

North Carolina Central Law Review

Volume 6
Number 2 *Volume 6, Number 2*

Article 11

4-1-1975

Victimless Crime Laws

Evelyn Cheverie

Follow this and additional works at: <https://archives.law.nccu.edu/ncclr>



Part of the [Civil Rights and Discrimination Commons](#), and the [Criminal Law Commons](#)

Recommended Citation

Cheverie, Evelyn (1975) "Victimless Crime Laws," *North Carolina Central Law Review*: Vol. 6 : No. 2 , Article 11.
Available at: <https://archives.law.nccu.edu/ncclr/vol6/iss2/11>

This Comment is brought to you for free and open access by History and Scholarship Digital Archives. It has been accepted for inclusion in North Carolina Central Law Review by an authorized editor of History and Scholarship Digital Archives. For more information, please contact jbeeker@nccu.edu.

CONCLUSION

It should never be the policy of the law to antagonize the relationship of husband and wife. The law should promote harmony within the marital unit, and the rules of law should have as their goal the mitigation of discord within that unit. Sadly, the *Fulp* decision creates a profound pressure upon marriage. It is a complete and utter disservice to the institution. It has caused and will continue to cause dissension in North Carolina homes. Yet, the most confounding part of the *Fulp* rule is that there seems to be no good reason why it should exist. Its only redeeming quality is that it prevents the litigation of stale claims. But this purpose shrinks to insignificance when compared to the potential consequences of forcing one spouse to sue the other. There are already sufficient pressures upon the institution of marriage without the Supreme Court adding another. North Carolinians deserve a rule of law that will foster domestic harmony, not sabotage it.

WILLIAM W. RESPESS, JR.

Victimless Crime Laws

Victimless crime laws have been criticized by many people as misguided and unnecessary. Others have defended these laws as serving an important role in our society. In evaluating our victimless crime laws, one should first consider what the aim and purpose of the criminal law is, and whether such laws are within the scope of the criminal law.

The basic function of the criminal law is to protect one's person and property, and to safeguard the young and the incompetent from exploitation. Crimes of violence against the person are generally recognized as harmful to society. These *mala in se* offenses are defined as those crimes which are wrong in themselves. By their very nature, they are illegal. Crimes classified *mala prohibita* on the contrary are those crimes which are forbidden by statute, but do not in and of themselves violate the social order. This category of crime tends to change with the social attitudes of the time.

Victimless crimes are not *mala in se* but rather *mala prohibita* and thus subject to change according to the times.¹ They fall within that category of crime that varies from country to country, and from era to

1. Samuels, *Legalization of Gambling on Sports Events*, 18 N.Y.L.F. 897 (1973) [hereinafter cited as Samuels, *Sports Events*].

era. The question then is whether our current prohibition against these crimes is warranted in the context of our society.

Generally, victimless crimes are "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 where no direct injury is inflicted upon other persons not participating in the proscribed conduct."² The acts involved in these crimes are much different from those crimes committed against the person. These crimes usually do not involve any injury to others beyond a possible affront to the moral convictions of some. The only real harm done is to the individual himself. If one considers that the function of the criminal law is to protect others, then these acts really have no place in the criminal law.

Victimless crimes include prostitution, homosexuality, drunkenness, use of narcotics, vagrancy, disorderly conduct and gambling. These laws are frequently disobeyed, and are hard to enforce. What enforcement there is has proved both ineffective and costly. The present prohibitions against this behavior seem ridiculous when one compares the cost of preventing this behavior through the criminal law. Beyond this, a large segment of society does not consider this behavior to be very harmful, and does not feel it should fall within the scope of the criminal law.³

This comment will discuss the relative detriments and benefits of the victimless crime laws to society. Drunkenness, prostitution, and gambling will be examined in depth, as well as several alternatives to the present criminal sanctions.

LEGISLATION OF MORALITY

In America, "we have a highly moralistic criminal law, and a long tradition of using it as an instrument for coercing men toward virtue . . . based on an exaggerated conception of the capacity of the criminal law to influence men."⁴ Not only is it questionable whether such legislation is effective, but also whether the legislature has a right to attempt proscription of such behavior. John Stuart Mill is frequently quoted as saying: "The only purpose for which power can be rightfully exercised over any member of a civilized community against his will,

2. Decker, *The Case for Recognition of an Absolute Defense or Mitigation in Crimes Without Victims*, 5 ST. MARY'S L.J. 40, 41 (1973) [hereinafter cited as Decker].

3. Kaplan, *Non-Victim Criminal Offenses*, in *Quest for Justice*, A Report of the Commission of a National Institute of Justice 89 (1973) [hereinafter cited as Kaplan].

