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# REAL AND IDEAL: THE USE OF LEGAL SANCTIONS AS MORAL AGENTS

Jennifer James\*

NOT THE LAW'S BUSINESS? AN EXAMINATION OF HOMOSEXUALITY, ABORTION, PROSTITUTION, NARCOTICS, AND GAMBLING IN THE UNITED STATES. By Gilbert Geis. Rockville, Maryland: National Institute of Mental Health Center for Studies of Crime and Delinquency, 1972. Pp. 262. \$1.50.

Crimes without complainants (victimless crimes) are fast becoming a central focus of criminal law reform. The quantity of literature and public debate provides evidence of both increased interest in decriminalization and the future direction of law revision. *Not the Law's Business?* is another in the series of books inspired by Edwin M. Shur's *Crimes Without Victims*.<sup>1</sup> Gilbert Geis' book discusses both sides of the issues and presents sufficient factual material to provide a basis for evaluation. Geis does not retreat behind scholarly objectivity but offers his own interpretation and analysis, concluding that abortion, prostitution, narcotics and gambling are not properly within the province of the criminal law.

The author points out that when research is ignored, as it frequently is on social-moral issues, the essence of the victimless crime argument becomes personal and philosophical, leaving one with opposing views represented by John Stuart Mill and Patrick Devlin. Mill's classic statement on individual liberty,<sup>2</sup>

[T]he sole end for which mankind are warranted, individually or collectively, in interfering with the liberty of action of any of their number, is self-protection. . . . [T]he only purpose for which power can rightfully be exercised over any member of a civilized community,

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1. E. SCHUR, *CRIMES WITHOUT VICTIMS: DEVIANT BEHAVIOR AND PUBLIC POLICY* (1965).

2. J.S. MILL, *ON LIBERTY* 23 (1863).

against his will, is to prevent harm to others. His own good, either physical or moral, is not a sufficient warrant.

contrasts sharply with Devlin's position:<sup>3</sup>

Societies disintegrate from within more frequently than they are broken up by external pressures. There is disintegration when no common morality is observed and history shows that the loosening of moral bonds is often the first stage of disintegration, so that society is justified in taking the same steps to preserve its moral code as it does to preserve its government and other essential institutions.

The resolution of the victimless crime debate depends upon a determination of the individual behavior and human passions which actually harm the community beyond a tolerable level. Is the tolerance level to be ascertained by factual knowledge, public opinion, or political expediency? How is the balance to be maintained between the effects of individual freedom on the society at large and the erosion of freedom of choice caused by restriction of individual activities? Mill suggests the burden of proof be shifted to those demanding restrictions. Geis agrees, stating: "the burden that they bear should be a heavy one, perhaps one as imposing as the criminal law's demand for proof 'beyond a reasonable doubt' or the Supreme Court's standard of 'clear and present danger'."<sup>4</sup> Discussions of sexual morality rarely can be settled beyond a reasonable doubt, but the actual danger of various modes of conduct to the person or property of the community is determined easily. The precise factual view of these activities provided by Geis in this publication clarifies the extent of danger to the individual and to the community.

The first activity considered by the author, *homosexuality*, appears close to settlement as a legal issue. Homosexuality presents no danger to the community except in the area of sexual preference, a private concern. There is growing consensus that the government does not belong in the bedrooms of consenting adults. The great majority of homosexuals are ordinary citizens whose major problem is the amount of injustice they face from police and social harassment. The law only forces the homosexual further and further into the deviant category, increasing mental health problems and creating the behavior it seeks

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3. P. DEVLIN, *THE ENFORCEMENT OF MORALS* 55 (1955).

4. G. GEIS, *NOT THE LAW'S BUSINESS?* 13 (1972).

to eradicate. Geis concludes that society's legitimate goals of protection from affront and protection of young persons can be accomplished by a legal revision removing *private* sexual relations between consenting adults from the purview of the criminal law. The problem of solicitation, Geis suggests, can be handled by requirements that such solicitation be no more aggressive than that now tolerated for heterosexual persuasion.

