Dalhousie Law Journal

Volume 4 | Issue 3 Article 8

5-1-1978

The Law Reform Commission of Canada, Barnes and Marlin, and the Value-Consensus Model: More about Ideology

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1. *Introduction*

Barnes and Marlin have attacked the original paper written by me about the Law Reform Commission of Canada and the ideology of criminal process reform. The discussion which follows is not limited to being my response to *their* response: such a discussion would be fruitless and introverted to the point of boredom. Thus, although some of the discussion begins with Barnes and Marlin, it is not intended to end there, for indeed Barnes and Marlin have not really discussed much of the original comment at all. Their paper contains some discussion of the notion of consensus although, it is submitted, their discussion is largely a product of misunderstanding. However, Barnes and Marlin have not discussed any other attribute of the value-consensus model at all, nor have they dealt with the specific examples and criticisms raised in the original paper. Barnes and Marlin do not deal with the quite substantial body of literature, referred to and discussed in the original paper, which has surrounded the debate concerning the ideology of the criminal process and the criminal law, both as it is and as it should be.

The discussion which follows is divided into three parts and each part is concerned with a different aspect of the response by Barnes and Marlin and some thoughts which flow from that response. The first part is concerned principally with what appears to be a misunderstanding by Barnes and Marlin of the purposes and objectives of the original paper. These purposes and objectives are further discussed. The second part of the paper is concerned with the notion of consensus: whether the Law Reform Commission has adopted a particular mode of criminal process ideology and considerations which flow from that disagreement between myself and Barnes and Marlin. The third part of the paper is concerned with the specific issue of abortion in relation to the issue of acceptance by

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the Commission of the *status quo* in substance of the present social order.

2. *Inconsistency and the Purposes of the Original Comment*

Barnes and Marlin make, *inter alia,* two specific criticisms of the original comment which I shall deal with together for reasons of relevance and convenience. The first of these is the statement:

> it is noteworthy that Goode himself gives little hint as to his own view of the way in which the legal system should be remodelled.[1]

The implication, and indeed the reason for "noteworthiness", is that I should have outlined my own "philosophy" for criminal law reform, and was sadly remiss in not doing so. The second, related, criticism is essentially one of inconsistency. Barnes and Marlin examine my original comment in much the same way as I examined the writings of the Law Reform Commission, and conclude that at one stage I appeal to the value of consensus, and at two other points, I appear to favour the contrary model.[2] This criticism is obviously related to the argument that I should have outlined my own "philosophy" for criminal law reform.

The short answer to both of these criticisms is that Barnes and Marlin have so far misunderstood the aims and objectives of the original paper, for the *desideratum* was not a consideration which the paper was designed to resolve. In that paper, I sought to demonstrate that there exist in present criminological thought two conflicting paradigms or models allegedly consistent with the way in which Western society and social authority operates and has operated. The two models, labelled in an *a priori* manner as "value-consensus" and "value-antagonism" are, in my submission, opposing poles of thought, determined by each other, and the tension between them is of particular relevance to the criminal process and its reform. Yet, despite the fact that the Law Reform Commission of Canada has avowed that it shall take a "philosophical" approach to law reform,[3] it has not discussed in

1. Barnes and Marlin, "Radical Criminology and the Law Reform Commission of Canada — A Reply to Professor M. R. Goode" (1977), 4 Dal. L.J. 151, at 155; hereinafter referred to as Barnes and Marlin

2. *Id.*

> "Indeed he seems to appeal approvingly to the very consensus model which he attacks (or more frequently reports as having been attacked by others)."

Why it should matter whether I report it as being attacked *more frequently* by others than by myself is a matter quite beyond me. But let it pass.

3. See, for example, Barnes, "The Law Reform Commission of Canada" (1975),

print this conflict of paradigms central to the "philosophy" of the criminal process. Moreover, it is difficult to ascertain precisely the nature of the actual philosophy adopted by the Commission in its working papers and suggestions for reform. Thus, the original paper contained a second purpose, for I thought then, and think now, that the Commission had adopted without qualification or explanation, a model of social authority closely resembling one of the posited models, and that an inadequate consideration of "philosophy" had led the Commission into particular and specified errors.

My first criticism of the Commission was thus a very simple one. Despite an avowed philosophical outlook:

> There has been no real philosophical enquiry, no reasoned discussion of the continuing dialectic of criminal process models which keeps the area in a constant "state of crisis.". . .[4]

And Barnes and Marlin do not, and indeed can not show that the Commission has publicly and rationally discussed the way in which social authority has operated and should operate and the reasons for preferring that view over others. It is ironic that Barnes and Marlin cannot appreciate that the reason why I chose to proceed by a method that they are pleased to call, inaccurately,[5] "guilt by association",[6] is precisely the same reason why they feel compelled to do precisely the same thing in their attempt to show that I am inconsistent in my own views. Barnes and Marlin draw implications from the original paper and identify them with one model or the other because I nowhere state my own views on the matter explicitly.[7] I drew implications from Commission papers because nowhere does the Commission state its views on the matter

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2 Dal. L.J. 62 at 72-73 and Barnes, "Criminal Law Reform; Canadian Style", [1976] Crim. L.R. 299-300.

