

"Victimless Crimes" *and Public Morality*

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IT IS TIME to attend to the coming struggle over "victimless crimes." Whether law should protect public morality or limit itself to attempting control of *violent* anti-social acts solely, is a question to which Americans must begin to give some serious thought. They must decide whether they believe law should promote a measure of social cohesion and deter self-directed harm, or permit all forms of private consensual conduct, no matter how gross. They must decide whether the law has a role in providing support for moral values and encouragement for personal virtue, or should become utterly disinterested in the moral qualities of individual citizens, so long as they do not violently harm one another. What may be called the conservative understanding seems rather ambivalent on these questions. Traditionalists believe the law does have a role; libertarians want to withdraw the law from the field. The questions are complicated by such factors as the conviction, shared by traditionalists and libertarians alike, that government meddles far too much in the economy, and their shared acceptance of the Jeffersonian principle (however one works out the pragmatics) that the best government is the least government; and the inclination of

some to transfer economic laissez-faire principles to the sociomoral sphere. Further, we are all influenced by the rhetoric of our times, which glorifies "self-expression" and personal autonomy but is silent as to the social value of virtue or discipline. And we subconsciously imbibe the assumptions of the generally liberal and sometimes radical ethos of hypersophistication pervading such cultural centers as "name" universities and leading communications media, an ethos which is above virtue and vice and romantically believes cultural and moral liberties arguably appropriate for a 40-year-old college professor or ACLU lawyer should be the norm for 14-year-olds in their first contact with cosmopolitan experimentation. The trend to change the criminal law in the name of "reform" will at last force us to rethink the presuppositions underlying resistance to government encroachment and the rhetoric of individual freedom. It is possible that the anti-statist, limited-government theorists will split into two groups, and that traditionalists and libertarians, both concerned to reverse the growth of omnicompetent government, may spend more energy anathematizing each other than taking their case against Leviathan to the educated public.

Already this rupture has appeared. "Libertarian" journals and even an embryonic Libertarian Party have arisen, announcing a platform of social laissez-faire at first glance, anyway, curiously reminiscent of views held not too long ago by the more reflective of the New Left radicals. It is probably in their position on "victimless crimes" that many persons otherwise conservative find themselves at home with the liberal secular humanism espoused by the ACLU, the National Council on Crime and Delinquency,¹ the *New York Times*² and most law professors who address the topic.³ That they usually part company with such groups on economic matters should quickly be noted as well; for the liberal secular humanists, on the whole, are governmental paternalists who deeply believe, despite the theoretical critique of men like von Mises and four decades of practical governmental failures, that national regulation is a more rapid path to economic utopia than individual entrepreneurship. But the following discussion will deal not with the united front presented by these two branches of conservatism against statist economics, but with the philosophical alliance, by some who claim the conservative heritage, with those who would remove all moral concern from the law.

This essay will examine the argument for "decriminalization" of "victimless crimes" and a paradoxical effect this movement toward "decriminalization" is likely to have, should it succeed, on the efforts of both traditionalists and libertarians to cut government down to its proper size.

The Meaning of the Phrase

"Victimless crime" is a modern phrase, absent, as far as I can tell, from both the classic literature on the problem and even such a recent writer as Lord Devlin.⁴ Like so many phrases that corrupt the concepts they should merely convey, it is an inaccurate expression that can mislead the unwary. To see what is involved one must glance at the rather expansive descriptive

definitions offered in the current literature. Thus, the Alliance for a Safer New York, in a booklet subtitled, "How Legislating Morality Defeats the Cause of Justice," lists "public drunkenness, disorderly conduct, vagrancy, loitering, gambling, prostitution, homosexual and other so-called deviant sex acts between competent consenting adults, the distribution and sale of pornography, and the possession of illegal drugs for one's own use."⁵ Eugene Doleschal, writing for the NCCD, echoes the belief of various spokesmen for the ACLU and law professors Norval Morris and Herbert Packer that "Victimless crime harms no one but the offender (if it does any harm at all)" and asserts it is conduct criminalized solely on moral grounds. Along with such staples in the usual litany as gambling, narcotics use, pornography and consensual deviant sexual behavior, he adds abortion, truancy, running away, disobedience, incorrigibility, attempted suicide, abetting suicide, loitering, euthanasia, liquor law violations, curfew violations, flag burning, and draft card burning.⁶ Unifying this hodgepodge of specifics are such general themes as the alleged lack of harm to any "real" victim, or the acknowledgment that such acts cause harm to the perpetrator but the concomitant assertion that it affects *only* him, or the declaration that the harm is at most "indirect." The cause of our hypercriminalization of such innocuous activities, it is said, is a moral puritanism still with us as a residuum from our religious heritage. It is also said that such use of the criminal law is bad jurisprudence.

