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THE CASE FOR RECOGNITION OF AN ABSOLUTE DEFENSE OR MITIGATION IN CRIMES WITHOUT VICTIMS

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Almost every scholar of criminal justice admits one proposition: Criminal justice administration in America is satisfactory to hardly anyone and is criticized by nearly everyone. Although the number of arrests has been increasing substantially, the incidence and rate of criminal activities continue to climb.[1] Even though more police protection is afforded the general population, more people for good reason fear for their lives and property, both in and out of their homes. More courts and better schemes for the administration of existing courts are developed, but court calendars continue to be clogged. More people are sent to prison or subjected to "rehabilitation" in "institutions," but upon release, more often than not, continue to commit crime.[2] In desperation, new schemes of control such as preventive detention are considered[3] and developed[4] to counter the growing maladies of our society, but to little avail.[5] On the other hand, while the rights of the accused are expanded significantly,[6] and rightly so,[7] those charged with crime and their lawyers complain that the system is too repressive, too demeaning for any civilized society.[8]

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1. *See* New York Times, July 11, 1972, at 1.

2. *See* R. CLARK, CRIME IN AMERICA 215 (1970).

3. G.O.W. MUELLER & F. LEPOOLE-GRIFFITHS, COMPARATIVE CRIMINAL PROCEDURE 93-106 (1969).

4. Hruska, *Preventive Detention: The Constitution and the Congress*, 3 CREIGHTON L. REV. 36 (1970).

5. *Preventive Detention in the District of Columbia: The First Ten Months* 69-73 (Study completed by Georgetown Institute of Criminal Law and Procedure, Wash., D.C. and the Vera Institute of Justice, N.Y., N.Y., 1972).

6. *See, e.g.*, Argersinger v. Hamlin, 407 U.S. 25, 92 S. Ct. 2006, 32 L. Ed. 2d 530 (1972) (right to counsel, appointed or retained, extended to all prosecutions where loss of liberty is a possibility); United States v. United States Dist. Ct., 407 U.S. 297, 92 S. Ct. 2125, 32 L. Ed. 2d 752 (1972) (bars all evidence in prosecution of "domestic subversives" procured through wiretaps without a search warrant).

7. A. GOLDBERG, EQUAL JUSTICE, THE WARREN ERA OF THE SUPREME COURT, 7-21 (1971).

8. Cratsley, *The Crime of the Courts* in WITH JUSTICE FOR SOME: AN INDICTMENT OF THE LAW BY YOUNG ADVOCATES (B. Wasserstein & M. Green ed. 1970);

What is the problem, or, more accurately, what is the answer? It would be neither appropriate nor accurate to proclaim that the solution can be accommodated by any single proposal. However, it is the opinion of this writer that much of the consternation and injustice in the administration of criminal justice can be eradicated if jurists would recognize and courts would adopt as an absolute defense to any criminal charge the fact that no direct injury was inflicted upon another. Or, to state the proposition in the alternative, where there is a crime with no victim, the defendant charged with the crime shall have an absolute defense to such charge. The next and related proposition is that if the fact that no direct injury was inflicted upon another is not an absolute defense, it should at least be considered a mitigating factor when a defendant is charged with a crime where there is no victim.

Initially, it is essential that crimes without victims be defined. Crimes without victims 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 prescribed conduct.

When speaking of *victim,* the perpetrators or participants in the prescribed conduct are excluded. Although it might be argued that the perpetrator of a crime—such as the illicit drug user—might also be the victim of his own wrong, the definition is concerned only with the infliction of harm upon another or the victimization of another. So too, it might be argued that one willing participant to a crime—such as an adulterer—might be victimizing another willing participant—the adulteress—to the same offense. Again, for purposes of definition, it is assumed that if the participant is not forced to engage in the conduct against his or her will, it is as if the other participant in the offense were a mere instrument of the former in carrying out the prescribed conduct. Hence, since some offenses such as adultery and prostitution require more than one actor, it is impossible for one of the actors to victimize the other since the offense cannot be completed without the acquiescence of both.

A second dimension of the word victim is the scope one is willing to give to it as it relates to nonparticipants. It might be argued that every criminal offense has victims which are injured in some remote

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The Panther 21: To Judge Murtagh in LAW AGAINST THE PEOPLE (R. Lefcourt ed. 1971); L. DOWNIE, JUSTICE DENIED (1971).

way. Hence, the definition includes the limitation "direct injury." Only those nonparticipants who feel injury as a direct consequence of the commission of the offense are included in the definition.

So as to preclude any notion that participants to an offense such as battery could consent to the infliction of the prescribed conduct of that offense, the word "nonforceful" is included. To protect children, the participants must be adults.

Hence, by illustration, when speaking of crimes without victims, only those offenses such as prostitution, gambling, nonmedical use of drugs and homosexuality are considered.

Maintaining the Badge of Disapproval

At this juncture, one might ask whether a proposal which essentially eliminates the bite of the criminal law could more efficiently be accomplished by simply removing such offenses from the penal law of the jurisdictions. Not necessarily. To remove the offenses from the list of illegal activities might signify societal approval of the prescribed conduct. However, to maintain the offense in the penal laws of one respective jurisdiction would be a reflection of societal discouragement of such activity and would constitute a badge of disapproval.

This type of conceptual framework is not totally lacking in precedent. For example, the defense of necessity in criminal law is available to a law violator if he can establish that the harm inflicted on society by violation of the law was less than would have been inflicted by compliance with it. Analyzing the concept, the defense of necessity does not place a stamp of approval on the conduct that is protected under the doctrine. Or, in the alternative, it is not that a person is doing something society deems as laudible when he succumbs to the pressure of circumstances which results in his "necessary" violation of the law. Rather, certain conduct is declared as illegal and an avenue of escape from the bite of the criminal law is made available where the exigencies of the situation demand.

> The law forbids stealing and murder, for there are positive values in the right to property and the right to life; but (as in the case of [a] starving man) it is better to save a life than to save the property, and (in the case of the killing of B to save C and D) it is better that two lives be saved and one lost than that two be lost and one saved.[9]

9. W. LAFAVE & A. SCOTT, HANDBOOK ON CRIMINAL LAW 382 (1972).

To borrow from the doctrine of equity, what is really being done is balancing the hardships[10] which will be inflicted on society. As Professors LaFave and Scott point out in their discussion of the necessity doctrine:

> The matter is often expressed in terms of choice of evils: When the pressure of circumstances presents one with a choice of evils, the law prefers that he avoid the greater evil by bringing about the lesser evil.[11]

In like terms, with regard to crimes without victims, would it not be consistent for society to declare the conduct illegal, but also create for the offenders an absolute defense where society establishes that, after balancing the hardships emanating from prosecution and nonprosecution of certain victimless crimes, it would be in society's best interests to allow the violators to go free? Moreover, would not recognition of such a defense against all violations of such victimless crimes avoid the difficulties in dealing with each case on an ad hoc basis such as is required with the assertion of the doctrine of necessity? We will return to these questions after two related illustrations.

