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Diversion from the Criminal Process: Informal Discretion, Motivation, and Formalization

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DIVERSION FROM THE CRIMINAL PROCESS: INFORMAL DISCRETION, MOTIVATION, AND FORMALIZATION

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INTRODUCTION

THE concept and practice of diversion is neither novel nor esoteric. Indeed, the exercise of some forms of discretion by criminal justice officials — ranging from the initial decision not to arrest, to the determination to refrain from prosecution, and up through the acquittal of the "guilty" — has always been an integral part of the criminal process. However, recognition and articulation of this phenomenon as part of a conceptually distinct and analytically helpful process called diversion is much more recent. Only in the past few years has the term diversion become common usage not only in academic circles, but even among officials in the criminal justice system who, having

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transcended the usual cultural-linguistic lag, are beginning to see it as part of their vocabulary.

The new familiarity of the term and concept of diversion is hardly attributable to the abundance of literature on the subject, since the literature dealing specifically with this notion is quite scarce.[1] The concept of diversion has been touched upon in incidental fashion in treatments of prosecutorial[2] or police[3] discretion, or in the context of arguments in favor of decriminalization,[4] with diversion usually viewed as a means of cushioning the impact of harsh laws but generally submerged in the viewer's preoccupation with more conspicuous or better-known dispositional processes — trial and plea-bargaining. Consequently, although diversion has been identified as a character-

[1] What little writing exists on the topic of non-criminal processing argues for the need for further exploration and a clearer focus. The literary experience also indicates that the present commonness of the term "diversion" stems not from the literature but more likely from the recent persistent habits of a growing number of academicians and reformers who circulate among criminal justice officials and periodically confront and bewilder them with questions and proposals on the subject. One topical article which focused on diversion in rural areas of Southern Illinois grew out of an American Bar Foundation study conducted two years ago. This modest piece, which exhibited a somewhat misleading emphasis on mental hospital practices, concluded that diversion in the informal rural setting came close to being the rule rather than the exception to "traditional" criminal processing. Brakel & South, *Diversion From the Criminal Process in the Rural Community*, 7 AM. CRIM. L.Q. 122 (1969).

[2] *See generally* R. DAWSON, SENTENCING: THE DECISION AS TO TYPE, LENGTH, AND CONDITIONS OF SENTENCE (1969); F. MILLER, PROSECUTION: THE DECISION TO CHARGE A SUSPECT WITH A CRIME (1969); and D. NEWMAN, CONVICTION: THE DETERMINATION OF GUILT OR INNOCENCE WITHOUT TRIAL (1966) (American Bar Foundation's *Administration of Criminal Justice Series*). *See also* Braun, *Ethics in Criminal Cases: A Response*, 55 GEO. L.J. 1048 (1967); Freedman, *The Professional Responsibility of the Prosecuting Attorney*, 55 GEO. L.J. 1030 (1967) and Kaplan, *The Prosecutorial Discretion — A Comment*, 60 NW. U.L. REV. 174 (1965).

[3] *See generally* W. LAFAVE, ARREST: THE DECISION TO TAKE A SUSPECT INTO CUSTODY (1966) (American Bar Foundation's *Administration of Criminal Justice Series*). J. SKOLNICK, JUSTICE WITHOUT TRIAL (1966); Goldstein, *Police Discretion Not to Invoke the Criminal Process*, 69 YALE L.J. 543 (1969).

[4] *See, e.g.*, F. ALLEN, THE BORDERLAND OF CRIMINAL JUSTICE (1964); J. BENTHAM, INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION (1948) (Hafner Library of Classics No. 6); P. DEVLIN, THE ENFORCEMENT OF MORALS (1959); H. HART, THE MORALITY OF THE CRIMINAL LAW (1964); H. PACKER, THE LIMITS OF THE CRIMINAL SANCTION (1968); Kadish, *The Crisis of Overcriminalization*, 374 ANNALS 157 (1967); Remington, *The Limits and Possibilities of the Criminal Law*, 43 NOTRE DAME LAW. 865 (1968). Abstract discussions of the problem of "overcriminalization," however, have failed to recognize the practical realities of existing diversionary practices. As a result, the arguments in favor of decriminalization have overstressed the recognition of the substantive impropriety (the harshness) of the criminal law. The problem with these arguments is that their basic premise is only one element in a series of philosophies and circumstances which are at the root of proposed or practiced decriminalization by diversion. In short, framing the argument in favor of diversion in terms of the harshness of the law is less than compelling when criminal justice officials already divert for a variety of other compelling reasons; talk of substantive or procedural due process is less than apposite when practitioners in the criminal justice system regularly avoid both substance and procedure.

istic of official practice in separate analyses of the various decisionmaking junctures, there has been no significant attempt to distinguish it from other kinds of discretionary behavior, or to explore the essence and the range of diversionary practices and the variety of motivations behind them. But the fact is that the dispositional process for a substantial (though not precisely known) number of criminal cases covering a wide variety of offenses bears little relation to traditional conceptualizations and modes of analysis. The fact that the diversion process is often informal and unrecorded has contributed to depriving it of the focal attention it merits.

