DIVERSION

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Despite the almost totally critical nature of what follows, I am in favour of the general trends indicated in this Working Paper. Since space for comment is short, I have concentrated exclusively on aspects which, in my view, could have received clearer or better exposition in the Commission's Paper. At the conclusion of this comment, I shall briefly try to place the Law Reform Commission's approach in this and other writings within the broader context of law and social change.

Writing in 1960 about criminal prosecutions, Lord Devlin held to the view that it was the duty of the executive to maintain order and the duty of the judiciary to administer the law.[1] In practice, however, the distinction is far from clear-cut. As a later writer noted, "[b]etween the two is the shadowy region where decisions are made as to whether or not the offender should be handed over to the jurisdiction of the courts".[2] That the area used to be shadowy is evident, and this Working Paper is part of a considerable movement to shed light upon the phenomenon.[3]

How successful has this paper been in clarifying the issues and facing up to the practicalities of implementation? I have mixed feelings in formulating a response to that question. Mixed, because much of what appears in the paper is sensible and well written, yet certain contradictions also appear which I wish to address in some detail. Further, certain aspects of the topic which should have been considered, do not really appear at all.

The first contradiction which confronts me in the paper is this: it appears to be clear that, in considering whether the court process should be used or not, certain criteria should be drawn up as the ground rules for that decision. So far so good. But, under the heading "A Matter of Restraint", we read that the "principle of restraint requires that an onus be placed on officials to show why the next more severe step should be taken",[4] *i.e.*, any doubt would be resolved in favour of not preferring or not proceeding with a charge. Nevertheless, under the heading "Diversion at What Stage?—The Police", there appears the following statement: "Such policies should

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[1] *See generally* P. DEVLIN, THE CRIMINAL PROSECUTION IN ENGLAND (1960).

[2] A. WILCOX, THE DECISION TO PROSECUTE (1972).

[3] B. GROSSMAN, THE PROSECUTOR (1969); B. GROSSMAN, POLICE COMMAND (1975); Gandy, *The Exercise of Discretion by the Police as a Decision-Making Process in the Disposition of Juvenile Offenders*, 8 OSGOODE HALL L.J. 329 (1970); TASK FORCE ON POLICING IN ONTARIO 11-38 (1974); Loh, *Pretrial Diversion from the Criminal Process*, 83 YALE L.J. 827 (1974); Stulberg, *A Civil Alternative to Criminal Prosecution*, 39 ALBANY L. REV. 359 (1975); N. MORRIS, THE FUTURE OF IMPRISONMENT 9-12 (1974).

[4] LAW REFORM COMMISSION OF CANADA, DIVERSION, WORKING PAPER 7, at 3 (1975).

as far as possible . . . require a charging option to be followed unless the incident can be screened out", [5] *i.e.*, any doubt would be resolved in favour of preferring a charge. Now we just cannot have it both ways. If the police are "officials" within the language used, then they are receiving quite contradictory advice about the basic approach which should be taken to the question, "to charge or not to charge". Even Hamlet, that paragon of equivocators, was never made to face such a conflict of apparent authority.

The police, having read this, would be justifiably bewildered to find a page later that the "assumption is that police and prosecutors should continue to exercise discretion not to lay charges in proper cases *and that such use of discretion should be increased*". [6] I fail to see how one can be increasing police discretion if a charging option is requried to be followed where diversion criteria are not met. The authors of the paper conclude this point by saying: "It is important, therefore, that diversion be firmly grounded on sound sentencing principles and governed throughout by the principle of restraint with *the onus on officials to justify proceeding with a case to the next more serious level.*" [7] That being the case, it is clear that the onus is being firmly placed on those who desire to proceed further to justify that course. Thus, any case of doubt must be resolved in favour of *not* proceeding. If this conclusion overrules the required charging option stated earlier, [8] then this should be made clear to police officials grappling with their role in this field.

The second contradiction in this paper is that it makes statements about the deterrent or educative effect of the criminal law which, if true, may be hindered rather than helped by the proposals which follow. Thus, we read that, the "deterrent or educative effect of the criminal law is probably found *in the certainty of arrest and publicity of the process*, rather than the increased severity of imprisonment as compared to a community based sanction". [9] Many people will have no difficulty in agreeing with a large part of that. But if additional police resources are to be used up in "processing" cases towards a decision on diversion, they are being taken from a scarce and finite total of police personnel, which must result in fewer police being available to make the apparently essential arrests. This is recognized, in part by the statement that the "Commission is also aware that carrying out a screening policy with some degree of uniformity and consistency may require additional police resources". [10] Nowhere is the concomitant reduction in field personnel recognized, or provided for (*e.g.*, by recognition of a need for federal funding assistance if the number of police employed on "screening" are not to be lost to "field operations"). Worse than that, when in-