Since many who counsel repeal do so out of pragmatic concerns for what they take to be, and sometimes is, the law's failure in this area, it should be noted that our prime concern here is philosophical. For it is in the presuppositions about the relation between the state and the citizen that the issue really is joined. One may agree that the police are overburdened dealing with alcoholics, that narcotics law enforcement by such means as informants and wiretaps is often "unsavory" (though not,

for that fact, unconstitutional, a point civil libertarians often forget), or that it is hard to tell exactly where to draw the line between erotic art and erotica. But one may fully cognize the realities of crime and punishment in modern society and still support a positive role for law in discouraging the grosser immoralities. Thus this essay will not expend much time on the pragmatic argument, save to note that the asserted "savings" to urban budgets through disbanding the vice squad are grossly overstated. It is indeed slightly amusing to hear the governmental activist, who joyfully votes for every conceivable government program having only the remotest wish that it will help the "common good," bemoan the loss of tax dollars because the law enforcement apparatus spends time and taxes trying to contain vice. It is equally ironic when one hears, from the lips of the academic who never would admit that violent crime could be a bona fide concern of the middle class, sudden eagerness to "decriminalize" crimes of vice because it is urgent that we "free up the resources" of police, courts, and jails to deal with "really serious" crimes of violence against person and property. But considerations of consistency aside, it is true that a case can be made to save some tax dollars by withdrawing legal sanction against, say, pornography or heroin use. What is less often noticed is that other costs may occur, because in the wake of police withdrawal may well come a host of social workers who will do much the same job. But our concern is not these pragmatics, but the philosophy behind them.

A further preliminary observation on the difference between "decriminalization" and "legalization" of, say, prostitution or heroin sale. The former means simple withdrawal of law from the field: let the marketplace decide, for all one has is "a transaction between a willing buyer and a willing seller." The latter suggests establishing state-managed sources of supply, with presumed consequent quality-control and possible screening of would-be neophytes from the

practice. When one argues the cost-benefit case that we can "save taxes" by "getting the law out of moral areas that are not its business anyway," he must, to be consistent, argue for free enterprise vice, without state involvement. For if we provide medical control of drunkenness instead of police control, if we follow the Hamburg example of state-regulated houses of prostitution with licensed women instead of the individualism now the norm in the trade, if we go the route of graded and pharmacist-dispensed marijuana or heroin instead of the present black market system, the cost-benefit is much less clear. It is possible that the pure tax expense of an administrative system would be more than the cost of the criminal system. Besides, one ends in a philosophical limbo: for if there really is "no harm" to any "real" victim, then why regulate the practice at all? And if one opts for regulation by government how can he consistently declare that the reason for removing the criminal sanction as presently imposed is that the state "meddles" too much in peoples' lives? for is not the regulation also a form of meddling? And if one declares that he agrees as to the evil of the cited practices, how can he put governmental power behind the promotion of that evil; is licensed moral evil somehow less disreputable than the anarchy of marketplace pursuit of self-degradation? Thus in passing I note that it strikes one as inconsistent, if he declare himself conservative, to recommend, as does David Brudnoy,⁷ that "government should license the manufacture and sale of marijuana, provide for honest labeling of strength, and, if need be . . . put a slight tax on it." The argument may carry some weight with marijuana from a moral—though not laissez-faire economic—point of view; but it is less clear that state monopoly over prostitution or heroin dispensing is any form of progress and reform, either morally or economically. So the following discussion proceeds on the assumption that "legalization" is not a viable alternative. Indeed, one feels it is not seri-

ously meant by most of those who urge it but is presented to reassure the hesitant who instinctively feel that "something should be done" to control the spread of vice; and that "decriminalization" or total withdrawal of law is the serious goal of civil libertarians on both Left and Right.