4. N. MORRIS & G. HAWKINS, *THE HONEST POLITICIAN'S GUIDE TO CRIME CONTROL* 5 (1969) [hereinafter cited as MORRIS].

is to prevent harm to others. His own good, either physical or moral, is not a sufficient warrant."⁵ Thus, while the drunk may be jeopardizing his own physical health, and the prostitute may in the eyes of others be harming her own moral health, it is questionable whether we have the right to legislate against their behavior. Besides a possible affront to the sensibilities of some, this behavior does no real harm to others.

The laws against victimless crime unnecessarily involve the government in citizen's private lives. The law can rightfully regulate and proscribe behavior which causes harm to others or to society as a whole. However, once the law attempts to regulate one's private morality, it may be overstepping its legitimate function. It would seem that one's private morality would fall under the Griswold⁶ penumbra "where privacy is protected from governmental intrusion." Such intrusion into one's privacy becomes a threat to civil liberties.

DISCRIMINATORY LEGISLATION AND ENFORCEMENT

Besides being an unwarranted attempt at controlling morality, victimless crime laws and their application tend to be used as a means of controlling and harassing minorities and the poor.

Ours is a pluralistic society composed of many social, ethnic, and occupational classes, each of which has its own set of norms. As some of these classes are not represented on the legislative level, their views are not reflected in the laws created by the legislative body. The moral and legal norms set out by the legislature are necessarily a reflection of the beliefs of those composing the ruling minority. Therefore, some persons are subjected to criminal sanctions for behavior which may not be considered either illegal or immoral by their subculture. The laws may be inconsistent with their own views and "when the criminal law runs counter to the traditions of minorities, administration of justice becomes entangled in the difficulties of coercing substantial numbers of respectable citizens to conform to rules they regard as unnatural and unreasonable."⁷ While victimless crime laws arise out of the middle class morality, they are nevertheless enforced in urban ghettos.⁸

Not only do the lower classes find the middle class morality imposed upon them, but the laws are enforced in a discriminatory manner. While police would deny any discriminatory enforcement, "how the law

5. J.S. MILL, *ON LIBERTY* (1859).

6. *Griswold v. Connecticut*, 381 U.S. 479 (1965).

7. E.H. JOHNSON, *CRIME, CORRECTION AND SOCIETY* 122 (rev. ed. 1968) [hereinafter cited as JOHNSON].

8. NATIONAL COMMISSION ON THE CAUSES AND PREVENTION OF VIOLENCE, *THE RULE OF LAW, AND ALTERNATIVE TO VIOLENCE* 556 (1970).

is enforced is largely a matter of discretion."⁹ Realistically, the laws are not enforced against all those who violate them. "Ideological orientations or values of policing" have been cited as circumstances which lead to a selective enforcement of the law.¹⁰ "While the activities of the police are governed officially by procedural law, their actual behavior conforms to their own occupational code."¹¹ This occupational code would by necessity include any personal values and biases the policeman might have. Personal expectations of the policeman will influence how he reacts in encounters with others.

This subjectivity in enforcement may result in racial discrimination. "Considerable evidence suggests that the police have long had differential arrest policies in regard to race. It is apparent that police have tended to arrest Negroes on slight evidence in comparison to the amount of evidence required to arrest whites."¹²

While discriminatory enforcement is found throughout the criminal law, victimless crimes in particular are enforced in such a way as to suggest discrimination along racial and class lines.¹³ This selective enforcement is closely related to the discriminatory legislation. Since victimless crime laws are made to reflect the morality of the class in power, the laws tend to be directed against the morality of other classes, and therefore enforced against the other classes.

Prostitution laws tend to be enforced most often against lower class prostitutes. The police tend "to take the line of least resistance, going after the more easily apprehended streetwalker and leaving her higher-status counterpart relatively undisturbed."¹⁴ In addition, there seems to be a "disproportionate number of Negroes, Puerto Ricans, Mexican-Americans, and other members of the urban poor" among arrested prostitutes.¹⁵

It has also been shown that Blacks are more frequently arrested for public drunkenness. One study found that "in one northern community, blacks were disproportionately arrested and incarcerated . . . and found in a sample of chronic police case inebriates, a high proportion of blacks as compared to their representation in the general population of the county."¹⁶

9. R. QUINNEY, *THE SOCIAL REALITY OF CRIME* 104 (1970).

10. *Id.*

11. *Id.* at 123.

12. *Id.* at 129.

13. See generally, N.Y. Times, April 1, 1973, § 6 (Magazine) at 11.

14. H. PACKER, *THE LIMITS OF THE CRIMINAL SANCTION* 291 (1968) [hereinafter cited as PACKER].

15. *Id.* at 328.

