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VICTIMLESS CRIMES: A DESCRIPTION OF OFFENDERS AND THEIR PROSECUTION IN THE DISTRICT OF COLUMBIA

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I. INTRODUCTION

Public drunkenness, narcotic and other drug abuse, gambling, and certain sexual behavior between consenting adults in private have been made crimes under the law in many societies. While these crimes differ vastly in the types of behavior they encompass, they have certain important features in common. As a class they represent society's attempt to legislate morality, to make immorality, as such, a crime.[1] Crimes against property and crimes against the person involve unwilling victims. Crimes against prevailing standards of morality do not, in and of themselves. The person who becomes involved in this type of crime does so willingly. There is no victimization in the usual sense of the term. Thus, this category of crimes has been called "victimless."[2]

This report describes and analyzes the prosecution of victimless crimes in the District of Columbia. The study is set in a context that blends two distinct but complementary approaches to the understanding of the criminal law: labeling theory and legal realism. Both emphasize the importance of discretion and choice, so that policy implications of the

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[1] T. Duster, The Legislation of Morality (New York: Free Press, 1970); N. Morris and G. Hawkins, An Honest Politician's Guide to Crime Control (Chicago: University of Chicago Press, 1970); and H. Packer, The Limits of the Criminal Sanction (Stanford: Stanford University Press, 1968).

[2] E. Schur, Crimes Without Victims (Englewood Cliffs: Prentice Hall, 1965). But see Chapter II, fn. 6, for the argument that prostitution is not a "victimless" crime, and p. 17 for evidence of a strong association between drugs and violent crimes.

analysis are highlighted. Labeling theory is a particularly relevant perspective for social policymakers. It emphasizes the significance of social choices and thereby reminds policymakers of the very real power that is directly available to them to influence social realities.

Labeling theorists have underscored the easily forgotten point that criminality is not inherent in a particular act or person. It is the result of social choices, first to outlaw certain behavior and then to select some people who engage in that behavior for prosecution and public designation as criminals. An act becomes a crime only when society chooses to make it one, and that choice can be reversed. Many acts that are crimes today were not crimes a century ago. Other acts have been criminalized and later decriminalized, such as the manufacture and sale of alcohol during and after Prohibition. Pointing out the relativity of crime may appear rather academic when considering such serious crimes against the person as murder, rape, and armed robbery. Society is unlikely to change its mind about these. But, the point is far from trivial when crimes without victims are considered. These are crimes that might very well be decriminalized. In fact, for over a century and a half the merits of decriminalizing these crimes have been openly debated, and to some extent the decriminalization process has already begun.[3]

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[3]See the debate between Bentham and Fitzpatrick (J. Bentham, Introduction to the Principles of Morals and Legislation [London: Oxford University Press, 1948] and (cont'd.)

It is not just society's initial decision to criminalize an act that reflects the labeling process. It is also that series of choices that results ultimately in someone being designated a "criminal." This process can be conceived of as a screening device with a series of filters, each of which represents a decision to either proceed with or drop the matter. Thus, of all the prohibited acts that are committed, only some will result in a decision (either by the actor himself, or by someone else) to regard the act as a violation of law; only some of those violations will be regarded as acts that should be reported to the police; in only some of those reported cases will the police respond; in only some of the police responses will arrests be made; in only some of those will charges be filed; in only some of those will convictions be obtained and sentences imposed.

In arguing that the crime problem can be studied by focusing on society's response to crime, rather than the more conventional approach of focusing on the reasons why people

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J. F. Stephen, Liberty, Equality and Fraternity, 2nd ed. [London: Smith Elgard & Co., 1874]) and more recently between Hart and Devlin (H.L.A. Hart, Law, Liberty and Morality [Stanford: Stanford University Press, 1963] and P. Devlin, The Enforcement of Morals [London: Oxford University Press, 1965]).

See, also, A. Scott, "Rethinking of Marihuana Laws Urged," Washington Post, December 26, 1976, A1; M. Malin, "Message to Congress: Decriminalize Pot: Carter," U.S. Journal of Drug and Alcohol Dependence, vol. 1, no. 8 (September 1977), p. 1 (President Carter has asked Congress to decriminalize possession of small amounts of marihuana for private use); and a study by the National Governors' Conference, which supports Carter's position (see "Study to Push Marihuana Decriminalization," Washington Post, March 9, 1977, A9).

commit crimes, labeling theory parallels and supports the theoretical perspective of the legal realists. As Pound would probably argue,[4] the law with regard to victimless crimes in the District of Columbia cannot be fully understood by a reading of the law "on the books" alone, but must be seen "in action." Even more to the point is Holmes's notion of the law as a prediction of what is likely to happen when the law is broken[5]--in effect, a prediction of how the screening process will operate. For the legal realist the question becomes "What is the probability that if a specific victimless crime is committed, a criminal with certain characteristics will be arrested, prosecuted, convicted, and incarcerated?" A collateral question is "Does this probability differ by type of crime, characteristics of the offender, or other factors?"

Thus, if asked what the law is in the District of Columbia regarding the possession of marihuana, the legal realist might not answer in terms of the law on the books but rather might say something like this: "It depends. If you are a white male, age 17, with no prior criminal record, enrolled in college, financially able to have a good defense counsel, are caught in possession of only one ounce of the drug, then you have X percent chance of being punished. But, if the above circumstances differ, your chance of punishment is Y percent."

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[4]See the discussion in E. Schur, Law and Society (New York: Random House, 1968), Ch. 2.

[5]Ibid.

It is in this Holmesian sense that this study is a description of the "law" regarding victimless crimes in the District of Columbia. It is an examination of the process of selecting persons for punishment for these crimes and the factors that influence that selection. That part of the selection process under examination begins after the decision to arrest and continues to the sentencing decision.[6]

Throughout the analysis, comparisons are made between the selection process for victimless crimes and for certain nonvictimless crimes. This will show whether the prosecution of victimless crimes catches a different type of criminal in the criminal justice net than is being caught for nonvictimless crimes. It will also permit a determination of whether the factors that affect the selection process differ for these two broad categories of crime.

A third part of the analysis focuses on the question of differential resource allocations. Decisions regarding resource allocations in the criminal justice system have not

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[6]The earlier decisions in the sequence, namely, the decision to regard an event as a crime, to report it to the police, and the police decision to make an arrest, are of tremendous significance. They probably account for the highest proportion of the attrition of cases in the sequence. But, unfortunately, it is virtually impossible to measure this attrition. That is, it is impossible to know how many crimes were actually committed and what proportion of these were reported and resulted in arrest. Consequently, the legal realist's ideal of knowing the product of all the probabilities in the sequence from commission of a prohibited act to punishment for it cannot be achieved. At best only a conditional statement is possible, namely, "<u>if you are arrested</u>, the probability of being punished is X."

received the careful study they deserve. They are discretionary decisions and have broad policy implications. Most studies of discretion in the criminal justice system have focused on individual case decisions, such as the individual policeman's decision not to arrest a particular suspect or the prosecutor's decision not to charge. Goldstein has called these "low visibility" decisions.[7]

Researchers have largely overlooked resource decisions at the organizational level, such as the prosecutor's decision to double the size of a special crime unit or the police decision to concentrate on a certain aspect of the drug traffic.[8] These organizational decisions also influence the selection process, but at a different level. Instead of a choice among different individual criminals, they represent a choice among different crimes, in effect, a rank ordering of the seriousness of crimes. No criminal justice agency tries to enforce all laws

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[7]J. Goldstein, "Police Discretion Not to Invoke the Criminal Process: Low Visibility Decisions in the Administration of Justice," Yale Law Journal, vol. 69 (1960), p. 543.

[8]One noteworthy exception is an in-house study by the New York City Police Department. Citizens had been pressing the department to make a greater effort to arrest street-level drug addicts. The department initiated such a policy but also made a study of its cost effectiveness. It found that convictions were obtained at a high cost in police man-hours and with little benefit to the community. The bulk of the addicts convicted under the program were returned to the community or given short sentences (see W. F. McDonald, "Choice in the Enforcement of Drug Laws: Organization and Discretion in Police Work," in Drug Abuse Control, R. Rachin and E. Czajkoski, eds. [Lexington, Mass.: D. C. Heath, 1975], fn. 24).

equally. Some crimes are more serious than others--and proportionately greater resources are devoted to their enforcement. But, given a fixed amount of resources, more concentration on some crimes must be achieved at the expense of less concentration on others.

This choice between crimes, this decision as to what constitutes an appropriate allocation of resources, is a critical matter of social policy. Yet, it is of even lower visibility than the individual case decisions referred to by Goldstein. It is second in importance only to the question of whether certain acts should be prohibited at all.

Thus, with regard to victimless crimes, the first order of discussion for policymakers is whether the laws should exist at all. If that question is answered in the affirmative, the next question concerns the level of criminal justice resources that should be devoted to their enforcement. Should they receive high, medium, or low priority? Should as much effort be made to enforce them as is made to enforce other laws? The lack of research on these issues makes it difficult to know what trade offs are currently being made in law enforcement. It also means that the criminal justice system is currently making resource allocation decisions and decisions about what sanctions are appropriate without empirical guidance. This study attempts to fill some of that gap.

The study, however, does not purport to resolve either the question of whether the laws creating victimless crimes should be repealed or the question of what proportion of available criminal justice resources should be devoted to their enforcement. Its purpose is to describe how the system is currently operating so that the decision to change or maintain the status quo can be an informed one.

The analysis in this study is based on cases brought by the police to the U.S. Attorney's Office in the District of Columbia for prosecution.[9] The handling of all such cases is recorded in a computer system called "PROMIS" (Prosecutor's Management Information System).[10] The victimless crimes included in the analysis are those cases in which the most serious police charge was gambling, certain consensual sex offenses, or certain drug offenses.[11] These constituted 21 percent of

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[9] In the District of Columbia, the U.S. Attorney's Office has jurisdiction over the prosecution of felonies and serious misdemeanors, virtually equivalent to the jurisdiction of state public prosecutors.

[10] "PROMIS" is an automated management system containing up to 170 items of data on the offense, the defendant, the case, and court actions.

[11] The sex offenses included in the study are "soliciting for prostitution" (sol pros) and "soliciting for lewd and immoral purposes" (SLIP). In the District of Columbia, the arrestee is charged with sol pros if the object of the solicitation is coitus, and with SLIP if the object is sodomy.

The drug offenses include marihuana-related offenses, as well as narcotic and dangerous drug offenses.

Although not all crimes traditionally included in the category of "victimless" are included in this analysis, the phrase, "victimless crimes" is used throughout the report to avoid unnecessary circumlocution.

all arrests brought to the Superior Court in the first half of 1976. The other crimes in the analysis include felonies and misdemeanors of the sort that are ordinarily tried in state courts of general jurisdiction. All federal offenses, such as bank robbery, are excluded from the analysis, except for violations of laws controlling narcotic and dangerous drugs.[12]

The analysis is based primarily on data from the first six months of 1976, but parts are based on 1973 and 1974 data. The use of three separate years and the choice of these particular years were a result of the fact that certain key data elements were not all available in any one year. The use of three years, especially these three, however, turned out to be serendipitous. As will be pointed out below, it allowed for analysis of the impact of an important change in an enforcement policy; it also provided for the analysis of certain trends that proved interesting.

The data bases for the three time periods are presented in Table 1. These figures represent the number of cases referred to the prosecutor's office by the police during the time periods indicated.

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[12]In the District of Columbia, these latter offenses are tried in the U.S. District Court, as opposed to the D.C. Superior Court where all other offenses included in this analysis were processed. In general, the determination of proper jurisdiction for a given case is based on a combination of the United States Code, the District of Columbia Code, and policy of the U.S. Attorney's Office.

Table 1

Description of Data Bases

Type of Crime	Number of Cases Brought by Police		
	1973	1974	First 6 mos. 1976
Gambling	360	356	104
Soliciting for Prostitution (Sol Pros)	630	1081	1027
Soliciting for Lewd and Immoral Purposes (SLIP)	91	164	291
Drugs*	1851	2448	633
	2932	4049	2055
All Other Misdemeanors	---**	---**	4255
All Other Felonies	---**	---**	3257

Source: Prosecutor's Management Information System (PROMIS)

* The 1973 and 1974 figures do not include cases taken to the U.S. District Court.

** Not done for 1973 and 1974.

The analysis presented in Chapter 2 describes who is prosecuted for victimless crimes; what happens to their cases and why; and how these dispositions differ from those for other crimes. In addition, some indication of the criminal justice resources consumed in handling victimless crimes is provided, although this measurement is somewhat rough and indirect.

II. DEMOGRAPHIC CHARACTERISTICS AND CRIMINAL RECORDS OF VICTIMLESS CRIME ARRESTEES

Summary Portraits of 1976 Arrestees

The following are composite portraits of the "typical" person arrested by the police in Washington, D.C., and brought to the prosecutor's office for certain victimless crimes during the first six months of 1976 (see Table 2).

- Gambling offenders were usually middle-age (median age, 51 years), black (92 percent), males (81 percent) who were permanent residents of the District (65 percent); who were as likely to be employed as not; and who had no prior arrests (64 percent) and no lengthy record of violence (94 percent), defined as three or more arrests for crimes against persons.

- SLIP (soliciting for lewd and immoral purposes) offenders were usually young adult (median age, 29 years), white (60 percent), employed (62 percent) males (93 percent) who were not permanent residents of the District (79 percent); who had no prior arrests (84 percent), and no lengthy record of violence (97 percent).

- Sol pros (soliciting for prostitution) offenders were usually young adult (median age, 26 years), black (63 percent) persons who had no prior arrests (66 percent), no lengthy record of violence (98 percent) and who were not permanent residents of the District (66 percent). They were somewhat more likely to be male (56 percent) than female (44 percent), and about equally likely to be employed as unemployed.

- Drug offenders were usually young adult (median age, 27 years), black (93 percent), unemployed (63 percent), males (86 percent) who had been arrested before (60 percent), usually within the last five years (52 percent), but who had no lengthy record of violence (85 percent). They were about as likely to be permanent residents of the District (52 percent) as not.

