COMMENT

DIVERSION: Recent proposals in criminal justice.

Introduction

"Diversion" is a relatively new term in the vocabulary of the criminal justice system. It applies, however, to a fairly old concept. Most legal systems make some sort of informal provision for diverting special types of cases out of the system or away from certain outcomes. This is especially so insofar as the handling of juvenile offenders is concerned. In New Zealand the Police Youth Aid Scheme is an informal diversionary device, while the new Children's Boards are a good example of a formal programme of the same sort.[1] Nevertheless, the term "diversion" itself has only come into prominence since the report of the U.S. President's Commission in 1967.[2] Furthermore, up until recently, its use has been largely confined to the United States.

"Diversion" is an exceedingly broad term. In this paper it will be taken as referring only to the process of:

> "halting or suspending before conviction formal criminal proceedings against a person on the condition or assumption that he will do something in return."[3]

This definition serves to emphasise those characterstics of diversion which distinguish it from such everyday processes as police and prosecution screening. Unlike screening, diversion involves imposing some obligation on the divertee to *do* something. In American programmes at least, this 'something' is generally intended to have some rehabilitative value.[4]

Thus, for example, offenders are diverted to programmes involving such things as vocational training, job placement and supervision, intensive individual family counselling, drug therapy and the like.[5]

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1. For a commentary on these Boards casting some doubt on their adequacy as diversionary devices, see Seymour, "The Children and Young Persons Act 1974", *6 N.Z.U.L.R.* p. 395 (1975).
2. See the President's Commission on Law Enforcement and Administration of Justice, *"The Challenge of Crime in a Free Society,"* (1967) and *"Task Force Report: Courts"* (1967).
3. U.S. National Advisory Commission on Criminal Justice Standards and Goals, *"Courts,"* (1973) p. 27.
4. There are, of course, exceptions. One programme at least, the so-called Van Dyke Youth Service Bureau, imposes no obligation on the divertee at all. See Cressey and McDermott, *"Diversion from the Juvenile Justice System,"* (1973) for a description of this project. Other programmes, such as the one run by the Philadelphia Center for Dispute Settlement, rely on arbitration and conciliation, rather than rehabilitation. See Nimmer, *"Diversion: The Search for Alternative Forms of Prosecution,"* (1974) chapter 8.
5. For general descriptions of many of the major American programmes see Nimmer, *op. cit. supra* n. 4, and the American Bar Association, National Pretrial Intervention Service Center, *"Descriptive Profiles on Selected Pretrial Criminal Justice Intervention Programs,"* (1974).

Like most "new" ideas, diversion has passed through two fairly distinct developmental stages. Its emergence as a distinct concept in the mid-1960's was greeted with a wave of largely uncritical enthusiasm which, as Nimmer rather pompously remarks, had "a disquieting, faddish quality."[6] At this stage, diversion was seen as a cheap and effective way of rehabilitating minor offenders and of reducing the workload in the overcrowded lower court system. It was also seen as a method of effectively decriminalizing certain controversial areas and of de-emphasising the law enforcement role of the police.[7]

This stage in the development of diversion has now passed and a much more critical stance is emerging. Over the last three years or so, we have accumulated an increasing body of evidence which suggests that many diversionary programmes are failing to produce the sort of benefits that were initially expected of them.[8] Indeed, some of the evidence suggests that such programmes are positively counter-productive.[9] In addition to specific criticisms of this sort, diversion has also been affected by the general attack on the concept of rehabilitation itself which has been gathering momentum since the late 1960's.