The status of *abortion* under the criminal law appears to have been settled by a recent Supreme Court decision.<sup>5</sup> Although problems of local regulation and limitations still may arise, the basic principle of a woman's right to terminate her pregnancy has been recognized. Geis notes that abortion historically has provided a prime example of the classist, sexist, and racist prosecution of victimless crimes, primarily victimizing poor, minority women. In all of the activities described by the author the severest penalties usually are meted out to the poor, uninfluential, minority individual.

Geis' discussion of *narcotics* introduces one of the key social arguments surrounding victimless crimes. Does an individual have the right to harm himself, to make himself a victim? Does the loss of a productive citizen seriously harm the community which must support or perhaps replace him? The positive and negative effects of the law's treatment of "the victim" of drug abuse, both addictive and non-addictive, are discussed in this book, which includes an analysis of the development of drug abuse in the United States as well as current research data. That there is no clear answer for prevention or treatment is obvious; attempted rehabilitation does not work in the vast majority of cases. The health of the addict depends on access to pure drugs rather than the extent of addiction.

The protection of the community depends on the economic pressure upon addicts to support their habits with criminal activity. Geis examines the alternatives and bases his conclusions on Mill's argument, reasoning that an individual has the right to use his own body as he wishes. Mill states:<sup>6</sup>

[A man] cannot rightfully be compelled to do or forbear because it will be better for him to do so, because it will make him happier, be-

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5. *Doe v. Bolton*, 93 S. Ct. 739 (1973); *Roe v. Wade*, 93 S. Ct. 705 (1973).

6. MILL, *supra* note 2, at 23.

cause, in the opinion of others, to do so would be wise, or even right. These are good reasons for remonstrating with him, or reasoning with him, or persuading him, or entreating him, but not for compelling him, or visiting him with any evil, in case he do otherwise.

Geis concludes that society's right to be protected against criminal acts connected within the context of addiction would be resolved if drugs were available through medical outlets.

*Gambling*, along with narcotics, is a victimless crime that does not involve sexual conduct but a choice of entertainment. The problem here, as Geis puts it is that:<sup>7</sup>

Gambling toys with and teases certain imperatives of our culture, particularly those concerned with what has been called the Puritan ethic, a set of postulates about human existence which maintain that man should prosper and enjoy the good (i.e., conspicuous consumption) only by means of his own efforts, and not through the sheer intervention of chance or providence.

The author discusses legal and illegal gambling: numbers, lotteries, offtrack betting and gambling in Nevada. He concludes, as have a number of state legislatures, that more abuse accompanies its illegality than is inherent in the activity itself. A key example is the problem of corruption in the law enforcement process. Criminalization of the behavior discussed in this book opens the door to ridicule of the law, prejudice in the courts, and corruption of the police officer. Geis quotes the following statement from Patrick Murphey, New York's Police Commissioner, on the relationship between law enforcement conditions and gambling crimes such as numbers:<sup>8</sup>

The policeman would be more effective in his crime prevention duties and he would be held in higher public esteem if he were not required to enforce so many regulations which attempt to control morals—the so-called victimless crime.

By charging our police with the responsibility to enforce the unenforceable we subject them to disrespect and corrupting influences. And we provide the organized crime syndicates with illicit industries on which they thrive.

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7. GEIS, *supra* note 4, at 222.

8. *Id.* at 230.

The hypocrisy of differing legal treatment and enforcement of similar activities is a more obvious contributor to the moral decline of the community than is the proscribed activity.

The last, and one of the most emotional, of Geis' topics is *prostitution*. Prostitution is probably the subject of more biased publications and more hypocrisy than any other crime without complainants. The illegal and clandestine support by many of this activity exposes the real morality of a community which attempts to enforce repressive laws on a selective basis. Although the data presented by Geis on this issue is adequate, his access to specific research on prostitution is limited. Since it is important to examine here at least one victimless crime in depth, the basis of present laws against prostitution should be clarified.