16. M.B. CLINARD & R. QUINNEY, *CRIMINAL BEHAVIOR SYSTEMS* 114 (2d ed. 1973) [hereinafter cited as CLINARD & QUINNEY].

Laws against public drunkenness are also enforced in a discriminatory manner against the poor. One study found that "although the Skid Row alcoholic constitutes only three to five percent of the total number of alcoholics . . . he accounts for fifty percent of the arrests for public drunkenness."¹⁷ Some of the class discrimination stems from the fact that it is public drunkenness that is proscribed. The middle class alcoholic can stay off the streets because he has a home to return to, and "cultural and economic characteristics strongly suggest that the middle and upper class drinker is likely to confine his activities to a private locale."¹⁸ Furthermore, even if the middle class drinker is found intoxicated in public, more likely than not, he will be sent home rather than arrested.¹⁹

Gambling laws tend likewise to be enforced against the poor. The social gambling of the middle and upper classes is usually not subject to arrests. However, "the lower-class counterpart to an evening of bridge at a tenth of a cent a point may be the back-alley crap game, which is far from being immune to arrests."²⁰ By the same token, "the middle-class businessman who places a bet with his bookie over the telephone is only dimly aware of the law enforcement activity directed at inhibiting his transaction. The slum resident who places a bet on the street corner or in the local bar or candy shop is highly conscious of the police threat."²¹

It can be seen from the above examples that the enforcement of victimless crime laws is discriminatory in its nature. The poor and the minorities are more likely to bear the brunt of enforcement. They must also bear the burden of having the morals of others forced upon them.

COST OF VICTIMLESS CRIME LAWS TO SOCIETY

Victimless crime laws are enforced at high cost to society. First, the great number of arrests for these relatively harmless "crimes" lead to an overburdening of our courts and prisons. Second, hours of valuable police time and manpower are involved in trying to enforce the laws. Third, the manner of enforcement tends to encourage disrespect for the judicial system.

The attempt to deal with morality through the legal system has led to an unnecessary overburdening of courts and prisons. "The expendi-

17. Olivieri & Finkelstein, *Report on "Victimless Crime" in New York State*, 18 N.Y.L.F. 77, 98 (1972) [hereinafter cited as Olivieri & Finkelstein].

18. Nimmer, *Public Drunkenness: Criminal Law Reform*, 4 VAL. U.L. REV. 85, 89 (1969).

19. Olivieri & Finkelstein, *supra* note 17, at 98.

20. PACKER, *supra* note 14, at 291.

21. *Id.* at 349.

ture of police and criminal justice resources involved in attempting to enforce [these] statutes . . . seriously depletes the time, energy and manpower available for dealing with the types of crime involving violence and stealing."²² A phenomenon called the 'revolving door policy' is responsible for a good deal of the clogging of the courts. The use of victimless crime laws "results in a repetitive cycle of arrest, short-term incarceration, and release."²³ And then there is invariably another arrest. There is no attempt at reforming the behavior, and the sanctions result in little or no deterrence. The lack of rehabilitation leads to subsequent arrests, which in turn lead to a further clogging of the courts.

In addition to using valuable court time, enforcement of victimless crime also leads to using valuable police time. The basic function of the police is generally thought to be to provide protection to citizens against violence to their person or property. Enforcement of victimless crime laws takes an inordinate amount of police time away from this basic function. The arrests for public intoxication alone have been estimated at thirty-one percent (31%) of all arrests.²⁴

Enforcement of victimless crime laws breeds disrespect for the judicial and law enforcement systems in several ways. First, the "endless procession of look-alike cases, especially through the lower criminal courts . . . [debases] the process of dispensing justice."²⁵ Second, the dual standard "causes people to lose respect for the law and breeds cynicism and distrust . . . ghetto residents are told the numbers game is illegal and immoral; yet the state encourages people to bet on state lotteries."²⁶ Such contradictions within the laws, and the discriminatory enforcement are hardly conducive to instilling respect for the system. A third cause for hostility created by victimless crime laws is that the police "are seen to be more intrusive than protective."²⁷ This is due to the fact that enforcement of these laws is impossible "without widespread and visible intrusion into what people regard as their private lives."²⁸

In attempting to justify retention of victimless crime laws, it is important to weigh their cost to society with the benefits they provide. Many are beginning to believe that the benefits derived from these laws are negligible, and that the problems could better be dealt with in a different manner.

22. MORRIS, *supra* note 4, at 6.

23. JOHNSON, *supra* note 7, at 122.

24. Olivieri & Finkelstein, *supra* note 17, at 78.

25. PACKER, *supra* note 14, at 292.

26. Olivieri & Finkelstein, *supra* note 17, at 79.

27. PACKER, *supra* note 14, at 283.

28. *Id.*

PROSTITUTION

The criminal law has sought to regulate many types of sexual behavior, and in some instances, this is justifiable. For example, "It is proper for the criminal law to seek to protect children from the sexual depredations of adults, and adults and children from the use of force, the threat of force and certain types of fraud in sexual relations."²⁹ Prostitution, however, does not fall within those categories. It involves one seeking to sell, and another seeking to buy sexual relations. There is no force or fraud involved, both are willing partners in the act. The issue then, is whether the criminal law is justified in attempting to regulate such consensual sexual behavior.

