, it seems clear that far from preventing harm to others, the laws tend to actually inflict it.

B. *The Effects of Criminalization: A High Price to Pay*

Further objections to victimless crimes relate to what the Honorable Sol Wachtler describes as their "high cost."[34] This cost derives from five basic sources: the financial and judicial burdens they impose, the logistical and constitutional problems of enforcement, and the ineffective nature of the laws themselves.

According to one estimate, California alone spent $100 million during 1970 to enforce the laws against the possession of marijuana.[35] The San Francisco Committee on Crime computed that in 1969 it cost the city a minimum of $893,000 for arresting and jailing drunks, and $379,000 for dealing with prostitutes.[36] On a national scale, it was estimated that in 1970 victimless crimes accounted for $20 billion of the nation's $51 billion annual crime bill.[37]

A second cost of victimless crimes is the critical burden they place on the already over-burdened criminal justice system. American courts are confronted with the serious problem of an increasing volume of criminal cases which they are ill-equipped to accommodate. In 1970, the Los Angeles County Superior Court handled 32,419 felonies, almost double the number before that same court just five years earlier.[38] During that same period its felony backlog increased nearly two and one-half times, from 2,761 cases in 1966 to 6,559 in 1970.[39] Courts across the nation report similar difficulties.[40]

One of the principal causes of this increasing backlog is the great number of petty offenses which consume the courts' time. These consist primarily of vari-

30 *See* Smith & Pollack, *supra* note 2, at 28.
31 *Id.*
32 *Id.*
33 *Id.*
34 Wachtler, *The High Cost of Victimless Crimes,* 28 RECORD N.Y. BAR ASS'N 357 (1973) [hereinafter cited as Wachtler].
35 KIESTER, *supra* note 28, 4-5.
36 THE SAN FRANCISCO COMMITTEE ON CRIME, A REPORT ON NON-VICTIM CRIME IN SAN FRANCISCO (April 26, 1971).
37 KIESTER, *supra* note 28, at 5.
38 ABA REPORT, *supra* note 29, at 67.
39 *Id.*
40 *Id.*

ous victimless offenses, a fact substantiated by the President's Commission on Law Enforcement and Administration of Justice.[41] As President Nixon declared in 1971:

> We have to find ways to clear the courts of the endless stream of "victimless crimes" that get in the way of serious consideration of serious crime.[42]

Added to this judicial cost is the misallocation of enforcement resources. The FBI reported that in 1971 there were 1.8 million arrests for the "crime" of public drunkenness.[43] This represents a substantial diversion of police time, personnel, and resources, at a time when the volume of serious crime continues to increase.[44] To many observers, such statistics provide proof that the nation's crime-plagued cities can no longer afford to regulate public morality at the expense of public safety.[45]

The Knapp Commission Report on Police Corruption[46] suggests yet another problem posed by victimless crimes. The Report recommended that criminal sanctions against various victimless crimes should be repealed because of the correlation between such laws and corrupt police practices. The Commission explained that these laws are particularly difficult to enforce because the "victims" of the crimes are usually willing participants and seldom complain to the police. Consequently, if a police officer, for whatever reason, decides to condone a violation, he need only fail to report it. Such a situation, concluded the Commission, is "an invitation to corruption."[47]

The inherent difficulty of enforcing victimless crimes laws also raises serious civil liberties considerations. Since there are no victims available to testify for the state, victimless crimes pose unique problems of enforcement. As Professor Packer characterizes the problem: "To the difficulties of apprehending a criminal when it is known he has committed a crime are added the difficulties of knowing that a crime has been committed."[48] Moreover, the lack of a complaining witness usually places the entire burden of producing evidence on law enforcement agencies. These two facts have led to "creative" enforcement techniques which have made victimless crimes the greatest single source of civil liberties' violations.[49]

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41 *See* THE PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT. THE COURTS 106 (1967). *See also* the Commission's general report: THE CHALLENGE OF CRIME IN A FREE SOCIETY (1967).

42 Address by President Richard M. Nixon, The National Conference of the Judiciary (March 11, 1971).

43 Derived from Federal Bureau of Investigation, *Uniform Crime Reports* (1971).

44 *Id.*

45 *See* NEWSWEEK, Nov. 29, 1971, at 83.

46 COMMISSION TO INVESTIGATE ALLEGATIONS OF POLICE CORRUPTION AND THE CITY'S ANTI-CORRUPTION PROCEDURES, COMMISSION REPORT (1972) (KNAPP COMMISSION REPORT).

47 *Id.* at 18.

48 PACKER, *supra* note 10, at 151.

49 *E.g.*, Beck v. Ohio, 379 U.S. 89 (1964) (gambling); Ker v. California, 374 U.S. 23 (1963) (narcotics); Wong Sun v. United States, 371 U.S. 471 (1963) (narcotics); Silverman v. United States, 365 U.S. 505 (1961) (gambling); Sherman v. United States, 356 U.S. 370 (1958) (narcotics); Irvine v. California, 347 U.S. 128 (1954) (gambling); On Lee v. United States, 343 U.S. 747 (1952) (narcotics); Rochin v. California, 342 U.S. 165 (1952) (nar-