Table 2

Selected Characteristics of "Typical" Victimless Crime Offenders, 1973, 1976 (Washington, DC)

Characteristics	Types of Crime*							
	Gambling		SLIP		Sol Pros		Drugs	
	1973 (N=360)	1976 (N=104)	1973 (N=91)	1976 (N=291)	1973 (N=630)	1976 (N=1027)	1973 (N=1851)	1976 (N=633)
% Male	81	81	97	93	1	56	90	86
% Black	93	92	94	40	63	63	88	93
% Resident of D.C. over 2 yrs.	81	65	57	21	39	34	69	52
% Employed	55	49	24	62	15	48	61	26
Median Age	51	51	24	29	22	26	22	27
% with any prior arrest	50	36	78	16	57	34	38	60
% with arrest in last 5 yrs.	31	19	71	14	51	30	32	52
% with three or more prior arrests	27	16	61	9	31	17	18	35
% with three or more prior arrests for crimes against persons	5	6	20	3	4	2	5	15

Source: Prosecutor's Management Information System (PROMIS).

* SLIP: Solicitation for Lewd and Immoral Purposes; sol pros: Solicitation for Prostitution; drug cases in 1973 were limited primarily to marihuana-related arrests.

These summary portraits contain some surprises, some new insights, and some confirmations of previous findings. The gambling arrestee seems to fit fairly closely the national portrait for this offense, but there is an important qualification to be noted. The national portrait is heavily influenced by the characteristics of the street-corner craps game player (see Appendix A), but that type of gambler is not reflected in the PROMIS data.[1] The present arrestees, in the main charged with offenses relating to the "numbers game," represent a higher level of gambling involvement than the street-corner craps player. Yet, despite the absence of the latter type offender, the summary portrait that emerges is for the most part not substantially different from that of previous studies that included him. The arrestee is still an older, black male. But, unlike the National Gambling Commission's[2] finding that gamblers are likely to have a prior record, these arrestees do not. Only 19 percent of them had been arrested in the previous five years. If these persons are involved in the more organized, continuous gambling operations, one might wonder why so few of them have previous

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[1]He would be charged with disorderly conduct (craps), a minor offense, and prosecuted by the Corporation Counsel's Office, not the United States Attorney's Office. Therefore, data on that offense are not entered in PROMIS.

[2]Commission on the Review of the National Policy Toward Gambling, Gambling in America (Washington, D.C.: Government Printing Office, 1976). See also Appendix A, "Gambling: A National Overview."

arrests (or recent arrests). Given the general lack of prior records among these arrestees, one can begin to understand the high rates of case attrition and the infrequent imposition of severe sentences in these cases. The prosecutor is likely to take note of the first-offender status of many of these arrestees and permit the case to be dismissed if the defendant successfully completes first-offender treatment. Similarly, judges are likely to be lenient with first offenders.

Also noteworthy about the prior arrest record of these gambling arrestees is the lack of a lengthy record of violence, defined here as three or more arrests for crimes against the person. Perhaps it is due to the absence of the street-corner gambler from the data. The latter may be the one who is more likely to get into the fight and, hence, to have the prior record of arrests for violence.

Two additional pieces of information in the gambling arrestee portrait that are not available on a national basis have to do with employment and residential status. The great majority of these arrestees are permanent local residents. Half of them are employed. Again, both of these factors help to explain why severe sentences are not meted out in these cases. These two factors are likely to be seen by judges as indications of responsibleness in the defendant's background, suggesting a sentence of probation or a fine rather than incarceration.

Returning now to Table 2, the most striking part of the summary portraits for SLIP and sol pros arrestees is the large proportion of males involved. It is particularly surprising for sol pros cases, which have traditionally been dominated by female arrestees. The characteristics of SLIP and sol pros arrestees and the reasons for the change in the proportion of female and male arrestees in the sol pros cases are discussed in more detail below.

The drug arrestee portrait in Table 2 differs substantially from that in the report of the National Commission on Marihuana and Drug Abuse (see Appendix B). It should be noted that while the Commission gave separate portraits for marihuana arrestees and dangerous drug arrestees (i.e., all non-marihuana drug offenses), the present data combine these two types of arrestees. But that difference cannot explain the 1976 portrait. The present data show that 93 percent of the drug arrestees are black, whereas the National Drug Commission's data for Washington, D.C., in the early 1970s showed 37 percent of the marihuana arrestees and 93 percent of the dangerous drug arrestees were black. This change in racial composition is discussed in the next section, which compares the characteristics of victimless crime arrestees in the District of Columbia over time.

Comparison of 1976 and 1973 Arrestees

Comparing the 1976 arrestees for gambling with those for 1973 (Table 2) reveals some striking similarities and differences. Sex, age, race, employment, and prior arrests for three or more crimes against the person are virtually identical for the two years, but in 1976 the arrestee was considerably less likely to have been a permanent resident of the District of Columbia and had a generally less serious prior arrest history. No explanation for these differences presents itself.

With regard to the SLIP arrestees, dramatic changes took place in the rate of arrest and in the profile of the offenders between the two years analyzed. In 1976, SLIP offenders were arrested at about six times the 1973 rate. Moreover, while the sex of the arrestees remained about the same (93 percent to 97 percent male), everything else changed substantially. In 1976, the SLIP arrestee was less than half as likely as he was in 1973 to be black; half as likely to be a permanent resident of the District; more than twice as likely to be employed; about five times less likely to have a prior arrest; about five times less likely to have had an arrest within the last five years; almost seven times less likely to have had three or more prior arrests; and about six and a half times less likely to have had three prior arrests for crimes against persons. Also, the 1976 SLIP offender was older (median age of 29 years compared with 24).

Clearly, the kind of person arrested for SLIP offenses had changed. The 1973 SLIP arrestee was a young, unemployed, local black with a substantial criminal record. The 1976 SLIP arrestee tended to be an older, white, employed, non-D.C. resident without a criminal record. The discretionary power of the police to alter the flow of offenders into the criminal justice system by virtual changes in enforcement policies is nowhere better illustrated than in this example. The explanation of the change is not altogether clear, however. A full explanation would require more interviewing of police and prosecutorial officials and line officers than was encompassed within the scope of this study. The explanation offered below, therefore, has been only partially confirmed and is offered as suggestive rather than conclusive.

In 1973, SLIP arrestees were primarily homosexuals. The high rate of prior arrests for violence among them appears to reflect the violent side of the gay world. It was violence among homosexuals and appears to have been confined largely to the gay community. By 1974 the climate of opinion about enforcement of sex offenses began to change. Some courts at the trial level ruled that enforcement of prostitution laws could not discriminate against females.[3] Even more significant in terms of shaping police arrest policy were indications from the City Council that it wanted to make concessions to the

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[3]See, e.g., United States v. Wilson, nos. 69760-73 and 74784-73 (Sup. Ct. D.C. March 14, 1974) 102 Daily Washington Law Reporter 661.

gay community and that it wanted the laws against prostitution enforced without discrimination against women. Subsequently, the police no longer gave the arrest of homosexuals the priority it once had. With regard to the enforcement of prostitution laws, the police began using female police decoys and began arresting male solicitors, many of whom were white, middle-class visitors to Washington, D.C., and possibly residents of suburban Maryland and Virginia. Enforcement of the sex laws was stepped up in response to a reported influx of prostitutes in the District of Columbia. Increasing numbers of arrests were made for both SLIP and sol pros. Homosexuals continued to be arrested but they now constituted a minority of the total arrests for SLIP. Therefore, their contribution to the statistical profile of the SLIP offenders in 1976 was suppressed by the dominance of the white, middle-class offenders.

The change in the profile of sol pros arrestees between 1973 and 1976 is also dramatic. The single, most outstanding difference is the vast increase in the proportion of male offenders (from 1 percent in 1973 to 56 percent in 1976).[4] Also striking is the accelerated rate of arrest (about three times as many in 1976 as in 1973). Yet, despite these changes the proportion of black arrestees remained constant (63 percent). With regard to other characteristics, the change from

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[4]See Appendix C, "Consensual Sex Offenses: Overview of Enforcement Policy."

1973 to 1976 in the sol pros arrestee profile paralleled that which occurred in the SLIP arrestee profile, but the differences were not so great. The change was away from a young adult, unemployed, female with a substantial criminal record to a somewhat older, more-likely-to-be-employed, male who was half as likely to have a criminal record as the 1973 sol pros arrestee.

In terms of social costs and benefits, the change appears to have been more in the direction of greater class, racial, and sexual justice. More middle-class, white males are now being charged with a crime that was formerly reserved more for black males and for females. This change may mean that the new arrest policy is more equitable. But it raises other questions in the process. Behind the old (1973) arrest policy there seem to have been a number of legitimate law enforcement concerns. The 1973 SLIP and sol pros offenders had substantial arrest records, particularly the SLIP offender, who had a considerable record of violence. In going after these offenders, it appears that the police may have been less influenced by the sex and social class of the offender than by the offender's potential harm to society beyond the violation of its sex laws. Indeed, this interpretation coincides with the rationale often given by police for their anti-prostitution efforts.[5] Not Victorian morality but prevention of assaults,

[5]A recent survey of the Washington Metropolitan Police Department casts some light on officer attitudes about victimless crimes. James Kretz, Police Perception of Plaintiffless Crime: Preliminary Report, Washington, D.C.: Bureau of Social Science Research, 1973).

robberies, murders, drug traffic, and general nuisance, they say, lies behind their fight against prostitution.[6]

It is possible that by arresting this new type of offender--these middle-class, white, male customers--the police are deterring more-serious crimes associated with prostitution. But it may be appropriate to question this. In the old days, police used to warn middle-class-appearing (and, hence, out-of-place) males in notorious areas of the city to move on because they could get hurt. Presumably this was as direct a deterrent as could be provided. Today, the same customer will be arrested by the female decoy he solicits. This may dissuade him from sexual solicitation in the future and may also deter others once the policy has become known citywide (nationwide for the out-of-town customers). An important question is, "What, if any, is the marginal increase in prevention of serious crime that can be achieved by arresting

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[6]In Washington, D.C., for example, the police say there have been 20 prostitution-related murders in the Thomas Circle, N.W., area in the last two years and that robberies and beatings are a nightly occurrence. They estimate that on any given night there are up to 300 women on the streets in that area accosting tourists and passersby, cutting and robbing people, and jumping into unlocked cars and assaulting drivers. See R. Shaffer, "Courts' Leniency Blamed for Army of Prostitutes," The Washington Post, August 29, 1977, pp. A1 and A12. And the police appear to agree with irate citizens who scoff at the notion that prostitution is a "victimless" crime. See Kretz, ibid. In a letter protesting the failure of the courts to rid the central city neighborhood of prostitution, the president of the local community association pointed out that the victims of prostitution are not only the people who are assaulted, robbed, and murdered; the neighborhood, itself, as a viable, livable area was being destroyed. See D. Smith, "This Parasite Must Go," in Letters to the Editor, The Washington Post, September 5, 1977, p. A20.

customers as opposed to warning them of danger or just running them out of the neighborhood?" We cannot answer this question with our data, but the data do suggest one of the costs that must be subtracted from the total benefits of such a strategy: The new enforcement policy increases the number of people in society with arrest records. (Compare the 1973 and 1976 profiles for prior arrests.) The effect of such a record is likely to be substantial.[7] It has direct effects on an individual's employment and career opportunities. Any law enforcement strategy that results in more people having arrest records should attempt to show that the intended benefit will outweigh this cost. In addition, one would have to calculate the change in costs to the criminal justice system's resources.

The drug cases in this study cannot be subjected to the same comparative analysis as the three victimless crimes described above. The 1976 sample includes federal District Court cases as well as D.C. Superior Court cases, whereas the 1973 sample contains only the latter. But one noteworthy point can be made--the number of drug arrestees has declined. In 1973, the total number of arrestees was 1,851. In 1976, with the addition of cases from the federal court, the projected annual rate of drug arrestees (that is, double the 633 arrests in the first six months) is 1,266, a decline of about one-third.

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[7] See H. S. Miller, The Closed Door (Washington, D.C.: U.S. Department of Labor, 1972).

It also bears noting that our 1973 drug arrestee profile differs from the 1970 profile of marihuana arrestees in the District reported by the National Drug Commission (see Appendix B). In contrast to the 1970 marihuana arrestee, the 1973 drug arrestee was twice as likely to be black and about 20 percent more likely to be a permanent resident of the local area. The median age of the two groups, on the other hand, was virtually the same (22 years). The two groups, however, are not strictly comparable--the Drug Commission selected only marihuana cases, whereas our 1973 data are largely marihuana cases but also include drug offenses other than marihuana, for example, possession of implements of crime, such as a syringe. The Drug Commission's 1970 sample of only marihuana cases was 780 arrestees per year whereas our sample in 1973 with marihuana plus other cases was 1,851 arrestees per year. Perhaps the difference in the scope of the samples accounts for the drastic difference between 1970 and 1973 in the race of the offender. Or, perhaps there was a real change in the racial composition of marihuana arrests during that time. Certainly by 1976 there was a real change in the racial characteristics of all "drug" arrests (i.e., including both marihuana and dangerous drug arrestees). As noted earlier, by 1976 there was a decline in the absolute number of total drug arrests and a substantial increase in the proportion of blacks arrested for drug offenses.

Accounting for these shifts is a complex and speculative matter. First, assuming there was a real shift between 1970 and 1973 in the direction of an increasing proportion of black arrestees for marihuana, this may have reflected a decline in the protest movement and the "hippie" lifestyle that brought many marihuana-smoking, middle-class white students to Washington to camp in the parklands and demonstrate against the war in Vietnam. This would be consistent with the fact that the 1970 D.C. arrests reported by the National Drug Commission were made mostly in outdoor settings; 37 percent of them were made by the U.S. Park Police.[8] Then, as the protest movement declined, there may have been a concomitant decline in the proportion of these arrestees in the data, leaving the resident (mostly black) youth of the city to form a large proportion of the marihuana arrestees.

Second, between 1970 and 1976 there has been increased indication of a changing public attitude toward marihuana offenses in the direction of greater tolerance for certain forms of this offense, such as possession of limited quantities. This, along with the possibility of future decriminalization, may have influenced the police effort against these kinds of cases. Thus by 1976 the proportion of all drug arrests that were marihuana arrests might have declined considerably. This in turn would affect the racial composition of

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[8] National Commission on Marihuana and Drug Abuse, Marihuana: A Signal of Misunderstanding (Washington, D.C.: Government Printing Office, 1972), p. 634.

the 1976 drug arrestee portrait because the dangerous drug arrestees were more likely to be black.