4. Goode, "Law Reform Commission of Canada — Political Ideology of Criminal Process Reform" (1976), 54 Can. B.R. 653 at 670

5. The use of the term is inaccurate. Guilt by association is a term usually applied to a process whereby a person is found to be guilty of a crime or charge because of his or here association with a thought, another person, or a political party. In the sense in which Barnes and Marlin use it, the phrase covers the whole operation of the criminal law: for what is a finding of guilt of *any* crime but a finding of an association between a person and a crime? I do not find the Commission "guilty" of adhering to the value consensus model by association in a very general way. Surely it is not guilt by association to analyze what its philosophy of reform may be and to come to a conclusion, except by a meaningless use of that phrase. See, for example, O'Brian, "Loyalty Tests and Guilt by Association" (1948), 61 H.L.R. 592

6. Barnes and Marlin at 156

7. *Supra*, note 1.

explicitly. Unlike the Law Reform Commission however, I have never claimed to be proposing law reform on a philosophical basis. I do not state my own views because they are not relevant to the objectives of my paper. Instead, I chose to highlight the philosophical sterility of the Commission.

So far from being able to rebut this criticism, Barnes and Marlin admit its truth in at least two, major, respects. First, on the matter of "core values", a matter allegedly at the very heart of the reform of the criminal process,[8] it is said:

> . . . there are certain core values . . . which people agree that the law should be used to protect and [the Commission] has sought to identify these . . . it is obviously difficult to articulate these values in any other than a general way and this has led to frequent charges of vagueness made against the Commission.[9]

Core values may well be hard to define if they do not exist and yet the Commission has not discussed a significant philosophical literature which argues that, indeed, they do not. Neither do Barnes and Marlin. Moreover, this passage carries the implication that law reform should proceed upon the basis of rather generally described, undefined, "core values" because, as in the celebrated obscenity *dictum,* "we" may not be able to define it, but "we" know one when "we" see it.[10] It is submitted that the real point is that the Commission is in this important respect guilty of the charge: for it has concededly been unable to define the concept at the very heart of its "philosophy", despite the fact that a lot of people are said to agree upon it. The proffered excuse is that such a task is not an easy one: but then, it has never been alleged that the philosophy of the criminal process and its application to good law reform is an easy task.

The second and similar concession is much clearer and to the point. Barnes and Marlin concede:

> . . . the Commission might be faulted for giving insufficient expression to the limitations on consensus in its published writings . . . .[11]

That is precisely the point, albeit in more moderate language. It is submitted that the phrase "might be faulted", carrying with it the

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8. For the relevant quotations and discussion in the original paper, see Goode, *supra,* note 4 at 654-655, 658, and 671-672
9. Barnes and Marlin at 153
10. With apologies to Stewart J. in *Jacobellis* v. *Ohio* (1963), 378 U.S. 184 at 197
11. Barnes and Marlin at 154-155

notion of triviality, is inadequate bearing in mind the avowal and proclamation of a philosophical approach. The use of the word "insufficient" is also misleading insofar as Barnes and Marlin are unable to show that the Commission has considered or discussed any coherent alternative to the value-consensus model: indeed, the fault is seen by them as one relating to the limits of the notion of consensus rather than as relevant to its very utility. A few neo-liberal cosmetic qualifications to an overall basis of consensus is no substitute for a reasoned philosophical discussion of the fundamental nature of the criminal process, as it is and as it should be.

In short, then, my omission to describe in detail the way in which I personally should like to see the philosophy of the criminal process reform is neither "noteworthy" nor culpable. It was not among the purposes of the original comment, and it was not relevant to these purposes. Nor should it have been, for constructive criticism may take the form of identifying weaknesses without providing comprehensive solutions. Indeed, I may have no firm philosophical views at all. My interest in the whole topic under discussion was prompted originally by a disappointment that the Commission had not lived up to its philosophical promise, for such a debate and discussion provides the best environment for the formation of an ideology or philosophy.

Turning now to the allegation of inconsistency,[12] it is necessary to look to the three passages in question, two of which are allegedly consistent with the value-consensus model, and one of which is allegedly consistent with the value-antagonism model. The essence of the following response is that none of the three passages will support the implications alleged to be drawn from them.

First Barnes and Marlin suggest that I appeal to the value consensus model because I state that the imposition of the morals or core values of one group by that group upon another group is a Bad Thing.[13] They further suggest that I must believe it is a Bad Thing because the imposed-upon group does not agree with the morals or values of the imposing group:[14] that is, because there is no consensus. Therefore I must adhere to the value-consensus model. That is an invalid conclusion for two reasons.