I. The Diversion Concept

Though the concept of diversion (or non-criminal disposition) is to some extent self-explanatory, a precise definition is difficult. The term diversion has been used loosely from time to time in contexts which imply a lack of agreement as to whether a certain process or disposition falls within the meaning of the concept. It is not the purpose of this article to participate in a debate over categorization. Rather, the definition offered here is an operational one which may help clarify the conceptual focus and hence the discussion of the issues in the remainder of this article.

For these purposes, then, diversion is the practice by criminal justice officials — police, prosecutors, and judges — of channeling *out* of the criminal process classes of offenders who, as a consequence of their probable and assumed guilt, could theoretically be handled by the criminal process. Diversion contemplates some sort of dispositional response, though it is often minimalistic and ineffectual, and in some instances a mere "do-nothing" response. Diversion usually (though not necessarily or always) means stopping short of conviction, sometimes short of prosecution or even formal arrest.

Diversion is most commonly a discretionary exercise and it has been used as synonymous with discretion. But not all diversion is discretionary. Some diversionary practices are highly structured, as, for example, diversion circumscribed by the laws of criminal irresponsibility (insanity pleas).[5] Moreover, diversion is distinct from discretion to the extent that it is an aspect of discretion, which is a broader notion. Diversion operates only to channel offenders out of the criminal system,

[5] American Bar Foundation studies already dealing with this type of diversion are: A. Matthews, Mental Disability and the Criminal Law (1970); and R. Rock, Hospitalization and Discharge of the Mentally Ill (1968).

whereas discretion generally can be used to achieve exactly opposite ends. For example, criminal justice officials use discretion to invoke the criminal process for offenses and offenders popularly perceived as not warranting criminal handling, *e.g.*, "victimless" crimes, morals offenses between consenting parties, drug or liquor "abuse," and so forth.

II. THE SPECIFIC FOCUS

The object of this article is to describe and analyze the concept of diversion on the basis of field research conducted in several urban centers in the Midwest.[6] The intention is not to treat in narrow and quantified detail the findings of the Midwest study, since subsequent reports on the American Bar Foundation project of which this study was a part will serve that purpose. Rather, this article will present some preliminary conclusions and impressions about the nature of diversionary practices, their motivations, and official attempts to formalize these practices. The data gathered during the course of the field work suggests that there are serious problems connected with (perhaps inherent in) the informality which characterizes many diversionary practices. But the experiences with formalized diversion raise equally troublesome questions. One certain conclusion is that the issues surrounding diversion are highly complex and not subject to facile analysis, nor to unidimensional resolutions.

This article will focus on diversionary practices which obtain in the areas of white-collar crimes, shoplifting, family disputes, and first offenses. There are many other areas involving common diversionary practices, or practices which may be diversionary, which have been excluded from the scope of this article.

These four general areas of crime — white collar offenses, shoplifting, family disputes, and first offenses — offer a profittable setting for the problems and issues which must be ex-

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[6] The survey was conducted in the fall of 1970 as part of the American Bar Foundation's project on Non-criminal Disposition of Criminal Cases, directed by Donald M. McIntyre. The cities are Cleveland, Ohio; Des Moines, Iowa; Indianapolis, Indiana; Kansas City, Missouri; Milwaukee, Wisconsin; Minneapolis-St. Paul, Minnesota; and St. Louis, Missouri. The purpose of the Midwestern swing was to arrive at an inventory and overview of the various diversionary practices which prevail in the criminal justice operations of the urban centers of this country. The Midwestern survey served as a complement to similar work conducted earlier in the life of the study in such geographically diverse urban centers as New York, Philadephia, Baltimore, Chicago, San Francisco, Los Angeles, and Seattle. Toward completion of the urban focus, the study further contemplates a similar effort (and in addition a more concentrated inquiry into the issues which have emerged) in the middle-sized cities of Charlotte, North Carolina and Albuquerque, New Mexico.

plored. The diversionary practices commonly applied in these areas are typically informal and inconspicuous. They occur at various stages in the criminal process, and the dispositions are generally devoid of approbative aspects except very perfunctory ones.[7] Though not exhaustive of the range of practices encountered during the field work, the areas selected for focus in this article do coincide with the dominant themes which developed in the course of interviews with the practicing officials, and it appeared that these "middle-ground" diversionary practices would sufficiently demonstrate the problems and complexities of diversion in general. This focus seemed to present an advantage over concentration on the particularly frequent (plea-bargaining accounts for anywhere from 75 percent to 95 percent of all criminal dispositions[8] and is rather difficult to fit within the concept of diversion), the particularly structured (commitment to mental institutions), or the particularly "undesirable" (police pay-offs, immunity for unreliable informers). Moreover, formalization schemes have been attempted in each of the four areas selected, providing a context which suggests to the fullest the intractability of the problems raised by the practice of diversion.