Comparisons Among 1976 Arrestees

The analysis so far has focused on comparisons over time. We turn now to comparisons among the types of crime. Table 3 presents the demographic characteristics and prior arrest records of arrestees for victimless crimes and other offenses during the first six months of 1976. Several of the demographic characteristics are noteworthy. Males dominate all crime categories, except soliciting for prostitution. Blacks dominate all crime categories, except the two consensual sex offenses. There are substantially more whites in the consensual sex categories, and the SLIP category contains a majority of whites.

With regard to residential stability, gambling arrestees tend to be permanent residents more than arrestees in any other crime category. In contrast, the arrestees in the consensual sex categories--especially the SLIP arrestees--are considerably less likely to be established local residents. The drug arrestees are at about the norm for all other misdemeanor and felony arrestees with regard to this characteristic.

With regard to employment, arrestees in three of the four victimless crime groups (namely, gambling, sol pros, and SLIP) are substantially more likely than the norm to be employed. The SLIP offenders, particularly, stand out from the rest as persons who do not exhibit the unemployment pattern

Table 3

Demographic Characteristics and Arrest Records of Defendants Referred for Prosecution by the Police: Jan. - June, 1976 (Washington, DC)

Type of Crime	Number of Cases	Percentage of Cases in Which the Defendant was:				Median Age	Percentage of Cases in Which the Defendant had:			
		Male	Black	Local Resident Over 2 Years	Employed		Any Prior Arrest	Arrest In Last 5 Years	Three Or More Prior Arrests	Three or More Prior Arrests for Crimes Against Persons
Gambling	104	81	92	65	49	51	36	19	16	6
Sol Pros *	1027	56	63	34	48	26	34	30	17	2
SLIP *	291	93	40	21	62	29	16	14	9	3
Drugs	633	86	93	52	26	27	60	52	35	15
All Other Misdemeanors	4255	84	86	51	32	25	44	39	21	9
All Other Felonies	3257	89	94	57	29	24	59	53	34	16

Source: Prosecutor's Management Information System (PROMIS).

* Sol pros: solicitation for prostitution; SLIP: solicitation for lewd and immoral purposes.

that is common to criminal populations. In contrast, drug arrestees have a somewhat higher rate of unemployment than the norm for arrestees in all nonvictimless crimes and a substantially higher rate than arrestees in the other victimless crime categories.

With regard to age, the typical arrestee in each of the victimless crime categories is older than the typical arrestee for all other misdemeanors and felonies. The gambling arrestee is particularly outstanding in this respect--he is typically almost twice as old as all other arrestees.

When it comes to prior arrest record, there are substantial differences among each of the victimless crime categories, as well as between them and the nonvictimless crime categories. Once again, the SLIP offender stands out. On every measure of prior arrest, he is dramatically lower than all other arrestees. Combining this difference with the other demographic differences noted earlier (that is, more likely to be employed, older, and transient), the result of the pursuit of sexual justice becomes apparent. The criminal justice system is now spending some of its limited resources on a new offender.[9]

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[9]While prostitutes tend officially to be unemployed and to have prior arrest records, many of them are really also unlike the other arrestees in the system and therefore perhaps equally deserving of a different kind of public sanction.

Other noteworthy aspects of the differences in arrest records are that gambling and the two consensual sex offenses were below the norm for all nonvictimless crimes. In contrast, the drug arrestees were above the norm. In all respects, the drug arrestees look more like felons than misdemeanants. They have almost identical rates of prior arrest, prior arrests within the last five years, three or more prior arrests, and three or more prior arrests for crimes against persons. This finding challenges the occasional allegation that police drug enforcement has concentrated on the less-serious criminal.

In contrast, the prior arrest profile for gambling arrestees suggests that police actions in this area may be open to the criticism of misapplied use of resources. These arrestees are markedly less serious criminals (based on prior arrests) than the drug arrestees. Nor do they appear to be as serious criminals as "all other misdemeanor" arrestees. Thus, if these people continue to be arrested, the reason should be something other than their own criminality. Law enforcement policymakers should be aware that these gambling arrestees are less crime-prone than arrestees in all other crime categories (excluding the 1976 consensual sex arrestees). This is evident when one compares the gambling arrestee profile with that for "all other misdemeanors" arrestees (presumably the less-serious criminals). The gambling offenders have

less serious prior records (which is all the more remarkable because they are twice the age of other offenders and hence have had twice the "exposure" to potential arrest). They are also considerably more likely to be permanent local residents and to be employed. All of these factors are indicators of social strengths. They are "plusses" that most correctional therapists would like to see in the more-serious offenders. Like the 1976 SLIP arrestee, the gambling arrestee stands out from most other arrested persons. His profile makes evident yet another trade off in that uncertain calculation of social costs and benefits. The price paid for allegedly deterring organized crime includes the costs associated with forcing persons who have no prior arrest records to endure the various costs associated with defending themselves against criminal charges. In addition, there are the costs to the criminal justice system of processing these low-threat defendants--in particular, the "opportunity costs" of not being able to use those criminal justice resources in the pursuit of more-serious criminals.

There can be little argument with the proposition that organized crime is a menace to society and that the police should attempt to stop it. Moreover, it seems reasonable to believe that the proceeds of some gambling operations do make their way back to organized crime to finance other criminal ventures. However, there is ample cause to doubt whether

enforcement practices that result in the arrest mostly of people with no prior record represents a serious force against organized crime. Perhaps the further rationale, that visible gambling requires a visible police response in order to avoid the appearance of official corruption, is the most viable one, however circular.

III. SELECTED CHARACTERISTICS OF CRIMINAL CASES INVOLVING VICTIMLESS CRIMES

In addition to the demographic characteristics and prior arrest histories of defendants, the PROMIS data base provides information about the case itself as it is processed through the court system. Some of this information gives additional insights about the circumstances of the arrest (such as the number of codefendants and the number of witnesses); some reflects on how the case was handled by the criminal justice system (such as the type of bail set; whether it was referred for special handling by the Major Violator's Unit of the prosecutor's office; the number of continuances it received; and the number of days it was in the system). The significance of some of these items, such as type of bail, is apparent on their face. But the significance of other items is less clear, such as the number of days a case spends in the system. A review of several of these items is presented below for the purpose of filling out our knowledge about victimless crimes, to the extent that the available data permit.

Number of Codefendants

The number of codefendants in a case is a reflection of the social nature of the crime and, perhaps even more directly, the number of people present at the time of arrest.[1] As

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[1] Some unknown number of cases that might have been processed with codefendants are separated and tried individually for various legal or other reasons. We presume this is a negligible percentage of cases.

Table 4 indicates, all offenses usually involve the arrest of a single defendant without any codefendants. But there is considerable difference by type of crime with regard to this characteristic. Two of the victimless crimes stand out from all other crimes--sol pros and SLIP. These two consensual sex offenses form a group that is distinguished by its outstandingly high rate of single-defendant crimes. All other crimes are considerably more likely to involve codefendants.

With regard to the drug cases, our codefendant data are somewhat surprising. The National Commission on Marihuana and Drug Abuse (see Appendix B) found that on a national basis 71 percent of the marihuana arrests and 56 percent of the dangerous drug arrests involved multiple defendants. In contrast, our data (in which marihuana and dangerous drugs are combined) show that only 37 percent of the drug arrests involved multiple defendants. The full significance of this finding is not apparent.

With regard to the two consensual sex offenses, the high rate of single-defendant cases is as one would expect.

Number of Witnesses

The number of witnesses in a case can be regarded as a rough measure of two aspects of the case: its strength (the more testimonial evidence, the stronger the case), and the financial cost of administering justice (the more witnesses, especially police witnesses, the higher the cost). In victimless crimes, the witnesses are almost always police officers

Table 4

Number of Codefendants by Type of Crime: Jan. - June, 1976
(Washington, DC)

Type of Crime	Number of Cases	Percentage of Cases in which the Number of Codefendants was:			
		0	1	2	3 or more
Gambling	104	62	17	14	6
Sol Pros *	1027	84	14	2	0
SLIP *	291	82	8	9	0
Drugs	633	63	22	7	8
All Other Misdemeanors	4255	75	15	5	5
All Other Felonies	3257	67	22	7	4

Source: Prosecutor's Management Information System (PROMIS)

* Sol Pros: solicitation for prostitution; SLIP: solicitation for lewd and immoral purposes.

or chemists who testify as expert witnesses regarding drugs that have been seized. The few lay witnesses in victimless crimes may often be codefendants turning state's evidence against their accomplices.

As indicated in Table 5, there is considerable difference both among victimless crimes and between victimless and other crimes in the number and type of witnesses involved in a case. As one would expect, lay witnesses are almost never involved in victimless crimes--only 4 percent of the gambling cases, 2 percent of sol pros, 3 percent of SLIP, and 16 percent of the drug cases had lay witnesses, compared with 52 percent for all other misdemeanors and 80 percent for all other felonies. Also as expected, expert witnesses are used more frequently in drug cases than in any other type of criminal case. Experts are virtually never used in sol pros or SLIP cases.

With regard to the number of police witnesses per case, the great majority of the sol pros and SLIP cases (83 percent and 87 percent, respectively) involve exactly two police officers. In contrast, there tended to be fewer police witnesses for all other misdemeanor cases and all other felony cases, with the exception of gambling and drug cases, which involved a substantially greater proportion of cases with four or more police witnesses.

Combining the last three columns of Table 5, we can compare the police manpower utilization by type of crime.

Table 5

Number and Type of Witnesses by Type of Crime: Jan. - June, 1976
(Washington, D.C.)

Type of Crime	Percentage of Cases in Which the Number of Witnesses was:																			
	0				1				2				3				4 or more			
	Police	Lay	Expert	Total	Police	Lay	Expert	Total	Police	Lay	Expert	Total	Police	Lay	Expert	Total	Police	Lay	Expert	Total
Gambling (N=104)	0	96	76	0	16	4	14	10	51	0	11	36	13	0	2	24	19	0	0	27
Sol Pros* (N=1027)	0	98	98	0	6	2	2	5	83	0	0	82	9	0	0	10	1	0	0	2
SLIP* (N=291)	0	97	98	0	3	3	2	2	87	0	0	84	7	0	0	10	2	0	0	3
Drugs (N=633)	3	84	23	1	14	10	71	1	49	5	3	15	20	0	2	42	14	1	0	39
All Other Misdemeanors	10	48	65	0	30	28	27	10	45	14	7	28	9	5	1	29	6	4	0	31
All Other Felonies	5	20	82	1	31	35	13	6	46	23	4	18	12	13	1	27	7	7	0	47

Source: Prosecutor's Management Information System (PROMIS).

* Sol Pros: solicitation for prostitution; SLIP: solicitation for lewd and immoral purposes.

It quickly becomes evident that the average victimless crime case consumes greater police resources (at least in terms of number of witnesses involved per case) than other felonies or misdemeanors. The proportion of cases in which there were two or more police witnesses is as follows: 96 percent of SLIP, 93 percent of sol pros, 83 percent of gambling and of drugs, 65 percent of all other felonies, and 60 percent of all other misdemeanors.

Number of Continuances

The term "continuance" is a word of art in the world of the courthouse. It is almost synonymous with delay. It refers to the idea of putting off to a later date a proceeding that was originally scheduled to have occurred on a certain date. In this study, the word "continuance" has two distinct meanings. The phrase "delay continuance" is used to describe the situation just mentioned, that is, rescheduling a proceeding for a later date; the phrase "mechanical continuance" is used to describe the movement of a case through the court process. Each time a case is moved on to another stage in the criminal process it is regarded as being "mechanically continued." This concept of a mechanical continuance can be regarded as a measure of the investment of court system resources in a case--the greater the number of mechanical continuances, the greater the expense. Delay continuances also represent an expenditure of court resources. The case had to have been on some docket and some arrangements,

however minimal, had to be made to notify all the parties involved of the change of date.

Delay continuances can be requested by either the prosecution or the defense, and there are various official and unofficial reasons for requesting them. Either side (prosecution or defense) may need more time to prepare, may have to be in another court at the same time, or may be missing a witness. Some defense lawyers continue a case until "Mr. Green shows up," that is, until their clients pay their fees. It is widely regarded as basic defense strategy to delay a case as long as possible because the memories of witnesses fade and witnesses move away or die. Hence, there is a greater chance of winning at trial, or getting a better plea bargain, or having the case dismissed. Such a strategy is less likely to be employed in victimless crimes, for several reasons. The witnesses usually are police officers or chemists, and these people learn to take notes to prevent their memories from fading. Moreover, since the penalty for most victimless crimes is going to be light in any event, there is less incentive for the defendant to engage in delay tactics as part of an effort to "win big."

Three additional points should be noted. First, while mechanical continuances refer to each processing step on the route to final disposition, delay continuances are largely associated with only two of those steps: court hearings to deal with motions, and trial. Second, felony cases involve

two more processing steps than misdemeanor cases, namely, the preliminary hearing and the grand jury hearing. Thus, they will have two more mechanical continuances. Third, in the 1976 data used in the analysis below neither of the two consensual sex offenses involved a felony-level charge, but 33 percent of the gambling cases and 49 percent of the drug cases did.

Tables 6 and 7 present the analyses of mechanical and delay continuances, respectively. Comparing the two tables, we can quickly note that for all crimes there tend to be fewer delay continuances than mechanical continuances. Focusing on Table 6, we see that indeed "all other felonies" tend to have more mechanical continuances than "all other misdemeanors" and that this pattern is borne out in the two victimless crimes that involve some felony charges--gambling and drugs. If we collapse the categories and look at the percentage of cases with less than three continuances, an interesting pattern emerges. The sol pros and SLIP cases have the highest proportion of cases (98 percent each) that are disposed of in less than three processing points. The rank order of the other crimes are: "all other misdemeanors" (93 percent), gambling (84 percent), drugs (65 percent), and "all other felonies" (51 percent). To the extent that the expenditure of court resources is reflected by the number of continuances, it appears that for two victimless crimes, namely sol pros and SLIP, the court resources expended are slightly less than

Table 6

Number of Mechanical Continuances By Type of Crime: Jan. - June, 1976
(Washington, D.C.)

Type of Crime	Number of Cases	Percentage of Cases in Which the Number of Mechanical Continuances was:								
		0	1	2	3	4	5	6	7	8 or more
Gambling	104	15	31	38	6	4	5	0	0	1
Sol Pros*	1027	21	68	9	2	0	0	0	0	0
SLIP*	291	22	69	7	1	0	0	0	0	0
Drugs	633	9	37	19	13	9	5	3	2	1
All Other Misdemeanors	4255	27	49	17	5	1	0	0	0	0
All Other Felonies	3257	19	11	21	11	12	10	7	4	4

Source: Prosecutor's Management Information System (PROMIS).