Theory of the Ideal Free Society

A common starting-point is Mill's *On Liberty*, which somewhat dogmatically declares,

That 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 a sufficient warrant. . .

From this premise the argument continued: a man has a right, it is said, to do anything to himself that does not harm others; "harm" is to be construed as direct, immediate, physical, and imposed on those others against their mature will. Therefore it follows that acts commonly thought immoral but performed "between (a) consenting (b) adults (c) "in private" are "not the law's business." Therefore, the litany of self-regarding vices noted earlier are all beyond the (proper) reach of law. It is sometimes added, with an absolutism that characterizes many of our modern relativists, that for the majority to use law to discourage the minority from having their consensual deviations is to "impose morality" on others, to "violate their privacy" and other horribilia.

Entwined in the argument one may discern a subtle Pelagianism, a vision of man and human society essentially good. Presumably in this society the citizens are all as enlightened as the prodigy Mill, despite today's pervasive hedonism which is quite a contrast with the public mores a century ago when Mill elaborated his theory. One may detect, as well, a trace of Rousseau. Intrinsically good citizens that we are, being above virtue, vice, and conventional legal

patterns which we find artificially constricting, there must be some explanation for the evils in society, and that explanation can only be outside us, in "the system" or "the laws," never in the human heart. It follows that because men are good, the social order can make no differentiation between "liberty" and "license": whatever a man would do has value just because he would do it. Thus until recently in obscenity cases "expert witnesses" would testify with a straight face that manifestly obscene depictions had "redeeming social value" on the grounds that they "tell us something" about the preferences of people or about divergent lifestyles. Moreover, there is an echo of Newton in this theory: the only harm that law may protect against must be "physical"; sometimes it is said that it must be "direct." That other forms of social harm—psychological, attitudinal, moral—might exist is not admitted. Physical causality, modeled on Newtonian physics—one billiard ball driving a second into the side pocket—is the only "scientific" kind. Apply such presuppositions to social philosophy and one ends with epistemological positivism, wherein it is well-nigh impossible to "prove" that prostitution harms family life, that pornography lowers the moral tone of society, or that "public decency" exists or needs the protection of the laws.

It is interesting to observe that this vision of man is both academic and adult. It is academic in its source: its articulators include a high proportion of college professors and members of the post-graduate school elite such as lawyers. These highly verbal, leisured adults share a voluntary and noncoercive life of intellectual pursuits largely untouched (save for a few lawyers vicariously through their clients) by the more sordid aspects of crime and vice. It is also academic in its using convenient conceptual categories to think about variegated and complex realities: e.g., in its unstated assumption that some persons are good and some are bad and this dichotomy fairly well exhausts the range of human conduct. Thus their theory of social order

need not take into account any "marginal" citizens whose softer character may be influenced for good or evil by convention, mores, art, entertainment or any of the indirect educative forces in a communications-surfeited society. And it is "adult" in its ambivalence about the protection of youth. On the one hand, "victimless crimes" are said to "hurt no one"; on the other, young people are to be protected from them. It is adult in its lack of sympathy for the young person's likely psychological and medical trauma should he be drawn into the drug, homosexual, or promiscuous sex cultures. Further, it is adult in its almost military insensitivity to and tolerance of the socially abrasive, publicly annoying, and morally outrageous: thus the citizen who is shocked and disturbed by certain practices is told to "look away" or "not go there."⁸ It is never suggested that the burden of changing should be on the deviant, who has overstepped society's legitimate limits. To note these influences is not to prove them mistaken; for on a given issue it may well be true that the intellectuals are correct and the average housewife or carpenter mistaken. But it is to suggest, given the track record of college professors as a class, when dealing with public policy matters, that one must be on guard lest he allow romanticism to replace common sense.