The organization and thrust of this article will be the following: First, the four categories of offenses will each be discussed in terms of the rationales for the practice of diversion in each of those particular situations. The analysis will suggest that informal diversion carries with it a substantial potential for discriminatory application. Second, the attempts at formalization of the practices will be examined. The point of this discussion is to indicate that these attempts have been mis-

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[7] In short, the practices dealt with in this article stand in sharp contrast to such conspicuous non-criminal dispositions as may result, for instance, from a plea of insanity, where the diversion option is formally documented in legal codes or cases, occurs only at the last stage of criminal processing, and includes very real sanctions, the punitive character of which is only guised by a twist in semantics which serves to make the deprivation of freedom which *does* result, "morally" palatable.

Other practices which have at times been labeled diversionary in conception and implementation but which are *excluded* from the scope of this article are the common disposition of probation, non-criminal handling of drug addicts and alcoholics, "morals" offenses, the sweeping institutionalized (diversionary?) scheme of juvenile justice (except to the extent that some aspects of the handling of youthful offenders are relevant to the diversion concept generally), and other particular practices listed in the text below. The reason for these exclusions is in part that these practices have been treated extensively, albeit not usually with the focus preferred in this article, in other writings. But the more basic reason is that the practices selected for *inclusion* appear more likely to raise the crucial issues and problems inherent in diversion than those excluded.

[8] These figures were obtained in the course of the field study. They are confirmed in writings such as NEWMAN, *supra* note 2, at 3.

directed. The formalizers have oversimplified the problems of diversion, and they appear to have been uncertain in identifying the purpose behind their attempts. These failings are not surprising because the informality of diversion is both its strength and its weakness, its necessary essence and its undesirable aspect, its promise of rationality and its potential for abuse. Does one structure, check, eliminate, control, legitimize, standardize, promote, or kill such a thing? The real failing of the formalizers is that they acted, whereas they should have studied.

III. SPECIFIC PRACTICES AND THEIR RATIONALES

The types of non-criminal dispositions with which we are concerned occur primarily, if not exclusively, in the area of misdemeanors. The very fact implies the rationale: the offense is "not too serious," and to expend the full energies of the criminal system in prosecuting such offense is simply "not worth it."[9] This statement comes close to describing the essence of the reasons behind the diversionary practices in question. However, by the use of specific offenses or categories of offenses as examples, it will become clear that the rationale is not as simple and one-dimensional as it appears; that the characterization of an offense by criminal justice officials as "not too serious" involves a variety of interrelated considerations; and that the phrase "not worth it" similarly denotes a complex of factors. Even at that, the statement risks incompleteness and oversimplification. Some of the motivations behind diversionary decisions fit only loosely within this generalization; involved are such disparate rationales as the moralistic one that in some instances the retribution required by the written law is dis-

[9] *See* H. PACKER, *supra* note 4, at 290-91: "The worst abuses of discretion in enforcement occur in connection with those offenses that are just barely taken seriously . . . . And it is here that the greatest danger exists of using enforcement discretion in an abusive way: to pay off a score, to provide a basis for extortion, to stigmatize an otherwise deviant or unpopular figure." *See also*, Jackson, *The Federal Prosecutor*, 31 J. CRIM. L.C. & P.S. 3, 5 (1940):

> If the prosecutor is obliged to choose his cases, it follows that he can choose his defendants. Therein is the most *dangerous* power of the prosecutor: that he will pick people that he thinks he should get, rather than pick cases that need to be prosecuted. . . . [L]aw enforcement becomes personal, and the real crime becomes that of being unpopular with predominent or governing group being attached to the wrong political views, or being personally obnoxious to or in the way of the prosecutor himself. (italics added).

Discretion as personal whim or prejudice may be part of the problem, but only a small part. Neither is it very helpful to suggest as a more appropriate practice the prosecution of "cases that need to be prosecuted," even where the focus, as above, is on discrimination in the narrow, personal, and political sense; the more pertinent problem, with which this article deals, is the more subtle social and racial form of discrimination.

proportionate to the harm done,[10] or at the other extreme, such essentially practical considerations as the difficulty of proof, the existence of tangible non-criminal disposition alternatives, or the need to conserve already overburdened criminal justice resources appear to be operative. Finally, the analysis suggests that "not too serious" and "not worth it" are at times independent rather than interdependent elements comprising the rationale behind diversion. It is a fact that some behavior which is decidedly not low-danger is nonetheless deemed to be beyond the scope of full intervention by the criminal process.

Before discussing specific offenses or offense categories and the motivation for diversion in those instances, it must be pointed out that linking of certain offense types to specific rationales is to some extent an artifical process. The fact of the matter is that diversionary decisions are often based not upon a single rationale, but upon interdependent or even cumulative sets of motives. The exercise thus often becomes a question of singling out what appear to be the outstanding and more conspicuous motivations behind the decision to divert a specific group of cases. At times, one motive will appear so obvious, one circumstance of the offenses so compelling in terms calling for a non-criminal disposition, that other motivations and circumstances naturally fall into the background. This is not to say that other factors and rationales play no part at all, consciously or subconsciously. In other instances, however, it is clear that the decision to divert is based on a combination of circumstances surrounding the offense or the offender and that several motivations are at play simultaneously, none of which are separable or can be said to predominate.