While this attack has certainly been fuelled by the realization that our present attempts at rehabilitation have, by and large, been dismal failures,[10] its initial impetus and its real sustaining force derives from much deeper concerns. In crude terms the major problem with the rehabilitative ideal is that its adoption in the penal setting inevitably involves an increase in the ambit of social control and a decrease in the legal and other protections traditionally afforded to the individual.[11] Furthermore, the rather belated recognition that criminality, unlike traditional physical illness, is primarily a matter of definition, has

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6. Ibid., p. xii.
7. For a brief summary of the perceived benefits of diversion, see Comment, "Pretrial Diversion: The Threat of Expanding Social Control," *10 Harvard Civil Rights Civil Liberties Law Review*, p. 180 at pp. 180-183 (1975). The cost-benefits aspects of such programmes are dealt with in more detail in the National Advisory Commission on Criminal Justice Standards and Goals, *op. cit. supra*, n. 3, pp. 27-31.
8. See generally, Nimmer, *op. cit. supra*, n. 4, p. 95ff., Comment *op. cit. supra*, n. 7, and Zimring, "Measuring the Impact of Pretrial Diversion from the Criminal Justice System," *41 U.Chi.L. Rev.* p. 224 (1974).
9. Thus, for example, Zimring's analysis of the Manhattan Court Employment Project suggests that over 50% of those drawn into the diversionary programme would not have even come to trial prior to the institution of the project. *Ibid.*, p. 237.
10. See, for example, Martinson, "What Works? — Question and Answers About Prison Reform" in Halleck et al. (eds.). *"The Aldine Crime and Justice Annual 1974,"* (1975) p. 352.
11. The classic exposition of this view is to be found in Lewis, "The Humanitarian Theory of Punishment," *6 Res Judicatae*, p. 224 (1958). More recent works include Schur, *"Radical Non-Intervention: Rethinking the Delinquency Problem,"* (1973), the American Friends Service Committee, *"Struggle for Justice,"* (1971), Morris, *"The Future of Imprisonment,"* (1974), Weiler, "The Reform of Punishment," in Law Reform Commission of Canada, *"Studies on Sentencing,"* p. 91, (1974) and Mitford, *"Kind and Usual Punishment: The Prison Business,"* (1973).

resulted in a recognition of the dangers of therapeutic imperialism.[12] As Norval Morris has pointed out:

> "Abuse of governmental power is a central problem of the human condition . . . if criminals are coercively cured today, the rest of us may tomorrow be regarded as in need of remedial training, both to achieve our maximum social potential and to minimize collateral injuries to others."[13]

Many of the results feared by critics of the rehabilitative ideal can, in fact, be seen in the present practice of diversion. As was indicated earlier, programmes such as the Manhattan Court Employment Project routinely process offenders who, but for the project, would have been weeded out of the system altogether at a much earlier stage. Furthermore, diversion, by its very nature, dispenses with the basic legal protections normally afforded by the criminal trial and permits the individual to be treated for lengthy periods of time without any formal finding of guilt having been made. While it is plain that the treatment prescribed by diversion programmes is nowhere near as coercive or unpleasant as more traditional outcomes it is also plain that such treatment has all the essential attributes of punishment.[14] As Francis Allen pointed out in an early attack on the role of the rehabilitative ideal in the juvenile justice system:

> "It is important . . . to recognize that when, in an authoritative setting, we attempt to *do* something for a child 'because of what he is and needs,' we are also doing something *to* him. The semantics of 'socialized justice' are a trap for the unwary. Whatever one's motivations, however elevated one's objective, if the measures taken result in the compulsory loss of the child's liberty, the involuntary separation of the child from his family, or even the supervision of the child's activities by a probation worker, the impact on the affected individuals is essentially a punitive one. Good intentions and a flexible vocabulary do not alter this reality."[15]

Thus, while many people would agree that there is an urgent need to reduce the scope and impact of the criminal law and to move towards more community-based methods of handling offenders, there

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12. This is, of course, a danger which has long been recognized in other areas. See generally, Kittrie, *"The Right to be Different,"* (1971) and Szasz, *"Ideology and Insanity,"* (1974). It is also being encountered in less obvious contexts, see Illich, *"Medical Nemesis: The Expropriation of Health,"* (1975).
13. Morris, "The Future of Imprisonment: Toward a Punitive Philosophy," *72 Michigan L. Rev.*, p. 1161 at p. 1179 (1974).
14. One of the attractions of diversion is its facade of free choice. In practice, however, the choice for most offenders is not a free one. "Such is the coercive threat of trial, the pain of detention, the delays, the fears and the uncertainties of punishment, that diversionary processes prove compelling for all but the most determinedly innocent or the most experienced in crime." Morris, *op. cit. supra* n. 11, pp. 10-11.
15. Allen, *"The Borderland of Criminal Justice,"* (1964) p. 18.

is considerable scepticism about both the propriety and the likely affect of introducing formal diversionary programmes to achieve these objectives.