Besides a strong philosophical agnosticism coupled with the Millian notion of liberty, the drive to decriminalize includes a preference for what strikes some as legal anarchy, on the assumption that human interaction is basically physical and direct and that moral influence is irrelevant to the law's concern. From this it follows that as long as the citizen "does not swing his fist into other people's noses" he must be left free to "do his thing." To persuade the fist-swinging citizen to accept even this internal restraint is the work of such agencies as home, church, and school. But excepting this token acknowledgment of the need for self-control or virtue, the libertarian theory is largely silent on responsibilities and how

society motivates its citizens to recognize and carry them out. Somehow or other the citizens of society may be as debased or corrupt in their private lives as perverse human ingenuity can make them, but in their public life they will continue to be honest, upright, loyal, respectful of others. Now traditionalists should admit that the connection between, say, private sexual deviance or promiscuity and public honesty in one's business dealings is difficult if not impossible to demonstrate; thus, if the public's only concern were the virtue of honesty, and that "in public" to boot, then it need not trouble itself about a citizen's intemperance or lust. But if a wider range of sensibility and moral outlook is necessary for a well functioning polity, including such virtues as willingness to postpone present pleasure for future nonmaterial improvement (*e.g.*, the athlete in training), loyalty to one's legally unenforceable promises (*e.g.*, spousal loyalty in an era of no-fault divorce), or respect for strangers as persons and not as mere things, then an educative atmosphere that promotes these secular values is a matter of concern. And the social philosopher should consider the possibility that the varieties of predatory hedonism present in most of the "victimless crimes" are harmful to the valid secular interests of society.

Differing Valid Secular Imperatives

One may believe that the Judeo-Christian ethic is outdated as a basis for public standards of conduct. With the positivist school of jurisprudence he may insist that law and morality are such separate spheres that any formative interaction between the two and particularly on the part of moral precepts in structuring legal arrangements is at best inappropriate and at worst socially harmful. He may accept current theories of moral relativism, the sacrosanctity of individual choice, and the popular fad of experimental lifestyles. Nevertheless, there is a possibility that besides religio-moral reasons for the law's present interdiction of

"victimless crimes" there might be valid secular imperatives necessitating the discouragement of such conventionally denominated vices as prostitution, excessive gambling, heroin addiction, and the other "victimless crimes." Any accurate appraisal of these secular concerns would begin with attention to the specific differences among all the forms of impropriety generically called "victimless crimes": the secular harm to the individual drug addict is considerably different from the harm associated with promiscuous or inverted sexual practice. The harm to society as a whole by pornographic entertainment is vastly different from the harm caused by alcoholism or marijuana smoking. It is convenient rhetoric to lump them all together but it is bad logic and misleading social theory. The reader himself can supply flesh and blood to this skeletal observation. Any honest and reflective person can see that the harm to the individual and to the moral tone of society varies from crime to crime. In some, such as alcoholism, already widely pervasive, it may be wiser to remove the criminal sanction and rely, if at all, on voluntary detoxification programs. In others, still relatively new and the peculiar intemperance of young people who are, as a group, psychologically immature, the use of opiates, even the allegedly "harmless" marijuana and certainly the no-return addictive which is heroin, can reasonably be a matter for the law's concern. The point here is not to prove that any specific "victimless crime" is indeed so socially dislocative that the traditional view is correct; but only that the problem is so complex that a summary repeal of "laws promoting morality" is simplistically Procrustean.

But the phrase "crimes without victims" disguises a fallacy: at best it should be, "self-victimizing conduct" or in some cases, "nonviolent victimization." The actor does harm himself: typically he loses his job, wastes his money, ruins his health, loses his self-respect, truncates his normal social relationships, shatters his reputation, develops or deepens serious neuroses, and

dies too young. Second, his consequent dysfunction spills over in costs to others, victimizing them. Unless a person be a rich desert hermit with no friends, relatives, or dependents, his self-regarding afflictions will touch the lives of tens and even hundreds of others. These he will outrage, scandalize, sadden, or embolden. To legalize, say, consensual adult homosexuality even "in private" is to permit any two deviants to move into any neighborhood and flaunt their status among the impressionable adolescents, and have far more influence on their moral perceptions than brawling muggers would have by swinging fists into their noses. As Mr. James Adair, a member of the Committee that composed the famous *Wolfenden Report* noted in his dissent:

The influence of example in forming the views and developing the characters of young people can scarcely be overestimated. The presence in a district of, for example, adult male lovers living openly and notoriously under the approval of the law is bound to have a regrettable and pernicious effect on the young people of the community. No one interested in the moral, physical or spiritual welfare of public life wishes to see homosexuality extending in its scope, but rather reduced in extent, or at least kept effectively in check.⁹

Third, he often tends to proselytize, spreading his habit or deviation further, victimizing innocent parties. Those who live off or entertain themselves through other people's lack of virtue and self-control usually seek converts to their life-style, new customers for their services, new buyers for their supplies. Under the present dispensation the law exercises a "separative function," by insuring that consensual self-abuse takes place not on the sidewalks or in restaurants but out of sight, and, for that reason, less frequently, thus protecting the marginal person. The law somewhat limits opportunity for advance, cajolery, trickery, solicitation, fraud, duress, peer-group pressure, and the other forms of harmful in-

fluence of one person on another. By motivating the deviant to keep to a minimum his efforts to induct others into his practice, it saves those others the burden of having to fend off repetitious advance, even as it lessens the frequency and intensity of that advance. Thus it prevents further victimization of the innocent. Though every society has its dregs, and no law can long prevent a man from pursuing vice if he is determined enough, most people are not irretrievably immoral or incorrigibly moral. The law can make easier one's decision not to victimize himself. It does not "impose morality" as much as it "discourages immorality," among young people especially, who take their standards largely from the very society which the proponents of decriminalization would have express no standards. The law can expand or contract the reach of the morally contaminated who would induct others into their practices. It can control the direction of initiative, by establishing a social arrangement wherein the casual experimenter will find it too much trouble to seek the narcotic, prostitute, or sado-masochistic liaison. It is true that the adventuresome, the eccentric, the sincere experimenter, and the raw pervert were never completely deterred by custom, convention, the teachings of the churches or the disapproval of their neighbors. They tumbled or ran down the paths of drug addiction, homosexual liaison, pornographic neurosis, and promiscuity even though social disapproval, family concern, religious teaching, and their own better judgment whispered warnings that temperance was safer. However, they took their various psychic and sexual trips somewhat clandestinely and less frequently, because the law diminished their chances to reach out and induct others. But if "anything goes" they will be free to practice the arts of persuasion on every adult and not a few adolescents, as long as they consent "in private."

Fourth, society is victimized. In all cases, the "decriminalization" proposals abolish self-discipline and help establish hedonism.

They would eradicate cultural restraints that nearly every society has found essential to civic morale, the maintenance of shared civic values, and a high degree of moral/aesthetic tone that transforms a mere aggregate of selfish autonomous beings into a truly *humane* and *civilized* community of persons. These qualities are necessary conditions of self-government. It is ironic that in the name of "liberation" the apostles of social permissiveness would uproot the very foundation of that character without which no people can long maintain their liberty. For "self-government," both individually and collectively, depends on a measure of self-control.¹⁰ A free society must of necessity encourage self-control among its members, as a precondition to their own personal happiness and a limitation on the likely harm to others that unrestrained "liberated" persons otherwise will use their manifold opportunities and freedoms to inflict. A free society also needs citizens with a well-developed dispassionateness and balance as preconditions to enlightened involvement in public affairs. In a phrase, it needs men and women of virtue.¹¹ Yet does anyone seriously think that encouraging promiscuity, alcoholism, gambling, drug abuse, pornography, and the other morally objectionable "victimless crimes" will help develop virtue among the citizens?

An indulgent policy on drug use and addiction, for instance, will at last set a certain moral tone that affects the lives of *all* citizens. Policy as expressed in law will educate the less mature to the customs, values, attitudes, expectations, and moral commitments of the (presumably) more mature. The law can remind a people of society's collective judgment as to what is "good" and what "bad." It should be obvious that not everyone has a fully coherent and defensible position on the so-called "victimless crimes" and that young people today have received perhaps less guidance on these matters than any other generation. One source of guidance is the law itself, which sets the level of expectation (in many

affairs, from speed limits to rules against fraud) and guides the style of future generations as they grow into its precursive patterns. In today's Western culture perhaps a majority of younger adults hold no deep-seated convictions as to the "rightness" or "wrongness" or the danger in experimenting with drugs, promiscuity, homosexuality, etc. For them the law is a collective expression of the more mature community's judgment, a distillation of its experience, its cultural remembrance of its history, an unambiguous guide. Those who do obey it are saved having to suffer through experience. It is an index of our materialism that so many social activists are so concerned today about our physical ecology but show little concern about mounting pollution of the moral environment.