Prostitutes and drug users, for example, are frequently the objects of entrapment by plainclothesmen.[50] Further, police records indicate that an incredible number of gamblers and drug possessors "drop" gambling slips and narcotics at the mere approach of a policeman.[51] This so-called "dropsie evidence" recorded on the police records is frequently a euphemism for an illegal search,[52] a fact suggested by the dramatic increase in the incidence of police "dropsie" reports since 1961 when the United States Supreme Court banned the admission of illegally seized evidence in *Mapp v. Ohio*.[53] Thus, the result appears to be a trade-off between victimless crimes legislation and the protection of civil liberties; that is, effective enforcement is inversely proportional to constitutional guarantees. Norval Morris terms the net result of this phenomenon surrounding the enforcement of victimless crime laws a general "enervation of the Constitution":

> Police work is almost by definition more difficult in cases of victimless crime; the best evidence is lacking, no injured citizen complains to the police and serves as a witness. The police must therefore "develop" cases with unreliable informers, undercover work, tapping and bugging, entrapment and decoy methods, swift seizure of evidence and forceful interrogation. Drug cases account for most of our constitutional difficulties with search and seizure . . . gambling cases account for most instances of wiretapping and other invasions of privacy. Attempting to balance, in these tilted scales, constitutional concerns for privacy and due process with a concern for police effectiveness has lessened for the rest of us the protection of our constitutional rights. In the long run, this enervation of the Constitution may not be the least of the harms flowing from the overreach of the criminal law.[54]

A second constitutional question raised by enforcement techniques centers on police harassment of suspected offenders. Particularly in the enforcement of laws against gambling and prostitution, police tactics are often aimed not at prosecution and conviction but at making life difficult for suspects. Such a practice is objectionable because it effectively constitutes punishment without a determination of guilt, raising due process questions.[55] Although the practice has not, as yet, been challenged on these grounds, it seems apparent that the

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cotics); Nardone v. United States, 302 U.S. 379 (1938), 308 U.S. 338 (1939) (smuggled alcohol); Sorrels v. United States, 287 U.S. 435 (1932) (gambling); Lefkowitz v. United States, 285 U.S. 452 (1932) (prohibition); Olmstead v. United States, 277 U.S. 438 (1928) (prohibition).

Citing these and other cases, Professor Sanford H. Kadish points out that the judicial response to these violations has been the imposition of severe restrictions on police enforcement techniques in general. Kadish, *The Crisis of Overcriminalization*, 7 AM. CRIM. L.Q. 17, 26 (1968). This could be termed an additional "cost."

50 *See* SKOLNICK, JUSTICE WITHOUT TRIAL chapter III (1966).

51 *See* Smith & Pollack, *supra* note 2, at 28-29; *see also* KIESTER, *supra* note 28, at 11.

52 *Id. See also* Comment, *Police Perjury In Narcotics "Dropsy" Cases: A New Credibility Gap*, 60 GEO. L.J. 507 (1971).

53 367 U.S. 643 (1961). See note, *Effect of Mapp v. Ohio on Police Search-and-Seizure Practices in Narcotics Cases*, 4 COLUM. J.L. & SOC. PROBLEMS 87 (1968).

54 Morris, *Crimes Without Victims: Law as a Busybody*, CURRENT, June 1973, at 7 [hereinafter cited as Morris].

55 W. LAFAVE, ARREST: THE DECISION TO TAKE A SUSPECT INTO CUSTODY 450 (1965); PACKER, *supra* note 10, at 293.

basis of such a challenge exists in the case of systematic harassment of an individual or group of individuals.

Finally, victimless crimes offenses are subject to a third constitutional challenge which lies in the apparently discriminatory manner in which many of the laws are enforced. Again, because of their complainantless nature, the enforcement of such laws is largely discretionary. As a result the laws are usually enforced, if at all, on terms that suggest racial and class bias.[56] Almost 70 per cent of those arrested on gambling charges are black, well out of proportion to the country's black population.[57] With respect to prostitution, during one "crackdown" period in New York only 6 per cent of the prostitution arrests were of customers;[58] furthermore, the penalties imposed are generally far greater for the prostitute than for those using her services.[59] In addition, studies of prostitution reveal that one segment of the prostitution population—the "call girls" who serve upper class customers, are generally ignored by law enforcement officers for political reasons.[60]

If, in fact, the police are deliberately applying these laws in this manner, it seems clear that their action violates the equal protection clause of the fourteenth amendment.[61] However, the validity of many of these allegations must be eyed with caution. It seems apparent that the prostitute would be subject to a higher incidence of arrest simply because she is much more "visible" than her customer. The same is true of the difference between the "call girl" and the common streetwalker. Since she is on the street all night, the streetwalker is much more prone to arrest than her "upper class" sister, whose services can be solicited discreetly. The apparent disparity of punishment between prostitutes and their customers may be explained by reflecting on the relative number of "first offense" prostitutes compared with "first offense" customers; the conclusion is apparent. Similarly, different gambling practices, drinking habits and habitations, and assorted drug use all have characteristic probabilities of arrest that are inherent. It seems at least plausible that Richard Neuhaus apprehends the central problem manifest in such "de facto" discrimination: "If there is injustice here, it is rooted not in the law but in a profoundly unequal economic system. How that can be corrected is another matter."[62]

But there remains the possibility that the discriminatory enforcement is, in fact, engendered by political and social considerations cognizantly undertaken by enforcement officials. If so, their action is undoubtedly in violation of the Constitution.