After a year of exhaustive research on questions relating to the use of marihuana in America, the National Commission on Marihuana and Drug Abuse (also known as the Shafer Commission) presented a report to the nation entitled "Marihuana: A Signal of Misunderstanding."[12] In it are contained several recommendations, most notable of which is the recommendation that the following acts should no longer be classified as criminal offenses: (1) possession in private of marihuana for personal use; (2) distribution in private of small amounts of marihuana for no remuneration or an insignificant remuneration not involving a profit; and (3) possession in public of one ounce or less of marihuana.[13] However, with regard to possession of marihuana in public, the Commission recommends that even marihuana in the amount of 1 ounce or less should be considered contraband subject to summary seizure and forfeiture.[14]

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10. W. DEFUNIAK, HANDBOOK OF MODERN EQUITY 382 (1972).

11. W. LAFAVE & A. SCOTT, HANDBOOK ON CRIMINAL LAW 382 (1972).

12. MARIHUANA: A SIGNAL OF MISUNDERSTANDING (First Report of the National Commission on Marihuana and Drug Abuse, 1972).

13. *Id.* at 154. The recommendations for federal law are similar: "POSSESSION OF MARIHUANA FOR PERSONAL USE WOULD NO LONGER BE AN OFFENSE, BUT MARIHUANA POSSESSED IN PUBLIC WOULD REMAIN CONTRABAND SUBJECT TO SUMMARY SEIZURE AND FORFEITURE. CASUAL DISTRIBUTION OF SMALL AMOUNTS OF MARIHUANA FOR NO REMUNERATION, OR INSIGNIFICANT REMUNERATION NOT INVOLVING PROFIT WOULD NO LONGER BE AN OFFENSE." *Id.* at 152.

14. *Id.* at 154.

These recommendations by the Commission are based on existing knowledge of the effects of marihuana; namely, that its use at the existing level[15] does not constitute a major threat to public health.[16] Nonetheless, the Commission warns that widespread usage might be fraught with more perilous effects upon the public health.[17]

The Commission feared that if a scheme of legalization or regulation were recommended and ultimately adopted by the various American jurisdictions, this would signify approval of the usage of marihuana.[18] Such an indication of approval, said the Commission, might set off a significant increase in usage of the substance, thereby enhancing the possibility of deleterious effects on the public health.[19] Thus, it refused to recommend a regulatory scheme.[20]

Analysis of the Commission's conceptual thinking reveals that in effect they were choosing between two evils. They realized the effects of marihuana usage did not necessitate or justify the criminal classification of minor marihuana-related activities or the harsh penalties which existed in most jurisdictions in this country.[21] On the other hand, they were not prepared to take a position which might be translated into a stamp of approval of the usage. Thus they maintained a badge of disapproval by failing to recommend regulation, allowing seizure of the substance, and keeping other offenses and penalties intact.

Another illustration of this point is Nevada's existing statutory scheme dealing with prostitution. At first glance, it appears to be a mere reflection of the legislation existing in all the other states in the Union, totally prohibiting prostitution.[22] The Nevada criminal law de-

15. Twenty-four million Americans have tried marihuana at least once and at least 8.3 million are current users. "[U]se of the drug has spanned every social class and geographic region" but is heaviest among the college population and young adults. *Id.* at 7.

16. *Id.* at 90.

17. *Id.* at 91.

18. *Id.* at 147.

19. *Id.* at 147.

20. *Id.* at 146.

21. *See* R. COLES, J. BRENNER, & D. MEAGHER, DRUGS AND YOUTH 208-47 (1970) for an analysis of the laws against marihuana in the various states.

22. *See* George, *Legal, Medical and Psychiatric Considerations in the Control of Prostitution,* 60 MICH. L. REV. 717, 719-30 (1962) for analysis of state and local laws in American jurisdictions. Federal legislation exists and is contained in the Mann Act, 18 U.S.C. § 2421 (1958). This legislation is directed chiefly at control of interstate prostitution and exclusion and deportation of alien prostitutes. It penalizes anyone who knowingly transports any woman in interstate or foreign commerce for the "purpose of prostitution" and subsequently is used against, among others, pimps, panderers and madams.

clares illegal pandering[23] or in any way inducing a female to become a prostitute, living off the earnings a prostitute provides,[24] knowingly transporting a woman with the intent to induce her to become a prostitute,[25] and placing a woman in a house of prostitution for immoral purposes[26] or for the purpose of collecting a debt.[27] Male persons who habitually resort in any house of prostitution are likewise guilty of an offense.[28] Moreover, prostitution activities and houses of prostitution in the state of Nevada are "nuisance[s] per se, and upon complaint of any citizen of any county of the state, the district attorney is obligated to abate the nuisance."[29]

However, in Nevada there is no statute prohibiting solicitation for purposes of prostitution. And although there does exist a prohibition of houses of prostitution, such prohibition extends only to those houses of prostitution which are situated within 400 yards of any school or church[30] or on a principal business street.[31]

This does not mean that prostitutes have a free reign in Nevada. The girls are subject to weekly medical inspections.[32] Federal tax agents monitor the required accounting books to insure against tax evasion.[33] Because of the nuisance per se classification of prostitution, the activities must either exist in relatively desolate areas where no one wil be bothered, or be maintained where little community resistance is present. (Amazingly, Nevada authorities report little community resistance to the prostitution or houses of prostitution.)[34]

Hence, in Nevada, for all intents and purposes, a system of regulation of prostitution exists. Nevada has decided that total prohibition by way of the penal law is not the answer. Yet, it refuses to provide a stamp of approval on the activities and thus maintains offenses such as frequenting a prostitute in its criminal law and the nuisance

23. NEV. REV. STAT. §§ 201.300, 201.310 (1971).
24. NEV. REV. STAT. § 201.320 (1971).
25. NEV. REV. STAT. § 201.340 (1971).
26. NEV. REV. STAT. § 201.360 (1971).
27. NEV. REV. STAT. § 201.330 (1971).
28. NEV. REV. STAT. § 201.370 (1971).
29. John W. Peevers, Planning Specialist, State of Nevada Commission on Crime, Delinquency and Corrections (written response to interrogatory, May 4, 1971).
In Kelly v. Clark County, 127 P.2d 221, 224 (1942), the Supreme Court of Nevada declared prostitution as a nuisance per se even though the state legislature had been silent on the matter.
30. NEV. REV. STAT. § 201.380 (1971).
31. NEV. REV. STAT. § 201.390 (1971).
32. Time, June 27, 1969, at 54.
33. *Id.* at 54.
34. *Id.* at 54.

per se classification in its civil law to signify its disapproval. Again we note the balancing process and the inherent badge of disapproval. Unlike the marihuana proposals, the ultimate result is regulation. But like the Shafer Commission, Nevada is saying, *We don't like it, but if you have to have it . . . .*

Applying this rationale to the initial inquiry—how to deal with crime where there are no victims without losing the prohibitory possibilities inherent in the penal law—one might ask: If society desires to maintain its badge of disapproval on certain conduct, would it not more effectively do so by declaring the inimical conduct wrongful but then allowing the accused an avenue to avoid the bite of the law if it is established that the offense did not involve a victim suffering injury?