The underlying reason for prostitution laws is the basic conviction that it is immoral. Doubtless, this stems from the ecclesiastical origins of the offense.³⁰ Despite criminal sanctions, however, "there seems little reason to believe that the incidence of prostitution has been seriously reduced."³¹ As the Wolfenden Report pointed out, prostitution "has persisted in many civilizations throughout many centuries, and the failure of attempts to stamp it out by repressive legislations shows that it cannot be eradicated through the agency of the criminal law."³²

Prostitution laws are difficult to enforce because "neither partner to the crime is willing to admit his or her role, and generally there are no witnesses . . . neither partner becomes a complainant, unless a serious crime is committed against one of them."³³ In the latter case, criminal sanctions should rightfully be applied.

The lack of complainant means that the laws must be enforced in other ways. One of these ways is by the use of the loitering statutes.³⁴ This results in the law being enforced in a discriminatory manner against the streetwalker, as opposed to the higher class call girl. The recent trend, however, toward voiding these statutes for vagueness will help remedy this problem.

Another means of enforcement is through plainclothes policemen.³⁵ This method also presents problems because the police must carefully avoid any conduct which would amount to entrapment.

The present approach to prostitution is hardly effective. It "alternates between trying to pretend it does not exist and periodic crack-

29. MORRIS, *supra* note 4, at 15.

30. PERKINS, *CRIMINAL LAW* 392 (2d ed. 1969).

31. PACKER, *supra* note 14, at 328.

32. The Committee on Homosexual Offenses and Prostitution, *The Wolfenden Report*. Reprinted in FORD, *THE AMERICAN LEGAL SYSTEM* 664 (1970).

33. Olivieri & Finkelstein, *supra* note 17, at 85.

34. *Id.*

35. *Id.*

downs.”³⁶ There are two alternatives. One could attempt strict enforcement. But even if one could “vastly increase the number of arrests . . . prostitution would continue.”³⁷ The alternative solution would be the legalization of prostitution. Since it is highly unlikely that any kind of enforcement will do away with prostitution, decriminalization is the only real alternative.

It is questionable whether sexual acts between consenting adults can or should be subjected to the sanctions of the criminal law. The penumbral right to privacy³⁸ “could logically be extended to all sex offenses carried out in private, or at least those in which there is no infliction of injury upon another.”³⁹ There is a limit to the control the criminal law can “properly exercise towards a woman who has deliberately decided to live her life in this way or a man who has deliberately chosen to use her services.”⁴⁰

Prostitution is not subject to criminalization in all countries. In Sweden, “prostitution is a woman’s own affair unless she is physically abused or becomes a general public nuisance.”⁴¹ In Amsterdam, “one has only to stroll along certain streets . . . to see that prostitution may be permitted to flourish openly without impairing personal security, economic prosperity or indeed the general moral tone of a most respected nation of the western world.”⁴²

While some countries proscribe street solicitation, the United States is the “only country in which the prostitute is punished.”⁴³ Every state in America has a prohibition of prostitution with the exception of Nevada.

In Nevada, there is no state statute proscribing prostitution. Regulation is left up to the counties, with the exception of counties having a population of 200,000 or more. In those counties, licensing of houses of prostitution is prohibited.⁴⁴

There are advantages to legalized prostitution. By requiring licensing, the time and place of prostitutes’ operation is regulated. The need for pimps is eliminated because the prostitute no longer needs the pro-

36. *Id.*

37. *Id.* at 89.

38. *Griswold v. Connecticut*, *supra* note 6.

39. *Decker*, *supra* note 2, at 56.

40. Kadish, *The Crises of Overcriminalization*, 374 *Annals* 157, 162 (1967) [hereinafter cited as Kadish].

41. Clinard & Quinney, *supra* note 16, at 119.

42. Schwartz, *Morals Offenses and the Model Penal Code*. Reprinted in RADZINOWICZ & WOLFGANG, *CRIME AND JUSTICE* 72 (1971).

43. Sagarin, *Sexual Criminality*, in BLUMBERG, *CURRENT PERSPECTIVES ON CRIMINAL BEHAVIOR* 150 (1974).

44. *NEV. REV. STAT.* 244.345 § 8 (1967).

tection he offers. Periodic medical checks can be required to help inhibit the spread of venereal disease.

While prostitution itself is not prohibited in Nevada, it is limited in some ways by state statute, and other related offenses are illegal.⁴⁵ Most of the prostitute related offenses are geared to protect the prostitute and to protect other women from being forced into prostitution.

There are also statutes prohibiting the location of houses of prostitution within four hundred (400) yards of schools or churches⁴⁶ and prohibiting their location on principal business streets.⁴⁷ It is also illegal for a house of prostitution to habitually disturb "the peace, comfort, or decency of the immediate neighborhood."⁴⁸ These statutes serve to protect the community from what might be considered a direct moral affront, such as a house of prostitution located next door to a church. Little community resistance has been reported⁴⁹ perhaps due in part to these simple limitations.