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12. *Supra*, note 2.
13. Barnes and Marlin at 155
14. *Id.*

First, and most importantly, it is absurd to suggest that every person who is of the opinion that the implication of morals upon one group in society by another group in society is a Bad Thing must adhere the value-consensus model. Much of "radical criminology" is directed toward demonstrating that just such a state of affairs exists and is a Bad Thing.[15] The reasons for objection are far more complex than Barnes and Marlin suggest, and, like most aspects of ideology, are very difficult to explain. I would like to try, through the medium of two related comments. First, part of the comment under discussion related to hypocrisy. The point is that the imposition is done in Western democratic society behind a "facade" of consensus as to core values. It bothers me that nowhere does the Commission define what it *means* by "consensus" and nowhere does the Commission define what it *means* by "core-values". These concepts raise endless unanswered questions. What *is* a consensus? Is it a majority, a plurality or a totality of opinion or none of these? And how does the law *find out* whether there is a consensus or not? Is that process an accurate one? Does the consensus mean that people agree with a value or that they want to enforce it against other people by law, or both? And what *is* a core value? Yet we are all asked to accept on faith, that these questions may be satisfactorily answered and that the law in question is made and enforced on the basis of that consensus and that core value. Thus, my point was that the consensus model may easily be used as a facade for something altogether different — legislation in the criminal process where there is no consensus. Because of this lack of a philosophical discussion, because of this lack of definition of basic fundamental concepts, it is very easy to use the notion of consensus to justify legislation not based on consensus.[16]

The second comment is that adherents of a value-consensus model often suggest that the fact that there exists a consensus and it does concern a core-value is a *sufficient* condition to justify legislation. If true, that is a very important philosophical principle, and it is rendered almost meaningless because the Commission has not discussed what distinguishes a core-value from any other value. For example, there is a moral rule that men shall not wear a hat in

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15. This matter is discussed at length in the original paper: *supra,* note 4 at 664ff. Barnes and Marlin, of course, do not discuss it at all. See also, as a further example, Young, *The Drugtakers* (1971)

16. And hence the original comment about the facade of consensus. See Goode, *supra,* note 4 at 672

church: and one may assume that most people in the community agree with that rule. If, and only if, that is so, then upon the general principle, that moral rule is not law because it is not a "core-value". Perhaps it is not a core-value because people do not feel sufficiently strongly about the matter to enforce it by law. But let it be assumed that there is a rash of hat wearing, and a committee is set up to include the crime in the Criminal Code. Should the rule then become law, assuming that a consensus exists? I would submit that the measure should not be made law, even so, for many reasons. For example, the purpose of the legislation is, religious reasons aside, excessively trivial,[16A] and the conduct to be prohibited does not, in any sense, *"harm"* any person. In short, the rationality of the content and purpose of the specific law may well be determinative. For example, I approve strongly of most, but not all,[17] of the ways in which a majority of governments have attempted to impose their morality of racism upon the government of South Africa which holds a different morality of racism. It is quite apparent that the imposition of a moral code by one social group upon another is *not* objectionable only because there exists, *ex hypothesi,* no consensus.

The second reason why that is an invalid conclusion relates to the lack of a reasoned discussion of the notion of consensus, and, in particular, a strange comment by Barnes and Marlin. They suggest that the notion of consensus used by the Commission includes the notion that there is a consensus when there is a consensus that there is no consensus.[18] If this amazing proposition can be accepted, then it is quite clear that the potential for the imposition of a moral code by one social group upon another is limitless. Legislation based on consensus may thus be based upon a consensus that there is no

16A. A recent example is the prosecution in England of "Gay News" for the common law offence of blasphemy. The Roman Catholic paper *The Tablet,* 23/7/77 at 691 comments under a heading: "Judge not . . .":

> "'it is right', as *The Times* put it, 'to respect other men's gods', but is it wrong to exact such respect through the sanctions of the criminal law."

17. My objections to other methods relate to the ethics of the use of force and to the idea of proportion between offence and solution. That kind of balance, like the morality of deterrence, is also vital. See Andanaes, "The Morality of Deterrence" (1970), 30 U. Chi. L.R. 648

18. Barnes and Marlin, at 154:

> ". . . consensus should be sought, even if the consensus is merely agreement of differ."

If this is true, then there can only be no consensus if there is no consensus about whether or not there is a consensus or not.

consensus. The original comment is thus enhanced.

The second passage allegedly containing the implication of an appeal to consensus quoted by Barnes and Marlin occurred at the conclusion of the original paper, and contained an appeal for further public and academic debate.[19] Barnes and Marlin conclude that that can only be an appeal to consensus.[20] This is an invalid conclusion, for it is absurd to suggest that the only possible objective in dialogue and debate is consensus. As the Commission itself has said, another proper objective is education,[21] and, no doubt, there are others. Mere curiosity as to an existing state of affairs may also provide an acceptable motive. It is suggested that no firm conclusions about adherence to either model may be made thereby from a call for public discussion. Indeed, the dangers involved in such a course are amply demonstrated by Barnes and Marlin themselves. The learned authors state that the Commission itself acts upon a basis of dialogue and debate with the public.[22] The application of logic similar to that employed by Barnes and Marlin should lead one to the conclusion that the Commission appeals to consensus and thus adheres to a value-consensus model. But that is not so, for Barnes and Marlin are not only concerned to deny that the Commission had adopted such a model[23] but also, and here is the rub, cite the two-way, educational approach of the Commission, involving dialogue with the public, as a reason why the Commission cannot be said to have adopted a value consensus model.[24] It is evident that Barnes and Marlin cannot have it both ways, but the point is that *no* implication can be drawn from such evidence, either about myself or about the Commission.