Canadian Proposals for Reform

In this context a number of recent papers put out by the Law Reform Commission of Canada may provide some assistance.[16] Drawing on over ten years of American experience and on the growing body of academic writing in this area, the Commission has attempted to provide a general overview of the theory and practice of diversion and to suggest viable solutions to the conflicts and difficulties inherent in the concept.[17] It is important to stress at the outset that in approaching this area the Commission has taken a rather more pragmatic and limited view of the potential role of diversion than some of its American counterparts.

In summary, the two Working Papers envisage the development of a formal programme whereby relatively minor offenders can be diverted away from the court structure after the charges have been laid and before the case comes to trial.[18] Conceptually, this process is seen as an extension of prosecutorial discretion and the ultimate decision on whether to divert an offender or not is thus left to the Crown.[19] However, this decision is to be guided by specific, public criteria[20] and will depend on the consent of the offender and the co-operation of the victim.[21] Once the decision to divert the offender has been made, the case will be referred to an outside agency which will be responsible for ensuring that some sort of satisfactory settlement between the parties is reached. Certain obligations will be imposed on the offender as a result of this settlement and any wilful failure to fulfil these obligations may be visited with resumption of the criminal proceedings if the prosecutor considers that course to be appropriate.[22]

It is this concept of "settlement" which forms the heart of the

16. See Law Reform Commission of Canada, Working Paper 3, *"The Principles of Sentencing and Dispositions,"* (1974), Working Paper 7, *"Diversion,"* (1975), *"Studies on Sentencing"* (1974) and *"Studies on Diversion (East York Project),"* (1974). Working Paper 3 is reprinted as part of *"Studies on Sentencing"* and Working Paper 7 forms part of *"Studies on Diversion (East York Project)."* This latter publication was unfortunately not available to the author at the time of writing.
17. Further discussion of material relevant to the Commission's proposals on diversion can be found in the other major papers relating to the reform of the criminal process and of the content of the criminal law. See Working Papers 5 and 6, *"Restitution and Compensation"* and *"Fines"* (1974), Working Paper 2, *"The Meaning of Guilt: Strict Liability,"* (1974), *"Studies on Strict Liability,"* (1974), Working Paper 10, *"Limits of Criminal Law: Obscenity, a Test Case,"* (1975) and *"The Native Offender and the Law,"* (1974).
18. Working Paper 7, *"Diversion,"* pp. 8-12, 14-16.
19. Ibid., p. 9.
20. See the guidelines suggested *ibid.*, p. 11.
21. *Ibid.*, pp. 16-17.
22. *Ibid.*, pp. 15 and 19.

Canadian proposals and which sets them apart from most of the existing American programmes. The Commission's adoption of this concept is the result of its commitment to a view of the criminal law which basically rejects ideas of rehabilitation and deterrence as a central focus, and instead, regards the law as an instrument for the "enhancement, re-alignment and protection of community values."[23] This approach involves the recognition that

> "the aims of rehabilitation, deterrence, *et cetera,* are not ends in themselves but rather means used to protect certain personal and proprietary interests in society and to promote public order and tranquility."[24]

Community values may be protected by a variety of measures apart from the criminal law and the Commission is basically concerned to question the effectiveness of traditional criminal law practices and procedures in this regard. It points out that in many minor cases the interests of the parties involved and of the community at large may be better served by informal procedures aimed at reconciling the parties, extracting restitution and compensation and generally restoring the social milieu which the offence has disrupted.[25] Such procedures are seen by the Commission as having a vital role to play in clarifying values at the local level. They can be contrasted with traditional criminal law procedures which, while attempting to serve a similar function for society as a whole are, often counter-productive in terms of both the protection of the interests of the parties concerned and the restoration of social harmony.[26]