[5] *Id.* at 6.
[6] *Id.* (emphasis added).
[7] *Id.* at 25 (emphasis added).
[8] *Id.* at 6.
[9] *Id.* at 13.
[10] *Id.* at 8.

creased costs are discussed,[11] the police are excluded from comment although the prosecutor's office, probation, child welfare, family counselling, and medical and health services all receive express consideration in this respect. Even more contradictory is the attitude towards publicity[12] on account of its deterrent or educative effect. Yet earlier in the paper, publicity had been treated very differently:

> [D]ealing with trouble in a *low-key* is far more productive of peace and satisfaction for individuals, families and neighbourhoods than an escalation of the conflict into a *full-blown* criminal trial.[13]

For "low-key" one can clearly read "in the absence of publicity", and for "full-blown" one can obviously infer the words "with all the attendant press coverage". The problem here cannot be resolved like the problem of police manpower, by providing more of a scarce resource. It is a dilemma left unresolved, although the pejorative reference to "the glare of television cameras"[14] when the pre-trial settlement is being discussed, leaves one in little doubt about the bias of the Working Paper's authors in this respect.

The third contradiction is the very loose language used when identifying persons being considered for diversion. One of the most frequently heard criticisms of low-visibility decision-making is its inherent danger to the rights of the persons involved. Bearing this in mind, the authors should have been particularly careful to describe unconvicted persons as "accused"; only after conviction would the term "offender" have been appropriate. Nevertheless, we read on several occasions of "offenders" when a more accurate and felicitous word would have been "accused". This is particularly evident in the gross statement: "Nor should an offender [*sic*] be denied the opportunity to plead not guilty and seek an acquittal in the courts".[15] So much for the landmark case of *Woolmington*:[16]

> Throughout the web of the English Criminal Law one golden thread is always to be seen, that it is the duty of the prosecution to prove the prisoner's guilt subject . . . to any statutory exception. If, at the end of and on the whole of the case, there is a reasonable doubt, created by the evidence given by either the prosecution or the prisoner . . . the prosecution has not made out the case and the prisoner is entitled to an acquittal. No matter what the charge or where the trial, the principle that the prosecution must prove the guilt of the prisoner is part of the common law of England and no attempt to whittle it down can be entertained.[17]

That the "golden thread" can be so easily cut in a publication of the Law Reform Commission of Canada is a matter of some concern. Even those of a sociological-philosophical-psychological bent who would denounce

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[11] *Id.* at 22.
[12] *Id.* at 13.
[13] *Id.* at 3 (emphasis added).
[14] *Id.* at 22.
[15] *Id.* at 16.
[16] Woolmington v. D.P.P., [1935] A.C. 462, [1935] All E.R. Rep. 1.
[17] *Id.* at 481-82, [1935] All E.R. Rep. at 8.

the above criticism as mere lawyer's semantics must surely admit that in addressing an argument to a general audience, obvious terms of art applicable to a part of that audience (the lawyers) should be respected so as not to diminish the force of the main argument. [18]

My next concerns relate to the present law of probation in Canada and how that is dealt with in the Working Paper. The writers of the Working Paper make the following statement: "Wilful failure to comply with the terms and conditions of an order is itself a separate offence, alternatively [*sic*] the defaulting offender can be re-sentenced on his original conviction." [19] With respect, that is just not so. A probation order can be attached to several court dispositions, *viz*:

(1) conditional discharge; [20]
(2) suspended sentence; [21]
(3) fine or imprisonment; [22]
(4) intermittent sentence. [23]

The "alternative" of dealing with the defendant for the original offence applies in (1) and (2) above but *not* in (3) and (4), where the accused has already been sentenced. The only sanction available in the latter two categories is "wilful failure to comply with the conditions of the probation order" [24] and, possibly (but not likely), committing the further offence of wilful failure to comply while on probation. [25] Law Reform Commissions owe a special duty to get the law right when discussing law reform.

I shall turn now to aspects of the topic which might have been addressed in the Working Paper but were not. The most central one is this: How different will the alternative diversionary systems be from those used now at the least Draconian end of the criminal justice system? This question was well put by Sheila Arthurs in a paper recently delivered at the Crime Prevention Workshop convened by the Centre of Criminology, University of Toronto:

> If our concerns about processing through a criminal justice system are ones of stigma, alienation and the availability of illegitimate opportunities, will

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[18] This misuse of language becomes almost jocular at page 21 of the Working Paper, when we are asked to consider the position of the "accused" at sentence. Clearly this is one of the times he could have been called "the offender" since "at sentence" the issue of guilt has been determined against him. Thus, when he really is "the accused", the paper often refers to him as "the offender" and, on this occasion, vice versa.