Rationale—Balancing the Hardships

An affirmative defense against crime without victims could be rationalized on several grounds. First, reference has been made to the doctrine of balancing the hardships borrowed from the field of equity. However, no weighing of the individual variables in the total balance has been undertaken. At this point, it is appropriate to do so.

With regard to a number of offenses, it is difficult to see why any hardship upon society would be involved if the perpetrator of some offenses were provided an absolute defense.

> In New York State, for example, gambling is prohibited by law, and the police, courts, and jails are expected to deal with numbers runners, bookies, and the like. At the same time, the state itself not only permits gambling at the race tracks and runs a lottery based on the outcome of the horse races, but has set up OTB, a corporation for handling off-track bets, from which the state expects to derive revenue. Nevada, among other states, licenses and taxes casinos and similar gambling establishments. Clearly nothing in gambling per se is inconsistent with a viable society; yet the resources of our criminal justice system are diverted to the enforcement of anti-gambling laws.[35]

Even if one accepts the assumption that some harm is involved if violators of these crimes without victims are not prosecuted, when one compares the harm inflicted on society by these offenders with the cost inflicted upon society by using the penal law to control such offenders, continued imposition of the penal law to eradicate crimes without vic-

35. Smith & Pollack, *Crime Without Victims*, Saturday Review, December 4, 1971, at 27.

tims seems ludicrous. The enforcement of these laws consumes the majority of the expenditures to maintain our system of criminal justice.[36] It has been estimated that the various cost aspects of gambling and the enforcement of gambling laws costs our society one-third of all the costs of crime.[37] The total expenditure of such, largely due to criminalization, has been approximated at $50 billion annually.[38] Police and prosecutors are diverted from other more serious violations of law,[39] and the courts are clogged with several of these offenses for every serious crime with which it is faced.[40]

Sometimes the enforcement of a particular law of this type is counterproductive in terms of its controlling actual direct injury inflicted upon individuals in society. For example, the rigorous suffocation of heroin traffic has driven the illicit street prices up to many times its normal value.[41] Although there exists no conclusive scientific evidence that the use of heroin causes crime,[42] the normal heroin user cannnt afford to feed his habit from his own funds and must turn to crime.[43] The crime, of course, causes many individuals not only loss of property,[44] but often times physical injury and death.[45] When it is found that at least 50 percent of the crime in cities can be attributed to heroin usage,[46] could it not also be stated that much of this crime is attributable to the strict enforcement of our anti-heroin laws?[47]

In some instances, rigorous enforcement of the penal law against certain crimes without victims reveals inconsistencies in attaining the objectives intended by such enforcement. The laws prohibiting prosti-

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36. *Id.*

37. Seney, *The Sibyl at Cumae—Our Criminal Law's Moral Obsolescence*, 17 WAYNE L. REV. 777, 804 n.133 (1971).

38. *Id.* at 804. It has also been found that one of every three arrests in the United States is for public drunkenness. *Id.* at 804 n.135.

39. Kadish, *The Crisis of Overcriminalization* in THE CRIMINAL IN SOCIETY 63 (L. Radzinowicz & M. Wolfgang ed. 1971).

40. Smith & Pollack, *Crime Without Victims*, Saturday Review, December 4, 1971, at 27.

41. *E.g.*, Five dollars worth of heroin purchased in Vietnam sells for approximately $100 in the United States. Smack 54-55 (Editors of Ramparts magazine and F. Browning ed. 1972).

42. Smith & Pollack, *Crime Without Victims*, Saturday Review, December 4, 1971, at 27.

43. E. SCHUR, CRIMES WITHOUT VICTIMS 139 (1965); O. BYRD & T. BYRD, HEROIN 6 (1972).

44. THE PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: NARCOTICS AND DRUG ABUSE 10-11 (1967).

45. *Id.* at 11.

46. Newsweek, April 10, 1972, at 96; Newsweek, March 6, 1972, at 84.

47. For an opinion that addiction control is a medical, not a legal problem, see A. LINDESMITH, THE ADDICT AND THE LAW 269-302 (1967).

tution serve to illustrate. There are 10 discernible motives for controlling the prostitute:

1) Protection of conventional morality;
2) A humanistic concern for the prostitute herself;
3) A humanistic cocern for the "exploited" male;
4) Prevention of incidental crime;
5) Control of the criminal culture;
6) Protection of juvenile girls aspiring toward this occupation;
7) Abatement of a "public nuisance;"
8) A humanistic concern for the prostitute's children;
9) Limiting evasion of income tax; and
10) Prevention of venereal disease.

All evidence points toward the fact that prohibitive legislation has not effectively met any of the objectives.[48] When prostitution is suppressed by the penal law, it is not eliminated, it is only dispersed into other areas.[49] The prostitutes, particularly juveniles, continue to be exploited by elements of the underworld[50] and are often-times assaulted and beaten.[51] Drug addiction[52] and venereal disease[53] run rampant in the world of the prostitute and the children of prostitutes are often lacking in normal care.[54] Prostitutes also commit crimes against their customers, in some instances resulting in beatings and murder.[55]

Be that as it may, most authorities agree that if prostitutes are segregated into particular areas, such as known houses of prostitution, they

48. H. BENJAMIN & R. MASTERS, PROSTITUTION AND MORALITY 372-73 (1964).

49. When solicitation by prostitutes is repressed in one area, they pop up in another or find alternative methods of plying their trade. *E.g.*, in New York, massage parlours are convenient fronts for prostitution. Look, June 29, 1971, at 33.

50. M. PLOSCOWE, SEX AND THE LAW 243 (1951).

51. George, *Legal, Medical and Psychiatric Considerations in the Control of Prostitution*, 60 MICH. L. REV. 717, 718 (1962).

52. It has been contended that 10 to 25 percent of all prostitutes at some stage in their careers become addicted to the use of narcotics. Thorton, *Organized Crime in the Field of Prostitution*, 46 J. CRIM. L.C. & P.S. 775 (1956).

A United Nations Study alleges 50 percent of all American prostitutes are drug addicts. UNITED NATIONS, DEPARTMENT OF ECONOMICS AND SOCIAL AFFAIRS, STUDY ON TRAFFIC IN PERSONS AND PROSTITUTION 25 (1959).

53. It has been alleged that 60 to 75 percent of all prostitutes have venereal disease. M. PLOSCOWE, SEX AND THE LAW 264 (1951).