Nevada has thus decided "that total prohibition by way of the penal law is not the answer."⁵⁰ Yet it has been said that Nevada refuses to "provide a stamp of approval on the activities and thus maintains . . . the nuisance per se⁵¹ in its civil law to signify its disapproval."⁵²

While our existing laws do not serve as a great deterrent, their relaxation does not lead to general moral turpitude and destruction of the public order, as can be seen from the Nevada example. Nevada has suffered no real or moral detriment by not proscribing prostitution. One county even made \$18,000 in 1971 from brothel license fees.⁵³

There is no doubt that sex legislation protecting citizens from non-consensual sexual attacks is justifiable. But, "the question remains whether the criminal law is the correct vehicle for . . . moral education."⁵⁴ Is it the place of the legislature to seek to regulate consensual sexual behavior, for the sole reason that it is an affront to the moral attitudes of the ruling minority? It would seem that the penumbral right to privacy recently upheld in *Griswold v. Connecticut*⁵⁵ would re-

45. See generally NEV. REV. STAT. 201.300-201.420 (1967).

46. NEV. REV. STAT. 201.380.

47. NEV. REV. STAT. 201.390.

48. NEV. REV. STAT. 201.420.

49. Decker, *supra* note 1, at 45.

50. *Id.*

51. *Kelley v. Clark County*, 35 Nev. 189, 127 P.2d 221 (1942) held that "such an evil has always been deemed a public nuisance . . . it has been considered a nuisance per se."

52. Decker, *supra* note 2, at 45.

53. Olivieri & Finkelstein, *supra* note 17, at 90.

54. Bragg, *Victimless Sex Crimes: to the Devil, not the Dungeon*, 25 U. FLA. L. REV. 139, 147 (1972).

55. *Griswold v. Connecticut*, *supra* note 6.

assert an individual's freedom of choice in matters of private morality. As long as no harm is done nor unfair advantage taken of another, one should have the freedom to choose.

PUBLIC DRUNKENNESS

The typical statute proscribing public drunkenness has two elements; first, being drunk, and second, being in a public place. These statutes attempt to serve a dual purpose.⁵⁶ First, they clear the drunks off the streets, their presence being offensive to some. And second, they take care of those who are too drunk to take care of themselves. However, the use of the criminal law for these purposes substantially overburdens our judicial system. It has been estimated that roughly forty percent of the total arrests in this country are for public drunkenness.⁵⁷ "More arrests are made for this offense than for any other."⁵⁸ During a nine-month period in Washington, D.C., "44% of the arrests made by the special tactical police force unit used 'to combat serious crime' was for drunkenness."⁵⁹

The use of the criminal sanction has proved futile as a means of controlling intoxication. The offenders receive little or no treatment during their short jail terms. Once released, they are invariably arrested again. Some alcoholics are arrested fifteen or more times a year.⁶⁰

Not only has the current use of the criminal law to deter public drunkenness proved ineffective, but it has seriously overburdened the courts and the jails. The time spent trying case after case for public intoxication is diverted from time that could be spent on more serious crimes. Public drunkenness offenders also add substantially to the overcrowding of the penal institutions. Between one-fourth to one-half of the prison population in the United States are alcoholics.⁶¹ And in "one city, it was reported that 95% of the short-term prisoners were drunkenness offenders."⁶²

The present system mainly serves to get the drunk off the street rather than to try to help him deal with his social and medical problems. Recently, however, the courts have begun to recognize the problem of the chronic alcoholic.

The landmark Supreme Court case which helped pave the way to this development was *Robinson v. California*.⁶³ In this case, the Court

56. See N.C. GEN. STAT. § 14-335 (1973).

57. Kaplan, *supra* note 3, at 90.

58. Kadish, *supra* note 40, at 166.

59. MORRIS, *supra* note 4, at 7.

60. Olivieri & Finkelstein, *supra* note 17, at 78.

61. *Id.*

62. MORRIS, *supra* note 4, at 7.

63. 370 U.S. 660 (1962).

held unconstitutional a California statute making it a criminal offense for one to "be addicted to the use of narcotics." It was recognized that addiction was an illness, and that to hold one criminally liable for such an illness constituted cruel and unusual punishment in violation of the Fourteenth Amendment. Thus, one cannot be punished for a status or condition.

In two subsequent lower court rulings, the "status" concept in *Robinson* was extended to the chronic alcoholic. The court in *Easter v. District of Columbia*⁶⁴ held that "one who is a chronic alcoholic cannot have the mens rea necessary to be held responsible criminally for being drunk in public."⁶⁵ Chronic alcoholism was deemed to be a defense to the charge of public drunkenness.