* Sol Pros: solicitation for prostitution; SLIP: solicitation for lewd and immoral purposes.

Table 7.2

Number of Delay Continuances by Type of Crime: Jan. - June, 1976
(Washington, D.C.)

Type of Crime	Number of Cases	Percentage of Cases in Which the Number of Delay Continuances was:					
		0	1	2	3	4	5 or more
Gambling	104	79	10	5	5	1	0
Sol Pros *	1027	60	29	6	3	1	1
SLIP *	291	62	30	4	2	1	0
Drugs	633	56	21	10	8	4	1
All Other Misdemeanors	4255	56	20	11	7	3	3
All Other Felonies	3257	71	16	8	3	1	1

Source: Prosecutor's Management Information System (PROMIS).

* Sol Pros: solicitation for prostitution; SLIP: solicitation for lewd and immoral purposes.

is usually expended for crimes of similar seriousness, that is, "all other misdemeanors." Unfortunately, the identical comparison cannot be made for the other two victimless crimes because of the mixture of felony and misdemeanor charges. But we can see that the two crime categories seem to approximate the rates for misdemeanors and felonies according to the proportion of such charges in each crime category. For the gambling cases, 67 percent of which involved only misdemeanor charges, 84 percent proceeded with less than three continuances (compared with 93 percent for "all other misdemeanors"). For the drug cases, 49 percent of which involved felony charges, 65 percent proceeded with less than three continuances (compared with 51 percent for "all other felonies").

Inasmuch as these comparisons for drugs and gambling cannot be more precise, it is difficult to draw firm conclusions. But it can be said that at least two victimless crimes, sol pros and SLIP, appear, based on the number of continuances, to require slightly less processing resources than other misdemeanors; and for the other two victimless crimes, gambling and drugs, it seems the processing costs do not differ substantially from those associated with crimes of similar seriousness.

Turning now to delay continuances (Table 7), we find considerably less variation among crimes in the rate at which cases were disposed of with less than three continuances of this kind. The rank order among the crimes is SLIP (96 percent), sol pros and "all other felonies" (both at 95 percent),

gambling (94 percent), and drugs and "all other misdemeanors" (both at 87 percent). To the extent that differences do emerge among these crime categories, drugs and other misdemeanors have at least three continuances slightly more often than SLIP, sol pros, gambling, and other felonies. The reasons for these small differences are not obvious, nor are the differences sufficiently large to warrant much scrutiny.

Bail

The imposition of bail is a judicial (not a prosecutorial) decision. In the District of Columbia, a Bail Agency representative interviews each defendant and makes a bail recommendation to the judge in the great majority of cases. The recommendation is based on a point system similar to that developed in the Manhattan Bail Project.[2] The prosecutor is present at the bail hearing and can interpose his own recommendation. Ordinarily, however, the Bail Agency's recommendations carry substantial weight in the decision process.

Bail is an ancient institution with a controversial and misunderstood contemporary status.[3] Under the law, the sole purpose of bail is to assure that the defendant will appear in court on the date(s) set for hearing(s) of his or her case.

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[2]C. Ares, A. Rankin, H. Sturz, "The Manhattan Bail Project: An Interim Report of the Use of Pretrial Parole," New York University Law Review, vol. 38 (1963), pp. 67-92.

[3]D. Freed and P. Wald, Bail in the United States: 1964, a report to the National Conference on Bail and Criminal Justice (Washington, D.C., 1964).

Bail reform projects operate on the principle that defendants with "community ties" tend to be better risks than other defendants. That is, if they are permanent residents of the area, are employed, and do not have a history of failure to appear for court hearings, they can be released on their promise to return or released into the custody of a third party who promises that the defendant will appear at scheduled hearings.

On the other hand, if a defendant is transient, unemployed, or has a history of prior failures to appear, then he is considered more likely not to keep court appointments. Hence, it it thought necessary to require him to establish an incentive to return, namely, the posting of a money bond or a percentage of a money bond, that either he or a bail bondsman forfeits if he fails to return.[4]

Table 8 presents findings about an analysis of the type of bail imposed by type of crime. Most striking about the data is the frequency with which money bail is imposed on gambling arrestees. They receive money bail at about twice the rate as the other categories of arrestees. The high rate of money bail for gambling offenders is inexplicable given their demographic profile. More than any other offenders, the gambling arrestees show the kind of community ties that should

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[4]For a more complete discussion of bail procedures in general, and in the District of Columbia in particular, see J. Roth and P. Wice, Pretrial Release in the District of Columbia, PROMIS Research Report no. 16, especially chapters 1 and 2.

Table 8

Type of Bail by Type of Crime: Jan. - June, 1976
(Washington, D.C.)

Type of Crime	Number of Cases	Percentage of Cases in Which Bail was:		
		Personal Recognizance or Third Party Custody	Surety or Cash Bond	Other*
Gambling	104	26	49	25
Sol Pros**	1027	59	25	16
SLIP**	291	64	22	14
Drugs	633	58	25	17
All Other Misdemeanors	4255	50	21	29
All Other Felonies	3257	39	30	31

Source: Prosecutor's Management Information System (PROMIS).

* Other includes "dock," mental observation, rehabilitation center for alcoholics, pretrial detention, unknown, and unrecorded.

**Sol Pros: solicitation for prostitution; SLIP: solicitation for lewd and immoral purposes.

make them eligible for release on their own recognizance. They tend to be older and have high rates of employment and residential stability. Moreover, their prior criminal records suggest that they are not generally dangerous to the community. Thus, the imposition of money bail in their cases does not seem to be motivated by an attempt to achieve sub rosa preventive detention of dangerous defendants. In short, neither fugitivity nor dangerousness are plausible explanations of the bail pattern for gambling arrestees. But a plausible alternative hypothesis is as follows: Some judges may be especially sensitive to the need to set pretrial release terms that are achievable and therefore are more likely to set money bonds for arrestees who can afford the financial burden than for arrestees who have no visible means of legitimate support. That gambling arrestees are more often able to afford a money bail is supported by the data.[5]

With regard to the other three victimless crimes (namely, sol pros, SLIP, and drugs), the rate of imposition of money bail is approximately the same for each of them and somewhat higher than for "all other misdemeanors" but somewhat lower than for "all other felonies."

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[5]Roth and Wice, ibid., Exhibits 2-3a and 2-3b, report that in 1974 felony gambling defendants received financial bond in 39 percent of all cases; the corresponding figure in misdemeanor gambling cases is only 20.6 percent. The high bond figure for gambling cases may result from the fact that gambling cases, unlike the other categories of Table 8, are in many instances felony cases.

Table 9 depicts the bail decision in such a way that the influence of residential status can be examined. We can see that for all offenses except gambling, the influence of residence is in the expected direction. Defendants who have been local residents for more than two years are more likely to receive personal recognizance or third-party custody and less likely to receive money bail than defendants without similar community ties. This reinforces the proposition that in gambling cases the bail decision is not being made on the basis of the usually expected indexes of likelihood of fugitivity, but rather is being made on some other basis or to serve some other function.

Table 9

Type of Bail by Type of Crime and Residential Status: Jan. - June, 1976
(Washington, D.C.)

Type of Crime / Residential Status*	Number of Cases	Percentage of Cases in Which the Bail Type was:		
		Personal Recognizance or Third Party Custody	Surety or Cash Bond	Other**
Gambling:	104			
Resident		23	56	21
Non-Resident		31	36	33
Sol Pros:	1027			
Resident		63	23	14
Non-Resident		57	26	16
SLIP	291			
Resident		72	20	14
Non-Resident		61	22	16
Drugs	633			
Resident		59	24	17
Non-Resident		58	26	16
All Other Misdemeanors	4255			
Resident		55	20	25
Non-Resident		45	22	33
All Other Felonies	3257			
Resident		41	29	30
Non-Resident		37	31	32

* Resident of local area for two years or more.

** Includes "dock," mental observation, Rehabilitation Center for Alcoholics, pretrial detention and unknown or unrecorded

Source: Prosecutor's Management Information System (PROMIS).

IV. DISPOSITIONS OF VICTIMLESS CRIME CASES

The final dispositions of all crimes referred by the police for prosecution during the first six months of 1976 are presented in Table 10. Reading across the table, we can trace the sequence of major decision points in the criminal justice process.

Dispositions Without Findings of Guilt or Innocence

The first three columns of Table 10, namely, declinations (not accepted for prosecution), dismissed for want of prosecution, and nolle prosequi--show the extent to which cases are terminated without reaching the issue of guilt or innocence.[1] This combined category encompasses a substantial proportion of cases for all categories of crime, but it varies considerably by type of crime (gambling, 42 percent; sol pros, 57 percent; SLIP, 67 percent; drugs, 28 percent; "all other misdemeanors," 53 percent; "all other felonies," 46 percent). Of all arrestees, SLIP arrestees are most likely by far to have their cases dropped without a finding of guilt or innocence. Their chances are better than six out of ten that this will happen. The sol pros arrestees stand a slightly better than even chance of this happening. In contrast, drug arrestees have the highest chance by far of any arrestee of having their cases disposed of with a determination of guilt or innocence.

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[1] Except for those victimless crime cases that were nolled in exchange for a guilty plea in another case.

Table 10

Final Dispositions of Cases Referred for Prosecution: Jan.-June, 1976
(Washington,D.C.)

Type of Crime	Number of Cases	Percentage of Cases in Which the Final Disposition was						
		Rejected at Screening	Dismissal for want of Prosecution	Nolle Prosequi	Guilty Plea	Guilty at Trial	Not Guilty	Other*
Gambling	104	12	10	20	41	5	1	11
Sol Pros**	1027	6	3	48	27	7	1	6
SLIP**	291	4	5	58	20	7	1	5
Drugs	632	8	5	15	43	5	3	20
All Other Misdemeanors	4255	21	5	27	28	4	2	12
All Other Felonies	3257	19	8	19	33	4	2	16

Source: Prosecutor's Management Information System

* Includes cases that had not reached final disposition at the time of this analysis.

**Sol Pros: solicitation for prostitution; SLIP: solicitation for lewd and immoral purposes.

Finally, gambling cases are dropped at about the same rate as "all other misdemeanors" and "all other felonies."

Reasons for Prosecutor's Actions. The fact that almost half the cases entering the criminal justice system are disposed of by the prosecutor without a determination of guilt or innocence is not news. It was first reported by the crime commissions of the 1920s.[2] These commissions conducted the first systematic studies of the administration of justice in America, and their discovery of the substantial amount of case attrition was greeted with shock and alarm. Their statistics made evident the immense discretion and power of the prosecutor, which in turn, raised the specter of the possible misuse of that power. As a check against this latter possibility, the commissions recommended that prosecutors be required to record the reasons for their discretionary decisions. In some states this became a requirement of law. In 1942, Weintraub and Tough studied a jurisdiction in New York where a statute had been passed requiring that the prosecutor give reasons for plea bargaining a case, but they found that the prosecutors had either not been entering their reasons into their files or were entering routine, general reasons.[3] The recent

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[2]Cleveland Crime Commission, Criminal Justice in Cleveland (Cleveland, 1922); and Missouri Crime Commission, The Missouri Crime Survey (New York: Macmillan, 1926).

[3]Weintraub and Tough, "Lesser Pleas Considered," Journal of Criminal Law & Criminology, 32 (1942), pp. 506, 518-21.

introduction of computerized information systems to prosecutors' offices, however, has made it possible to systematically collect and retrieve the reasons for the prosecutor's decisions.

The PROMIS data base used in this analysis contains reason codes for each disposition point (initial screening, nolle prosequi, and dismissed for want of prosecution). While the dismissal phenomenon itself is not new, new insight into the phenomenon can be obtained by analyzing the reasons--as recorded in PROMIS--why the prosecutor disposed of cases short of a determination of guilt or innocence. Three points of information should be noted in discussing these findings. First, the sample of cases being examined represents the combined case attrition due to declinations, nolles, or other prosecutor dismissals. Second, a substantial number of cases had to be excluded from the analysis because the reason for the prosecutor's action did not appear in the PROMIS data base. (We assume that this was a random and not a systematic loss of data.) Third, when a prosecutor drops a case he may have several reasons for his action, each of which could have approximately equal weight in determining his decision. For the initial screening decision only, the PROMIS system allows for the recording of more than one reason and directs that the most important reason be entered first. Our analysis of that decision is based solely upon the first reason.

Table 11 shows the vast difference, both among victimless crimes and between victimless crimes and all other crimes, in

Table 11

Reasons for Case Attrition by Type of Crime*: Jan. - June, 1976
(Washington, DC)

Reasons	Percentage of Cases for Each Type of Crime Dropped for the Reason Given was:					
	Gambling (N=23)	Sol Pros (N=352)	SLIP (N=116)	Drugs (N=98)	All Other Misdemeanors (N=1431)	All Other Felonies (N=969)
Evidence Reasons						
Testimonial and circumstances insufficient to establish necessary element of the offense or lacks testimonial corroboration of offense	9	9	3	10	11	22
Physical evidence insufficient to prove offense charged (e.g., UNA (mj) - pipe ...)	4	0	0	8	2	4
Physical evidence of crime unavailable or missing (not recovered, lost)	0	0	0	2	0	0
Insufficient nexus between defendant and crime (e.g., UNA (mj) found under defendant's car)	0	0	0	5	1	1
Other evidence problems	0	0	0	9	0	0
Formal office policy (to no paper, to treat as first offender; to divert; to regard offense as trivial, e.g., insignificant amount; other formal office policy)	35	81	90	5	38	6
Unlawful arrest or search and seizure; no probable cause	26	0	0	17	6	5
Essential witness no show, unavailable, or reluctant	9	4	3	9	27	41
Pled to other charge in this case or to other case in exchange for nolle of this charge	0	2	1	10	3	1
Other miscellaneous reasons	17	2	1	17	12	18

* The following number of cases were excluded from the analysis because the reasons for attrition were unknown: gambling, 21; sol pros, 237; SLIP, 81; drugs, 79; all other misdemeanors, 845; all other felonies, 506.