The Centrality of Virtue to a Free Society

Those who attack the present dispensation do so in the name of "liberty," a word which pretty well summarizes their social philosophy. They rarely ever consider questions of social or civic *responsibility*. They offer their disciples no guidance on what limits the good citizen should impose upon himself; from the extent of their discussion one would presume none at all. If they were teachers of driver education they would explain the accelerator but never mention the brake. Their remarks about "morality" are almost invariably pejorative. One may seriously question whether such a theory, if embodied in the ordinary actions of the commonality of citizens, could result in anything but social chaos. For the theory that *I* may always pursue my own self-defined "rights" offers no guidance to *others* who are expected to restrain themselves and to recognize those rights—*i.e.*, who must display virtue by controlling their own inclination to pursue their own self-defined rights.

Whatever the academic theorists may think, in the daily lives of the citizenry the complicated social order continually de-

mands virtue. The citizens must develop some willingness to accept, gracefully, the legitimate demands of others, whether these be speed limits, zoning ordinances, tax regulations, military conscription, or reasonable free speech. One could make a case that ethics consists largely in identifying and living up to one's own obligations and the imperatives of self-limitation and only minimally in pursuing personal advantage or one's "rights." This is as true for politicians as it is for parents. The government of a republic presupposes a citizenry who will devote their energies to long-range public interests and who can on occasion sacrifice personal comforts and personal satisfactions for those vital public interests. As Professor Harry Clor has noted:

A people devoted exclusively to the satisfaction of sensual appetites is not, strictly speaking, a citizen body at all. It is a collection of private individuals, each concerned with his private gratifications.¹²

Unrestrained pursuit of self-centered gratifications produces interpersonal conflicts which so disturb the order of society and absorb the energies of its harried citizens that to escape the undisciplined among them they must turn to government, which imposes external regulation on the social maelstrom that lacks internal self-control. This government regulation commonly leads to government control and to the loss of liberty. Thus liberty without internal order becomes anarchic license and destroys itself.

It should not need much elaboration for twentieth century citizens: if every member of the free society were to exercise his liberty in such a way as to pursue every opportunity to maximize his own power they would soon be living not in a humane society but in a jungle. It is only when one restrains his baser instincts and conforms his inclinations to the basic patterns adopted by the community as a whole that the weak in any group can deal with some confidence with the strong. This is as true

for businessmen negotiating multi-million-dollar transactions as it is for teenage girls hitchhiking home from school.

But such self-restraint requires an amalgam of positive moral qualities usually summarized as "good character." And society cannot be long indifferent to the moral character of its individual members; for they cannot long be upright in public and in interpersonal dealings if they are warped and twisted in their own attitudes. This good character includes obedience: within reason, the student must obey his teacher, the secretary her employer, the worker his foreman, the manager the vice president over him. Citizens must obey the tax authorities, the health commissioner, the traffic patrolman. Now what would happen if one took the "victimless crimes" rationale that "harm" does not exist if it is not direct and immediate and afflictive of someone else and applied it thus: "Disobedience may not be punished so long as it directly hurts no one else"? Such a rule would disrupt the particular relationship and ultimately create an undisciplined citizenry incapable of accepting the most legitimate demands of social order. If people cannot restrain their own desires in the face of justified demands, they will at last not pay their taxes, not care for their children, not respect the criminal law.