*Driver v. Hinnant*⁶⁶ went even further in defining chronic alcoholism as "a disease which has destroyed the power of his will to resist the constant, excessive consumption of alcohol."⁶⁷ Alcoholism, so defined as a disease, should not be made criminal. Thus the alcoholic's appearance in public is not of his own free will but rather "a compulsion symptomatic of the disease."⁶⁸ Citing *Robinson*, the court found that the statute in question "criminally punishes an involuntary symptom of a status."⁶⁹

Two years later, however, the Supreme Court considered a case similar to *Easter* and *Driver*, and seemed to overrule these decisions. In *Powell v. Texas*⁷⁰ a drunkenness conviction was upheld because the Court felt it was "unable to conclude . . . on the current state of medical knowledge, that chronic alcoholics in general, and Leroy Powell in particular, suffer from such an irresistible compulsion to drink and to get drunk in public that they are utterly unable to control their performance."⁷¹ The Court sought to distinguish this case from *Robinson* in that the Texas statute, under which Powell was indicted, sought to punish one for an act, not just a condition. The statute proscribed being in public while drunk, and not merely the state of being drunk. Whereas in *Robinson*, the proscribed behavior was the mere "status" of being addicted to narcotics. It should be noted that the *Powell* decision had a very strong, four justice dissent. They applied the rule from *Robinson* in stating "criminal penalties may not be inflicted upon a person for being in a condition he is powerless to change."⁷² They

64. 361 F.2d 50 (D.C. Cir. 1966).

65. *Id.* at 53.

66. 356 F.2d 761 (4th Cir. 1966).

67. *Id.* at 763.

68. *Id.*

69. *Id.* at 765.

70. 392 U.S. 514 (1968).

71. *Id.* at 535.

72. *Id.* at 567.

stressed the importance of applying the *Robinson* principle because "it is the foundation of individual liberty and the cornerstone of the relations between a civilized state and its citizens."⁷³

Recent cases seem to follow along the line of *Powell*. In *People v. Myers*⁷⁴ the court discussed these previous cases. They affirmed the conviction in the vein of *Powell*, stating "it may be cruel and inhuman punishment to direct sanctions against chronic intoxication or drug addiction, but that is not the thrust of the statute under review, which punishes the behavior of the individual as a result of his intoxication."⁷⁵ While they recognized the need for treatment in such cases, they nevertheless felt that it was an area in which the state should and must control behavior. "Drunkenness and narcotic addiction of a degree capable of potential injury are nonetheless a legitimate subject of state suppression by sanctions."⁷⁶ The court distinguished its holding from *Robinson* in reaffirming the distinction in *Powell* between a statute prohibiting a certain "status" and a statute prohibiting certain acts, here, being drunk in public.

The route future courts will take is, of course, unknown. However, changing the law is theoretically not the place of the judicial branch. Change and reformation of law lie primarily with the legislature. So, it should be the legislature's responsibility to consider the problem of the alcoholic and make whatever changes it deems necessary.

It has been recommended that public drunkenness should not be considered a criminal offense.⁷⁷ Current efforts have concentrated on redirecting the criminal approach to public intoxication, and on dealing with "the drunk through a non-criminal public health approach."⁷⁸ By removing the drunk from the criminal justice system, it is possible to deal with his problem in a more humane manner.

It has been found that "medical and quasi-medical programs are a viable alternative to the criminal justice system . . . these programs have often been responsible for substantial decreases in the arrest rate for drunkenness offenses."⁷⁹ In New York City, arrests for public intoxication "decreased from 31% of all arrests in 1968 to 2% in 1970"⁸⁰ due to the Manhattan Bowery Project, a quasi-medical rehabilitation program.

In Texas, there has been a sincere attempt made to aid the public

73. *Id.*

74. 39 A.D.2d 122, 332 N.Y.S.2d 242 (1972).

75. *Id.* at 126, 332 N.Y.S.2d 247.

76. *Id.*

77. MORRIS, *supra* note 4, at 3.

78. Kaplan, *supra* note 3, at 90.

79. Olivieri & Finkelstein, *supra* note 17, at 94.

80. *Id.* at 94 n.74.

drunkenness offender through civil commitment.⁸¹ While this program may have its shortcomings, it does attempt to deal with the problem alcoholic in a rehabilitative manner. The statute recognizes that "alcoholism is . . . an illness subject to treatment and abatement and the sufferer of alcoholism is recognized as one worthy of treatment and rehabilitation."⁸²

The method of commitment of the alcoholic is set out by statute.⁸³ In addition, Article 5561c provides for a Texas Commission on Alcoholism⁸⁴ whose duties and functions include carrying on a continuing study of the problems of alcoholism.⁸⁵ The Commission is also to "provide for treatment and rehabilitation of alcoholics and allocate funds for . . . the establishment of local alcohol clinics . . . and contracting with hospitals or institutions not under its control for the care, custody and treatment of alcoholics."⁸⁶

This program of civil commitment is of course not perfect. It has been found "that the Texas judiciary and medical profession treat alcoholic commitment far too casually, that the legislature should amend the statutes to speed the commitment process and provide meaningful safeguards (such as right to counsel) to alcoholics, and that hospital treatment needs broadening to offer more help for more types of patients."⁸⁷ It has also been argued that the language of the statute is so vague as to leave room for abuse.⁸⁸

While the program does little to relieve the crowded courts of the many public drunkenness offenders, it does provide for an attempted rehabilitation of the alcoholics and it does take them out of the penal system. While this system is far from totally satisfactory, it is a step in the right direction.