Source: Prosecutor's Management Information System (PROMIS).

the reasons why cases are disposed of without a finding of guilt or innocence. Among the victimless crimes, the two consensual sex offenses have similar profiles of reasons for dropping out. The sample size for the gambling cases is so small that it would be risky to assume that this distribution would not be somewhat different with a larger sample. But even allowing for the possibility of some such difference, it seems reasonable to conclude from the data that gambling cases present considerably different kinds of prosecution considerations than the two consensual sex offenses. Particularly noteworthy are the differences between gambling and the two sex offenses in the problems associated with the arrest and search (gambling has such problems; the sex offenses do not); and the prosecutor's willingness to dismiss as a matter of formal office policy the sex offenders' cases at a considerably higher rate than those of the gamblers (81 percent and 90 percent compared with 35 percent). This is especially remarkable in the light of two other points. A more detailed analysis of the subcategories included in the category "formal office policy" showed that 91 percent of the sol pros cases in this group were dropped because of "first offender treatment" (as opposed to diversion, trivial offense, or "other"). In contrast, only 37 percent of the gambling cases received "first offender treatment." This is probably a reflection of the fact that gambling cases involved felony charges while sol pros cases are all misdemeanors. By office policy, felony

arrestees are generally ineligible for the first offender treatment.

Turning now to the drug cases, we see that the profile of the reasons for attrition of these cases is distinct in Table 11. Combining all of the subcategories of evidence problems, we find that the drug cases have the highest rate of total evidence problems of any crime in the table (34 percent for drugs compared with 27 percent for "all other felonies"; 14 percent for "all other misdemeanors"; 13 percent for gambling; 9 percent for sol pros; and 3 percent for SLIP). In regard to this particular characteristic, drug cases are more like "all other felonies" than any other category in the table. This is consistent with the greater similarity found between drug cases and "all other felonies" than between drug cases and other misdemeanors with respect to offender characteristics.[4] In some other respects, we would expect the drug profile to look more like the gambling profile (except for reason no. 2) than any other profile, because the policing of gambling and of drugs bears certain important similarities. As the National Commission on Marihuana and Dangerous Drugs reported, the majority of arrests for these offenses are not the result of prior investigations but rather happen "spontaneously" on the street or in connection with other police inquiries. Again, this means that these cases are more susceptible than most to legal challenge. Indeed, as shown in

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[4]See Table 3 and p. II-17 above.

Table 11, the drug cases are similar to the gambling cases in this respect. Both have a substantial proportion of cases dropped because of problems with the arrest (26 percent gambling; 17 percent drugs); and both of these rates are considerably higher than the rates for any other crime.

In contrast, we would not expect the drug profile to look like the gambling profile with respect to the use of "first offender treatment," because the drug arrestees were substantially more likely than gambling arrestees (60 percent compared with 36 percent) to have had a prior criminal record. This expectation is borne out in Table 11; the difference between the drug and gambling profiles in regard to cases dropped due to "formal office policy" is 5 percent compared with 35 percent.

One characteristic reflected in Table 11 distinguishes all victimless crimes from all other crimes: their lower rate of attrition due to witness problems. As noted earlier (see Table 5), almost all the witnesses in victimless crime cases are criminal justice employees, usually police officers, whereas witnesses for other cases are usually civilians, who for a variety of reasons may not be available as witnesses. One can regard the number of victimless crime cases dropped due to witness "unavailable, no show, or reluctant" as an indicator of the efficiency with which the complex logistical machinery involved in prosecuting a criminal case is operating. The scheduling and rescheduling of court hearings is no small

feat. It requires a complex job of finding and agreeing to dates on which all parties can be present and communicating this to all parties involved. The dates may be months in advance. Each party has numerous cases in which he is involved and must plan around his own schedule of private events. Some parties to the scheduling may not be present when the date is set. The possibility for schedule conflicts and failure to communicate dates to all relevant personnel is rife.

Given this complexity, one might expect to find a small but substantial proportion of instances in which the logistical system broke down. These instances would be reflected in the data on "police no-shows" (a subcategory of "witness unavailable, no show or reluctant" not shown in Table 11). An examination of this subcategory (not presented here) indicated that the amount of case loss due to police no-shows was negligible for all crimes (SLIP, 3 percent; drugs, 2 percent; all other misdemeanors, 2 percent; sol pros, 1 percent; all other felonies, 15 percent; and gambling, 0 percent).

Selected Factors Associated with Dispositions Without Findings of Guilt or Innocence. In brief summary, Tables 10 and 11 illustrate the enormous discretion of the prosecutor in deciding what to do with cases police have referred to him for prosecution. In exercising this discretion, the prosecutor is supposed to be guided by two sets of considerations: legal aspects of the case and considerations of office policy.[5] It

[5]American Bar Association Project on Standards for Criminal Justice, The Prosecution and Defense Function: Approved Draft (Chicago, 1971), section 3.9.

is proper for him to consider such legal factors as whether the elements of a crime exist and whether the arrest and search were lawful. It is also proper to consider such various policy matters as special treatment for first offenders and resource conservation achieved by not proceeding with weak cases. It is not proper for him to consider extralegal factors, such as sex, race, religion, social class, and political influence.

Table 11 shows the official, legal reasons why the prosecutor dropped those cases that were dropped. But now it is of interest to analyze the same cases in a different way. The focal question of this re-analysis is, "To what extent does the prosecutor, as a by-product of the exercise of his discretion, cause the demographic and arrest history profiles of the cases referred to him by the police to change?" The analysis compares the sex, race, and arrest history profiles of the cases the prosecutor did not dispose of short of a determination of guilt or innocence (that is, all cases that were not dropped at screening, nolled, or otherwise dismissed). At a more abstract level, we can think of this analysis as addressing the question, "To what extent does the type of offender pursued by the police differ from the type pursued by the prosecutor?"

Two analyses of the data were performed. The first analysis was a multiple regression in which it was possible to hold constant the defendant's race, sex, prior record, employment

status, and length of residence in the local community. A summary version of the results of this analysis are presented in Table 12 (for further details, see Appendix D).

The results of the analysis show that prior record is important in every crime, with the exception of gambling. Race is significant only in SLIP cases; and sex is significant only in sol pros cases. In addition we see that in the two "all other" crime categories, age and employment status are significant. But not much can be said about these two categories because they encompass many different kinds of crime.

The final analysis of this same set of data is presented in Tables 13, 14, and 15. In these analyses, the relationships between race, sex, prior record, and whether a case is dropped were examined in a variety of ways. The purpose of these analyses was to learn the effect of race and sex on case disposition, holding constant the effect of having a prior record. As Tables 13 and 14 show, race and sex are significant factors, even after prior record has been held constant, for three types of crime--sol pros, SLIP, and all other misdemeanors. The relationships among these four variables, namely, race, sex, prior record, and case disposition is clarified by Table 15. As indicated in that table, having a prior record greatly increases the likelihood that the case will be prosecuted (rather than dropped) no matter what crime is involved. With regard to sol pros cases only, the relationship between

Table 12

Factors Significantly* Related to Prosecutor's Decision to Drop a Case from Prosecution by Type of Crime: Jan. - June, 1976 Washington, D.C.

Crime	Factor Associated with the Case Not Being Dropped
Gambling	None
Sol Pros**	Female Prior Arrest Record
SLIP**	Black Prior Arrest Record
Drugs	Prior Arrest Record
All Other Misdemeanors	Prior Arrest Record Age (being older) Black
All Other Felonies	Age (being younger) Employed Prior Arrest Record

* At the .05 level, based on the t-statistic.

**Sol Pros: solicitation for prostitution; SLIP: solicitation for lewd and immoral purposes.

Table 13

Association Between Race and Whether a Case is Dropped Without a Determination of Guilt or Innocence Controlling for Prior Record by Type of Crime: Jan. - June, 1976 Washington, D.C.

Type of Crime	Defendants with Any Prior Arrest		Defendants with No Prior Arrest	
	% black of all cases referred by police	% black of all cases going to guilty plea or trial	% black of all cases referred by police	% black of all cases going to guilty plea or trial
Gambling	(N=37)* 95	94	(N=67) 91	90
Sol Pros **	(N=346) 81	80	(N=681) 53	63***
SLIP **	(N=48) 81	91	(N=243) 32	53***
Drugs	(N=378) 95	96	(N=255) 89	91
All Other Misdemeanors	(N=1855) 92	91	(N=2400) 81	85***
All Other Felonies	(N=1923) 94	96	(N=1334) 92	92

Source: Prosecutor's Management Information System (PROMIS)

* All "N's" refer to the number of cases referred by police.
** Sol Pros: solicitation for prostitution; SLIP: solicitation for lewd and immoral purposes.
***Difference is significant at .05.

Table 14

Association Between Sex and Whether a Case is Dropped Without a Determination of Guilt or Innocence Controlling for Prior Record by Type of Crime: Jan. - June, 1976 Washington, D.C.

Type of Crime	Defendants with Any Prior Arrest		Defendants with No Prior Arrest	
	% male of all cases referred by police	% male of all cases going to guilty plea or trial	% male of all cases referred by police	% male of all cases going to guilty plea or trial
Gambling	(N=37)* 92	94	(N=67) 75	81
Sol Pros**	(N=346) 19	21	(N=681) 75	48***
SLIP**	(N=48) 73	75	(N=243) 97	94
Drugs	(N=378) 89	89	(N=255) 81	83
All Other Misdemeanors	(N=1855) 87	86	(N=2400) 81	81
All Other Felonies	(N=1923) 91	91	(N=1334) 85	88

Source: Prosecutor's Management Information System (PROMIS)

* All "N's" refer to the number of cases referred by police.
**Sol Pros: solicitation for prostitution; SLIP: solicitation for lewd and immoral purposes.
***Difference is significant at .05.

Relationship Between Race, Sex, Prior Record and Whether a Case is Dropped Without A Determination of Guilt or Innocence by Type of Crime: January - June, 1976, Washington, D.C.

Type of Crime	Defendant's Characteristics		Case Disposition		
			Percentage of Cases That Were:		Number of Cases
	Arrest Record	Race/Sex	Prosecuted	Dropped	
Sol Pros*	Defendants with any prior arrest	White Male	**	**	9
		White Female	67%	33%	51
		Black Male	67	33	54
		Black Female	64	36	210
	Defendants with no prior arrest	White Male	14	86	
		White Female	56	44	
		Black Male	18	82	
		Black Female	54	46	
SLIP***	Defendants with any prior arrest	White Male	**	**	5
		White Female	**	**	4
		Black Male	77	23	30
		Black Female	**	**	9
	Defendants with no prior arrest	White Male	13	86	155
		White Female	**	**	3
		Black Male	34	66	68
		Black Female	**	**	2
All Other Misdemeanors	Defendants with any prior arrest	White Male	48	42	105
		White Female	51	49	33
		Black Male	47	43	1321
		Black Female	55	45	170
	Defendants with no prior arrest	White Male	25	75	324
		White Female	21	79	89
		Black Male	33	67	1393
		Black Female	35	65	310

Source: PROMIS (Prosecutor's Management Information System)

* Soliciting Prostitution

** Figures too small for meaningful percentage

***Soliciting for Lewd and Immoral Purposes

race, sex, prior record, and the prosecutor's decision to prosecute or drop a case is as follows. When a prior record is involved, the prosecutor is likely to prosecute the case (rather than drop it) regardless of the race or sex of the defendant. But when there is no prior record, then the prosecutor appears to be significantly influenced by the sex but not the race of the defendant. That is, the prosecutor is more than twice as likely to proceed against (rather than drop) female defendants as he is male defendants. Thus it tentatively appears that prosecutors do not share the criminal justice system's new attitude of enforcing the laws against prostitution with equal vigor against male customers as against female offerors. However, before reaching such a conclusion, plausible alternative explanations of this finding must be considered. One plausible rival hypothesis is that the difference between males and females in the rate of case dismissal for this crime lies not in prosecutorial favoritism toward the male customer but, rather, some behavioral difference between males and females, such as their willingness to complete a first offender treatment program operated by the prosecutor. All defendants without prior records who are charged with sol pros, SLIP, and most other misdemeanors are eligible for admission to the first offender treatment program. If the program is successfully completed the charges against the defendant are dropped. The terms of the treatment vary somewhat by type of offense, but they may involve such

things as spending a day or two watching court proceedings and then writing a brief essay on the problems of criminal justice administration. It is reported by lawyers familiar with these cases that the male customers of prostitutes (who are usually middle-class businessmen with families and reputations to protect) are more than willing to participate in any program that will result in the charges being dropped. They enter the program and scrupulously complete all the requirements. In contrast, the prostitutes are less concerned about the conviction and are less diligent about completing the terms of the program. Therefore, they are less often successful at qualifying for having their cases dismissed.

In order to test this alternative hypothesis, an analysis was made of the rate at which male and female first offenders charged with sol pros had their cases dismissed as the result of successfully completing the first offender treatment program. Table 16 shows that for sol pros defendants 50 percent of the male first offenders whose cases were accepted for prosecution had their cases subsequently dismissed upon completion of the first offender program. Only 5 percent of the female first offenders successfully completed first offender treatment.[6] Were the females to complete first

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[6]There are no PROMIS data on the number of defendants actually enrolled in first offender treatment. Only the fact of successful completion is recorded. Therefore, there is no empirical information on the reasons for noncompletion nor on the rate of entry into the program. However, we believe that it can safely be assumed that all persons who are nominally eligible (such as all those represented in Table 16) (cont'd.)

Table 16

First Offender Soliciting Prostitution (Sol Pros)
Cases: First Offender Treatment (FOT)
by Sex of Defendant (June - Jan. 1976)

Defendant's Sex	Cases Accepted for Prosecution (Papered)	Cases Dismissed After Acceptance	Cases Prosecuted	Papered Cases Dismissed After FOT	Papered Cases Dismissed for All Other Reasons
Male	498	395 (79%)	103 (21%)	251 (50%)	144 (29%)
Female	146	45 (31%)	101 (69%)	8 (5%)	37 (25%)
Females, Assuming same FOT Completion Rate as Males	146	110 (75%)	36 (25%)	[73 (50%)]	37 (25%)

Source: PROMIS (Prosecutor's Management Information System)

offender treatment at the same rate as the males, their overall dismissal rate would closely approximate that of the males (79 percent vs. 75 percent); thus, the difference in the dismissal rates between male and female first offenders is almost entirely accounted for by first offender treatment.