A. *White Collar Crimes*

White collar offenses are "low-danger" offenses not involving violence and are typically committed by persons belonging to the more advantaged sectors of society.[11] Included are business frauds, bad checks and the like. That the offense has

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[10] The argument, however, that discretion-diversion occurs only because of the substantive impropriety of the law is too limited. Law enforcement officials divert for many other reasons and will continue to do so even if laws become substantively more reasonable.

[11] H. PACKER, *supra* note 4, at 354:

> As introduced by the sociologist E. H. Sutherland, the term refers to crimes that persons of respectability and high social status commit in the course of their occupations. It is a sociological concept that cuts across legal categories, and it is admittedly imprecise as a definition of categories of crime. The proper function of the term is probably connotative rather than denotative. Nonetheless, it has some usefulness as a boundary-setting term.

become labeled in the criminal justice jargon to reflect the typical offender is illustrative of the general fact that the characterization of an offense as non-serious or low-danger is heavily permeated with an evaluation of the offender, as distinguished from an evaluation of the act.[12] The point is not only that the act of perpetrating a business fraud or writing a bad check is deemed to be relatively harmless. but that certain "sociological" assumptions are made about the perpetrators as well. Many criminal justice officials apparently adhere to the notion — and they may have some empirical basis for this — that these middle class offenders will not readily recidivate nor regress into patterns of more serious crime, and that the mere fact of official detection serves as a sufficient deterrent against future misbehavior.[13] Even more compelling, the white collar offender is typically a businessman, white, head of a family — in short, someone with "status" and "worth" in the community. It is in part this status which is seen to make criminalization disproportionate and prosecution inappropriate. The very frequent response of the criminal justice system to these cases is therefore not to prosecute, but to simply compel the offender to make restitution to the victim, or to extract a "promise to cease and desist."[14]

The merits of this response are difficult to gauge. The following observations, however, may be deserving of further exploration. Though a measure of individualized justice based on sound experience may be viewed as salutary, it would seem that the exercise of discretion in the area of white collar offenses is peculiarly open to misapplication. It is of course a fact that discretion always entails this risk and that discretionary decisions are commonly based on assumptions of varying validity. The problem, however, is that behavior is adjudged innocuous not just by the evenhanded assumptions or misassumptions about the nature of the offense, but rather by unequal predictions or mispredictions based on the offender's social

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[12] For an interesting discussion of this phenomenon, see Sudnow, *Normal Crimes: Sociological Features of the Penal Code in a Public Defender Office*, 12 SOCIAL PROBLEMS 255 (1964-65).

[13] *See* F. MILLER, *supra* note 2, at 279:

> Another factor present in many charging decisions is the economic and social standing of the suspect. In many such cases, the administrative officials apparently believe they should be more lenient because prosecution would be particularly harmful to the suspect's reputation and the suspect's awareness of and concern for his own standing makes a recurrence of the offense more unlikely. It is a regular practice in the Detroit's prosecutor's office not to charge well-to-do persons accused of offenses such as exhibitionism and homosexual acts.

[14] *See id.* at 272-73.

status. There is a certain — perhaps perverse — sense of equality in predictions or assessments, be they reasonable or unreasonable, when these are derived from the nature of the offense. In other words, there is an element of neutrality in the discretionary judgment that a particular type of offense is not worth full prosecution, whether this judgment derives from the view that the punishment prescribed by the law is too harsh, or that the cases occur too frequently and would overload the system at the expense of more "serious" matters. Examinations of the specific circumstances surrounding the offense, including considerations bearing on the strength of the evidence, may also play a legitimate part in the discretionary decision not to prosecute. These considerations are already more troublesome, however, in that they are "individual" and open to manipulation. Consideration of the prior record of the offender, though perhaps a justifiable concern, is even more problematic. The problem is that consideration of "specific circumstances" readily becomes a smokescreen for more arbitrary and subjective decisions, where a disproportionate focus is on the offender and on his social status, where assessments cease to be neutral but tend to become expressions of favoritism towards a social group (and prejudice to those outside of it) that is felt to have "something in common" with the decisionmakers, hence deemed to be deserving of a "break," and for whom the confrontation with the reality (brutality) of the criminal process would be unsuitable.

Prior studies focusing on the handling of white collar crimes[15] have largely missed the systematic diversion which occurs in this area of offenses. Such omission may in part be attributable to the jurisdictional selection: the frequency and regularity of diversion of white collar offenders may vary in substance and, more particularly, in observability from jurisdiction to jurisdiction.[16] Differentials may even be apparent within

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[15] *See, e.g.*, H. EDELHERTZ, THE NATURE, IMPACT AND PROSECUTION OF WHITE COLLAR CRIME (published in May 1970 by the National Institute of Law Enforcement and Criminal Justice). *But cf.* J. HALL, THEFT, LAW AND SOCIETY, ch. 7 "Embezzlement," at 289 (1952); E. SUTHERLAND, WHITE COLLAR CRIME (1961); and Robin, *The Corporate and Judicial Disposition of Employee Thieves*, 1967 WIS. L. REV. 685.