The last and most pressing cost of victimless crimes lies in the ineffective nature of the laws themselves. After discussing the other costs of victimless crimes, the San Francisco Committee on Crime concluded: "If these expendi-

56 Morris, supra note 54, at 7.
57 *Id.*
58 Robey, *Politics and Criminal Law: Revision of New York State Penal Law on Prostitution,* 17 Soc. Prob. 83, 97 (1969).
59 *Id.*
60 *Id. See also* Hobbins, Huser, & Johnson, Criminal Law, Annual Survey of American Law 1971/72 (Part 1) 93 (1972).
61 *See, e.g.,* Yick Wo v. Hopkins, 118 U.S. 356 (1886); United States v. Falk, 479 F.2d 616 (7th Cir. 1973).
62 Newhaus, *supra* note 19, at 284.

tures achieved some social or public good, they should be gladly borne. But they do not."[63]

A case in point is the "Washington Six" report, a special report on six habitual drunks in Washington, D.C.[64] The report showed that these six offenders had been arrested a total of 1,409 times and had collectively served 125 years in the city's penal institutions. But after all of this, they were still chronic drunks, offenders who would continue the same "revolving door" process.

Judge Wachtler identifies the crux of this problem by noting that enforcement of the laws has no deterrent or rehabilitative effect on the habitual offenders, who characterize many victimless crimes.[65] "Those who are incapable of changing their behavior voluntarily," he points out, "are unaffected by our criminal laws."[66] Thus, Judge Wachtler concludes that, in essence, "they are being oppressed by society, little more—and we are accomplishing nothing."[67]

In fact, by enforcing some of the laws, the condition of the offender may actually be worsened. American penal institutions have achieved general notoriety as "schools of crime."[68] It is especially paradoxical that many offenders should be "punished" by subjecting them to a medium which is perhaps best suited to the continuance of their particular crime. The prison drug culture is a case in point.[69] Similarly, the appropriateness of placing a homosexual offender in prison must be questioned. As Justice Craven of North Carolina ironically pointed out in *Perkins v. North Carolina*:[70]

> Putting [the accused] into the North Carolina prison system is a little like throwing Brer Rabbit into the brierpatch. Most doctors who have studied homosexuality agree that prison environment . . . aggravates and strengthens homosexual tendencies and provides unexcelled opportunity for homosexual practice.[71]

The observations of Judges Wachtler and Craven go beyond the threshold question of harm to the second level of inquiry: the appropriate limits of public policy. The fact that many offenders are being oppressed by victimless crime laws raises serious questions concerning the constitutionality of the laws themselves. The balance of this inquiry will survey these constitutional issues.

IV. Beyond the Threshold Question

After addressing the threshold question of requisite harm, one encounters four related questions concerning the criminalization of victimless offenses: the limits of public policy, the right to privacy, the aspect of cruel and unusual

63 SAN FRANCISCO COMMITTEE ON CRIME, A REPORT ON NON-VICTIM CRIME IN SAN FRANCISCO (April 26, 1971).
64 Reported in NEWSWEEK, Nov. 29, 1971, at 83.
65 Wachtler, *supra* note 34, at 359.
66 *Id.*
67 *Id.*
68 *See, e.g.*, NATIONAL ADVISORY COMMISSION ON CRIMINAL JUSTICE STANDARDS AND GOALS, A NATIONAL STRATEGY TO REDUCE CRIME 132 (1973).
69 *See generally* R. GOLDFARB, JAILS: THE ULTIMATE GHETTO (1975).
70 234 F. Supp. 333 (W.D.N.C. 1964).
71 *Id.* at 339.

punishment, and the right to treatment. These concerns go beyond the wisdom of criminalization to the constitutionality of the laws themselves.

A. *Substantive Due Process: The Limits of Public Policy*

One of the central tenets of any free society is that government may act only for valid public purposes. In *West Coast Hotel v. Parrish,*[72] the United States Supreme Court enunciated this principle as constitutional doctrine. In *Parrish,* the Court held that governmental power is limited to activities impinging on the public health, safety, morals, and general welfare. The exercise of governmental authority to effect these purposes is generally referred to as the police power.

Victimless crime statutes are restrictions imposed on individual conduct under the guise of the police power. While this power is one of the broadest possessed by the state, its exercise is not unlimited. The fixed limit and basic standard by which the validity of an exercise of the police power is measured is one of "reasonableness," a requirement which derives from the basic constitutional guarantee of due process.[73] This due process requirement of reasonableness has beeen interpreted as establishing two conditions which must be satisfied to justify the exercise of the police power over an individual: first, it is necessary that the interests of the public health, safety, morals, or general welfare require such interference; and, second, that the legislative means adopted are reasonably necessary for the accomplishment of these purposes and not unduly oppressive upon the individual.[74] If a police regulation fails in any respect to satisfy these requirements, it has long been held that it is the duty of a reviewing court to give effect to the Constitution and overturn the statute.[75]

Since the 1930's the Court has evidenced increasing reluctance to entertain a substantive due process argument that would use the due process clause to strike down economic or social welfare legislation.[76] Nevertheless, with respect to legislation which infringes upon the personal liberty of the individual, the Court has continued to require a demonstrable nexus between the proscription and the public interest.[77] Although it is difficult to delineate with precision the line between the protected autonomy of the individual and the authority of the state to enact laws in the general interest of the public, it is firmly established that the police power may not unreasonably invade private rights.[78] The state thus has no power to arbitrarily invade the personal rights and liberty of the individual citizen.[79] To justify such an intrusion, some public necessity must be demonstrated.[80]