Returning now to Table 15 and examining SLIP offenses we see again that having a prior record increases (doubles) that likelihood that a case will be prosecuted (rather than dropped--at least for the one category for which the data were sufficient for comparison, namely, black males). Among male defendants with no prior record there is a remarkable difference in what happens to a case depending upon the race of the defendant. Black males are prosecuted at twice the rate as white males (even though offense and prior record are being held constant). Again, at first glance, these data seem to suggest bias on the part of the prosecutor, this time based on the race rather than the sex of the defendant. But, again, plausible alternative hypotheses may account for the difference. The most plausible rival hypothesis is that the difference in drop-out rates is due to the difference in the nature of the behavioral problem that lies behind the offense charged. The legal category, SLIP, lumps together under one label two rather different types of behavior. The law is

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are initially informed of their eligibility, since that is the prosecutor's formal policy. The defendant and his or her lawyer must then take the initiative and seek enrollment.

designed to punish anyone for soliciting the commission of an unnatural sexual act without regard to whether the solicitation is between two members of the same sex or two members of the opposite sex. But, from a behavioral point of view, there is a substantial difference between a heterosexual solicitation and a homosexual solicitation. A heterosexual solicitation can be regarded in much the same light as a sol pros case. That is, although they are violations of the law, they both involve the kind of sexual orientation, namely, heterosexual, that is regarded as normal by conventional society. In contrast a homosexual solicitation is likely to be seen as representing a different and more serious kind of problem. For one thing the latter has a far stronger socially disapproved status than the former. Second, persons familiar with the law enforcement problems associated with certain aspects of the gay world are especially concerned with the potential for violence associated with this lifestyle and in particular with homosexual solicitations. Lovers' quarrels between homosexuals are known to lead to violence. Also, homosexual solicitation of nonhomosexual males is known to result in violent rebuffs. Given these differences between SLIP cases involving homosexual solicitations and those involving heterosexual solicitations, it is plausible to hypothesize that prosecutors regard the former as more serious and therefore more deserving of full prosecution (rather than being dropped) than the latter. Hence, if it could be shown that

the black defendants charged with SLIP were disproportionately involved in homosexual solicitations than white defendants, the difference in the drop-out rates between blacks and whites for this offense could be given a plausible alternative explanation to prosecutorial bias. In order to examine this point, the data were analyzed by the sex of the arresting officer (the object of the solicitation). Due to the legal requirements of corroboration in sexual solicitation cases, two officers are always involved in SLIP arrests. Often these police teams are made up of one male and one female officer. Table 17 is arranged to show arrests of black and nonblack male first offenders by the sex of the arresting and assisting officer. Since the arresting officer is not necessarily the one who was actually solicited, our focus is on those arrests of males made by all-male police teams. The table shows that of all black male first offenders arrested for SLIP, 36 percent were arrested for a homosexual solicitation, while of all white male first offenders arrested for the same offense, 15 percent involved homosexual solicitation. Thus, the proportion of homosexual solicitations among black male first offenders was more than twice that of whites. It appears, then, that the sex orientation of the defendant, rather than his race, may account for the difference in the prosecutor's treatment of these cases. Thus, although the law regards homosexual solicitations as no different from heterosexual solicitation

Table 17

First Half 1976
Black Males with no Prior Arrests,
Arrested for Slip

Arresting Officer	Assisting Officer: Male	Female	Unknown*
Male	(27)	8	11
Female	9	15	3
Unknown	0	2	1

TOTAL: (76)

[With all-male crew, 36 percent of arrests]

Non-Black Males with no Prior Arrests
Arrested for Slip

Arresting Officer	Assisting Officer: Male	Female	Unknown
Male	(25)	22	8
Female	44	37	23
Unknown	0	3	2

TOTAL: (164)

[With all-male crew, 15 percent of arrests]

*Badge numbers are as of February 1975, therefore unknowns represent numbers no longer on list as of first half 1976.

(in terms of greater moral turpitude as reflected in more severe penalties), the prosecutor is more likely to prosecute homosexual SLIP solicitations and dismiss heterosexual ones.

But, once again, it is possible that some other factor not included in this analysis might account for the different treatment of the heterosexual and the homosexual SLIP cases. It may be that, as with the sol pros cases, there is a difference in the rates of first offender program completions.

Returning again to Table 15 just for purposes of thoroughness, it should be noted that the purpose of including the category "all other misdemeanors" in the table was to illustrate the effect of prior record. As can be seen, the existence of a prior record appears to increase the probability that the prosecutor will not drop the case. There are other differences by race and sex that are noticeable in the table but no significance can be attached to them because the category "all other misdemeanors" is composed of a variety of crimes that may differ in the proportion of defendants of a certain race or sex.

Factors Associated with Whether Defendants Plead Guilty or Go to Trial

The determination of guilt or innocence is made in the American system of criminal justice either by trial or by a plea of guilty. Although trial is theoretically the preferred method of disposition, the guilty plea system is in reality the dominant means by which cases are disposed in large

jurisdictions.[7] As Table 10 indicated, this is the situation in Washington, D.C. For the bulk of the cases in which a determination of guilt or innocence was made, the determination was made through guilty pleas.

The decision to plead guilty is exclusively the prerogative of the defendant, at least in principle. But the decision to offer the defendant something in exchange for his plea belongs to criminal justice officials, usually the prosecutor.[8] Thus, those guilty pleas that are entered without plea bargains are the result of decisions made solely by the defense, whereas those pleas involving bargains are the result of decisions by both the defense and one other party, usually the prosecutor. No attempt has been made in this analysis to separate guilty pleas entered as a result of bargaining from those entered on the defendant's initiative alone.[9] It is believed that most pleas in felony cases involve bargains and that this is less true of misdemeanor cases. This background is necessary context for the analysis that follows.

A multiple regression analysis was performed to determine if any particular factors were associated with whether a defendant went to trial or pled guilty. The results showed

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[7] H. Miller, W. McDonald, and J. Cramer, Plea Bargaining in the United States: Phase I Report (Washington, D.C.: Government Printing Office, forthcoming).

[8] Ibid.

[9] But see William M. Rhodes, Plea Bargaining: Who Gains? Who Loses? PROMIS Research Report no. 14 (forthcoming).

that in sol pros cases, defendants with arrest records were more likely to plead guilty (see Appendix D). Given that we do not know how many of these pleas were solely the decision of the defense and how many were influenced by decisions made by the prosecutor, it is difficult to interpret this finding. If these are mostly defendants pleading guilty without concessions on the prosecutor's part, then it suggests that defendants (or their attorneys) are anticipating that they will obtain a more lenient sentence if they plead guilty. They are repeat offenders, and they may feel it is best to get the criminal case disposed of as quickly and cheaply as possible. Perhaps if the penalty for sol pros, especially for repeat offenders, were stiffer, these defendants would be less willing to plead guilty. Thus, policymakers considering an increase in these penalties should appreciate this possible ramification of such a change. If, for example, the fines for sol pros were increased, it could lead to more trials. This is especially likely to happen as the cost of the fine substantially exceeds the cost of attorneys' fees for going to trial. At a certain point it would become apparent to defense attorneys that it would be in their clients' best interests to pay the attorney fee and try for an acquittal and avoidance of the large fine. There would be little to lose and a lot to gain. If the defendant were convicted at trial, it would cost him only slightly more (the difference between the attorney's

fee for a guilty plea and the fee for trial) than if he pled guilty. Thus, there would be an incentive to go to trial.

If the above did happen, experience suggests that the criminal justice officials would probably remove that incentive by imposing lesser fines on defendants who plead than on those who go to trial.[10] Thus, the net effect of the increased fines could ultimately be to create or expand a plea-bargaining situation that formerly either did not exist or was minimal. The deterrent effect of such a change is likely to be minimal. However, it could be argued that even after plea bargaining reduced the amount of the fine imposed, that amount would be substantially higher than the fines now being imposed.

Factors Associated with Conviction

It is apparent from the data presented thus far that many cases are disposed of without a determination of guilt or innocence. In addition, some cases that go to trial end in an acquittal. Thus, of all cases referred by the police for prosecution only some result in a finding of guilt. The remainder end in dispositions favorable to the arrestee,

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[10] In the District of Columbia, sentencing--including fines--is not officially subject to bargaining but remains within the province of the court. The court is not involved in the bargaining process, per se. Moreover, in accepting a plea of guilty, the court must assure itself that no specific sentence or type of sentence was promised to the defendant to induce his plea of guilty. (Such inducement is viewed as contrary to the voluntariness required. SCR Crim.P. 11). However, it is a common expectation that courts sentence more leniently when guilt is established by plea rather than trial. See Ibid.

namely, rejected at screening, nolled, dismissed, not adjudicated because of the defendant's abscondence, or acquitted. It would be instructive to know whether any factors significantly influence whether a victimless crime case ends up in one or the other of these two global categories: convicted, or disposed of in a manner favorable to the arrestee.

This question was addressed through a regression analysis. It showed that for sol pros and SLIP, having a prior record appears to have increased the likelihood of conviction. In sol pros cases, being female appears to have increased the likelihood of conviction. In SLIP cases, being black appears to have increased the probability of conviction.[11] (For details see Appendix D.)

Sentencing of Victimless Crimes

An analysis of the sentencing of victimless crime offenders using 1973 data is presented in Table 18. As indicated, the great majority of the victimless crime offenders were given sentences that did not involve incarceration. An analysis of the factors associated with whether defendants were sentenced to serve time in jail or not was not performed because of insufficient variation in the sentences.

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[11]But see the discussion supra, p. IV-10, ff.

Table 18

Percentage Distribution of Sentences for Convicted Cases Brought by the Police as Victimless Crimes: 1973 (Washington, D.C.)

Highest Convicted Charge \ Sentence	Probation & Suspended	Fine	FYCA A	FYCA B & C	Under 5 months	6 to 11 months	1 yr, or 1 yr min 1 yr max	Over 1 yr min 3 yr max	TOTAL	
Felony Gambling	58.8	23.5	0	0	0	5.9	11.8	0	100	(17)
Misdemeanor Gambling	54.0	45.2	0	0	0	.8	0	0	100	(124)
Sol Pros	46.4	36.6	2.6	0	14.3	0	0	0	100	(265)
SLIP	31.6	31.6	0	0	36.8	0	0	0	100	(19)
Felony Drugs	33.3	0	0	16.7	16.7	0	33.3	0	100	(6)
Misdemeanor Drugs	69.0	13.7	4.6	1.0	4.9	3.9	2.6	.3	100	(306)
Other Felony	50.0	12.5	0	0	12.5	12.5	0	12.5	100	(8)
Other Misdemeanor	60.5	11.6	0	2.3	2.3	11.6	11.6	0	100	(43)
TOTAL	57.0 (449)	26.8 (211)	2.7 (21)	.6 (5)	8.0 (63)	2.5 (20)	2.2 (17)	.2 (2)	788	

Source: Prosecutor's Management Information System (PROMIS).

V. CONCLUSIONS

Victimless crimes have been the focus of public debate for over a century. Libertarians argue that immorality, as such, should not be a concern of the criminal law. Others argue that morality is the basis of all law. A third position is that of pragmatists who argue that these acts should be controlled by the criminal law not because of their inherent immorality but because they are a nuisance and can lead to greater evils. These debates have been marked by a noteworthy lack of data about the actual enforcement of victimless crimes. This study has supplied more of that kind of descriptive data than has previously been available. In doing so, we have left unresolved the larger issue of public policy, namely, whether victimless crimes should be decriminalized. Rather, we have attempted to sharpen the issues by showing the extent to which the enforcement of victimless crimes catches a different kind of criminal and presents different enforcement problems than the enforcement of other crimes.

There is a tendency in discussions of victimless crimes to presume that these crimes are similar in more respects than the fact that they are victimless and involve offenses against morality. However, our analysis shows that this is not the case. There is as much difference among the victimless crimes as between them and nonvictimless crimes regarding several

important characteristics, including the demographic and prior arrest profiles of the arrestees, the reasons why prosecutors dropped cases from prosecution, the type of bail imposed, the number of codefendants, the number of mechanical continuances and delay continuances, and the significance of certain factors in determining final dispositions. But victimless crimes are similar in the sentences they receive. Time in jail is rarely imposed.

Victimless crimes are particularly sensitive to changes in law enforcement policy. A convergence of several policy decisions prohibiting the enforcement of consensual sex offenses against only females resulted in a drastic change in the type of person subsequently arrested for these offenses. This new policy may have resulted in a more equitable arrest practice with respect to prostitution offenses; it also brought into the system a type of offender who was more often employed and more often free of prior involvement with the criminal justice system than was any other type of offender. That is, it resulted in the arrest of predominantly middle-class males who patronized prostitutes. These offenders had their cases dropped by the prosecutor more often than the female prostitutes, but this appeared to be due partly to a greater willingness of male first offenders to complete the first offender treatment program.

With regard to the enforcement of the other consensual sex offense, namely, soliciting for lewd and immoral purposes,

the prosecutor dropped these charges in cases against white males significantly more often than in cases involving black males. But this difference seems to be due to the fact that the black males were significantly more likely than white males to be involved in homosexual (rather than heterosexual) solicitations. That is, it appears that it is the sexual orientation, not the race of the defendants charged with SLIP, that affects the prosecutor's decisions. However, it is possible that further analysis would show that factors other than sexual orientation could account for this difference. One factor in particular is a likely candidate (given what we found about its influence in sol pros cases). The difference may be due to the difference between the homosexual and the heterosexual defendants in their willingness to complete the first offender treatment program.

In regard to all offenses, including the two consensual sex crimes, the drug and gambling offenses, and other misdemeanors and felonies, one factor consistently affected the prosecutor's decision making. If a defendant had a prior record, his case was significantly more likely to be prosecuted (i.e., go to either a guilty plea or a trial) than to be dropped. Other factors that one might have thought <u>a priori</u> to have a significant and systematic impact on the prosecutor's discretion did not. They include: the defendant's age, sex, race, employment status, length of time in local residence,

number of delay continuances, type of defense attorney, length of experience of the prosecutor, and the type of bail imposed.

In setting law enforcement policies regarding victimless crimes, policymakers would do well to reassess the trade offs involved and the differential consumption of criminal justice resources involved in enforcing victimless crimes compared with that involved in the enforcement of crimes with victims. The current enforcement pattern in gambling cases appears in particular need of such reassessment. Among the reasons police give for enforcing gambling laws are that it prevents violence related to gambling and it helps fight organized crime. But our data show that most of the people being arrested for this offense do not have records of violence nor, for that matter, any records at all. Moreover, their demographic profile is different from the usual profile of the criminal. They are older, more likely to be employed, and more likely to be a long-term local resident. An enforcement policy that results in giving arrest records to this type of person in the name of preventing greater harms needs to be based on firm evidence that it is achieving its goal.