54. Lindsay, *Prostitution—Delinquency's Time Bomb*, 16 CRIME AND DELINQUENCY 153 (1970).

55. New York Times, August 26, 1971, at 22. New York Times, Mar. 28, 1971 § 4, at 3.

are much more controllable.[56] Hence, if the courts recognized an absolute defense to a prostitution charge based on lack of injury when the prostitutes stayed within the confines of a certain area, more than likely they would remain in that area. With the prostitutes concentrated in such an area, social workers could more readily care for the physical, psychological and moral needs of the prostitutes and their children. Rigorous health regulations might require mandatory physical examination of the prostitutes to control the existence of venereal disease or drug addition. Stringent police protection could defend against illegalities inflicted upon either the prostitute or her customer and could more successfully suppress those who leech on her. Segregation of the prostitutes would eradicate much of the public nuisance aspect of prostitution, and certainly, a substantial abatement of these various negative effects of prostitution have positive moral value. In fact, even in moral terms, the deleterious results caused by prostitution prohibition might outweigh those which would occur if prostitution were regulated. In summary, the net effect of this approach would be a more successful implementation of the objectives sought by outlawing prostitution than is currently being enjoyed by the policy of dragging prostitutes through the normal avenues of our criminal justice system.[57]

Probably the worst aspect of most of these offenses is the lack of respect they engender for the law. First, many of the crimes without victims, particularly sex offenses, are not enforced.[58] The Kinsey Report indicates that 95 percent of the population are potential criminals

56. H. BENJAMIN & R. MASTERS, PROSTITUTION AND MORALITY 240-42 (1964).

57. Kadish, *The Crisis in Overcriminalization,* in THE CRIMINAL IN SOCIETY 62-63 (L. Radzinowicz & M. Wolfgang ed. 1971). This type of legislation has other negative effects which should be placed in the balance.

> [T]he intractable difficulties of enforcement, produced by the consensual character of the illegal conduct and the typically organized methods of operation, have driven enforcement agencies to excesses in pursuit of evidence. These are not only undesirable in themselves, but have evoked a counterreaction in the courts in the form of restrictions upon the use of evidence designed to discourage these police practices. One need look no further than the decisions of the United States Supreme Court. The two leading decisions on entrapment were produced by overreaching undercover agents in gambling and narcotics prosecutions, respectively. Decisions involving the admissibility of evidence arising out of illegal arrests have, for the most part, been rendered in gambling, alcohol, and narcotics prosecutions. Legal restraints upon unlawful search and seizure have largely grown out of litigation over the last five decades concerning a variety of forms of physical intrusion by police in the course of obtaining evidence of violations of these same laws. The same is true with respect to the developing law of wiretapping, bugging, and other forms of electronic interception. Indeed, no single phenomenon is more responsible for the whole pattern of judicial restraints upon methods of law enforcement than the unfortunate experience with enforcing these laws against vice.

58. *Id.* at 58.

under existing sex offenses.[59] Certainly the knowledge that at any time one can flout a host of these offenses with no possibility of apprehension creates little respect for law generally, and even less for these laws specifically. Second, these laws invite discriminatory enforcement for purposes totally unrelated to the evil which they are intended to prevent,[60] such as repression of political dissidents. Of course, reverence for law will not be preserved by the existence of this phenomena either.[61]

Perhaps the most efficient mode of alleviating these inherent difficulties with victimless crimes is to have these offenses struck from the statutes. For example, after considering the relative value in maintaining existing prohibitions against abortion, the United States Supreme Court considered the hardships emanating from present anti-abortion laws.[62]

If victimless crimes are not going to be enforced but yet are maintained on the books due to moralist pressures, would it not be more honest and fair and less hypocritical simply to adopt the absolute defense concept in the absence of infliction of injury upon another so as to avoid these suggested evils plaguing our present system?

In summary, if in weighing the relative hardships inflicted on society by (1) processing offenders of a particular victimless crime through the normal avenues of the criminal justice system, or, (2) exonerating them by providing an absolute defense to such offense, it appears more profitable to society to follow the latter course, then that avenue should be developed.

Rationale—No Injury to Another

The second principal rationale upon which a concept such as that outlined could be based is the proposition that there can be no wrong

59. A. KINSEY, W. POMEROY, & C. MARTIN, SEXUAL BEHAVIOR IN THE HUMAN MALE 392 (1948).

60. Kadish, *The Crisis of Overcriminalization*, in THE CRIMINAL IN SOCIETY 59 (L. Radzinowicz & M. Wolfgang ed. 1971).

61. For a discussion of the relationship between marihuana offenses and alienation of youth, see J. KAPLAN, MARIJUANA, THE NEW PROHIBITION 33-37 (1971).

62. Roe v. Wade, — U.S. —, 93 S. Ct. 705, 35 L. Ed. 2d 147 (1973).

> The detriment that the State would impose upon the pregnant woman by denying . . . [the] choice [to have an abortion] . . . is apparent. Specific and direct harm medically diagnosable even in early pregnancy may be involved. Maternity, or additional offspring, may force upon the woman a distressful life and future. Psychological harm may be imminent. Mental and physical wealth may be taxed by child care.
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> There is also the distress, for all concerned, associated with the unwanted child, and there is the problem of bringing a child into a family already unable, psychologically and otherwise, to care for it.

without an accompanying harm.[63] Quite simply stated, no criminal liability should attach to acts not involving direct injury to another. This position, which has been espoused in recent years by H.L.A. Hart[64] and others,[65] holds that the criminal law is concerned only "with the outward conduct of citizens insofar as that conduct injuriously affects the rights of other citizens."[66] This theory is based on the thinking of John Stuart Mill when he states in his essay *On Liberty*:

> The only purpose for which power can be rightfully exercised over any member of a civilized community against his will is to prevent harm to others. His own good, either physical or moral, is not sufficient warrant. He cannot rightfully be compelled to do or forbear . . . because in the opinion of others to do so would be wise or even right.[67]

This directly refutes those moralist theorists, most notably Lord Devlin, who maintain that criminal law is the codification of a public morality which allegedly binds the citizenry to certain basic values and principles without which no viable society can function.[68]

This position disputes the existence of a public morality and assumes, as does Sir Leon Radzinowicz, that "[t]he present condition of our societies makes for a changing morality, less coherent, more differentiated. The criminal law cannot be a rigid reflection of any single standard."[69] Although this theory will acknowledge the existence of a

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63. The role of "harm" in the criminal law has been succinctly stated by Professor Jerome Hall:

> In penal theory, harm is the focal point between criminal conduct on the one side, and the punitive sanction, on the other. In relation to criminal conduct, harm is essential as the relevant effect, the end sought. Without an effect or end, it is impossible to have a cause or means, and everything in penal law associated with causation and imputation would be superfluous. So, too, . . . harm is equally necessary in the elucidation of punishment. * * * Harm, in sum, is the fulcrum between criminal conduct and the punitive sanction; and the elucidation of these interrelationships is a principal task of penal theory.

J. HALL, GENERAL PRINCIPLES OF CRIMINAL LAW 213 (1960).

64. H.L.A. HART, THE CONCEPT OF LAW (1961); H.L.A. HART, LAW, LIBERTY AND MORALITY (1963); Hart, *Social Solidarity and the Enforcement of Morals*, 35 U. CHI. L. REV. 1 (1967).

65. T. DUSTER, THE LEGISLATION OF MORALITY 3-28 (1970); L. RADZINOWICZ, IDEOLOGY AND CRIME 101-105 (1965); H. PACKER, THE LIMITS OF THE CRIMINAL SANCTION (1968); Binavince, *Crimes of Danger*, 15 WAYNE L. REV. 683 (1969); Gussfield, *On Legislating Morals: The Symbolic Process of Designating Deviance*, 56 CALIF. L. REV. 54 (1968); Skolnick, *Coercion to Virtue: The Enforcement of Morals*, 41 S. CAL. L. REV. 588 (1968); Schwartz, *Morals Offenses and the Model Penal Code*, 63 COLUM. L. REV. 669, 670-73 (1963).