72 300 U.S. 379 (1937).
73 *See* Mutual Loan Co. v. Martell, 222 U.S. 225 (1911).
74 *See* Goldblatt v. Hempstead, 369 U.S. 590 (1961).
75 Fairmont Creamery Co. v. Minnesota, 274 U.S. 1 (1926); Lochner v. New York, 198 U.S. 45 (1904).
76 *See, e.g.,* Ferguson v. Skrupa, 372 U.S. 726 (1963).
77 *See* Doe v. Bolton, 410 U.S. 179 (1973); Roe v. Wade, 395 U.S. 621 (1969); Griswold v. Connecticut, 381 U.S. 479 (1965); Bates v. City of Little Rock, 361 U.S. 516 (1964). *See also* Packer, *The Aims of the Criminal Law Revisited: A Plea For a New Look at Substantive Due Process,* 44 S. CAL. L. REV. 490 (1971).
78 Lochner v. New York, 198 U.S. 45 (1904).
79 *Id.*
80 *See* Chicago Park Dist. v. Canfield, 370 Ill. 447, 19 N.E.2d 376 (1939).

Thus, in *Bates v. City of Little Rock*,[81] the Supreme Court asserted that when it is shown that state action threatens significantly to impinge upon constitutionally protected freedom, it becomes the duty of the Court to determine whether the action bears a reasonable relationship to the governmental purpose asserted as its justification. The Court went on to hold that: "Where there is significant encroachment upon personal liberty, the State may prevail only upon showing a subordinating interest which is compelling."[82]

These limitations on the proper scope of the police power raise constitutional questions concerning victimless crime statutes. As previously discussed,[83] it is difficult if not impossible to demonstrate any compelling state interest which justifies the imposition of the criminal sanction in many such cases. As John Decker asks, "How can such acts as homosexual conduct between two consenting adults be cloaked in public interest ramifications?"[84] Moreover, even if public interest ramifications are discernible, it is by no means clear that criminal prohibition is reasonably necessary for the accomplishment of the asserted governmental purposes underlying the laws. Finally, it does seem clear that the laws are unduly oppressive as applied to many offenders. The ineffective nature of the laws as well as their counterproductiveness attests to these facts. Decriminalization is thus not only the first step in framing a more rational and effective public policy in the area of victimless crimes, but also the first step towards a course of dealing in the area which is in substantive harmony with the Constitution.

More recently, however, constitutional challenges to victimless crimes have been on narrower grounds than the inherent limitations of the police power. These arguments stem from recent judicial decisions emphasizing particular rights which are constitutionally reserved to the individual.

B. *The Right to Privacy*

An area of increasing controversy in the victimless crimes debate derives from the recent judicial development of a constitutionally protected right to privacy. The private and consensual nature of many victimless offenses raises an intuitive objection to criminal prohibition of such activity, and recent judicial refinement of the right to privacy has given such objections constitutional impact.

In *Griswold v. Connecticut*,[85] the Supreme Court reversed the conviction of defendants who gave information, instruction, and medical advice to married persons concerning birth control techniques. In reversing the conviction, the Court invalidated a Connecticut statute of Civil War vintage which banned the use of contraceptives. Mr. Justice Douglas, who delivered the opinion of the Court, reasoned that the statute was unconstitutional since it prohibited activity which is "within the zone of privacy created by constitutional guarantees."[86] Thus, the Court extended express constitutional recognition to "the right to be

81 361 U.S. 516 (1964).
82 *Id.* at 524.
83 *See* text accompanying notes 21-33, *supra.*
84 Decker, *supra* note 1, at 55.
85 381 U.S. 479 (1965).
86 *Id.*

left alone—the most comprehensive and the right most valued by civilized man."[87]

Justice Douglas noted that while the Constitution does not expressly recognize such a right, "that specific guarantees in the Bill of Rights have *penumbras,* formed from those guarantees that help give them life and substance."[88] That is, the specifically enumerated rights give rise to "penumbras" creating "zones of privacy," and therein lie the bases of a distinct, constitutionally protected right—the right of privacy. The ninth amendment's reservation of "unenumerated rights," he added, further suggested this interpretation.

The Supreme Court further extended the concept of constitutionally protected privacy in several later decisions. *Stanley v. Georgia,*[89] decided in 1969, involved the conviction of a person for possessing obscene movies in his home. The Court found this to be an unconstitutional invasion of privacy, stating that "whatever may be the justifications for other statutes regulating obscenity, we do not think they reach into the privacy of one's own home."[90] The Court later made clear, however, in *Paris Adult Theatre v. Slaton,*[91] that this doctrine did not protect the public exhibition of obscene movies.

In *Roe v. Wade,*[92] the Court concluded that the constitutional right to privacy "is broad enough to encompass a woman's decision whether or not to terminate her pregnancy."[93] Although the Court noted that the right involved is not unlimited, the decision further illustrates that there are definite areas of private conduct between consenting adults which are constitutionally beyond the reach of criminal statutes.