[16] In one city, for example, the stated prosecutorial policy was "hard-nosed prosecution — restitution is not our business, we're not a collection agency." By contrast, officials in two other cities made much of the fact that they systematically diverted white collar offenses; restitution demand sheets (instruments of implementation) and statutory authority were liberally shown and cited. Interestingly, the same rationale which was used to support the stated policy of prosecution ("we're not a collection agency") was avowed to be the motivation for systematic diversion. More importantly, further discussion with the prosecutor and with other criminal justice officials in the non-diverting metropolitan area

a single jurisdiction since practice and stated policy shift with changes in prosecutorial administrations.[17] Our field investigation, however, indicates that observability may be the primary factor accounting for apparent differentials in processing of white collar crimes. Prosecutors who claim that they are "hard-nosed" or "exercise little discretion" in this area in effect operate quite similarly to those officials who are quite comfortable with — who in fact propagandize — their policy of diversion. Further studies in the area of white collar offenses should take this fact into account.[18]

B. *Shoplifting*

An analysis of the offense of shoplifting yields a series of observations quite similar to those relating to white collar offenses. There is no need to reiterate these. Separate mention of the shoplifting situation is made here because it constitutes a significant chunk of the types of non-serious cases where the dispositional pattern is almost universally diversionary, and because it provides a particularly notable illustration of the notion that the offense can be adjudged non-serious when the offender is presumed to be ripe for diversion by virtue of his social position. Shoplifting, of course, can hardly be equated with dangerous criminal behavior, but the offense is generally regarded as highly repetitive behavior, furnishing, at least in theory, a compelling basis for criminal processing.

The fact that many stores today post notification that "shoplifters will be prosecuted" is implicit evidence of official

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revealed that, despite the "hard-nosed" talk, diversion of "appropriate" cases was nonetheless a reality. In sum, dispositional practices were roughly similar in all three cities.

[17] Stated policy with regard to the handling of white collar crimes exhibits significant disparity, but the relationship between stated policy and practice is uncertain. While practices vary in the sense that some jurisdictions pursue a course of active implementation of the diversion option and others play a role more akin to passive acquiescence to private preferences, the evidence suggests that these variations do not result in correspondingly different dispositional patterns in either volume or types of cases diverted. Whatever relationship exists between stated policy, implementing practice, and dispositional consequence is difficult to measure given the lack of data on diversionary decisions. It should not be too readily assumed.

[18] A point of departure for subsequent investigation may be to focus on those white collar cases which were routed through the regular criminal process and *not* diverted. An examination of these more observable dispositions may well result in a finding that convicted white collar offenders are atypical in terms of social status of the label which describes the class. Important as such a finding would be in its own right, it would additionally demonstrate that crucial determinations are made at a less observable level and provide clues as to when and where these decisions are made, under what circumstances, and how frequently. Also, such an examination would tend to test the relationship between stated policy on the exercise of discretion and the concrete practice of diversionary disposition, and clarify the meaning of dispositions recorded versus those which go unrecorded.

practices whose aims are the converse of that.[19] Such notification announces perhaps the merchants' aspirations, but little more than that. To be sure, some shoplifters are fully prosecuted,[20] but only those who quite clearly fall outside the group which is normally accorded diversionary treatment.

When criminal justice officials talk about shoplifting, they seem to be thinking exclusively of women offenders. The image is one of slightly imbalanced, compulsive, older ladies who take things not out of economic need, but from mysterious drives attributed to menopausal phenomena.[21] Evidently, this image contributes heavily to the notion that shoplifting is not worth concern from the prosecutorial point of view, and that restitution and or fines are adequate and appropriate solutions.

The interesting aspect of the shoplifting situation is not only that essentially adverse prejudice works in this situation to the benefit of a class of offenders, but that factual circumstances and perceptions are virtually forced to conform to the standard image. Apparently, the notion of "worth" in the community and the consequent protection accorded to persons of that status figure even more strongly with respect to middle class female offenders than they do in the white collar crime situation. One almost wonders whether criminal justice officials confronted with atypical shoplifters (*e.g.* a male) will venture to transform the offense or the offender to fit the acceptable dispositional pattern. This is, of course, an overstatement, but the question may serve as a starting point for more intensive inquiry into this area. A profitable focus might be to see how prosecutorial discretion is exercised with respect to atypical shoplifters: how are the less tangible facts such as social or racial status, occupational status, potential and prior criminal record, and so forth, manipulated when "diagnostic" expectations and dispositional inclinations are upset by inescapable physical facts?

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[19] *See* W. LAFAVE, *supra* note 3.

> When shoplifters are caught, they are usually apprehended in the act, which results in immediate recovery of the stolen goods. Merchants generally are unwilling to prosecute, asserting that they cannot afford the time away from the store to testify in court or that they do not want to risk a loss of good will.

This is only a partial explanation for the low volume of prosecutions. The behavior of enforcement officials is often determinative of the "unwillingess" to prosecute.

[20] *See, e.g.*, THE PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: CRIME AND ITS IMPACT — AN ASSESSMENT 48-49 (1967) (especially footnotes).

[21] *See, e.g.*, W. LAFAVE, *supra* note 3, at 179-80.