With regard to all victimless crimes, but especially SLIP and sol pros, policymakers should note that at least in one respect, namely, the number of police witnesses per case, the cost per case of enforcing these crimes is higher than for nonvictimless crimes. Yet, the usual penalty for victimless crimes is light.

Because of the sensitivity of victimless crimes to changes in criminal justice policy, it would be particularly useful to conduct trend analyses of the victimless crimes. This could be supplemented by more intense monitoring, through direct observation and interviewing of police and prosecutors, of the actual implementation of policy. It would be a useful study in legal change to trace in detail the causes of the changes reflected in our data involving the enforcement of the sex laws against homosexuals and against male customers of female prostitutes. These changes are major turning points in society's attitude toward these crimes and therefore merit fuller documentation than was possible here.

The influence of participation in the first offender program on the outcome of sol pros and SLIP cases should also be examined more carefully. Interview and observation methods could be used to determine whether indeed this is the explanation for the differences in the handling of these cases. If not, then alternative explanations must be sought. A closer look at the types of defendants behind the statistics presented here is needed. The 1973 SLIP offender, for example, had a very high record of violence and perhaps deserves to be treated as a major violator.

With regard to sol pros and SLIP cases, policymakers may want to reassess the existing enforcement policy in terms of the level of effort expended, the target of the arrests, and the basic strategy of control.

There are at least three separable problems involved in the prostitution issue. First, there is the problem of violence and danger to the personal well-being of members of the community. This arises from the assaultive and drug-related behavior of some people involved in prostitution. Second, there is the matter of consensual sex for money. Assuming that the violent element of this business could be eliminated, society would then have to address whether consensual sex for money should be permitted when there is no associated danger of violence. It may be that the nuisance element of prostitution alone may warrant legal restrictions against such transactions. Finally, depending upon how the second question is answered, the last question is, "How should prostitution be controlled?"

Our data indicate that some people arrested for consensual sex offenses have a history of violence. It seems that the criminal justice system could make provisions to treat these violent, repeat offenders more severely than those whose only offense is violation of the laws against consensual sex. This might reduce the violent side of this business without using limited resources on prostitution, per se. Then the consensual sex issue could be addressed by itself. If society chooses to try to suppress this vice, then a strategy should be chosen that will best achieve the several partially conflicting goals at stake. The strategy should deter the behavior; it should be nondiscriminating in regard to sex;

and it should meet the demands of community associations to keep prostitution (even without the violence) out of their neighborhoods. Two somewhat conflicting strategies might be considered, namely, the use of large fines and the unofficial establishment of a certain area of the city for this business. The advantage of the large fines is that they can be applied equally to male and female, and they will drive the price of doing business higher. This may deter some of the traffic (as well as provide an additional source of public revenue).

The advantage of localizing the business in one area of the city would be that it would allow policymakers to be better able to satisfy the demands of citizens' associations to keep this nuisance out of their neighborhoods. If such a policy was politically feasible, many of the costs of the current strategy of control could be avoided. In the end, policymakers would do well to reconsider the point made by Jeremy Bentham in 1789 regarding the possibility of eliminating sexual misbehavior through legislation:

> With what chance of success...would a legislature go about to extirpate drunkenness and fornication by dint of legal punishment? Not all the tortures which ingenuity could invent would compass it; and, before he had made any progress worth regarding, such a mass of evil would be produced by the punishment as would exceed a thousandfold, the utmost possible mischief of the offense.1

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[1]Jeremy Bentham, An Introduction to the Principles of Morals and Legislation (1789) (New York: Hafner, 1948), p. 1.

APPENDIX A

Gambling: National Overview

The most comprehensive study of the enforcement of gambling is contained in the recent work of the Commission on the Review of the National Policy Toward Gambling.[1] With regard to national trends, the Commission noted there has been a substantial (68 percent) decline in the number of arrests for gambling over the last decade and a half.

In 1974 the overwhelming majority of gambling arrests (79 percent) consisted primarily of card and dice arrests (which are usually low-level street arrests, including street-corner craps games) as opposed to bookmaking or numbers-lottery arrests.

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[1]See Commission on the Review of the National Policy Toward Gambling, Gambling in America (Washington, D.C.: Government Printing Office, 1976). Hereinafter, "National Gambling Commission."

[2]Some theorists have concluded that the criminal justice system operates on the principle of maximizing rewards for the system and the individuals in it and minimizing the strains. (See W. Chambliss and R. Seidman, Law, Order and Power [Reading: Addison Wesley, 1971], p. 266.) It is believed that this principle operates ubiquitously throughout all levels of all parts of the system. That is, if one looks for a pattern in the way discretion is exercised by police, prosecutors, judges, or others one will find that it is used to favor the interests of the powerful and disfavor the interests of those who lack the power to cause strains for the criminal justice system. Supporters of this theory find empirical support of it in divers actions by criminal justice officials. They would, for example, regard police willingness to raid sidewalk crap games but tolerate gambling at the country clubs as confirming evidence. A recent incident in the enforcement of gambling laws in Washington, D.C., would be regarded by such theorists as an exquisite example of their principle (cont'd.)

The majority of the arrestees were older (average age of 38.5), black (73 percent), males (91 percent). National data on the prior arrest records of these arrestees were not available, but the Commission concluded that "a substantial proportion of persons arrested for gambling have prior arrest records," but these prior arrests were usually for previous gambling offenses.[3]

A Commission-sponsored national survey of police departments found that the primary goal of police anti-gambling efforts was to fight organized crime. Another reason was to prevent gambling from becoming too widespread and visible. A third important reason was to prevent fights, shootings, and stabbings that occur in card and dice game disputes.[4]

With regard to the enforcement of gambling laws, the Commission found that in general there was an exceptionally

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at work. The police raided a betting ring that catered to white-collar professionals. According to reports in the newspaper, the customers of this betting ring were not the powerless, lower class, unemployed, minority group members, but some of the more prominent people in the community, including well-known media personalities, dentists, lawyers, and at least one congressional aide, who indicated he was placing bets for his congressman. The operators of the gambling ring were convicted in a "stipulated trial." But of particular note is the fact that the prosecutor departed from normal practice and did not identify for the public record the names of the cooperating bettor-witnesses. They were identified at the trial only by numbers. (T. S. Robinson, "Prominent Customers Kept Secret: Gambling Ring Operators Convicted, Washington Post, October 15, 1977, pp. A1-A6.

[3]National Gambling Commission, Gambling in America, p. 38.

[4]Ibid. Appendix, p. 465.

low conviction rate for gambling arrests (between 1 percent and 12 percent depending upon the jurisdiction)[5] and that jail or prison terms were rarely imposed. However, in at least one jurisdiction, namely, New Jersey, where gambling was considered a serious crime because of its perceived connection with organized crime, this pattern of high case attrition and light sentences was reversed. The Commission found that among the reasons given for the general pattern of light sentences for gambling cases were the following: (1) most cases are of a relatively nonserious nature; law enforcement was not reaching the upper levels of the gambling hierarchy; (2) judges might be more severe if a defendant were shown to be associated with organized crime but such connections were rarely shown; (3) many of the defendants in certain jurisdictions are housewives, senior citizens, or handicapped or disabled persons living on pensions or social security; (4) the existence of legal games makes it difficult for judges to impose harsh sentences against illegal games; (5) the fact that defendants convicted of muggings and burglary are getting light sentences makes it difficult to impose harsher sentences on gambling offenders.[6]

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[5]Compare this with the 27 to 41 percent conviction rates for serious crimes. See Appendix B, fn. 6, and accompanying text.

[6]National Gambling Commission, Gambling in America, pp. 47 and 52.

APPENDIX B

Illegal Drugs: National Overview

1. Policing Marihuana

The National Commission on Marihuana and Drug Abuse in two separate nationwide studies analyzed the enforcement of laws relating to marihuana and to other dangerous drugs.[1] In its marihuana study, the Commission found that for the last six months of 1970 more than two-thirds of the marihuana arrests in 18 jurisdictions were "spontaneous." That is, they resulted from direct police-arrestee contact without prior investigation.[2] Prior investigations were used in less than a third of the arrests. According to the Commission, in Washington, D.C., prior investigations occurred in only 20 percent of the arrests. When prior investigations did occur, they were usually "short term" investigations.[3] In Washington, D.C., 37 percent of all marihuana arrests were made by the U.S. Park Police; 65 percent were made "outdoors"; and 19 percent were made in vehicles.

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[1]National Commission on Marihuana and Drug Abuse, Marihuana: A Signal of Misunderstanding (Washington, D.C.: Government Printing Office, 1972), and Drug Use in America: Problem in Perspective (Washington, D.C.: Government Printing Office, 1973). Hereinafter, "National Drug Commission."

[2]National Drug Commission, Marihuana, p. 627.

[3]Defined as "focused on few people, primarily to verify evidence supplied by independent source, not characterized by any police-supervised 'buys'." National Drug Commission, Marihuana, p. 700.

For all jurisdictions combined, the most common reasons for the police search of persons arrested outdoors were "suspicious behavior" (34 percent); visibility of marihuana (24 percent); and, for juveniles, "suspected loitering" (17 percent). Arrestees were searched incidental to an arrest warrant in less than 1 percent of all outdoor arrests. The most common reason for stopping vehicles was "suspicious circumstances."[4]

These findings indicate several things: the policing of marihuana offenses is clearly proactive (i.e., the result of police-initiated interventions); the marginal cost of policing this crime is slight, since most arrests occur in the course of investigating "simultaneous" offenses; sixty percent of the cases were "terminated" between apprehension and trial or plea of guilty. Only 38 percent resulted in conviction either at trial or by a plea of guilty.[5]

But while this rate of conviction is low in absolute terms, it is equal to or better than the rate for crimes with victims (for example, forcible rape, 31 percent; robbery, 33 percent; aggravated assault, 37 percent; burglary, 27 percent; larceny, 37 percent).[6] Thus, instead of being weaker,

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[4] Ibid., p. 636.

[5] "Terminated" means dropped out of the system permanently without a finding of guilt. Ibid., p. 644.

[6] These rates are based on national data for 1965. They were calculated from the data presented in Table 19 in President's Commission on Law Enforcement and Administration of Justice, Task Force Report: Crime and Its Impact: An Assessment (Washington, D.C.: Government Printing Office, 1967), p. 39.

it seems marihuana arrests are as strong or stronger than arrests for crimes with victims--despite the large number of "spontaneous" arrests. In addition, the Commission found that the marihuana arrests became even stronger (that is, were less likely to be terminated) the greater the amount of investigative investment in the case.[7]

2. Policing Dangerous Drugs

In its second study, which focused on dangerous drugs other than marihuana,[8] the National Drug Commission found patterns of arrest and disposition that were similar to those in its marihuana study in some ways and different in others. The analysis was based on 5,582 arrests that occurred between July 1 and December 31, 1971, in six cities. Sixteen hundred of those arrests were in Washington, D.C., and of that number 53 percent occurred without any "prior investigation." That is, they happened "spontaneously" as a result of police-arrestee contact that was not drug-related and that did not involve prior drug investigation.[9] An additional 30 percent involved

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[7]National Drug Commission, Marihuana, pp. 646-48.

[8]The drugs involved were opiates, cocaine, hallucinogens, stimulants, depressants, and "ancillary drug offenses," such as possession of drug paraphernalia, intoxication, and "narcotics vagrancy." National Drug Commission, Drug Use in America, p. 502.

[9]A "prior drug-related investigation" was defined as "any form of pre-arrest involvement in detecting possible drug offenses." A "prior drug investigation" has occurred when any of the following preceded the arrest: evidence collected by undercover agents, tips by informers, independent complaints about a drug offense, or detection in the course of a police stake-out. Ibid., p. 518.

"passive investigations" (responding to a complaint). Only 14 percent involved "active investigations" (ones generated by the law enforcement agency itself). In Washington, 51 percent of the arrests were made by local patrolmen and 40 percent by special narcotics or drug or vice officers. Only 10 percent of the arrests were preceded by drug buys by undercover police agents. The number of persons arrested in each episode was one person in 51 percent of the arrests, two people in 28 percent of the arrests, and three or more in 22 percent of the arrests. The location of the arrest was a public area in 41 percent of the arrests, a nonpublic area in 39 percent of the arrests, and in a vehicle in 17 percent of the cases.[10] The official basis given for the arrests differed by whether the arrest occurred in a public area, a nonpublic area, or a vehicle.[11] Of the public-area arrests, the specific grounds for the arrest was usually an arrest for a simultaneous offense (43 percent).[12]

These arrests were often on thin or challengeable legal grounds. That is, they followed searches based on either the arrestee's "suspicious behavior"; or they occurred incidental to an arrest for an offense such as loitering or vagrancy; or

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[10]National Drug Commission, Drug Use in America, pp. 523-39.

[11]Analysis by separate jurisdictions is not available.

[12]National Drug Commission, Drug Use in America, p. 542. The basis for the arrest was unknown for 32 percent of the cases.

the officer saw the drug or drug paraphernalia in plain view. Among the nonpublic-area arrests, the grounds for the arrests were somewhat stronger. Similarly, the vehicle-related arrests were also strong. Forty-four percent of the persons arrested in vehicles were arrested after they have been stopped for a traffic violation. The drugs or drug paraphernalia were discovered in connection with searches of the vehicles (55 percent).

The National Drug Commission's findings confirm that the policing of dangerous drugs other than marihuana is in fact largely proactive. However, the nature of the proactive policing revealed by the data is surprising. Contrary to what one might expect based on the popular image of drug-law enforcement, the bulk of these arrests were not the result of investigative work by specialized police drug units, but rather the product of local patrolmen acting on their own initiative and without prior investigations. The legal basis for the discovery of the drugs was unknown for a substantial proportion of the cases.[13] Nationally, about half (52 percent) of all dangerous drug cases were dismissed. Only a third

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[13]Arrests on warrants are usually the strongest cases because a judicial officer has already found probable cause to arrest. But, the National Drug Commission found that only 3 percent of all the arrests involved the use of an arrest warrant. (Drug Use in America, p. 543.) Searches based on the arrestee's "suspicious behavior" are probably the most challengeable.