Moreover, the *Griswold* Court emphasized that a governmental purpose to control or prevent activities may not be achieved by a means which is unnecessarily broad and thereby invades the area of protected freedom.[94] These principles suggest the constitutional difficulties inherent in laws which prohibit prostitution, gambling, certain sexual practices, and private possession of drugs.

In some instances, lower courts have demonstrated receptiveness to this rationale. In *State v. Kantner,*[95] three of the five justices of the Hawaii Supreme Court voiced the view that a state statute prohibiting the private use of marijuana was unconstitutional. The constitutionality of the statute was upheld only because one judge, Justice Abe, felt that the issue had been improperly raised. More recently, the Supreme Court of Alaska did in fact find a similar law unconstitutional as an impermissible invasion of privacy.[96]

The principles embodied in these cases are applicable to other victimless crimes. In *Cotner v. Henry,*[97] the United States Court of Appeals for the Seventh Circuit vacated a conviction for sodomy. The defendant had entered a guilty

87 Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting).
88 381 U.S. at 484 (emphasis supplied).
89 394 U.S. 557 (1969).
90 *Id.* at 565-66.
91 413 U.S. 49 (1973).
92 410 U.S. 113 (1973).
93 *Id.* at 153.
94 381 U.S. at 479.
95 53 Hawaii 327, 493 P.2d 306, *cert. denied,* 409 U.S. 948 (1972).
96 Ravin v. State, 537 P.2d 494 (Alaska 1975).
97 394 F.2d 873 (7th Cir.), *cert. denied,* 393 U.S. 847 (1968).

plea to the charge but had challenged the constitutionality of the criminal statute as a violation of his marital right of privacy. In reaching its decision, the court noted that there had been no mention of force in the complaint, and that the state had made no clear showing of a compelling state interest in preventing the act of sodomy. It concluded that: "The import of the *Griswold* decision is that private, consensual, marital relations are protected from regulation by the state through the use of a criminal penalty."[98]

In 1972, the Supreme Court made clear that the right to privacy enunciated in *Griswold* was not limited to the marital relationship. In *Eisenstadt v. Baird,*[99] the Court held that a Massachusetts statute prohibiting the use of contraceptives by unmarried couples was an unconstitutional denial of equal protection as well as a constitutionally impermissible invasion of privacy. This decision made clear that the focus of the right to privacy is not upon the marital status of the participants, but upon the private, consensual nature of the prohibited conduct. Thus, in *Lovisi v. Slayton,*[100] a Virginia federal district court relied on *Eisenstadt* for the view that:

> It is not the marriage vows which make intimate and highly personal the sexual behavior of human beings. It is, instead, the nature of sexuality itself or something intensely private to the individual that calls forth constitutional protection. While the condition of marriage would doubtless make more difficult an attempt by government to justify an intrusion upon sexual behavior, this condition is not a prerequisite to the operation of the right of privacy.[101]

This expanded view of the right to privacy suggests that other types of private, consensual adult sexual behavior may be similarly beyond the reach of criminal prohibition. In *United States v. Binns,*[102] for example, the District of Columbia Superior Court struck down a statute prohibiting solicitation for "lewd or immoral conduct." In reaching its decision, the court cited, among other reasons, that no compelling state interest had been advanced to justify the state's invasion of the privacy of the prostitutes and homosexuals whose activities were proscribed. Similarly, the Maryland federal district court has suggested that the prohibition of private homosexual conduct might be both an infringement of liberty protected by due process and a violation of the right to privacy, although it denied relief to a homosexual school teacher on other grounds.[103]

In sum, it is apparent that the right to privacy will have a profound impact on the entire spectrum of victimless crimes. Many observers have concluded that the application of criminal laws to conduct carried on in private is constitutionally suspect. An increasing willingness of the courts to view other victimless offenses in the light of *Griswold* and its progeny will undoubtedly transform this suspicion into holding.

98 *Id.* at 875; *see also* Harris v. State, 457 P.2d 638 (Alaska 1969).
99 405 U.S. 438 (1972).
100 363 F. Supp. 620 (E.D. Va. 1973) (however, the court ruled that the defendants had waived their right of privacy by allowing photographs of their acts of sodomy to fall into the hands of their children).
101 *Id.* at 625.
102 11 CRIM. L. RPTR. 2335 (1972).
103 Acanfora v. Board of Educ., 359 F. Supp. 853 (D. Md. 1973), *aff'd on other grounds,* 491 F.2d 498 (4th Cir.), *cert. denied,* 419 U.S. 836 (1974).

C. *Cruel and Unusual Punishment*

A second area in which victimless crimes conflict with constitutionally protected rights lies in the eighth amendment's prohibition against "cruel and unusual punishment." Traditionally, this provision has been interpreted as prohibiting sanctions which involve unnecessary cruelty and pain,[104] or punishment which is substantially disproportionate to the offense for which it was imposed.[105] More recently, the provision has been interpreted as a bar to sanctions which are arbitrarily or not usually imposed.[106] It is significant to note that the punishment of victimless crimes has been challenged on each of these grounds.