"Good character" also includes honor. Society must insist that its political leaders, its writers and artists and teachers, its soldiers and its police, and to some degree its "ordinary citizens" know the difference between the honorable and the dishonorable, the uses and abuses of power, the decent and the indecent. Society must insist that most of its citizens—in principle, all—be persons who are able and willing to act on their accurate perception of the honorable, the proper use of power, and a correct grasp of the decent. In principle this insistence must be universal, even though some practice falls short of the ideal. In order to guide and uplift ordinary practice and provide a realistic ideal to strive for, public standards of morality must be more

than an "average" or summary of private moral practices. Yet decriminalizing "victimless crimes" across the board will push society away from that fine sense of one's obligations that is honor. The practices to be permitted consist largely in casting off one's duties to others and in pursuing varieties of hedonism which, considering the collaborative nature of many of the permitted acts, can only harm one's consort who, apparently, may be cast aside like a crumpled empty beer can. This extreme libertarian theory generally disregards the need to promote attitudes of respect for others. Instead of trying to control his harmful propensities, the citizen is encouraged to give them free vent. For example, in sexual matters and in drug experimentation, he is to be told, in effect by society's considered judgment through its laws, that he need not restrain his impulse to use or abuse others. Just so he does not literally coerce them, apparently he may cajole, persuade, trick, bribe, or embarrass others into conduct he probably knows, and society certainly knows, is harmful to himself and to his partner. Is this any way to promote a sense of honor? And what sort of esteem for others will society's younger members be taught, once society takes a stand of *de facto* neutrality on such essentials as whether they become drug addicts or contract venereal disease?

"Good character" also includes willingness to postpone present enjoyment for the sake of higher obligations or long-term future return. The ability to assess one's prospective advantage, though it be not present and visible, and thereby resist the inclination to immerse oneself in the sensual and the immediate, is an integral part of both every transcendent religion and, analogously, even of the mental qualities essential to free enterprise business practice. It is always easier to spend on oneself now than to save for future needs. It is easier to use all the income of the corporation for salaries and immediate benefits than to amass investment capital which one spends on new product development or plant ex-

pansion and thus bring a return only years in the future. Anyone who would build for lasting long-term results must resist the temptation to expend his substance on the immediate and transitory, however pleasurable it may be. That any familiarity with this truth in its economic application is slipping away from our population should be obvious from the public's reaction to the recent oil/gasoline scarcity: very few even grasp the need for the oil industry to make large gross profits to enable long-term investment in costly exploration equipment and refinery plants. And what may be more important as an index of popular attitudes, we have recently viewed the unseemly spectacle of various groups in the public such as truckdrivers and airline pilots demanding special concessions for their own group as if hard times meant hardship for everybody else but themselves. We saw almost no willingness to sacrifice in the slightest for the common long-range good, among groups that had the political power to transfer the sacrifice to someone else, even though the objective situation demanded some sacrifice by all of us.

Now I realize it may appear to be a long step from popular attitudes of selfishness in the energy crisis on the one hand, to the likely results of legal permissiveness by encouraging the hedonism that pervades most of the "victimless crimes." But I do believe there is a connection: we have slipped a long way from the relatively spartan national ethos at the close of World War II. We now have a society where welfare recipients who own color TV sets organize and picket for a guaranteed income, which will of course come out of the pockets of someone else; where college students have browbeaten spineless deans into permitting all-night room visitation and on-campus abortion clinics; where in New York and some other urban centers teenage venereal disease has reached such epidemic proportions that school administrators and juvenile officers now talk, euphemistically, of students' being "sexually active" instead of coming right out and admitting they are

promiscuous. In general, we have a population that has fooled itself into believing the causes of its discontent lie in others, in perhaps the machinations of big corporations or the undue restrictions of the laws, rather than in its own growing gutless refusal to discipline itself in the face of an external reality which is not as soft and pliable as affluent Americans would have it. The thread or common denominator connecting and underlying these different debasements of civic morale is the fashionable rationalization that somehow the essence of the free society is the pursuit of one's own desires, the fulfillment of one's own wants, the satisfaction of one's own passions, the immediate maximization of one's own comforts, the steady transfer to others of one's own responsibilities. One need not spell out how much farther down this slope wholesale "decriminalization" of "victimless crimes" will take us.