The rationale for the present biased system generally rests on three grounds: it is claimed that prostitution is linked to Organized Crime, and that prostitution is responsible for much ancillary crime as well as the increase in (or at least the transmission of) venereal disease. Underlying these assumptions is the belief that legal proscriptions deter women who would otherwise become prostitutes, thus protecting the community from moral decline. Current research does not support any of the above arguments for maintaining the illegal status of prostitution.

While it is not always clear where Organized Crime begins and mere organized crime (*i.e.*, coordination necessary for following the convention circuit) ends, evidence indicates that the Mafia is not involved. The Presidential Commission on Law Enforcement and the Administration of Justice has stated unequivocally that prostitution plays "a small and declining role in organized crime operations."<sup>9</sup> The reviewer's three years of field research in a major American city support those findings.<sup>10</sup> Recognized experts on Organized Crime also have pointed out that prostitution is not an attractive investment for the Mafia because it is difficult to control due to the nature of the transaction and the relationship between pimp and prostitute. Involvement in prostitution is simply bad public relations for the legally and

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9. PRESIDENT'S COMM'N ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT, ORGANIZED CRIME 4 (1967).

10. Burnstin & James, *Prostitution in Seattle*, 25 WASH. ST. BAR NEWS 5 (Aug.-Sept. 1971).

politically sensitive Organization, and the return is small when compared to the severe penalties when procuring, in contrast to prostitution, is involved.

The argument that prostitution supports ancillary crime (larceny, robbery, assault, narcotics) is more complex. It is obvious that other crimes do occur in the environment of an act of prostitution, but whether it is rational to make one activity criminal in order to reduce or control another merits serious inquiry. Since each is deemed illegal in itself, the prohibition of prostitution fosters a double impact. For example, if the customer can be prosecuted for prostitution, a larceny will not be reported by the customer to avoid involving the police. If prostitutes believe their victims will not report them, larceny may be encouraged.

Robbery and assault, more serious law enforcement problems, are dangerous to both customer and prostitute. Though the instances of men who are beaten by women *presumed* to be prostitutes and their accomplices receive more public attention, statistics on assault indicate that it is the prostitute who is more likely to be beaten by customers.<sup>11</sup> Labelled as a criminal, the prostitute is regarded as a legitimate victim by the customer. The separation of prostitution from criminalization and the arrest of those who commit assault or robbery is a more straightforward solution.

Traffic in narcotics also is cited as ancillary to prostitution, and in fact many heroin addicts do turn to prostitution to support their habits. In the subculture, they are considered "hypes," and are dissociated from professional prostitutes.<sup>12</sup> Addicts, by necessity, are associated with dealers, and infrequently a pimp will sell narcotics. But the addict-prostitute rarely engages in sales. She is a user, an occasional transferrer, but her activity relates only to herself, not to other persons or property.

Advocates of repressive laws also declare that prostitutes are the cause of the current epidemic of venereal disease. In fact the age group recognized by Public Health experts as primarily responsible for over eighty percent of syphilis and gonorrhoea cases (age fifteen to

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11. J. James, *A Formal Analysis of Prostitution in Seattle, Part II*, 1971 (basic statistical summary, in University of Washington Library).

12. J. James, *Ethnographic Semantic Approaches to the Study of the Argot of an Urban Subculture: Streetwalkers*, 42-49, 1972 (unpublished Ph.D. dissertation in University of Washington Library).

thirty) does not patronize prostitutes.<sup>13</sup> Public Health officials believe that prostitutes, despite their numerous sexual contacts, account for only about five percent of all VD cases.<sup>14</sup> Unlike persons in the fifteen to thirty age group who have experienced a change in sexual values unaccompanied by health education, officials note that prostitutes are generally well-educated about preventive techniques.