66. GREAT BRITAIN'S COMMITTEE ON HOMOSEXUAL OFFENSES AND PROSTITUTION, THE WOLFENDEN REPORT, 1957.

67. J.S. MILL, ON LIBERTY 15 (1859).

68. P. DEVLIN, THE ENFORCEMENT OF MORALS 90 (1965).

69. L. RADZINOWICZ, IDEOLOGY AND CRIME, 103-04 (1965); Gussfield, *On Legis-*

private morality, it holds that the maintenance of one's individual morals is not a matter of the criminal law, but rather one for educational, religious, and family elements in our society to deal with.[70]

The argument that an absolute defense to a criminal charge should be recognized in the absence of injury to another can be defended not merely on philosophical or jurisprudential grounds, but also by reference to existing law in related areas which might serve as precedent. With regard to a number of criminal offenses against property, an absolute defense to a charge is that the property destroyed belonged to the defendant. Thus, for example, we note that at common law, arson was "the malicious burning of the dwelling *of another*."[71] If one burned his own home he had a defense;[72] if he burned a building he owned in which someone else resided, he did not have a defense;[73] if he set fire to his own home and injured another, he again had no defense.[74] The test is whether or not there was infliction of harm upon another. Certainly one could argue that to burn one's own home is hardly laudible, aesthetically horrendous, and ecologically wasteful. Nonetheless, the common law declared one had absolute power over his property, even to the point of destroying it.

Burglary, "the breaking and entering of the dwelling of *another*,"[75] provides yet another example. Does society not suffer some injury according to moralist standards by the perpetrator's breaking and the inherent destruction and violence? Yet, again an absolute defense exists if the perpetrator is inflicting the "breaking" upon his own property.[76]

Why not apply this doctrine, by way of analogy, to crimes against the person? If the person is committing a crime against himself—consumption of dangerous narcotics, for example—why not provide him with the same defense that exists if he were to commit a crime against his property?

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lating Morals: The Symbolic Process of Designating Deviance, 56 CALIF. L. REV. 54, 55-56 (1968). As Professor Gussfield has stated:

> To assume a common culture or a normative consensus in American society, as in most societies, is to ignore the deep and divisive role of class, ethnic, religious, status, and regional culture conflicts which often produce widely opposing definitions of goodness, truth and moral virtue.

70. *See* R. CLARK, CRIME IN AMERICA 40-43 (1970).
71. R. PERKINS, CRIMINAL LAW 216 (2d ed. 1969) (emphasis added).
72. *Id.* at 226.
73. R. PERKINS, CRIMINAL LAW AND PROCEDURE 121 (1972).
74. R. PERKINS, CRIMINAL LAW 226-27 (2d Ed. 1969).
75. *Id.* at 192 (emphasis added).
76. *Id.* at 206.

Rationale—Consent

The third rationale for allowance of an absolute defense in crimes without victims is based on the doctrine of consent. The defense of consent, like the defense of no injury inflicted upon another, is common to the law of offenses against property. If one inflicts injury upon the property of another with the owner's consent, he has an absolute defense.

Although there exists the general rule that the consent of the victim of a crime against a person provides no defense,[77] there are instances where consent is recognized as a defense to a crime against persons. If a "fond embrace" is accepted by a sweetheart, she is consenting to what otherwise would be assault and battery.[78] Most notably, where participants agree to engage in a boxing or wrestling match, as well as a football or hockey game, the parties to the event consent to the infliction of certain injury which would otherwise constitute assault and battery.[79] Why, then, can't one consent to a premarital sexual "embrace" or "match" in the privacy of one's bedroom, where the potential for injury may be significantly less?

The law of rape provides another illustration of consent as a defense to a crime against the person. The basic law of rape provides that it is normally legally impossible to rape one's wife.[80] Query: Has the wife really consented to her husband's forceful assault with the intent to rape when she contracted to marry him? Does she not enjoy, in Brandeis's words, "the right to be left alone"[81] like anyone else, at least once in a while? Yet, her interest is not protected. Why then recognize consent where it may not actually exist, and not recognize it in such offenses as homosexuality between consenting adults, where society can assume it does exist?

Rationale—Autonomy of the Individual and the Limits of Governmental Action

The final rationale for recognizing the defense against charges for crimes without victims is based on the sanctity and autonomy of the person and the corresponding limits on governmental action. This concept is hardly new to America. As Professor Schwartz points out:

77. *Id.* at 961-63.
78. *Id.* at 961-63.
79. *Id.* at 961-63.
80. *Id.* at 156.
81. Olmstead v. United States, 277 U.S. 438, 478, 48 S. Ct. 564, 572, 72 L. Ed. 944, 956 (1928).

> By the time of the founding of the American Republic . . . individual right [had] come to be so far accepted as to be enshrined in a natural-law conception as fundamental natural rights above and beyond the reach of the society themselves.[82]

The inalienable individual rights as expressed in the Constitution protect not only an individual's property rights but his very right to "life, liberty, and the pursuit of happiness."[83] It sets aside a realm of protected activity within which the government cannot intrude. Essentially the protected realm is an area where, in utilitarian terms, there is no injury to society by allowing individual activity.

In summary, there is a realm where it appears that government should not step, or if it does, it must step lightly. Such can be legitimized not only on utilitarian grounds or Locke's concept of the social contract, but also on existing and well-recognized concepts of law.

1. Inherent Limitations on the Police Power

It is generally recognized that in a free society the government can act only for public purposes. Accepted as constitutional doctrine, it has been held that the exercise of governmental power is limited to activities impinging on the public health, safety, morals or welfare.[84] Correspondingly, any exercise of the police power which transcends a legitimate public purpose is invalid. Hence, if a regulation imposes restrictions on a certain conduct without fulfilling any ascertainable public function, the regulation should be discarded. On this basis, early prohibitions against possession of alcohol were struck down as unconstitutional. For example, in 1915 the Supreme Court of Kentucky declared:

> It is not within the competency of government to invade the privacy of a citizen's life and to regulate his conduct in matters in which he alone is concerned, or to prohibit him any liberty the exercise of which will not directly injure society.
>
> . . . .
>
> The right to use liquor for one's own comfort, if the use is without direct injury to the public, is one of the citizen's natural and inalienable rights . . . . We hold that the police power—vague and wide and undefined as it is—has limits . . . .[85]

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82. 1 SCHWARTZ, RIGHTS OF THE PERSON 171 (1968).
83. *Id.*
84. West Coast Hotel Co. v. Parrish, 300 U.S. 379, 391, 57 S. Ct. 578, 581, 81 L. Ed. 703, 708 (1937).
85. Commonwealth v. Campbell, 117 S.W. 383, 385, 387 (Ky. 1909).