Lastly, attention must be paid to the passage which allegedly shows my adherence to the value-antagonism model. Logically, the

19. Barnes and Marlin at 155

20. *Ibid.*: "Why should one have this hope unless one felt — as the Commission plainly feels — that such discussion would promote harmony and agreement."

21. See, for example, Barnes, "Criminal Law Reform, Canadian Style", [1976] Crim. L.R. 299.

22. Barnes and Marlin at 5:

> "[The Commission prefers] . . . continual informed debate. It *then* becomes difficult to see how Goode can accuse the Commission of promoting unitary interests." (emphasis added)

23. Barnes and Marlin at 5.

24. *Id.*

> "[The Commission] . . . could hardly be taken to hold a consensus-is-everything philosophy. Such a view would *be contradicted by* its stress on a two-way educational approach — where the Commission analyzes, evaluates and enters into dialogue with the public." (emphasis added).

authors point out that I describe a Commission view as based on the value-consensus model, that I describe that view as "erroneous", and that the two models are antagonistic is evidence of my adherence to the value antagonism model.[25] The problem with such reasoning is that, although I described the Commission view as "erroneous", I specifically did not describe the value-consensus model as "erroneous". The purpose of the passage quoted by Barnes and Marlin was to point out that first, since the logic of the Commission view reflected the logic of the value-consensus model, that made it more likely that the Commission had adopted that model and second, to demonstrate that the particular recommendation was absurd by use of specific examples.[26] On this occasion I go further and remark that quite possibly, the failure of the Commission to define core values and the opinion of the Commission that the crime of murder need not be defined precisely may well be related. After all, if one cannot define the values upon which a law is to be based, it is very difficult to frame a law consistent with these values. Perhaps one of the limits of the notion of consensus is that although it may be possible to achieve a consensus, however defined, upon the ukase "Thou shalt not kill", consensus as to the *limits* of that rule is impossible to achieve. Clearly, for example, policemen need the right to kill in extreme situations,[27] and what about such things as provocation, self defence, causation, duress, insanity, automatism, *mens rea* and so on. Barnes and Marlin do not discuss the given example; indeed, they discuss very few of the specific points and criticisms contained in the original paper.

3. *Whether or Not the Philosophy of the Law Reform Commission is Properly Described as Conforming to the Value-Consensus Model.*

Barnes and Marlin profess surprise that, of all the law reform bodies which exist, I should choose to direct my remarks to the Law Reform Commission of Canada.[28] They go on to show to their own

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25. Barnes and Marlin at 152-3: "implied acceptance"
26. *R.* v. *Blaue*, [1975] 1 W.L.R. 1411; [1975] 3 All E.R. 446, (C.C.A); *R.* v. *Paquette* (1974), 5. 0.R. (2d.) 1; 19 C.C.C. (2d.) 154, (Ont. C.A.)
27. Or at least, let it be assumed that this is true or that there is a consensus about it, or whatever else is sufficient.
28. Barnes and Marlin at 153; "An initial reaction . . . is likely to be surprise . . ."

satisfaction that in fact, the Commission has in its philosophy been "consistent" with the findings of "radical" criminology.[29] Apart from the fact that no specific example is discussed or provided by Barnes and Marlin, that is, of course, not the point. Barnes and Marlin cannot show and do not show that the coherent alternatives to the value consensus perspective have been discussed or presented. Nevertheless, there is the additional question: is it accurate to describe the Commission's philosphy as a value-consensus philosophy?

I suggest that this is principally a question of definition, and that I am as much at fault as the Commission and Barnes and Marlin in defining ambiguously. However, I am also of the opinion that the issue is not really in doubt. The definitional problem will be revealed by an examination of the passage in which Barnes and Marlin summarize the reason why the Commission cannot be accused of adopting value-consensus philosophy. They state:

> . . . it [the Commission] could hardly be taken to hold a consensus-is-everything philosophy. Such a view would be contradicted by its stress on a two-way educational approach — where the Commission analyzes, evaluates and enters into dialogue with the public.[30]

The definitional problem is at once apparent. Barnes and Marlin are clearly of the opinion that, for the identification of the Commission with the value consensus model, it must be shown that pure, undiluted consensus is the raison d'etre for existence. That consensus is everything. Thus, the Barnes and Marlin defence of the Commission is based upon the argument that, for the Commission, "consensus is not the whole story".[31] That in turn raises two questions for examination. First, it is true that for the Commission, consensus is not the whole story"? Secondly, are Barnes and Marlin correct in their definition of this aspect of the value consensus model?

By way of introduction to that discussion, however, it should first be pointed out that it has been submitted above[32] that there is absolutely no relevant connection between my original discussion of alternative social philosophies and whether or not the Commission engaged in dialogue and debate. The reason given for the

29. Barnes and Marlin at 153
30. Barnes and Marlin at 155
31. Barnes and Marlin at 154
32. *Supra,* notes 19-24

conclusion in the passage quoted above that the Commission does not hold a consensus-is-everything philosophy is not a sufficient reason for that conclusion.