[19] *Supra* note 4, at 19.

[20] Criminal Code, R.S.C. 1970, c. C-34, § 662.1.

[21] *Id.* § 663(1)(*a*).

[22] *Id.* § 663(1)(*b*).

[23] *Id.* § 663(1)(*c*).

[24] *Id.* § 666.

[25] *Id.* § 664(4). This outrageous possibility must be left open because of the restrictive law on autrefois convict and acquit: Wright v. The Queen, [1963] S.C.R. 539, 40 C.R. 261, and the still uncertain Canadian law on abuse of process: The Queen v. Osborn, [1971] S.C.R. 184, 1 C.C.C. (2d) 482 (1970). See Kienapple v. The Queen, [1975] 1 S.C.R. 729, 15 C.C.C. (2d) 524 (1974), however, for some hope of restrictions in the law of multiple convictions based on the same fact situation.

> these alternatives in fact provide otherwise. It would seem that these 'new' systems will receive a similar clientele if not exclusively so, thus setting in motion the potential for stigmatization, alienation and illegitimate opportunity. Further, these alternative systems are conceived and operated by people with attitudes and backgrounds similar to those who "manage" the criminal justice systems. Even if lay citizens are involved, should we expect these 'new systems' to be any more successful?[26]

In other words, we may end up dealing with much the same people in much the same way as before with (depressingly) much the same results. This is not addressed in the paper.

Another problem I should like to have seen discussed is that of the effects of publicizing the criteria upon which decisions will be made as to whether to divert or process particular behaviour through the criminal justice system. The police have a discretion to decide, *in any particular case*, whether to proceed or not, but considerable difficulties arise when discretionary policy of a general nature is propounded. The difficulties of the Commissioner of Police in London, England, in the first *Blackburn* case[27] showed this clearly, and the Commissioner only avoided a mandamus to enforce the law (in that case the gambling provisions) by undertaking to reverse his policy, which had been one of non-enforcement except in certain stated cases. Assuming, however, that this problem can be overcome by careful drafting of the appropriate policy guidelines, the real problem lies in the effects that this might have on criminal behaviour in the area affected. Obviously there will be different policies in different parts of each province. Will this result in "jurisdiction shopping" by would-be transgressors? This is an issue which should be addressed, even if only to denounce it as irrelevant and to assign reasons for that conclusion. Since this has not been done, I am left in doubt. Maybe the sort of crime which would result in diversion is so simple that jurisdiction-shopping is irrelevant. But since the first area where the English police attempted express policy statements of non-enforcement was gambling (to their cost), one should not assume this too readily.

Despite all of the above criticisms, I feel sorry for the Law Reform Commission of Canada. They seem to have concentrated on trying to change the street scene, the court scene and the prison scene, by persuasion, advice and discussion. This takes a lot of courage. Most law reform commissions rush to legislation. It is safer. When asked what they have done, they can then point to piles of legislation and leave the questioner to assume that the commission has been active indeed. But what has changed on the

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[26] S. Arthurs, *Community Involvement and Crime Prevention*, *in* A READER FOR THE CRIME PREVENTION WORKSHOP 85, at 95 (May 21-22, 1975).

[27] Regina v. Commissioner of Police of the Metropolis, *Ex parte* Blackburn, [1968] 2 Q.B. 118, 1 All E.R. 763 (C.A.). *See also* Regina v. Commissioner of Police of the Metropolis, *Ex parte* Blackburn (No. 3), [1973] 1 Q.B. 241, [1973] 1 All E.R. 324 (C.A.), for the problems involved in the discretionary non-enforcement of obscenity laws.

street, in the court or in the prison?[28] Not necessarily anything. This is not to say that legislation never works, of course, only that one must not assume that having passed the legislation, the de facto situation will be transformed. It may prove to have been an act of considerable bravery for the Law Reform Commission to have largely turned its back on the safer legislative-activity route. This paper, like many others in the last five years, has aimed at the less dramatic but possibly more essential business of seeking a change in attitudes. The double danger in this approach is that, if you succeed, those who have changed their attitudes will claim to have done so independently of your efforts! A law reform commission can, of course, never prove the contrary. A prescient one would not seek to. The job they were trying to do will have been done. This paper, for all its imperfections, may well prove to have been one step in that slow but essential process.

[28] An analogy might be to consider the extent to which the de facto street, court or prison conditions changed in the United States during the so-called civil libertarian decisions of the United States Supreme Court in the 1960's. The conclusion seems to be that neither legislation nor court decisions will greatly affect the reality so long as the underlying social causes and public attitudes remain unchanged.