Thus, for example, once the process has been set in motion, it tends to alienate the offender and the victim from one another and from the system as a whole. In the traditional criminal trial there is no room for the complex social rituals of remorse and forgiveness which are so essential in everyday life. Furthermore, the legal process itself distorts and oversimplifies the complex reality of the offence and this in turn serves to alienate the parties further. In fact, by abstracting real-life disputes and endeavouring to make them manageable in a legal context, the law actually inhibits conflict resolution and severs linkages which, in the normal course of events, would bring offender and victim together. The more complex the law becomes and the more it intrudes into hitherto sacrosanct areas of everyday life, the more serious this potential for alienation becomes.[27]

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23. Working Paper 3, *"Principles of Sentencing and Dispositions,"* p. 7.
24. See Hogarth, "Alternatives to the Adversary System," in *"Studies on Sentencing,"* p. 35 at p. 81. Cf. the criticisms of this approach by Grygier, "Sentencing: What For? Reflections on the principles of Sentencing and Disposition," 7 *Ottawa L. Rev.*, p. 267 (1975).
25. *Op. cit. supra,* n. 23, p. 11ff.
26. See generally, Hogarth, *op. cit. supra,* n. 24.
27. There is, of course, a nice circular movement here. Law intrudes in part because social control is perceived as becoming less effective. Social control in turn becomes less effective as people perceive problems more and more as legal problems.

Of course, there are always situations where the intervention of the criminal law is necessary and is productive of ultimate harmony. In the case of serious violations of community values, for example, small scale reconciliation and settlement is simply not on and the community demands the sort of symbolic statement that the criminal law is designed to deliver. In other cases, the offender and the victim may be total strangers or may have wildly conflicting interests and values so as to make legal intervention and the imposition of an authoritative solution the only possible means of resolving the situation. But such cases are the exception rather than the rule.[28]

Some Problems

The implications of this sort of critique plainly extend well beyond the discussion of diversion and settlement and involve consideration of wide-ranging community-based reform throughout the system as a whole. Hogarth himself, for example, follows the logic of this basic approach through all the stages of the criminal process and discusses a variety of alternatives in the realms of police recruitment, training and organization; the structure and ethos of the legal profession; the composition and role of the criminal courts and the nature and organization of penal institutions. Nevertheless, attractive as this basic critique is, there are a number of problems which it does not really face.

In the first place, one of the central themes of the whole discussion is the need to get minor conflict resolution back into the community and out of the courts. This raises immediate questions about the dangers of injustice and unfairness as between different offenders, different victims and different communities. Whatever the nature of the settlement procedure that is eventually adopted, the fear always remains that local communities and different victims are likely to vary enormously in their attitudes to offences and offenders. Furthermore, it seems fair to assume that such variation is likely to be most pronounced in relation to minor offending which does not violate any deeply held common values, that is, in relation to precisely those offences which the Commission sees as being most appropriate for diversion and community-based settlement. Unfortunately, the general safeguards which the Commission proposes, such as the setting up of specific, publicly known criteria, and the retention of the initial diversion decision in the hands of the Crown, are not likely to be very effective in handling such problems. As Hogarth, quoting Edelman, remarks in a rather different context, law is "a virtuous generalization around

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28. Thus Hogarth, quoting Hans Mohr, points out that:
> "the bulk of recorded criminality occurs within ongoing relationships — familial, friendship, neighbourhood or commercial. Research shows that 60% of crimes of violence occur within the family and 80% between people who know each other."

The opportunities for effective conciliation in such instances are self-evident.
Op. cit. supra, n. 24, p. 54.

which a game can be played."[29] The problem in diversion is that different groups may, because of the generality of the rules, end up playing totally different games. This is unlikely to be avoided by the addition of more general rules — 'criteria' — or by the insertion of a new umpire — prosecutorial oversight.[30] The only real solution is to make the rules more restrictive, but this is precisely what the criminal law and the formal trial process is about and it is precisely what you cannot do with a flexible community-oriented scheme like diversion if it is to retain its attraction as an alternative.