Subsequently, however, prohibitions against liquor were upheld as reasonable exercises of the police power.[86] Nevertheless, courts have continued to demand the showing of a relationship between the proscription and the public interest.[87] With respect to a number of crimes without victims, it may be difficult to substantiate any positive public interest impact that will be derived from the prohibition. Thus, considering the general change in sexual mores and attitudes about sex generally,[88] it is relevant to inquire whether such acts as homosexual conduct between two consenting adults can be cloaked with public interest ramifications? So too, with the difficulty in mustering evidence to support the argument that pornography has a deleterious effect upon society,[89] it should be asked whether existing anti-pornography legislation can be considered a legitimate exercise of the police power.

Nonetheless, perhaps this type of constitutional infirmity that seems to pervade many victimless crimes could be eliminated by adopting the affirmative defense concept. While it might be improper to convict and sentence a person for acts involving no injury to another, because of the serious consequences emerging from the potential incidental deprivation of liberty, the mere declaration of societal disapproval of certain conduct with no possibility of penalizing those engaged in such conduct would not be attenuated with such consequences.

More recently, instead of relying on the inherent limitations on the police power of the government, constitutional libertarians who seek to dismantle prohibitions on activities of individual citizens have emphasized the rights reserved to the individual. It is to these individual rights that the focus of this inquiry shall now turn.

2. *Right to Privacy*

In 1890, Brandeis and Warren wrote their now renowned article, *The Right to Privacy*,[90] which served as the starting point for judicial recognition of the right to privacy as an independent legal right.[91] Based on the assumption that there exist certain basic rights which are

86. *E.g.*, Crane v. Campbell, 245 U.S. 304, 38 S. Ct. 98, 62 L. Ed. 304 (1917).
87. *See, e.g.*, Liggett Co. v. Baldridge, 278 U.S. 105, 49 S. Ct. 57, 73 L. Ed. 204 (1928); Lochner v. New York, 198 U.S. 45, 25 S. Ct. 539, 49 L. Ed. 937 (1905).
88. L. GRAHAM, NO MORE MORALS: THE SEXUAL REVOLUTION (1971).
89. PRESIDENT'S COMMISSION ON POPULATION GROWTH AND THE AMERICAN FUTURE, THE REPORT OF THE COMMISSION ON OBSCENITY AND PORNOGRAPHY (1970).
90. Warren & Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890).
91. 1 SCHWARTZ, RIGHTS OF THE PERSON, 171 (1968).

immune from the scrutiny of anyone, particularly the government, this concept established a zone of protected activities over which the individual had absolute autonomy. Subsequently elevated to the Supreme Court of the United States, Justice Brandeis warned that the individual did indeed have "the right to be let alone—the most comprehensive of rights and the right most valued by civilized men."[92] The Supreme Court of the United States belatedly recognized the doctrine in 1965 in *Griswold v. Connecticut*[93] when it determined a zone of privacy emanated from the Bill of Rights which was as real as any of those constitutional guarantees specifically mentioned. While in *Griswold* the Supreme Court simply reversed the convictions of defendants who were dispensing information to married persons on how to avoid conception, in violation of state law, the Court necessarily opened up an avenue of protection to other types of activity carried on in private.

Could not the doctrine of Brandeis and Warren, which was accepted in *Griswold*, be logically extended to *all* sex offenses carried out in private or at least those in which there is no infliction of injury upon another? Considering the *Griswold* doctrine against the existing marihuana offenses, the Shafer Commission indicated that application of criminal laws to such offenses carried on in private was "constitutionally suspect."[94] Others have indicated they feel *Griswold* can be extended to include a variety of criminal offenses carried on in private.[95]

Indeed, there are signs that the courts are willing to accept such arguments. Most notably, the United States Supreme Court, in *Roe v. Wade*, stated the right of privacy "is broad enough to encompass a woman's decision whether or not to terminate her pregnancy,"[96] thereby rendering those laws which prohibited abortion in the early months of pregnancy as unconstitutional. The District of Columbia superior court struck down a statute prohibiting solication for "lewd or immoral conduct," because, among other reasons, no compelling or

92. Olmstead v. United States, 277 U.S. 438, 478, 48 S. Ct. 564, 572, 72 L. Ed. 944, 956 (1928).

93. 381 U.S. 479, 85 S. Ct. 1678, 14 L. Ed. 2d 510 (1965).

94. MARIHUANA: A SIGNAL OF MISUNDERSTANDING 140 (First Report of the National Commission on Marihuana and Drug Abuse, 1972).

95. Hutt, *The Right to Use Alcohol and Drugs* and Lister, *The Right to Control the Use of One's Body*, in THE RIGHTS OF AMERICANS (Dorsen ed. 1970); Weiss & Wizner, *Pot, Prayer, Politics and Privacy: The Right to Cut Your Own Throat in Your Own Way*, 54 IOWA L. REV. 709, 728-32 (1969).

96. Roe v. Wade, — U.S. —, 93 S. Ct. 705, 35 L. Ed. 2d 147 (1973). It should be noted that, in the opinion of this writer, abortion prohibitions were victimless offenses since the unborn could not be considered persons capable of being victimized.

even rational state interest was advanced to justify the statute's invasion of the privacy of female prostitutes or male homosexuals who ran afoul of it.[97]

3. Right to Liberty

Certainly, the zone of constitutionally protected activities extends beyond those activities carried out in private. The first amendment guarantees of the free exercise of religion, speech and assembly, the fifth and fourteenth amendment guarantee of no denial of liberty without due process of law; and the ninth amendment's declaration that those rights specifically enumerated in the constitution do not exhaust the realm of constitutional protections, taken together indicate the existence of a fundamental right to liberty—the right to carry on certain activities, whether or not carried on in private, free from the intrusion of the state. Admittedly, many of these protected activities are not absolute; nonetheless, limitations extend only to those acts which will significantly infringe on social objectives.

Heretofore, the scope of protected activities has been interpreted in a rather narrow manner, particularly with regard to those activities which are classified as illegal even though no injury is inflicted upon another. Recently, however, there have been cries for[98] and movement toward[99] recognition of the right to liberty in areas where it is not now uniformly recognized. In *State v. Kantner*[100] the Supreme Court of Hawaii took a significant step in the recognition of the right to liberty. Three of the five justices of that court agreed that smoking marihuana was protected by the constitutions of both the United States and Hawaii. Unfortunately for the defendant, he had restricted his attack on Hawaii's marihuana prohibition statute to its classification of marihuana as a narcotic. Hence, one of the three justices who agreed marihuana smoking was constitutionally protected, considered the issue of right to liberty moot in this particular case. Nonetheless, because the other justices addressed themselves to the issue of the right to smoke marihuana, he offered his opinion on the subject.

> I [believe] that under Art. I, Sec. 2 of the Hawaii State Constitution one has a fundamental right of liberty to make a fool of

97. United States v. Binns, 11 CRIM. L. REP. 2335 (1972).

98. Hutt, *The Right to Use Alcohol and Drugs* and Lister, *The Right to Control the Use of One's Body*, in THE RIGHTS OF AMERICANS (Dorsen ed. 1970); Weiss & Wizner, *Pot, Prayer, Politics and Privacy: The Right to Cut Your Own Throat in Your Own Way*, 54 IOWA L. REV. 709, 728-32 (1969).