Is it right to assume that the value-consensus model requires the view that "consensus is everything"? The short answer is that it is not. Neither I nor any of the sources cited by me in the original paper define the consensus model so strictly that it applies *only* to persons or institutions who regard consensus as everything. This process of definition is the key to one of Barnes' and Marlin's misunderstandings; for they here demonstrate the simplistic notion that the issue of philosophy can be seen in absolute dichotomies; in black and white.[33] That is clearly not so, and Barnes and Marlin give no reason for their definition, nor cite a similar one. It is submitted that it is evident that what is important to this aspect of the value consensus model is the notion that consensus, *however defined,* is central to the operation of society and social authority and a justification for law.

And indeed it is submitted that on Barnes' and Marlin's account, the Commission has adopted a value-consensus model. It is evident from their discussion that to the Commission, consensus as to values is very important.[34] Moreover, Barnes and Marlin have produced no evidence or argument which in any way undermines my original assertion that the only structured and organized social philosophy appearing in the publications of the Commission is that of value-consensus. The fact that some isolated statements *may* be seen as consistent with an alternative philosophy means nothing unless it can be shown that philosophy is employed or considered as a coherent system of thought. However, it is also important to look to these isolated statements and what they mean.

In order to support the notion that, to the Commission, consensus is not everything, Barnes and Marlin cite two specific examples. Both, however, are examples of issues on which the Law Reform Commission has *not* acted because there is *no* consensus. Thus, it refused to suggest reform of the criminal law relating to offences against property because there is no consensus[35] about "the role of property in Canadian society". Thus also, "There is no clear

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33. See, *infra,* note 48
34. Barnes and Marlin at 154:
"In its enquiries, the Commission has taken the optimistic position that *consensus should be sought . . .*"
35. *Barnes and Marlin at 153.*

consensus on the abortion question, but the Commission has made no recommendation as yet, to remove abortion provisions from the Criminal Code."[36] To take the latter example, the point is that if consensus was everything to the Commission, surely the fact that there is no consensus means that the Commission must recommend repeal of the law. This argument reveals clearly the simplistic analysis employed by Barnes and Marlin and other inadequacy of the notion of consensus. It may equally be said that the Commission has not repealed because there is no consensus for repeal. It may also be argued that there is a consensus that there is no consensus. Moreover, it is not adequate to refer merely to consensus "on the abortion question". The "abortion question" contains a large number of sub-questions: is it the role of the criminal law to regulate abortions? If not, shall the law regulate abortions and if so how and on what "core-value"? If so, what shall be the precise content of the criminal law and again based on what "core-value"?

It is submitted that the Law Reform Commission, in applying its philosophy to the abortion question, has again acted quite consistently with a value consensus model. That model, in general terms, gives the reformer three types of situations to consider. First, there may exist a consensus for reform of the law. If there is also a consensus for the content of the reform, and it involves a "core-value", the reformer will reform in accordance with the consensus. Secondly, there may exist a consensus in favour of the *status quo* and, similarly, the reformer will not reform. But the third situation, which will always give rise to trouble, is where there is no consensus, or consensus on only a number of a larger number of related questions. Leaving aside the odd definition of consensus mentioned by Barnes and Marlin,[37] and assuming that there is no consensus as to the abortion question, what does the Commission do? In both cases cited by Barnes and Marlin the Commission opted for keeping the *status quo*. In general, the third situation where there is no consensus is the difficult one, and a law reformer needs a perspective which provides a useful response to it. A value antagonism model may dictate possible alternatives in such cases, and these alternatives should be explored.

The fact that the Commission has evidently opted for the *status quo* has two important consequences. First, that is the usual

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36. Barnes and Marlin at 155
37. Supra, note 18

response on a value consensus model, and thus makes it more likely that the Commission adheres to that model.[38] The weakness of the value-consensus model when there is no consensus stems from the very general nature of the consensus as to core values required and the fact that if there is no consensus as to *anything* concerning a particular question, there is no mandate for the reformer to *do anything*. Hence the reformer must opt for the *status quo*. The second consequence is that these examples deomonstrate yet another misunderstanding by Barnes and Marlin, for they state that I have not shown that the Commission has accepted the *status quo* of an unjust system. Not only have they thus ignored specific examples in the original comment,[39] but they also provide two additional ones.

Thus, the examples provided by Barnes and Marlin do not provide evidence for the assertion that for the Commission, consensus is not the whole story. Not only is acceptance of the *status quo* an important indication, but it may equally be said that the Commission has failed to act because there is no consensus. Indeed, the rest of Barnes and Marlin's response supports the view that the Commission has adopted the value-consensus model. They do say that the Commission has "questioned the value base of the present law at every stage",[40] yet do not deal with the specific example of explicit failure to question raised in the original paper.[41]

Barnes and Marlin submit that I should have shown that " . . . no moral consensus in society is possible to any significant extent, and the striving for consensus is misguided."[42] The interesting thing about that contention is that it argues that my original paper failed, *not* because I was wrong and the Commission has not adopted the value-consensus model, but because I did not show that the model has no utility. Even assuming that I *believe* that the model has no utility, that was not the objective of the original paper, and of course, it does not go to the question of whether or not the Commission *has* adopted the model.