Neverthless, it is arguable that, as the Commission suggests:

> 'equal justice is not an absolute to be pursued to the exclusion of all other values or considerations. If the resulting inequality is not gross it may be worthwhile to put up with it in order to secure other desirable objectives."[31]

Some inequality of treatment is inevitable in any system and, so long as we recognize the dangers, it may well be that the only realistic thing we can do is make general rules and set up safety nets to catch the worst examples. In any event the proposal on diversion, insofar as they relate to relatively minor offences, do not raise really fundamental questions of injustice. If Hogarth's more far-reaching ideas were to be implemented the problem would become far more acute and really serious consideration would have to be given to the question of the extent of variation which can be tolerated as between different communities or groups in a highly mobile and heterogeneous society.

A nagging doubt does remain however, even in relation to the diversion of minor offenders in the way proposed. The sort of utilitarian argument advanced above, raises both serious definitional problems — who, for example, is to decide when inequality is 'gross' or not? — and more fundamental ideological difficulties. As Weiler puts it in his discussion of the justifications advanced for the rehabilitative ideal:

> "At the level of theory, it is clear now that justification simply does not mean pragmatic or utilitarian argument. We cannot reduce all values to the one common denominator (call it happiness, welfare, the *summum bonum* or what have you) and collapse the value of the means by which this is produced into the sum of their end-results."[32]

Another problem raised by this whole discussion relates to the concept of "settlement" itself. Both Hogarth and the Commission basically see settlement as a means of enhancing and protecting basic values and assisting in the development of an harmonious and self-

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20. *Ibid.*, p. 50.
30. Indeed these additions are simply likely to obscure the real nature of the games which are being played.
31. *Op. cit. supra*, n. 18 ,p. 10.
32. Weiler, *op. cit. supra*, n. 11, p. 203.
33. See Morris' comment cited earlier, text accompanying n. 13. See also Kittrie, *op. cit. cupra*, n. 12, chapter 9.

policing community. Although the prevention of future offending and conflict may be one result of this process, it is not seen as a basic objective. This formulation of the aims of the law and the role of diversion is a conscious attempt to avoid the major criticisms which have been levelled at the rehabilitative ideal and at diversionary programmes which are overtly rehabilitative in intent. As was indicated at the outset, such programmes raise serious questions about the expansion of social control, the dangers of therapeutic injustice, the increase in discretion and the decrease in effective legal and community controls over the actions of therapeutic bureaucrats, and the general dangers of the growth and abuse of power inherent in the development of the "therapeutic state."[33]

At first sight the Commission's proposals appear to avoid most of these problems by providing for the expansion of screening procedures and, more importantly, by the emphasis which they place on settlement. Settlement, after all, presumably involves no attempt to rehabilitate and imposes no obligations on the offender apart from those which could be imposed on him in a civil proceeding. Unfortunately, even this gives rise to some difficulty. Whatever the nature of the settlement involved, the introduction of the scheme will inevitably result in people being processed who would previously have been left alone. Thus, if settlement simply involves the parties entering into an agreement, as Working Paper 7 seems to envisage,[34] people who would previously have been screened out or who would have engaged in voluntary settlement, will tend to be prosecuted so that rather more effective settlement procedures can be used. Once they are in the programme, the dangers of ultimate prosecution in the event of failure to complete the programme are plain. Such expansion would only be avoided where no sanction whatsoever was attached to a failure to fulfil the obligations under the agreement. This solution was canvassed and specifically rejected by the Commission.[35]

In addition to this, there is a considerable amount of doubt about what the term "settlement" actually means to the Commission. Working Paper 7 certainly seems to limit it to conciliation between the victim and the offender sealed with a formal agreement. The other papers, however, seem to go rather further. Working Paper 3, in particular, espouses a view of diversion which definitely includes the possibility that an offender may be obliged to undertake treatment of some sort as part of the settlement procedure.[36] Hogarth seems to agree with this view.[37]