99. State v. Kantner, 493 P.2d 306 (Hawaii 1972).

100. *Id.*

> himself as long as his act does not endanger others, and that the state may regulate the conduct of a person under pain of criminal punishment only when his actions affect the general welfare—that is, whether others are harmed or likely to be harmed. Thus, I believe that the right to the 'enjoyment of life, liberty and the pursuit of happiness' includes smoking of marijuana, and one's right to smoke marijuana may not be prohibited or curtailed unless such smoking affects the general welfare.[101]

4. The Principle of Equality

Another concept which has had the effect of placing limits on governmental prohibitions against certain conduct can best be described as the principle of equality. Derived essentially from the equal protection clause of the fourteenth amendment and in part from other constitutional provisions including the prohibitions against cruel and unusual punishment contained in the eighth amendment,[102] the principle demands that tools of the criminal justice system be used and administered in an equitable and nonarbitrary manner.

To fully understand the prinicple, it is best to analyze the constitutional foundation upon which it is based. The Supreme Court of the United States has declared that "equal protection of the laws" requires:

> [T]hat equal protection and security should be given to all under like circumstances in the enjoyment of their personal and civil rights; that all persons should be equally entitled to pursue their happiness and acquire and enjoy property . . . that no impediment should be interposed to the pursuits of any one except as applied to the same pursuits by others under like circumstances . . . .[103]

Although "equal protection" does not require that all persons be treated identically and does not forbid all legal classifications,[104] it does

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101. *Id.* at 311-13 (Abe, J., concurring). Moreover, one of the dissenting justices posited:

> The crucial issue in this case is whether a person has a constitutionaly protected right purposely to induce in himself, in private, a mild hallucinatory mental condition through the use of marijuana. I believe that there is such a right and that it is founded upon the constitutional rights to personal autonomy and privacy, guaranteed by article I, sections 2 and 5 of the Hawaii Constitution as well as by the due process clause of the fourteenth amendment of the Federal Constitution.

Id. at 313.

102. Certainly, such a principle could be founded in part on other constitutional provisions as well, *e.g.*, the fourteenth amendment due process clause. However, given the context of this discussion, I will limit my remarks to these two constitutional provisions.

103. Barbier v. Connally, 113 U.S. 27, 31, 5 S. Ct. 357, 359, 28 L. Ed. 923, 924-25 (1885).

104. Baxstrom v. Herold, 383 U.S. 107, 111, 86 S. Ct. 760, 763, 15 L. Ed. 2d 620, 624 (1966).

require that all persons be treated in an "equal" manner—equal in the sense that the person be free from any legal classification which is arbitrary and unreasonable. Any legal classification, says the United States Supreme Court, "must always rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed, and can never be made arbitrarily and without any such basis."[105]

Complementing the basis for this principle of equality is the "cruel and unusual punishment" prohibition. Unlike the equal protection clause, it merely places restrictions on the type of punitive sanction that can be imposed by the government on members of the citizenry. But like the equal protection provision, it bars unreasonable, inequitable and arbitrary[106] effects—in this case sanctions that might otherwise be inflicted upon a person.

It is questionable whether many crimes without victims and the enforcement of these offenses measure up to the dictates of the principle of equality. First, many crimes without victims carry heavier sanctions than do crimes which result in direct injury upon another. For example, one discovers in Illinois that a person convicted of gambling can be imprisoned in the penitentiary for up to 5 years,[107] while one convicted of battery cannot be jailed for more than 6 months.[108] On the other hand, the Illinois Supreme Court has exhibited its willingness to declare as unconstitutional legislative provisions affecting sentencing which produce arbitrary and inequitable results. In *People v. McCabe*,[109] that court held the classification of marihuana under the Illinois Narcotic Control Act, which provided for a mandatory 10-year minimum sentence upon first conviction, rather than under the Drug Abuse Control Act, which provided for a maximum jail term of only

105. Gulf, C. & S.F. Ry. v. Ellis, 165 U.S. 150, 155, 17 S. Ct. 255, 257, 41 L. Ed. 666, 668 (1897).

106. Traditionally, the "cruel and unusual punishment" provision was interpreted as merely a prohibition against sanctions which involved unnecessary cruelty and pain. *See* Wilkerson v. Utah, 99 U.S. 130, 135-36, 25 L. Ed. 345, 347 (1878) (embowelling or burning a live prisoner, [dicta], or punishment which was substantially disproportionate to the offense for which it was inflicted); Weems v. United States, 217 U.S. 349, 30 S. Ct. 544, 54 L. Ed. 793 (1909) (15-year sentence for falsifying a public document). *See also* M. BASSIOUNI, CRIMINAL LAW AND ITS PROCESSES 26-27 (1969).

More recently, the provision has been interpreted as a bar to sanctions arbitrarily or not usually imposed. Furman v. Georgia, 408 U.S. 238, 92 S. Ct. 2726, 33 L. Ed. 2d 346 (1972).

107. ILL. REV. STAT. ch. 38, § 28-1 (Supp. 1972).

108. ILL. REV. STAT. ch. 38, § 12-3 (1972).

109. 275 N.E.2d 407 (Ill. 1971).

1 year, was arbitrary and a violation of equal protection of the law since existing evidence indicated the effects of marihuana on the user specifically, and on society generally, more closely resembled the effects of substances in the latter Act than the "narcotics" in the former.[110]

> Appropriate respect should be given to the fact of a legislative classification, but there is a judicial obligation to insure that the power to classify has not been exercised arbitrarily and, if it has been, the legislation cannot be justified under the label of "classification."[111]

Considering the relative harm generated from a gambling violation as compared to that emanating from a battery, it is difficult to understand how a rational basis exists for the former crime sanctions. Heretofore, the United States Supreme Court has been willing to adopt a comparative standard in evaluating the appropriateness of sanctions.[112] In *Weems v. United States*,[113] the Court in striking down as excessive a 15-year sentence for falsifying a public document noted that other existing crimes, such as several degrees of homocide and misprison of treason, were not punished as severely.[114]

As mentioned above, crime without victim offenses are quite often unequally and arbitrarily enforced. Packer has stated, for example, that "[t]he enforcement ratio of private consensual sex offenses must show incredibly heavy odds against arrest—perhaps one in ten million?"[115] In Robey's study of New York prostitution, blatant inequity in law enforcement was discovered. She noted that one segment of the prostitution population, the "call girls" who serve "upper class" customers, are generally ignored by law enforcers due to political reasons.[116] Moreover, she found the great majority of legal pressure was exerted upon the prostitutes while her cohort-in-crime, the customer, was ignored.[117] The laws against marihuana have been indicted by