C. *Family Disputes*

The very frequent fact of non-criminal handling of family quarrels offers an appropriate setting for the recognition of another rationale behind diversion: in an already overburdened criminal justice system, a percentage of cases must be disposed of with a mininal expenditure of resources. It is probably true that this conservation argument lurks behind the entire spectrum of cases which are commonly diverted,[22] but in the context of family disputes this rationale seems particularly compelling and conspicuous.

The observation that the diversion of intrafamily offenses is firmly predicated on reasons of economies respecting the utilization of criminal justice resources is not derived from the statements of criminal justice officials. The conservation argument is rarely articulated probably because officials are reluctant to display the detachment (or cynicism) required for the admission that it is operative. About the strongest response obtained from officials queried on this area is that "discretion must be exercised," otherwise there is "too much to handle." That conservation of criminal justice resources is a predominant motivation behind the systematic diversion of family disputes is thus largely a matter of inference, negative inference at that. The following factors point to its predominance: First and generally, family quarrels are a high volume phenomenon, constituting a major portion of police calls. This in itself implies that economies must be made and leads to the inference that they are made. Secondly, diversion of a high proportion of domestic incidents is an empirical fact, but the rationales which support diversionary practices in other offense categories do not apply. Family disputes are not nondangerous forms of behavior, confined to socially preferred classes whose prior or future behavior is or can be assumed to be non-repetitive or non-regressive. To the contrary, as any police officer will testify, domestic quarrels constitute high risk situations for both the participants and enforcers. Intrafamily offenses cut across social classes, and officials apparently perceive that fact. Moreover, the offenses are commonly associated with prior and future similar misbehavior. In fact, minimal intervention by the criminal system is particularly notable in high-danger areas of the cities,[23] a phenomenon which runs directly counter

[22] *Id.* at 102-24.

[23] In connection with this point on family disputes, it is appropriate to refer to the problem of neighborhood assaultive behavior, since the criminal justice system's response of minimal intervention in that area

to the typical pattern that only offenders with social status from worthy neighborhoods are selected for non-criminal handling. The notion that criminal processing of family disputes is "not worth it" thus operates independently from assumptions as to the non-seriousness of the offense or the positive characteristics of the offender. "Not worth it" in the context of domestic offenses means primarily a reluctance to commit already over-taxed criminal justice resources to an unmanageable situation. The official response is usually temporary intervention at most. The decision to avoid criminal processing is generally made at the earliest stage — by the police — and in full recognition that this solution is inadequate, that it represents only "a temporary cooling-off." The typical attitude is: "Tomorrow they'll probably be at it again — but you can't bring them all in."

There are other motivations at play in the diversion of domestic offenses. Already alluded to is the situation in parts of the large inner-city areas — the ghettos in particular — where violence, including bloodshed, is an unfortunately common phenomenon. Law enforcement response in these areas is generally less than adequate.[24] It is apparently the system's judgment that more frequent and more incisive action is not worth the risk and effort in neighborhoods where violent behavior is common and thereby assumed to be condoned (and perhaps felt to be

of offenses reveals that some alternative motivations are at stake. "Neighhood assaults" are commonly understood to refer to acts of violence committed among people who live in close physical and social proximity to one another — specifically, in the city ghettos. Intrafamily offenses can be said to be part of the neighborhood assault phenomenon. In our field study, however, questions and responses were formulated along the former category, hence the focus in the body of the article. The point to be made is that, though the motivations of conservation and difficulty of proof play a role in the handling (non-handling) of neighborhood assaults, additional reasons exist which reinforce these motivations and which render the policy of minimal involvement compelling and operational. The need to conserve criminal justice resources operates along lines which are inverse to the usual diversionary process. Diversion (if one can call it such) is the rule because violence is commonplace, *not* because it is isolated or aberrational; intervention is avoided or minimized because it is dangerous to intervene, *not* because the behavior is deemed innocuous. Some uneasy assumptions are involved: violence is tolerated which would be intolerable in more affluent communities. Disputants are left to their own devices "to work out problems." But the evidence must be overwhelming, and overwhelmingly ignored, that the behavior tolerated by the system is not at all tolerated in the disadvantaged communities, and that those left to work out their own disputes are least capable of doing so.

[24] *See* TASK FORCE REPORT, *supra* note 20, at 22, where the point is made that this situation may be improving:

> Not long ago there was a tendency to dismiss reports of all but the most serious offenses in slum areas and segregated minority group districts. . . . [But c]rimes that were once unknown to the police, or ignored when complaints were received, are now much more likely to be reported and recorded as part of the regular statistical procedure.

"deserved"). A related factor motivating non-intervention is the common experience (or assumption) that the adversaries to these disputes are reluctant to take part in the prosecution of one another. This is an evidentiary problem, and it extends beyond the city ghettos, providing a motivation for diversion of domestic disputes generally. The short of it is that the system will not be burdened with cases where victims refuse to testify on the date of trial. Finally, another motivation which is operative involves the notion that a family should not be deprived of its breadwinner and thus forced onto the welfare rolls.[25]

These alternative motivations serve to reinforce the propriety of diversionary dispositions already dictated by the need to conserve the system's resources. They do not undercut the basic thesis that unmanageable quantity determines the quality (the admitted inefficacy of minimal intervention) and frequency of official response. They demonstrate the complex and sometimes cumulative nature of motivations behind diversionary decision, but fall short of being broadly applicable or self-sufficient rationales. Rather, they take the form of somewhat overworked excuses often applied to less than appropriate situations in which it is evident that decisions are actually based on economic considerations.