1. Proportionality and Arbitrariness

In *Weems v. United States*,[107] the Supreme Court struck down, excessive under the eighth amendment, a 15-year sentence for falsifying public documents. In reaching this decision, the Court noted that other existing crimes, including several degrees of homicide and suspicion of treason, were not punished as severely. This fact, observed the Court, violated the basic "precept of justice that punishment for crime should be graduated and proportioned to offense."[108]

Similar objections have been raised concerning the punishments applied to many victimless crimes. As Chief Judge Craven posed the question in *Perkins v. North Carolina*:[109]

> Is there any public purpose served by a possible sixty year maximum or even five year minimum imprisonment of the occasional or one-time homosexual . . . ? Are homosexuals twice as dangerous to society as second degree murderers—as indicated by the maximum sentence for each offense?[110]

Although *Perkins* was decided on other grounds, there is an increasing tendency by the courts to answer these questions in the negative.

Recent decisions by the Michigan Supreme Court illustrate this fact. In *People v. Sinclair*,[111] the court reversed the conviction of a defendant who had been sentenced to 9½ to 10 years in prison for possession of marijuana. Two justices voted for reversal expressly because the sentence constituted cruel and unusual punishment.

In a later decision, *People v. Lorentzen*,[112] the Michigan court held that a 20-year minimum term of imprisonment for the sale of marijuana was cruel and unusual punishment. The court compared this sanction with those imposed for similar offenses under Michigan laws prohibiting the illicit sale or distribution of unlawful substances, as well as with the punishment imposed for more serious

104 *See, e.g.*, Wilkerson v. Utah, 99 U.S. 130 (1878).
105 *See, e.g.*, Weems v. United States, 217 U.S. 349 (1909).
106 Furman v. Georgia, 408 U.S. 238 (1972).
107 217 U.S. 349.
108 *Id.* at 367.
109 234 F. Supp. 333.
110 *Id.* at 340.
111 387 Mich. 91, 194 N.W.2d 878 (1972).
112 387 Mich. 167, 194 N.W.2d 827 (1972).

offenses in Michigan. Finally, the court took notice of the fact that other states had recently reduced their drug penalty statutes. As a result of this analysis, the court concluded that the statutory penalty imposed upon Lorentzen was so grossly disproportionate to the offense that it violated both the federal and state prohibitions against cruel and unusual punishment.

Similarly, the Supreme Court's decision in *Furman v. Georgia*[113] has focused judicial concern on sentencing procedures which produce arbitrary and inequitable results. In *People v. McCabe*,[114] for example, the Illinois Supreme Court held that the classification of marijuana under the Illinois Narcotic Control Act rather than under the Drug Abuse Control Act was arbitrary and a denial of equal protection. The basis of the court's decision was the fact that the Narcotic Control Act provided for a mandatory 10-year sentence, whereas under the Drug Abuse statute a one-year maximum sentence was imposed.

Nor is this concern limited to drug cases. Arbitrariness in sentencing is also a matter of increasing comment in prostitution, gambling, and public drunkenness, with critics pointing out that the sentence imposed on particular defendants often suggests racial and class bias.[115]

2. Unnecessary Cruelty

Perhaps the most serious constitutional deprivation inflicted on many victimless crimes offenders is raised by the Supreme Court's decision in *Robinson v. California*.[116] At issue in that case was a California statute which made it a criminal offense to be addicted to narcotics; violations were punishable by a mandatory ninety-day jail sentence.

Robinson was arrested in Los Angeles by police, whom he told that he used narcotics; his arms bore what appeared to be hypodermic needle marks. He was charged with a violation of the statute on these facts alone and sentenced to jail. On appeal, Robinson's counsel successfully raised the "cruel and unusual punishment" issue on the grounds that the law did not require proof of purchase or use of the drugs. Accepting this argument for the majority, Mr. Justice Stewart declared the statute unconstitutional as a violation of the eighth and fourteenth amendments. As he viewed it, the statute fell into the same category as one purporting to make it a criminal offense "for a person to be mentally ill, or a leper, or to be afflicted with venereal disease."[117] In applying the pertinent provision of the eighth amendment, he held:

> [A] state which imprisons a person thus afflicted as a criminal, even though he had never touched any narcotic drug within the state or been guilty of any irregular behavior there, inflicts a cruel and unusual punishment in violation of the Fourteenth Amendment.[118]

In a significant concurring opinion, Mr. Justice Douglas regarded Robinson's

113 408 U.S. 238 (1972).
114 49 Ill. 2d 338, 275 N.E.2d 407 (1971).
115 *See* text accompanying notes 56-60, *supra*.
116 370 U.S. 660 (1962).
117 *Id.* at 666.
118 *Id.* at 667.

conviction of being an addict, rather than his confinement, as the specific "cruel and unusual punishment."

The Court's decision in *Robinson* appeared to be a watershed for opponents of victimless crimes, who argued that its rationale should be extended to other offenses which constitute "conviction by force of habit."[119] Although the lower courts have maintained a cautious attitude toward such arguments, the extension of *Robinson* does have adherents on the bench. For example, although the petition in *Lloyd v. United States*[120] was denied, Chief Judge Bazelon dissented that the principles set forth in *Robinson* should be extended to include possession of heroin. Judge Bazelon synthesized the problem by asking "whether punishment of an addict . . . whose purchase and possession of narcotic drugs is explained entirely by his need for them, is cruel and unusual punishment."[121] In partial response to this question, his dissent continues:

> [O]n the one hand, the *Robinson* opinion is replete with dicta affirming the right of the states to punish possession or actual use of narcotic drugs in unauthorized situations. On the other, I am not able to distinguish in any meaningful sense the punishment of an addict and the punishment of an addict for buying and possessing the drugs his body compellingly craves.[122]

This same concern was voiced by Chief Justice Finley of the Washington Supreme Court in *Seattle v. Hill.*[123] Finley wrote in dissent of the court's affirmance of appellant's conviction for public drunkenness, stating: "I can see no rational basis for disallowing punishment because they are ill but approving their punishment for involuntarily exhibiting a symptom of their illness."[124]

The principles set forth in these dissenting opinions were ultimately accepted in two United States Courts of Appeals cases dealing with public intoxication convictions of chronic alcoholics. In *Easter v. District of Columbia,*[125] the District of Columbia Circuit reversed the appellant's conviction on the grounds that one who is a chronic alcoholic cannot have the necessary *mens rea* to be held criminally responsible for being drunk in public. In *Driver v. Hinnant,*[126] the Court of Appeals for the Fourth Circuit termed alcoholism an "addiction," and reversed Driver's conviction for public drunkenness. Judge Bunyan, writing for the majority, asserted that:

> *Robinson v. California* sustains if not commands the view we take . . . the California statute criminally punished a "status"—drug addiction, while the North Carolina act punishes an involuntary symptom of a status—public intoxication.[127]

119 *See, e.g.,* Diamond, *Conviction by Force of Habit,* 1 FORDHAM URB. L. J. 395 (1973).
120 343 F.2d 242 (D.C. Cir. 1964).
121 *Id.* at 244 (Bazelon, J., dissenting).
122 *Id.* at 245 (Bazelon, J., dissenting).
123 72 Wash. 2d 786, 435 P.2d 692 (1967).
124 *Id.* at 816, 435 P.2d at 710 (Finley, J., dissenting).
125 361 F.2d 50 (D.C. Cir. 1966).
126 356 F.2d 761 (4th Cir. 1966).
127 *Id.* at 765.

These decisions seemed to signal the advent of a major constitutional challenge to the victimless crime of public drunkenness in cases involving chronic alcoholics. But in 1968 the Supreme Court reversed this trend. In *Powell v. Texas,*[128] the Court expressly refused to extend the *Robinson* principle to chronic alcoholics convicted of public drunkenness. The Court held that a Texas statute making it a crime to be "found in a state of intoxication in any public place" could not be *ipso facto* held "irrational" in line with the *Robinson* reasoning.[129] Mr. Justice Marshall, writing for the majority, asserted that *Robinson* did not require reversal since Powell was not "convicted for being a chronic alcoholic, but for being in public while drunk on a particular occasion."[130]

However, the decision of the Court in *Powell* left many important constitutional questions concerning public intoxication unanswered. In his concurring opinion, for example, Mr. Justice White noted that had the trial record been sufficient to support the conclusion that Powell was a chronic alcoholic with a compulsion not only to drink in excess but also to frequent public places when intoxicated, the eighth amendment might well have forbidden the conviction.[131]

Moreover, the four dissenting justices who supported the extension of *Robinson* voiced concern that the majority's holding in *Powell* failed to address the central constitutional question presented. The dissenting opinions were characterized by that of Mr. Justice Fortas, who asserted that the distinction drawn between *Robinson* and the instant case was unconvincing:

> Criminal penalty may not be inflicted upon a person for being in a condition he is powerless to change. . . . [T]he essential constitutional defect here is the same as *Robinson,* for in both cases the particular defendant was accused of being in a condition which he had no capacity to change or avoid. . . . [A] person may not be punished if the condition essential to constitute the defined crime is a part of the pattern of his disease and is occasioned by a compulsion symptomatic of his disease.[132]

Thus, despite the *Powell* decision, the ultimate impact that *Robinson v. California* will have on such offenses as public drunkenness is uncertain. Constitutional questions in the area clearly remain, and as medical and psychological data concerning alcoholism and drug addiction become more refined, the courts may be less reluctant to give an expansive reading to the eighth amendment.

D. *The Right to Treatment*

The immediate constitutional issue raised by "compulsive" or "addictive" behavior is also suggested in *Powell* and *Robinson*: the consideration of the defendant's right to treatment in such cases. As Mr. Justice Douglas pointed out in his concurring opinion in *Robinson,* "Addicts should be cured, not jailed."[133]

128 392 U.S. 514 (1968).
129 *Id.* at 532.
130 *Id.*
131 *Id.* at 552 (White, J., concurring).
132 Id. at 567-69 (Fortas, J., dissenting).
133 370 U.S. 660, 676-78 (1962) (Douglas, J., concurring).

Similarly, Mr. Justice Marshall's majority opinion in *Powell* expressed deep concern over the indefinite sentence permissible in civil commitment proceedings for public manifestation of the disease of alcoholism. He noted that the alcoholic is merely confined until "cured," without any assurance that a cure will be effected.[134]

These comments suggest a nascent judicial recognition of a right to, or at least the state's responsibility for, the systematic treatment of compulsive offenders. Of course, the impact of the recognition of such a right would not be limited to victimless crimes, but as the dicta in *Robinson* and *Powell* illustrate, the need for treatment is most pronounced in the areas of drug abuse and alcoholism.