It is sometimes said that "people will do what they want to do anyway" and that the law cannot make people be good. What this overlooks is that the law does have quite a capability of making it harder to be bad. It may not impose morality in a direct sense; but it can discourage immorality. In any event, this assertion is usually made by persons who have discovered a tremendous didactic potential in laws dealing with such broad social problems as "civil rights," consumer protection, and fair campaign practices. It is made by people who probably would not repeal the laws against shoplifting or burglary, even though these, like the laws against gambling or prostitution, do not "work" one hundred percent. The fact is, realistically, that very few laws completely eradicate the evil they aim at. But they do inform the marginal person inclined toward certain conduct that society disapproves and deter many people by the prospect of sanction. Laws dealing with broad social problems do educate to a certain higher standard and formalize widespread if not universal ethical judgments about propriety. This formalization is also a hardening or strengthening of community

judgment. It gradually sets new patterns of action and ultimately of thinking, and definitely strengthens the teaching and example and attitudes of those who otherwise would have to contend with a babble of discrete actions, some quite contrary to what the vast majority would have their children emulate.

The foregoing scarcely exhausts the subject matter, but it should serve to indicate some reasons why one can make a case for public morality and why the crusade to repeal all laws against "victimless crimes" is, in the writer's judgment, misguided. This is not to question the motivation of the proponents of these changes; only their wisdom. For a free society cannot be one where each individual defines the common good for himself alone and makes no effort to share the broader moral commitments of his fellow citizens. Nor can the

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¹Eugene Doleschal, "Victimless Crime," *Crime and Delinquency Literature* (June 1971), 254; Milton G. Rector, "Victimless Crime, Whose Responsibility?" *Trends* (July-August 1972).

²See: Norval Morris, "The Law Is a Busy-body," *New York Times Magazine* (April 1, 1973). The writer's offer of a rebuttal essay to NYT was not accepted.

³Besides Professor Morris, another leading proponent is Herbert Packer, *The Limits of the Criminal Sanction* (Stanford, 1968).

⁴Hon. Patrick Devlin, *The Enforcement of Morals* (1961).

⁵Edwin Kiester, Jr., *Crimes with No Victims, The Alliance for a Safer New York* (1972) 5.

⁶Doleschal, *supra* note 1, @ 255.

⁷David Brudnoy, "Decriminalizing Crimes Without Victims: The Time Is Now," *New Guard* (April 1973) 4.

⁸Packer, *supra* note 3, @ 311. Packer notes "the nuisance aspect of sexual activity" as a residue the law would, inconsistently, continue to deal with but urges "an evaluation of the setting" as a criterion of illegality. "The adoption of such

citizen of any society that would remain viable declare that the sum and substance of his relationship to society is the one-way-street requirement that society let him do anything he wants, as long as not literally violently, with supposedly consenting adults, and not in full public view. Nor can any society exist for long if it makes no effort to instill such virtues in its members as: courage, self-control, respect for others, willingness to forego immediate pleasure for long term gain, obedience to reasonable laws, acceptance of shared customs of propriety, acquiescence to slow-moving but workable channels of change, civility. The movement to make "victimless crimes" legal directly contradicts most if not all of these secular imperatives that are essential prerequisites to a free, humane, virtuous, and lasting social order. Therefore, that movement is pernicious and should be resisted.*

a criterion would probably mean that certain places would in time become known as the resort of persons having certain sexual proclivities." He fails to consider the results of his logic: under his dispensation certain parks, roads, beaches and apartment buildings would become enclaves of deviance, and the ordinary citizen would be forced to avoid them. For the law to formalize a dual standard would have a disastrous educational impact, and amount to preferential treatment, ironically, for deviants, who would have greater freedom of movement than ordinary citizens (who would be forced by circumstances to avoid certain places).

⁹*Report of the Committee on Homosexual Offenses and Prostitution*, Authorized American Edition with Introduction by Karl Menninger, M.D. (New York: Stein & Day, 1963), commonly known as "The Wolfenden Report."

¹⁰On this point generally, see: Walter Berns, *Freedom, Virtue and the First Amendment* (Louisiana University Press, 1957).

¹¹Sir James Fitzjames Stephen, *Liberty, Equality, Fraternity* (1873), the classic argument in refutation of Mill, is usually overlooked on this point.

¹²Harry M. Clor, *Obscenity and Public Morality* (University of Chicago Press, 1969), 200.