The police diversion practices range from no response, to temporary "holding actions" until "things calm down,"[26] to forcing the aggressor to sleep off his drunk in the park, and to providing transportation to a hospital for the injured. Sometimes these are eminently appropriate actions. Moreover, the desire to hold families together through nonintervention or through — paradoxically — temporary disruption may be both explainable and commendable, while the methods may at least be temporarily effective. A greater paradox, however, and one which is in need of a better justification, is why action must always stop that short, regardless of the circumstances that prompted the dispute or those which might result in its persistence or aggravation.

D. *First Offense*

First offenses, of course, include the categories of offenses already discussed as commonly diverted. In addition to the rationales already discussed for diversion of white collar offenses, shoplifting, or family quarrels, the decision to handle in a noncriminal manner may depend in part on the absence of a crimi-

[25] *See* F. MILLER, *supra* note 2, at 260-66.
[26] *Id.* at 266-71.

nal record, though a totally unblemished record is ordinarily not required. Second or third offenders in the areas of business frauds or shoplifting may still be given a "break." Persons involved in domestic misbehavior are likely to be diverted at a stage too early for, or under circumstances which preclude, even an inquiry into the question of prior record.

The categorization or recognition of an offense as a first offense serves to assure diversion in classes of offenses where there already exists a predisposition to divert. This re-emphasizes the point that the exercise of the discretion to handle in non-criminal fashion is often based on a combination of circumstances and motivations. There is an element of the first offense situation which, however, has a more independent character, constituting a more or less separate and distinct motivation accounting for the decision to handle in non-criminal fashion.

First offenders are usually youthful offenders due to the established fact that people who run afoul of the law at a later age have often run afoul of the law before; stated conversely, individuals without a criminal record developed in their more youthful days are not so likely to develop one later in life. In the folklore of criminal justice officials, as a result, the term first offender is essentially equated with youthful offender, and the standard enforcement response is influenced accordingly. First offenders (read *youthful* offenders) constitute a preferred class who are given a "break" because to subject them to the rigors of the criminal justice system at an impressionable age is felt to have adverse consequences. For first offenders, criminalization is thought to result in a hardening of anti-social tendencies, whereas for other offenders the theory (or myth) is maintained that exposure to the criminal system has a deterrent effect. A distinctive rationale is operative here: prosecution of a first offense is deemed inappropriate not only because the offense is deemed non-serious by virtue of the nature of the act or assumptions about the offender, but because the consequences of full prosecution for the offender are viewed differently. The selective adherence to or elimination of the fictions which permeate criminal justice thinking, and the substitution of new fictions, as exemplified in the handling of first offenders, present an intriguing and intractable process. Most probably it reflects an awareness, if a somewhat subconscious one, that more serious and systematic reevaluation of the prevailing notions of deterrence, rehabilitation, retribu-

tion, and morality in terms of their impact on the criminal process at large, or diversion specifically, constitutes an alternative which crosses the boundary of political and social feasibility (if not personal imagination).

The decision to handle first offenses in non-criminal fashion is also influenced by the existence of what are thought to be clear and worthwhile non-criminal dispositional alternatives, presumably more effective than such hopeful non-criminal sanctions as enforced restitution, official detection and so forth, the inefficacy of which is often conceded by criminal justice officials themselves. For many young first offenders a very real and at least temporarily effective dispositional alternative is the military service. Criminal justice officials have an inordinate — but for short-term purposes, perhaps a justifiable — faith in the correctional value of military service. They will go to great length to utilize this alternative. One prosecutor stated that he would "wipe everything off the record" just to get the offender in the Army, thus providing the pre-condition as well as the incentive for the offender to "choose" this alternative. This more extreme version of the non-criminal response again reveals that circumstances can be made to fit the preconceived category which would render the diversionary response indisputably appropriate. That is to say, the first offense category is quite an elastic one, including offenders who are technically not first offenders. The designation of an offense as a first offense is often little more than a function of prosecutorial interpretation, since in many instances something can be found in the record of a non-youthful offender which disqualifies him from first offender treatment, while for the youthful offender there is usually something that can conveniently be ignored. This phenomenon may be both an outgrowth of, and an explanation for, the equation made between first offenders and youthful offenders; in that sense, the first offender situation is analogous to other diversion categories and reminiscent of the point made semi-facetiously earlier that a shoplifter is a menopausal old lady or else is not a shoplifter.