110. *Id.* at 413.
111. *Id.* at 409.
112. Turkington, *Unconstitutionally Excessive Punishments: An Examination of the Eighth Amendment and the Weems Principle*, 3 CRIM. L. BULL. 145, 147 (1967).
113. 217 U.S. 349, 30 S. Ct. 544, 54 L. Ed. 793 (1909).
114. *Id.* at 380, 30 S. Ct. at 554, 54 L. Ed. at 803.
115. H. PACKER, THE LIMITS OF THE CRIMINAL SANCTION 304 (1968).
116. Robey, *Politics and Criminal Law: Revision of the New York State Penal Law on Prostitution*, 17 SOC. PROB. 83 (1969).
117. Robey reports that during one "crack down" period in New York, only 6 percent of the prostitution arrests were of customers. *Id.* at 97. Moreover, the penalties are generally greater for prostitution than using her services. Hobbins, Huser, and Johnson, *Criminal Law*, ANNUAL SURVEY OF AMERICAN LAW 1971/72 (Part 1) 93, 105 (1972).

many as being nothing more than tools of political repression to be used arbitrarily against alienated elements of society.[118]

Admittedly, selective or inequitable enforcement of a law has not been widely recognized historically as the basis for an attack upon the law itself.[119] However, new ground has been broken very recently for those who have been critical of certain laws for that reason. When the Supreme Court of the United States struck down the death penalty in *Furman v. Georgia*,[120] the two swing justices—Justice White and Justice Stewart—chose not to emphasize the eighth amendment cruel and unusual punishment prohibition as did the three Warrenites—Justice Brennan, Justice Douglas and Justice Marshall. Both swing justices refused to say the death penalty was cruel and unusual punishment in all circumstances.[121] Rather they stressed the arbitrary and infrequent utilization of the penalty. Justice White stated that as presently administered "the penalty is so infrequently imposed that the threat of execution is too attenuated to be of substantial service to criminal justice . . . ."[122] Justice Stewart said it was as cruel and unusual as being "struck by lightning" and that it was too "wantonly and freakishly imposed" to pass constitutional muster.[123]

Could not this criteria be applicable to crimes without victims? If the law is only imposed in remote and arbitrary instances, is not the law vulnerable to attack on the principle of equality; namely, if the law is only enforced in a shoddy manner, it should not be enforced at all? Or, if *capital punishment* is *not* cruel and unusual *per se*, but merely cruel and unusual *as administered*, could it not follow naturally that the enforcement of crimes without victims might be subject to similar attack? As Professor Bonfield has said:

Where both the community and its law-enforcement agencies have

118. *See* J. KAPLAN, MARIJUANA, THE NEW PROHIBITION 33-37 (1971).

119. *E.g.*, Younger v. Harris, 401 U.S. 37, 91 S. Ct. 746, 27 L. Ed. 2d 669 (1970) (refusal to enjoin prosecution of California's Criminal Syndicalism Act in absence of "any showing of bad faith, harassment, or . . . other unusual circumstance"); Oyler v. Boyles, 368 U.S. 448, 82 S. Ct. 501, 7 L. Ed. 2d 446 (1962) (refusal to grant writ of habeas corpus to defendant, who alleged prosecution under West Virginia's habitual criminal statute was a violation of equal protection). *See also* Comment, *Prosecutorial Discretion—A Re-evaluation of the Prosecutor's Unbridled Discretion and Its Potential for Abuse*, 21 DE PAUL L. REV. 485 (1971).

But see United States v. Robinson, 311 F. Supp. 1063 (W.D. Mo. 1969) (conviction of private detective for violation of federal wiretap law reversed in view of showing that federal agents are not prosecuted for similar conduct).

120. 408 U.S. 238, 92 S. Ct. 2726, 33 L. Ed. 2d 346 (1972).

121. *Id.* at 306-14, 92 S. Ct. at 2760-764, 33 L. Ed. 2d at 388-92.

122. *Id.* at 313, 92 S. Ct. at 2764, 33 L. Ed. 2d at 392.

123. *Id.* at 309-10, 92 S. Ct. at 2762-763, 33 L. Ed. 2d at 390.

> notoriously ignored an enactment for an unduly protracted period, it should be constitutionally impermissible to suddenly prosecute its violation because the act's proscriptions have disappeared from the legal consciousness of the body politic.[124]

By recognizing an absolute defense to crime without victim offenses, the constitutional difficulties which are encountered by enforcement of these offenses would be substantially abrogated.

5. Advantages and Disadvantages

There are a number of advantages to this proposal. The more notable are (1) the plan is more politically feasible than total abolition of all offenses we consider crimes without victims, (2) it would leave an option open to punish where something heretofore classified as a crime without victim suddenly results in injury to another, and (3) it might be developed through the courts based on existing legal principles (*e.g.*, the doctrine of balancing hardships) without appealing to the legislature for codification of such a concept.

This proposal, it should be recognized, admits of several disadvantages: (1) it might detract from the purpose and impact of the criminal law, most notably with the expectation of punishment following the commission of a wrong, (2) arrests, particularly harassment arrests, with their inherent stigma could and probably would exist for no apparent redeeming purpose, and (3) the courts might continue to be jammed with proceedings dealing with such wrongs until they are summarily dismissed, again for no apparent redeeming purpose.

Mitigation

Be that as it may, if an absolute defense is not acceptable, why not at least consider the lack of injury upon another as a mitigating factor? Is it possible that when many of these offenses are carried out there is mitigation sufficient to negate the legal concept of malice that might be required of the offense,[125] or at least to be considered prior to the imposition of sanctions?[126]

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124. Bonfield, *The Abrogation of Penal Statutes by Nonenforcement*, 49 IOWA L. REV. 389, 415 (1964).

125. R. PERKINS, CRIMINAL LAW 336 (2d ed. 1969).

126. In many American jurisdictions, after conviction the court provides the defendant with an opportunity to show the existence of mitigating circumstances. M. BASSIOUNI, CRIMINAL LAW AND ITS PROCESSES 17 (1969). Although the absence of direct injury inflicted upon another is probably de facto considered at the sentencing hearing, de jure recognition of this mitigating factor would add to its efficacy.

SUMMARY

Thurman Arnold, after considering a number of sex offenses, wrote that such laws "are unenforced because we want to continue our conduct, and unrepealed because we want to preserve our morals."[127] Crimes without victims are widely violated, generally unenforceable, and are extreme burdens on both our system of criminal justice administration and the civil liberties of the citizenry. Nonetheless, so as to avoid the stigmatization of condoning such conduct, society chooses to maintain the prohibitory legislation. Thus, the jurist is confronted with a dilemma: How to maintain the laws on the books and avoid the relative hardships and jurisprudential inconsistencies of present methods of enforcement.

There exists an alternative approach. Quite simply, given the prohibitory legislation and its inherent (and perhaps necessary) badge of societal disapproval, allow the violator of such offense an absolute defense to the charge, provided there exists no direct injury inflicted upon another. In the alternative, if an absolute defense is not recognized, at least the fact that no injury occurred should be considered as a mitigating factor.

Admittedly, there exists several disadvantages in this approach, as have been outlined above, and repeal of these crimes without victim offenses may be preferable. However, even considering the disadvantages of this approach, it appears far superior to that hypocritical, nonutilitarian stance on crime without victims our American system of criminal justice now assumes.

127. T. ARNOLD, SYMBOLS OF GOVERNMENT 160 (1936).