GAMBLING

Illegal gambling, today, provides a major source of revenue for organized crime and of police corruption. The current approach to gambling laws is clearly ineffective. "Prohibitions have not substantially eliminated the demand . . . nor have the laws and enforcement efforts suppressed sources of supply."⁸⁹

81. See generally TEX. REV. CIV. STAT. ANN. art. 5561c (1958).

82. *Id.* § 1.

83. See generally TEX. REV. CIV. STAT. ANN. art. 5561c (1958).

84. *Id.* § 1.

85. *Id.* § 5(1).

86. *Id.* § 5(4)(a), (c).

87. Kuhn, *Civil Commitment of Alcoholics in Texas*, 1 AM. J. CRIM. L. 334, 336 (1972).

88. *Id.* at 339.

89. Kadish, *supra* note 40, at 62.

In the long run, attempting to prohibit gambling has given the revenue to organized crime. The prohibition serves to increase the possible profits, and deprives the government of a possible source of revenue.⁹⁰ The choice before us is not between "abolishing or legalizing gambling, the choice is between leaving gambling and the vast profits which accrue from it in the hands of criminals or citizens taking it over and running it for the benefit of society or by licensing and taxation measures, controlling it."⁹¹

A frequently cited reason for urging legalization of gambling is that it would take the control of gambling out of the hands of the syndicates. It could provide a valuable source of income for the state, and would help eliminate some of the police corruption.⁹² In addition, "time and expense required to enforce the gambling laws can be diverted into more vital areas."⁹³

The gambling prohibition is also hypocritical, and thus is one of the causes for disrespect in regard for the law. Some forms of gambling are legal in the majority of the states. "Thirty-one states authorize pari-mutuel betting on horses, seven states authorize pari-mutuel betting on dog races, eight states authorize state operated lotteries, two states (New York and Nevada) authorize off-track pari-mutuel betting on horse races, Florida authorizes pari-mutuel betting on jai alai, Nevada has legalized all forms of gambling, California allows card rooms by local option, and many states have legalized some form of Bingo game."⁹⁴ While these forms of gambling are legal, all other forms are not. For some, this is a contradiction and generally it leads to misunderstanding of the laws.

Because there is a general prohibition against gambling in most states, the exceptions were enacted by the legislatures. Since, in many instances, "a public referendum was required for approval, it is a fair statement that an overwhelming majority of the American people are in favor of some form of legalized gambling."⁹⁵

The New York State Constitution "contains a total ban against legalized gambling" except in those cases specifically authorized by the legislature.⁹⁶ Prior to 1970, "state run lotteries, games of bingo and lotto run by certain charitable organizations and pari-mutuel betting on

90. Kaplan, *supra* note 3, at 86.

91. MORRIS, *supra* note 4, at 11.

92. JOHNSON, *supra* note 7, at 142.

93. Olivieri & Finkelstein, *supra* note 17, at 81.

94. Samuels, *Sports Events*, *supra* note 1, at 900.

95. *Id.* at 901.

96. *Id.*

272 NORTH CAROLINA CENTRAL LAW JOURNAL

horse races" were permitted.⁹⁷ In 1970, the legislature⁹⁸ extended the pari-mutuel betting on horse races to "governmentally operated, carefully regulated locations other than the track enclosures."⁹⁹

The reasoning behind the legalization of off-track betting was to provide a source of revenue for the participating municipalities, and at the same time take a source of income away from organized crime, and "to help prevent and curb unlawful bookmaking and illegal wagering on horse races."¹⁰⁰

A public benefit corporation was set up to operate the system. "As a 'public benefit corporation', the corporation is able to run along the lines of a private business organization whose earnings accrue back to the public in the form of public benefit programs of state and local governments."¹⁰¹

The legalization of off-track betting has been for the most part successful. It has provided the envisioned revenue for the municipalities. It has also taken some revenue away from organized crime. But since horse racing constituted only about ten to fifteen percent of the bookies business "no matter how effective the off-track betting operation is in New York, there is no way that it will alone be able to drive the bookie out of business."¹⁰²

The actual effect of legalized off-track betting on bookies has been the subject of several studies. One study "recorded a forty percent decrease in book wagering by off-track betting customers."¹⁰³ Another study showed that some of the smaller bookies had been forced out of business because their volume of bets had been dominated by bets on horse racing.¹⁰⁴ An Oliver Quayle study stated that "Off-track betting has taken a great deal of betting out of illegal channels."¹⁰⁵

But no matter how successful the legalizationalization of off-track betting is in taking horse race bets out of the bookies' hands, it can have little overall effect on illegal gambling as a whole. This is due to the fact that only a small percentage of the bookies' operation is horse racing. The remaining eighty to ninety percent of the bookies' business lies in such sports as baseball, football, boxing, and others. Many people familiar with the Off-track betting experiment have suggested New York

97. Samuels, *The Off-Track Betting Experiment in New York*, 17 How. L.J. 731, 732 (1973) [hereinafter cited as Samuels, *Betting*].