The question of law enforcement as a deterrent to prostitution and the feared moral decline of the community is perhaps the basic issue underlying all the arguments discussed above. In a society where the law is often regarded as the guardian of morality, it is difficult to argue that repeal of prohibitive laws does not signal instant destruction of the moral fiber of the community. For example, opponents of liberalized abortion laws predicted many more abortions would occur upon legalization, rather than just the elimination of illegal abortions. In fact, the number of abortions has not changed significantly. What has changed is that now we know about them. Proponents of victimless crime ignore the view that the primary function of the criminal law is the protection of persons and property, and that, even when society through its laws punishes immorality, it does not do so with consistency. They ignore the argument that to seek repeal of the laws prohibiting prostitution is not necessarily to conclude that prostitution is morally good. Rather, it is a judgment about the appropriate use of the criminal law and the abuses that accompany the involvement of law enforcement officials in crimes without complainants.

Proponents of current laws often ignore the negative effects of prohibition on police, prostitutes, and the community as a whole. Prostitution forces the policeman into using questionable techniques. Since no citizen is a complaining victim, he must pose as a decoy and encourage the prostitute to solicit him. Often this involves the officer himself in illicit behavior. Frequently, when prostitutes become familiar with the vice squad officers, rookies are used as decoys. The impact of chasing prostitutes while ignoring their customers—a distasteful and hypocritical job—can blur the new officer's image of a policeman's duty. The individual officer's diminished respect for his

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13. Wilcox, *Proportion of Venereal Disease Acquired from Prostitutes in Asia: A Comparison with France, the United Kingdom, and the United States of America*, 38 BRIT. J. VENEREAL DISEASES 37-42 (1962).

14. *Id.*



position affects the community. Further, the corruption of the police through possible pay-offs and questionable professional image compromises the basic integrity of our system of justice.

The effects of the enforcement procedures on the prostitute clearly are negative. Jail is not a deterrent. It often encourages criminal conduct. Incarceration contributes little to rehabilitation while teaching the prostitute about genuine criminal activity. She learns that other more serious crimes may pay better; she begins to view herself as a criminal. Attaching the label "criminal" to prostitution and imposing heavy sentences blur the distinction between offering a service and committing a theft.

The abuse and degradation felt by the prostitute under the current system is much more a part of the arrest-incarceration process than the act of prostitution. Prostitutes who are arrested repeatedly become enmeshed in a cycle of debt and degradation that is difficult to escape. They either move elsewhere to work, commit other crimes, or continue being recycled through jails as long as they survive. The degradation of women in the current *handling* of prostitution is much more destructive in its hypocrisy and abuse than the profession itself.

A partial solution to this situation suggested by both the author and reviewer is a change in the legal status of the profession. While a permanent solution depends upon basic changes in our sexual values, as an interim measure, decriminalization of prostitution is the least abusive choice. It differs from legalization and accompanying government regulation in that it removes prostitution from the criminal code entirely rather than merely enabling greater legal involvement. All sexual behavior, in private, between consenting adults should be outside the purview of the law. Option for local controls would still remain depending on the community's concern about overtness, taxation, hygiene and age. These are areas arguably outside the scope of the "private consenting adult" limitation. Criminal sanctions would still limit personal freedom in a purely private area, but the ideal of a "consenting adult" approach will need to be balanced by the reality of public expediency. Decriminalization, with some restrictions, is regarded only as a provisional solution while we seek to eliminate the more fundamental causes of prostitution.

In summary, balancing individual freedom and "community morality" involves both a philosophical question and a basic inconsistency between the normative ideal and the unpleasant and unjustifiable real.

## Not the Law's Business?

Britain once used the slogan "Keep Britain Tidy" for an anti-litter campaign, but the tidiness ethic cannot extend to the personal habits of individuals. The price to be paid in hypocrisy, corruption, and loss of personal freedom is a much greater harm to the community than the harm fashioned by those individuals whose sexual choice, entertainment source, or relationship to their body is deemed somehow morally untidy.