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38. Goode, *supra,* note 4 at 656 n.15 in which this conclusion is more than adequately documented
39. *Id;* see also *id.* at 660-662 (compounding); id. at 666 n.58; and 670 n.72 which contains a quotation from the Commission defining core values as being those of society as *it is*
40. Barnes and Marlin at 153
41. Goode, *supra,* note 4 at 656, quoting Law Reform Commission of Canada, Working Paper No. 4, *Discovery (Criminal Procedure),* June 1974 at 1-2
42. Barnes and Marlin at 156

Barnes and Marlin also cite Radzinowicz and King[43] to show that the notion of even very limited consensus is important, which, of course, again does not go to the question of whether or not the Commission has adopted the value consensus model. It is submitted to be "significant" that the only source cited by the learned authors which is not a publication of the Law Reform Commission on Barnes himself, is a quotation defending the notion of consensus. The quotation itself is worthy of comment. Radzinowicz and King state:

> They [the "radicals"] have overstated the heterogeneity of social values, ignoring the large measure of consensus, even among the oppressed, in condemning the theft and violence that make up the bulk of traditional [*sic!*] crime . . . And they have indulged in exaggerated hopes of human nature, been overoptimistic about what society will tolerate, either now or in the future . . .[44]

The quotation is unhelpful for two fundamental reasons. First, opponents of the value-consensus model do not deny that small groups of people in society may agree that petty theft is a Bad Thing. But that does not mean that the thieves agree, and those who live from the proceeds of thievery. Moreover, that is not really the kind of broad social consensus upon which, surely, adherents of the value-consensus model would wish to base law, and the quotation does not advert to whether such a small consensus is useful for any specific purpose. Secondly, the quotation assumes that which it sets out to prove. To say that the "radical" criminologist is "over optimistic about what society will tolerate" assumes that it is possible to know what society will tolerate, that it *is* society that is doing the tolerating, and that a society is capable of doing any such thing.

There is one further major misunderstanding which must be discussed. Barnes and Marlin state:

> In Goode's view, the Commission far too often pronounces on the nature and value of the criminal law in terms that suggest that is little or no dissent.[45]

The example given to support that view is my criticism of the Commission for using a "we-us" terminology. But the quotation

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43. *Times Literary Supplement,* Sept. 26, 1975, 1089, cited by Barnes and Marlin at 4
44. *Id.*
45. Barnes and Marlin at 152

above does not represent the thrust of my criticism. I selected from the working papers various passages which used the words "we", "us" and "them" in discussion of reform in a context which showed that the Commission was talking about crime in terms of a "we-us" representing the victims of crime, the so called non-criminals, the law abiding right thinking citizen, and in terms of a "them" representing the criminals.[46] The context made it equally clear that, although "we" *included* the Commission, it did not mean the Commission *only*. The point of my criticism is and was that such a distinction is insupportable and dangerous. *Anyone* may become a criminal at any time. It is simply not possible to divide a society into "we" the non-criminals and "them" the criminals. Four comments flow from the distinction. First, it will be recalled that the Commission has titled a report "Our Criminal Law".[47] Whoever "we" may be, the criminal law is *not* property susceptible to rights of ownership in any group of persons, nor should it be, despite the fact that the present criminal law appears to be far more responsive to the rights of certain groups in the society than others. Secondly, it will be noted that the distinction is simplistic and black/white in purpose, and thus arguably a product of inadequate philosophical consideration.[48] Third, the dichotomy between "we" and "them" is a fiction. Criminality is a continuum: a flexible, controversial, everchanging line between the black of criminality and the white of virtue. At the interface, there is no black and there is no white, for the extent of the line is often the result of formal factors having little relevance to the social and behavioral realities in question. Fourthly, it is a convenient and comforting philosophical prop if one can believe in a "we-us" "them-they" model of criminal behaviour. Bearing in mind how often one hears of a "war" on crime, it is interesting to recall that the U.S. Army encouraged its soldiers to think of the enemy as "gooks" rather than human beings, for it is easier on the conscience to kill a "gook". Whether or not that is legitimate in a state of war, it is submitted to be both an inadequate and a dangerous approach to the problem of crime and reform of the criminal process.[49]

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46. See Goode, *supra,* note 4 at 670-671
47. *Our Criminal Law* (March 1975)
48. See the analogy, *supra,* note 33
49. See Krisberg, *Crime and Privilege: Toward A New Criminology* (N.J.: Prentice Hall, 1975) at 4; Fox, "The XYY Offender: A Modern Myth" (1971), 62 J.C.L.C. & P.S. 59 at 71-72 quoted in Goode, *supra,* note 4 at 671

4. *Conclusion: The Status Quo*

Barnes and Marlin have in fact said very little that was not evident from what the Commission itself has said, and notably, they have failed to discuss the real issues of law, policy and ideology involved in this question. Take for example Barnes' and Marlin's second conclusion — the first is dealt with above.[50] They state:

> . . . he has to show something like one of the following . . . (2) that by failing to examine the class biases in our inherited legal system the Commission has uncritically accepted a *status quo* and endorsed an unjust system.[51]

Barnes and Marlin do not concede, of course, that that has been done. Yet consider the following evidence;

(a) Consider the following two statements by the Commission to which emphasis has been added:

> . . . there are others [values] which, though not essential to any society, are necessary for *our society* — they help to make it the sought of society *it is*. So when *such* values are contravened and threatened we call into play the use of the criminal law.[52]
>
> [core-values] . . . essential to the existence of our own particular society *as it is*.[53]

(b) The original paper contained a quite extensive discussion of the crime of "compounding" an offence, in relation to the Commission's view that restitution is a "central consideration in sentencing and dispositions".[54] Essentially, the Commission opts for restitution only as formally structured *through the criminal process:* by courts, in diversion schemes, and in determining a proper date for an offender's parole.[55] Hence, the Commission does not recommend the abolition of the crime of compounding and other similar offences which make it an offence to become involved in restitution *outside* the criminal process. In substance the Commission has kept the *status quo*.[56] It recommends a different emphasis, and little details are different: but there is absolutely no discussion

50. *Supra,* note 42
51. Barnes and Marlin at 156
52. Law Reform Commission, Working Paper 10, *Limits of Criminal Law* (1975) at 36, quoted in Goode, *supra,* note 4 at 655 n.8
53. Law Reform Commission Report, *Our Criminal Law* (March 1976) at 20, quoted in Goode, *supra,* note 4 at 670 n.72
54. Law Reform Commission, Working Paper 5, *Restitution and Compensation* (October 1974) at 14
55. *Id.*
56. See also Goode, *supra,* note 4 at 662 n.41

of the major question of whether restitution without the involvement of the criminal process should be permitted.

Why should restitution always be within the ambit of the criminal process? In the original paper, I suggested why the crime of compounding was developed to prevent private restitution and indeed, the Commission had come to a similar conclusion.[57] In essence, I suggested that the purpose of the rule was to strengthen the King's political position and his authority and to guarantee a source of revenue.[58] The Commission seems to think the development of the crime "well intentioned":[59] an amazing proposition. In any event, the Commission opted in this case for the systemic *status quo,* with no discussion of the larger questions involved. In the original paper I suggested a value-consensus justification for the crime of compounding:[60] but Barnes and Marlin do not discuss that, either.

(c) Some discussion of the acceptance by the Commission of the *status quo* is included within the text above, and it is not intended to repeat that analysis again.[61] Suffice it to say that Barnes and Marlin provide two further examples of the Commission adopting the *status quo:* the reform of abortion law, and offences against property rights.

(d) Symptomatic of acceptance of the *status quo* is failure to question it: and Barnes and Marlin do not deal with the explicit failure to question quoted in the original paper from the Working Paper on Discovery. There it was said, *inter alia:*

> . . . it is unnecessary, perhaps even unwise to go beyond the mere statement of these basic questions.[62]

It is submitted that all of these are examples of an uncritical acceptance of the *status quo* of society. Is this an "unjust system"? There can, of course, be no "objective" answer to such a question and indeed, the fact that Barnes and Marlin require demonstration of the "unjustness" of the present "system" as a fact is a further indication of their simplistic attitude toward this question. The question of whether or not "justice" or an objective fact capable of demonstration would take far more time and space than is possible

57. Working Paper 5, *supra,* note 54 at 9
58. Goode, *supra,* note 4 at 661
59. Working Paper 5, *supra,* note 54 at 9
60. See Goode, *supra,* note 4 and 660, and at 660 n.36.
61. *Supra,* notes 35-39
62. See, for the full quotation and citation, Goode, *supra,* note 4 at 656

here. Questions of objectivity aside, however, a number of comments may be made about the *kind* of *status quo* which the Commission has accepted.

An opposite example is the abortion example provided by Barnes and Marlin. To accept the *status quo* for the time being, as the Commission has done, is no doubt prudent for its own survival, if not the survival of working class women. Abortion has been an issue for as long as records exist; hence, the origins of the common law offence of abortion which was replaced by statute in 1803 are obscure.[63] Nevertheless, it is submitted for the purposes of this discussion that the law arose and developed from a concurrence of theological and secular interests. Upon the theological side, the law against abortion was probably based upon the extensive influence of the medieval church. Whether or not the matter was based upon objective theological teachings is not a matter susceptible of full discussion here. Equally, and perhaps more importantly in modern times, the medieval ruling class had a clear vested interest in the prevention of abortion. The manor lord wanted plenty of hungry and hence willing serfs to fill his land: the more serfs the serfs had to feed, the more dependent upon the lord and his manor the serfs would be. The lord did not have to worry about overpopulation: the overpopulation could be mobilized into an army and perhaps win more land, power, and money for the lord.[64]

Modern Canadian abortion law may be subjected to a similar analysis. It cannot be seriously argued that the "therapeutic abortion" provisions of the *Criminal Code* represent more than a cosmetic patch upon the fabric of the original criminal law.[65] Again, it is in the interests of the Canadian upper and middle classes to keep cheap and available abortions from the working class. The obvious result of such a policy is that working class families will be much larger than would otherwise be the case and it is submitted that, the larger the family, the more dependent upon the *status quo* that family will be.

Large families are one of the more important reasons for the dependence of the working class upon the *status quo*. The woman

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63. See, for a brief but good general account, Dickens, Abortion And The Law (1966), Chapter 1; de Valk, *Morality And Law In Canadian Politics* (Montreal: Palm, 1974) ch. 1

64. It may also provide a hedge against depletion by epidemic: and indeed it took the plagues of the fourteenth and fifteenth century to destroy that "system".