98. See generally N.Y. UNCONSOL. LAWS §§ 8061-8165 (McKinney 1972).

99. Samuels, *Betting*, *supra* note 97, at 732.

100. *Id.* at 740.

101. *Id.* at 734.

102. *Id.* at 743.

103. Samuels, *Sports Events*, *supra* note 1, at 905.

104. *Id.* at 906.

105. *Id.* at 907.

take a further step and legalize sports betting in a similar fashion. The Quayle study found "that although legalization of betting on sports events will not eliminate booking sports . . . most of the money now bet with bookies on these sports . . . would flow into a legal operation."¹⁰⁶

If one of the reasons behind legalizing off-track betting is to eliminate illegal gambling, then the legalization should be expanded to include these other types of gambling. The President and Chairman of the Board of the New York City Off-Track Betting Corporation feels:

The establishment of legalized gambling institutions to conduct wagering on other sports and on numbers can be enormously successful by fulfilling its dual functions of providing desperately needed revenue for the state and local government and dealing a crippling blow to the syndicates of organized crime which derive the major part of their revenues from illegal gambling operations.¹⁰⁷

Further and more wide-spread legalization of gambling would free much needed police and court time. Important as this is, the most compelling reason for legalizing gambling is to take it out of the control of organized crime.

CONCLUSION

Victimless crime laws are widely violated and generally hard to enforce. The prohibitions seem to serve as little deterrent to the behavior. Valuable enforcement and court time, and prison space are employed in this seemingly futile attempt to legislate morality. The revolving door phenomenon connected with attempted enforcement leads to an endless procession of similar faces in similar cases. The same people are tried again and again. The government could save millions of dollars a year if these acts were decriminalized.

Going before a judge numerous times a year is of no benefit to the drunk. Once his minimal sentence is served, he will be drunk on the streets again. Efforts should be geared towards rehabilitating the alcoholic rather than attempting to deter his alcoholism by throwing him in jail. Past experience has proved the latter ineffective.

The harm done to the criminal system by the disrespect victimless crime laws encourage is immeasurable:

Overcriminalization—the misuse of the criminal sanction—can contribute to disrespect for law, and can damage the ends which the law is supposed to serve, by criminalizing conduct regarded as legitimate by substantial segments of the society, by initiating patterns

106. *Id.*

107. Samuels, *Betting*, *supra* note 97, at 745.

of discriminatory enforcement, and by draining resources away from the effort to control more serious misconduct.¹⁰⁸

The basic problem is whether it should be up to the state or up to the individual conscience to regulate this so-called immoral behavior. In attempting to control this behavior, the criminal law has overstepped its primary function, that of protecting a person and property from unwarranted invasions. The legislature has overstepped its primary function in attempting to legislate private morality. This extension of the legislative function and the legitimate scope of the criminal law is not only unwarranted, but expensive and ineffective. Many feel that "no criminal liability should attach to acts not involving direct injury to another."¹⁰⁹ Since victimless crimes are primarily directed against one's self, it is not necessarily in the best public interest to attempt to control these "crimes."

A change in priorities is due. There should be an overall decriminalization of victimless crime. Rather than attempting to deal with the "deviant" behavior through the criminal law, the legislature should redirect the efforts towards control through licensing and through rehabilitative measures.

But the legislatures have so far been reluctant to decriminalize some of these offenses. They feel that decriminalization would be read as an approval of the behavior which they somehow feel is basically immoral and wrong. For fear of condoning the victimless crimes, the legislatures in most jurisdictions have not seen fit to revise the current criminal status of these crimes.

EVELYN CHEVERIE

Disqualification From Unemployment Benefits in North Carolina

INTRODUCTION

In order to examine the basis for disqualification from unemployment benefits, it is first necessary to extract the subject from the statutory and judicial framework in which it lies. Therefore, the approach shall be one of denuding the subject by revealing and disposing of the background to its establishment and the interpretations and amendments to its essence.

108. NATIONAL COMMISSION ON THE CAUSES AND PREVENTION OF VIOLENCE, *THE RULE OF LAW, AND ALTERNATIVE TO VIOLENCE* 551 (1970).

109. Decker, *supra* note 2, at 50.