The Supreme Court has, in fact, taken significant steps in the direction of extending formal recognition to the "right to treatment." In *Jackson v. Indiana,*[135] for example, the unanimous Court held that when an individual is confined under commitment procedures, due process requires that the nature and duration of confinement bear some relation to its purposes. Further, the Court emphasized that its holding requires that the state either justify continued confinement by therapeutic progress or release the patient. In a second case, *Humphrey v. Cady,*[136] the Court termed a sex offender's claim that he was receiving no treatment a "substantial constitutional claim," and noted that the constitutionality of a "defective delinquent" statute must be viewed in terms of the "criteria, procedures, and treatment" afforded.

In the light of these decisions, it seems likely that a "right to treatment" is in the making. The recognition of such a right will have its most profound impact upon victimless offenders who have been "oppressed and little more" for too long, that is, those offenders who cannot voluntarily change their offensive conduct.

Thus, the use of the criminal sanction to prohibit victimless crimes raises many constitutional issues. Quite apart from the practical considerations which recommend decriminalization, there are also constitutional principles which demand it. These are: (1) the inherent limitations on the police power as defined by substantive due process; (2) the right to privacy; and (3) the considerations surrounding the eighth amendment's prohibition of cruel and unusual punishment. Morever, even if criminal prohibition is retained, many victimless offenses raise the question of the "right to treatment."

V. Conclusion

"Victimless crimes" are the best examples of a more general phenomenon which can aptly be termed the over-reach of the criminal law. The criminal justice system is simply not effective in regulating the vast array of conduct presently governed by victimless crime statutes. Moreover, the imposition of the criminal sanction in an attempt to regulate such conduct is, in many respects, constitutionally suspect. As many federal and state studies have suggested, a

134 392 U.S. at 529.
135 406 U.S. 715 (1972).
136 405 U.S. 504 (1972).

thorough reordering of criminal justice priorities is essential to remove victimless crimes from the criminal codes.[137]

In some cases, decriminalization is the only reform needed. The matter of private sexual conduct between consenting adults, whether heterosexual or homosexual, is simply not the state's concern. However, there are areas of conduct in which decriminalization must be accompanied by the establishment of either state regulatory agencies or treatment facilities. Decriminalization of prostitution and gambling requires state regulation of the legitimized "businesses." State regulation of legal prostitution, entailing localization and regular medical inspections, has enjoyed notable success in the state of Nevada.[138] In addition, taxation of the enterprise has provided an additional source of state revenue. Gambling has also long been profitably regulated by that state, and a similar system will soon be in effect in Atlantic City, New Jersey. Similarly, pari-mutuel betting at racetracks represents a limited form of legalized gambling from which some states realized significant revenue.[139] The adoption of state lotteries, and the legalization of off-track betting in New York, further represent means of producing revenue as well as stripping crime syndicates of the gambling monopoly they have enjoyed.[140]

Drug addiction and alcoholism are legitimate social concerns, although the criminal justice system is ill-equipped to deal with the problems presented. Thus, any legalization of the possession of drugs or public intoxication must be accompanied by the establishment of effective treatment facilities.

Some promising alternatives to the criminal sanction have been developed for dealing with the public drunk. The Manhattan Bowery Project, conducted by the Vera Institute of Justice in New York City, is a notable example of a viable treatment alternative. The Institute assembled teams of doctors and social workers which regularly tour the Bowery section of New York seeking out persons who are intoxicated. Such persons are offered the opportunity to commit themselves voluntarily to detoxification centers for treatment. The project has demonstrated that alcoholics will voluntarily remove themselves from the streets when they are offered the opportunity for medical treatment.[141] The St. Louis Detoxification Center also represents the promise of such programs.[142] Similar projects have been effective in combatting the problems posed by drug addiction.[143]

Legislatures must be made aware not only of the problems posed by victimless crime statutes, but of the viable alternative measures which are available.

137 *See generally* NATIONAL ADVISORY COMMISSION ON CRIMINAL JUSTICE STANDARDS AND GOALS, A NATIONAL STRATEGY TO REDUCE CRIME (1973); THE KNAPP COMMISSION REPORT, *supra* note 46; NATIONAL COMMISSION ON MARIHUANA AND DRUG ABUSE, FIRST REPORT. MARIHUANA—A SIGNAL OF MISUNDERSTANDING (1972); THE PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND THE ADMINISTRATION OF JUSTICE, REPORT. THE CHALLENGE OF CRIME IN A FREE SOCIETY (1967).

138 *See* Decker, *supra* note 1, at 44-46.

139 ABA REPORT, *supra* note 29, at 21.

140 *Id.*

141 *See* VERA INSTITUTE OF JUSTICE, TEN YEAR REPORT 1961-1971. PROGRAMS IN CRIMINAL JUSTICE REFORM (1972).

142 *See* LEAA PROJECT REPORT. THE ST. LOUIS DETOXIFICATION AND DIAGNOSTIC EVALUATION CENTER (1970).

143 *See* ABA REPORT, *supra* note 29, at 52-54.

The present policy of many enforcement agencies in not enforcing existing laws or practicing selective enforcement upon only blatant offenders is not enough. Such a policy serves no salutory purpose and has the adverse effect of engendering a disrespect for law in general. Legislative reform is essential, reform which promises a more rational and effective answer to the problems of victimless crime than the broad and indiscriminate sweep of the criminal sanction.

Joseph F. Winterscheid