65. R.S.C. 1970, c. C-34, s.251

cannot afford the price of present abortions:[66] the wage earner can ill afford to strike, or to denounce as dehumanizing or mindless the job he or she must have to feed, clothe and educate the children. Often, large families must go into debt, which further ties them to "the system."[67] In short, the lack of cheap and available abortion is one of the factors that shackles the working class to the present "system". It is, therefore, quite easy to understand why economic or financial reasons for abortion are not sufficient legal reasons to have an abortion. It is evident that I think the abortion *status quo* to be "unjust". As Dickens has remarked of Dr. Morgentaler's case:

> It may identify the moment when a woman's obligation to continue an unwanted pregnancy ceased to be merely her misfortune, but become recognized as an injustice.[68]

Present Canadian abortion law contains many manifest injustices. A "therapeutic abortion" requires a hospital committee approval:[69] but there is no legal requirement that a hospital provide such a committee.[70] The wealthier woman, can, of course, obtain an

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66. See the *Report of the Committee On the Operation of the Abortion Law* (Feb. 1977) summarized in (1977), 3 Commonwealth Law Bull. 254 at 257:

> "Despite nation-wide medical care insurance there is a financial deterrent for some women to obtaining a therapeutic abortion. One out of five women . . . paid extra medical fees and in some instances the performance of the operation was contingent upon payment of the extra fees. These charges were not evenly distributed among all abortion patients, but affected most of those women who were young, were less well educated, or were newcomers to Canada."

67. See Dickens, *supra,* note 63 at 13, quotes from the *Report of the Inter-departmental Committee on Abortion* which reported in England in 1939. *Inter alia,* the Sixth Main Conclusion is fascinating:

> "The law relating to abortion is freely disregarded among women of all types and classes. Predominant among the causes of the desire for abortion are economic and financial reasons. In case of poverty or unemployment, the task of maintaining another child may be felt to be intolerable. When the family is wholly or largely dependent upon the earnings of the pregnant woman, there may be an added incentive to cimrinial abortion. Among parents of more moderate or comfortable means, feat that a lowering of the family's standards may result . . ."

68. Dickens, "The *Morgentaler* Case: Criminal Process And Abortion Law" (1976), 14 Osgoode Hall L.J. 229 at 229 citing Turner, "The theme of Contemporary Social Movements" (1969), 20 Br. J. Sociol. 390

69. R.S.C. 1970, c. C-34, s.251(4)

70. de Valk *supra,* note 63 at 136-137, where, speaking of Quebec, it is stated:

> ". . . discovered that only 14 out of 250 provincial hospitals had abortion committees and that all but one of the 181 abortions during the first ten months of 1970 had been performed at English-language hospitals in Montreal's West End."

See also the summary of the report of the Badgley Committee, *supra,* note 67 at 256:

abortion. If her expensive gynecologist cannot provide one, she may be able to afford to fly to another jurisdiction where abortion laws are less repressive.[71] Neither of these options is open to a woman of the working class. And yet the Law Reform Commission has left the problem of abortion untouched. Why? It is one of the major social-criminal issues in present Canadian society. There is no consensus,[72] of course, but that should be a reason for examination of the *status quo,* and not a reason for leaving it alone. In present abortion law there is injustice: both because it is unjust to impose morality and through morality, economic dependence upon women and families and because the content of the law is of itself unjust, for it discriminates in operation in favour of the wealthy and in favour of the urbanized middle class.[73]

". . . the number of hospitals *eligible* to do the abortion procedure was effectively reduced to two our of every five hospitals in the nation." (emphasis added)

71. Badgley, *id.* at 257; see also the commentary by Dickens, *id.* at 303-304. The proportion of women varies from 1:5 to 1:6 who fly to the U.S. Dickens comments:

"Access to the convenience of such facilities is limited, of course, to those able to pay the travel and treatment costs involved."

72. *Id.* at 255: "no consensus exists for major changes in the law". See also de Valk, *supra,* note 63 at 129

73. See the constitutional arguments to this point in *Morgentaler* v. *The Queen* (1975), 20 C.C.C. (2d.) 449; 30 C.R.N.S. 209; 53 D.L.R. (3d.) 161; 4 N.R. 277, (S.C.C.) discussed in Maksymiuk, "The Abortion Law: A Study of *R.* v. *Morgentaler*" (1974-5), 39 Sask. L.R. 257

See the account of Badgley, *supra,* note 67 at 255:

"The law is not operating equitably . . . The burden of the inequitable operation of the abortion law tends to fall on women who are less well educated, who have lower incomes and who live in smaller centres or rural centres with no direct access to abortion services."

Dickens, *id.* at 298 and 300 agrees; at 300, he quotes from the report:

"The procedure provided in the Criminal Code for obtaining therapeutic abortion is in practice illusory for many Canadian women"

At 298, Dickens reports:

"Both proponents and opponents of easier abortion provisions agreed that particular availability was governed more by geography and economic means than by the abortion applicant's medical consertion."