The adoption of a definition of "settlement" which includes this possibility raises all the problems discussed earlier. Thus the offender is being treated over and above his civil obligation to repay his victim

34. *Op. cit. supra*, n. 18, p. 15.
35. *Ibid.*, pp. 18-19.
36. *Op, cit. supra*, n. 23, p. 12.
37. *Op. cit. supra*, n. 24, p. 83.

without the benefit of a finding of guilt. He may well be being punished more than he would otherwise have been, and he is certainly being subjected to more control. Furthermore, in the specific context of the Canadian proposal, the inclusion of a treatment component casts considerable doubt on the propriety of victim involvement in the process. While it can be argued very strongly that the victim should, regardless of the practical difficulties,[38] have a central place in discussions about the way in which the offender should pay his debt to him, it cannot really be said that the victim should have any voice in a decision as to the appropriate treatment programme for the offender to undertake. In crude terms the rehabilitation of the offender is none of the victim's business. His interest in the matter stops at just compensation and, perhaps, a reasonable show of contrition.

Conclusion

Overall, the proposals contained in these two Working Papers do not really mark much of an advance on current American programmes. They stress a number of novel points — for example, the role of the victim — and they are concerned from the start to set up specific criteria to guide those who will be making the decisions at the various stages. Yet the fundamental problems of potential injustice, expanding social control and the basically coercive structure of such schemes persist. In addition, although it is rather difficult to assess, it seems likely that the practical effect on the criminal justice system as a whole will be minimal. The concept of settlement, whatever it means, would seem to place a severe limit on the intake.[39] After all, a large number of criminal offences, even very minor ones, are not really capable of settlement.[40] In such cases, straightforward screening would seem to be the most appropriate response. In other areas it may well be that some of the problems which lead to a demand for diversion can be dealt with satisfactorily by an increased willingness on the part of the courts to make more use of absolute and conditional discharges. This is an area which has been curiously neglected by the Commission, but it is one which has the great virtue of combining considerable flexibility with full legal and judicial protection for both the offender and the community.

It is important to stress that the practical implications of diversion are still matters of considerable debate. Few programmes have been in operation long enough to be properly evaluated and of those that

38. For a brief discussion of such problems see Beaulue, "Working Paper 3: Principles of Sentencing and Dispositions," *7 Ottawa L. Rev.*, p. 262 at p. 266 (1975).
39. Even American programmes which, because of their flexibility, are likely to be more attractive to police and prosecution agencies than the scheme proposed by the Commission, only divert about 5% of the total lower court intake and many of these are eventually returned to the system for failing to fulfil the programmes. See Nimmer, *op. cit. supra*, n. 5, p. 104.
40. E.g., disorderly behaviour, obscene language, vagrancy, drunkenness, liquor offences generally, etc.

have, few have been examined in their full social and legal context. Nevertheless, it seems likely that the future of the criminal justice system does not lie with diversion. In many ways the growth of formal diversionary programmes has been a cosmetic change, rather like the development of formal rehabilitative programmes in prisons, which has done some good, but which has left the structure basically untouched.

On the other hand, a large part of the future development of the system may well lie in the abandonment of grandiose ideas of rehabilitation and deterrence as advocated by the Commission. But in this context it is Weiler's essay in *"Studies on Sentencing"* that points the way — not diversion.[41] As Weiler indicates, the time is fast coming when a return to a fully-fledged philosophy of retribution, stressing the importance of fairness, decency and restraint in punishment, is inevitable. No other approach to punishment provides the necessary limitations on state power and on the ambit of the criminal law. Retribution is, in fact, a paradoxical concept for, while often presented as harsh and repressive, it in fact provides a sound and far-reaching philosophical basis for decriminalization and for the diminution of punishment. The logic of just desert is that conduct should not be rendered criminal unless we can really say that such conduct deserves to be punished. This alone is a powerful tool for reform and it is a tool which is more powerful by far than the ideas which underlie diversion.

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41. *Op. cit. supra*, n. 11.

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