(36 percent) of the arrestees were convicted.[14] But, as was the case with the marihuana conviction rate, this rate of conviction for dangerous drugs while seemingly low on an absolute scale is not low when compared with other crimes. It is virtually identical with the national norm for major crimes with victims.[15] For all the differences between crimes with victims and those without outlined above, it is surprising to find that in the end there is virtually no difference between them on what might be regarded as the ultimate measure, namely, the proportion of arrests resulting in conviction. It should be noted though that, as with the marihuana cases, the Commission found that the conviction rate for dangerous drug cases increased with the greater investment of investigative resources per case.[16]

3. Characteristics of Drug Arrestees

The National Drug Commission also reported demographic characteristics of the persons arrested in connection with drug offenses. In its marihuana study, it found that, on a national basis, the typical arrestee is a young, white, single male who is a permanent resident of his jurisdiction, is

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[14] In Washington, D.C., 39 percent of the cases were dismissed, 31 percent ended in conviction, 8 percent proceeded on a nondrug charge, and 21 percent were pending or the outcome was unknown.

[15] See fn. 6, supra.

[16] National Drug Commission, Drug Use in America, p. 348.

either employed as a blue-collar worker or is attending school, and has had no prior police contact.[17] In Washington, D.C., 63 percent of the marihuana arrestees were white and 37 percent were black; half of the arrestees were permanent residents. With regard to the other demographic characteristics, Washington arrestees followed the national pattern, which was male (85 percent), under age 21 (58 percent), unmarried (57 percent), and either employed or enrolled as students (70 percent).

In its dangerous drug study, the Commission found that the demographic characteristics of arrestees for dangerous drugs were similar in some respects but different in important other respects from the pattern for marihuana arrestees.[18] On a national basis, the majority of the arrestees for dangerous drugs were male (83 percent), young (74 percent under age 30 and 48 percent under age 25), and usually permanent residents of the jurisdictions in which they were arrested (81 percent). But, in contrast to marihuana arrestees, about half of the dangerous drug arrestees were black (53 percent); 16 percent were Spanish-speaking, and 30 percent were white. Also different were the findings that more than half of the arrestees were unemployed, 29 percent were employed, and 7 percent were

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[17] National Drug Commission, Marihuana, pp. 618-20.

[18] Ibid., Drug Use in America, pp. 507-14, 518.

students; and the finding that over half (63 percent) had at least one arrest prior to the current offense.

Among arrestees for dangerous drugs other than marihuana, the pattern found by the Commission in Washington, D.C., differed from the national pattern in a number of ways:

Arrestee Characteristics	D.C.	National Sample
Under age 20	28%	22%
Black	93*	53
Employed	40	28
Prior drug arrest	41	46
Prior nondrug arrest	57	56
At least one prior drug conviction	13	23
At least one prior nondrug conviction	28	36

*The population of the District of Columbia is approximately 70 percent black, whereas the national average is less than 13 percent.

APPENDIX C

Consensual Sex Offenses: Overview of Enforcement Policy

1. Policing Prostitution

Skolnick found that the enforcement of prostitution laws involves different tactics depending upon whether the object of the enforcement is the streetwalker (who is generally from a lower income, nonwhite background) or the call girl (who is more likely to be white and from a middle-income background).[1] In either instance, making "successful" arrests--ones that are free of legal faults (particularly the problem of a police officer rather than the arrestee making the offer of illicit sex)--is difficult. Call-girl operations are run by experienced madams who carefully scrutinize potential customers to determine whether they are police officers. Streetwalkers also rapidly learn how to avoid making a solicitation and to wait for the potential customer to, in effect, make the offer (thereby avoiding the commission of the offense of solicitation).

The police rely on three methods for making arrests: surveillance, decoy or undercover work, and tips from informers. Surveillance involves observation of the prostitute making contact with a customer and then following the couple and trying to catch them in the act. The decoy method involves the use of private citizens acting as police "special employees" or police officers in plain clothes. The essence of the method

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[1] J. Skolnick, Justice Without Trial (New York: Wiley, 1966), pp. 96-111.

is to place a person in a situation in which to be solicited. The frequency with which these three methods led to arrest in Oakland, California, in 1962 is presented in Table C-1.

Skolnick does not present any statistics on the disposition of these cases, but some of his observations are relevant to that issue. He notes, for example, that in order to protect the identity of the special employee, the prostitutes are allowed to pay a fine in exchange for their guilty pleas. He also reports that the prostitutes claim that many of the arrests are unlawful because the police do the soliciting. Whether or not this is true, it indicates the susceptibility of these arrests to legal challenge and suggests that the dispositions of these cases will be generally favorable to the arrestee (that is, a high number of arrest rejections, dismissals, pleas to lesser offenses, and acquittals). Another aspect of the enforcement of prostitution laws that affects the disposition rates is that some arrests of prostitutes may be made with no intention of prosecution; rather, they may be made primarily to harass,[2] perhaps with the aim of deterring future prostitution. Thus, it is a foregone conclusion that they will result in no charges being brought or, if brought, a later dismissal.

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[2]D. MacIntyre, ed. Law Enforcement In the Metropolis (Chicago: American Bar Association, 1967) pp. 84-86.

Table C-1

White, Nonwhite Women Arrested for Solicitation or Prostitution in Westville (Calif.) during 1962, by Enforcement Pattern

Enforcement Pattern	Women					
	Nonwhite*		White		Total	
	N	%	N	%	N	%
Surveillance	59	38	10	50	69	39
Solicitation (plainclothesman)	51	32	2	10	53	30
Solicitation (decoy)	44	28	3	15	47	26
Informer call	3	2	5	25	8	4
Total arrests	157	100	20	100	177	99**

Source: J. Skolnick, Justice Without Trial (New York: Wiley, 1965), p. 100.

* On police records, one hundred and fifty-two were identified as black, five as Hispanic.

** Rounding error.

2. Characteristics of Prostitution Arrestees

In summarizing several studies of the demographic characteristics of persons arrested for prostitution and allied offenses, Lemert sets forth several differentiae of these arrestees.[3] They are primarily a one-sex (female) group, between 21 and 25 years of age, who are usually recent migrants to urban areas. The characteristics of migration and mobility were found to be the significant differentiae of prostitutes rather than racial or ethnic backgrounds. There was a disproportionate representation of women from ethnic and racial groups that had recently arrived in urban areas. With regard to mobility, Lemert reports that a study in San Antonio found that only 11 out of 50 in the group of arrestees were residents of the community. A more recent study by Kalmanoff reported that on the West Coast prostitutes are thought to travel a "circuit."[4] They work in an area until they have accumulated several criminal charges and must stand trial. Then they leave town, change their names, and begin again elsewhere.

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[3] E. Lemert, "Prostitution," in Problems of Sex Behavior, E. Sagarin and D. MacNamara, eds. (New York: Thomas Crowell, 1968), pp. 69-71. But note that the studies summarized by Lemert are from the 1940s.

[4] A. Kalmanoff, Criminal Justice (Boston: Little Brown, 1976), p. 99. A consultant to this study reports that in his view and that of a Portland police captain, Kalmanoff's observation about prostitutes traveling a circuit on the West Coast is no longer accurate. Today, he says, prostitution on the West Coast is organized locally. Anonymous, outside reviewer.

Skolnick's data on arrests of females for prostitution in 1962 in Oakland show 152 blacks, 5 Hispanics, and 20 whites.[5] The Annual Report of the Metropolitan Police Department of Washington, D.C., for FY 1973 shows a total of 907 persons were arrested for "prostitution" that year. Particularly striking is that 262 of them were males This is a departure from the usual female dominance in this arrest category. The relationship between sex and race of the arrestees is shown in Table C-2.

Table C-2

Race of Arrestees for Prostitution in Washington, D.C., FY 1973, by Sex

Sex	White	Nonwhite
Male	19	224
Female	182	459

Source: Annual Report of the Metropolitan Police Department of Washington, D.C., Fiscal Year 1973, p. 31.

The arrest of males in connection with prostitution represents a significant change in social policy. A very few of these males may themselves be prostitutes; virtually all are the male clients of female police officers impersonating prostitutes. This latter class of offender has traditionally been ignored, allowed to get off with a summons, or treated

[5]Skolnick, Justice Without Trial, p. 98.

protectively by the police. In the recent climate of increased social consciousness about discrimination against women, this practice has been criticized as sexist. In 1975 a case based on these grounds was brought by the American Civil Liberties Union before an Alameda County (Calif.) court. The court agreed with some of the arguments noting:

> The plain unvarnished fact is that men and women engaged in proscribed sexual behavior are not treated equally.... The purpose of enforcement policy is, or at least should be, curtailment and discouragement of the forbidden activity. Since prostitution cannot exist without paying customers, it would seem that taking male customers to jail for formal booking and all that goes with it would be a much greater deterrent....6

Immediately after the decision the police began using female decoys to attract and arrest potential male customers. These customers were arrested, detained, and like the prostitutes, checked for venereal disease.[7]

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[6]Kalmanoff, Criminal Justice, p. 100.

[7]Kalmanoff does not report the final dispositions of these charges. Thus, while his report documents that a police department changed its policy in this matter, it remains to be seen whether the new consciousness about this offense has reached a prosecutor's office.

APPENDIX D

Results of Regression Analyses

Regression analysis is a technique that allows one to determine the independent contribution to the dependent variable (for example, whether a case was dropped by the prosecutor or allowed to reach a determination of guilt or innocence) of each independent variable. This technique permits one to answer the question, "Holding other factors in this case (such as prior arrest and sex) constant, what is the independent contribution of this factor (say, race) to the determination of whether the case is dropped or goes to plea or trial?"

Factors Significantly Associated with Whether Cases Referred by the Police Are Dropped by the Prosecutor or Go to Plea or Trial By Type of Crime: Jan. - June, 1976 (Washington, D.C.)

Type of Crime	R^2	N	Factor	Zero Order Correlation	Partial Correlation	F	Degrees of Freedom	Levels of Significance
Gambling*								
Sol Pros	.159	1027					(1,1027)	
			Male	-.36	-.22	50.61		$P \leq .01$
			1 prior arrest	.17	.14	20.94		$P \leq .01$
			More than 5 prior arrests	.18	.10	9.85		$P \leq .01$
			2 to 5 prior arrests	.14	.08	6.65		$P \leq .01$
SLIP	.187	291					(1, 282)	
			Black	.35	.27	23.14		$P \leq .01$
			2 to 5 prior arrests	.22	.17	8.78		$P \leq .01$
Drugs	.019	633					(1, 624)	
			2 to 5 prior arrests	.10	.08	4.22		$P \leq .05$
All Other Misdemeanors	.018	4255					(1,4246)	
			2 to 5 prior arrests	.07	.09	32.50		$P \leq .01$
			More than 5 prior arrests	.06	.07	20.46		$P \leq .01$
			Age	.05	.05	11.12		$P \leq .01$
			1 prior arrest	.02	.04	8.59		$P \leq .01$
			Black	.05	.04	5.98		$P \leq .05$
All Other Felonies	.018	3257					(1,3248)	
			Age	-.10	-.09	28.09		$P \leq .01$
			Employed	-.06	-.05	9.04		$P \leq .01$
			2 to 5 prior arrests	.05	.05	8.68		$P \leq .01$
			More than 5 prior arrests	.01	.04	5.41		$P \leq .05$

Source: Prosecutor's Management Information System (PROMIS).

*No factors were significant.

Factors Significantly Associated with Whether a Defendant Goes to Trial or Pleads Guilty by Type of Crime: Jan. - June, 1977* (Washington, D.C.)

Type of Crime	r²	n	Factor	Zero Order Correlation	Partial Correlation	F	Degrees of Freedom	Levels of Significance
Gambling		49						
Sol Pros	.10	371					(1,360)	
			Local resident for more than 1 year	.16	.15	8.29		P ≤ .01
			Prosecutor has 1 year or more years experience	.14	.13	6.10		P ≤ .05
			Male	.13	.12	4.91		P ≤ .05
			Bail type: personal recognizance or third party custody	.12	.10	3.86		P ≤ .05
SLIP		79						
Drugs	.06	326	Number of delay continuances	.19	.21	15.26		P ≤ .01
All Other Misdemeanors	.04	1458					(1,1446)	
			Prosecutor has 1 year or more years experience	-.16	-.12	21.45		P ≤ .01
			Number of delay continuances	.15	.10	14.98		P ≤ .01
All Other Felonies	.08	1267					(1,1255)	
			Number of delay continuances	.24	.23	69.58		P ≤ .01
			Bail type: personal recognizance or third party custody	-.03	-.09	10.52		P ≤ .01
			Prosecutor has 1 year or more years experience	.11	.09	9.81		P ≤ .01
			Bail type: money bail	-.03	-.08	7.27		P ≤ .01
			Has prior arrest	-.03	-.07	5.69		P ≤ .05

Source: Prosecutor's Management Information System (PROMIS).

* Independent variables included in the analysis were defendant's age, sex, race, prior record, length of local residence, employment status, type of bail imposed, type of defense attorney, length of experience of prosecutor and number of delay continuances.

Factors Associated with Whether a Case Referred by Police for Prosecution Results in Conviction or Any Other Disposition: Jan. - June, 1976 (Washington, D.C.)

Type of Crime	R^2	N	Factor	Zero Order Correlation	Partial Correlation	F	Degrees of Freedom	Levels of Significance
Gambling**	.08	93						
Sol Pros	.21	960					(1,953)	
			Any prior arrest***	.40	.23	53.41		$P \leq .01$
			Male	-.41	-.21	43.56		$P \leq .01$
SLIP	.23	276					(1,269)	
			Black****	.37	.26	19.82		$P \leq .01$
			Any prior arrest	.40	.25	18.29		$P \leq .01$
			Age	-.06	.12	4.12		$P \leq .05$
Drugs**	.01	507						
All Other Misdemeanors	.03	3745					(1,3738)	
			Any prior arrest	.17	.15	89.91		$P \leq .01$
			Black	.07	.04	6.82		$P \leq .01$
			Age	.05	.04	4.84		$P \leq .05$
			Male	-.02	-.03	4.23		$P \leq .05$
All Other Felonies	.02	2807					(1,2800)	
			Age	-.11	-.11	31.85		$P \leq .01$
			Any prior arrest	.07	.08	16.61		$P \leq .01$
			Employed	-.07	-.06	9.66		$P \leq .01$

Source: Prosecutor's Management Information System (PROMIS).

* Variables used in the analysis were: defendant's age, race, sex, prior arrest record, employment status and length of time as local resident.

** No association significant

*** r (any prior arrest, male) = -.54

**** r (any prior arrest, black) = .39