Another typical non-criminal response to first offenses is the "deferred sentence."[27] The peculiarity of this diversionary

[27] As distinguished from "deferred prosecution," which is also a common diversionary practice, deferred sentence implies a hearing and conviction prior to the diversionary determination. In practice, however, the concepts are less distinct. In the cities visited during the course of the field work, most officials appeared to be talking about deferred sentence, though at times the term deferred prosecution was used interchangeably with deferred sentence, and the concepts were confused. Even judges within a single jurisdiction labeled this exercise of dis-

disposition is that it is at least technically a function of judicial, rather than prosecutorial or police, discretion and occurs at a late stage of the criminal process. The fact that relatively significant criminal justice resources have been expended prior to the decision to divert would emphasize the fact that, as compared to other offense categories discussed, the conservation argument plays a smaller part in the handling of the first (youthful) offenders class of cases.

The judicial decision to defer the sentence of a first offender has been said to amount to a disposition in the nature of "informal probation." The judge hears the evidence surrounding the act and the background of the offender, upon which he predicates the decision to delay judgment for a period of 6 months or a year. During this time the offender has a chance to prove himself worthy of the special consideration accorded to him. Good behavior during this period results in the sentence being dropped. Since there is practically no supervision over the offender during the time of his conditional status, it has been argued that the deferred sentence is an inadequate dispositional alternative, in effect a minimal response like most other diversionary dispositions. This argument, however, ignores the fact that the deferred sentence poses a threat to the offender which in appearances — if not in actuality — is quite immediate, serious and predictable. The consequence of misbehavior, including minor infractions, during the conditional period is imposition of the original sentence with no further consideration given.

IV. Formalizing Diversionary Practices

Having sketched the character of these several categories of offenses, the reasons behind diversion in each category, and the specific non-criminal dispositions commonly applied to each, the discussion which follows focuses on attempts, and their impact, to formalize these processes. The diversionary practices treated in this article are, as stated earlier, characteristically lacking in formality, low in observability, and devoid of such institutional elements as specialization of personnel and thorough data gathering and reporting. If one of the aims of formalization is to remedy this situation, it has not been achieved. Legislative

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cretion variously, and the procedural technicalities differed at some points. One judge said that he in essence convicted before deferring the ultimate judgment; another judge claimed there was no conviction. Regardless of labels applied, the process is characterized by perfunctory hearings on the merits (the evidence) held prior to the decision to divert. The distinctions center on where or in what manner of formality the decisions and findings which will subsequently be "re-entered" or "expunged," depending on the offender's interim behavior, are recorded.

or administrative schemes designed to formalize one or several of the diversionary practices described exist today in many of our larger cities, but the experiences have generally been limited, tools of implementation have been wanting, and little reliable data on impact has been collected. As a consequence, responses in the course of the field survey were largely confined to vague descriptions by criminal justice officials who were neither very knowledgeable nor enthusiastic about the formal programs. Alternatively, enthusiastic program directors would hand out what were in effect self-serving and inflated reports indicating the unmitigated successes of their diversion schemes. Despite these limitations, sufficient impressionistic data was obtained to justify an attempt in this article to describe and speculate about the operations, goals, and rationales of existing and proposed formalized diversion programs.

The formalization of diversion poses serious dilemmas. The enactment into law of discretionary diversion practices aims to impart a measure of uniformity, predictability, and evenhandedness to an area of the criminal process where there is perceived to be an excess of unchecked discretion and unequal application.[28] Formalization also seeks to legitimize and extend more widely what are viewed as extra-legal and sporadic practices. The problem, however, is whether these goals can be achieved, or even whether they should be. The questions to be posed are whether the ends of equality of application, standardization, legitimation, and extension can be accomplished without sacrificing the ends of diversion itself, and whether criminal justice officials can be persuaded that formality is workable and desirable: in short, whether the elimination (or better, the reduction) of discretion which accompanies formalization is not accompanied by both results and means which are shortsighted and counter-productive. The answers to these questions will be explored by again turning to the specific offense categories and legislative or administrative schemes which have sought to codify or programmatize the non-criminal processing commonly reserved for these offenses.

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[28] *See, e.g.*, K. DAVIS, DISCRETIONARY JUSTICE 225 (1969): "Prosecutors . . . should be required to make and to announce rules that will guide their choices, stating . . . what will and what will not be prosecuted, and they should be required otherwise to structure their discretion." The quote above reveals an oversimplification of the problem. Can we expect prosecutors and police to announce as rules diversionary practices motivated by complex, sometimes prejudicial, and often subconscious perceptions?

A. *Statutory Grace Periods and White Collar Crimes*

Formalization of diversionary responses to white collar offenses has focused primarily on the bad check area.[29] Prosecution of bad check offenses in most of the several large cities visited during our field work is technically controlled by state statutes which provide that the offender shall have 5 or 10 days in which to atone for his offense — *i.e.* make restitution to the payee.[30] The response of criminal justice officials to these statutes is variable, which serves to point up various weaknesses of attempts to formalize diversionary decisions. One feature of the statutes is that they commonly frame the restitution concept in terms of intent — failure to make restitution after notification constitutes proof of intent to defraud — a feature which serves to obscure the diversionary purpose of the provisions, and thereby facilitates a blunting of the diversionary mandate on the operational level.

One observed response was to ignore the statutory mandate. The statute typically eliminates discretion by making the grace period applicable to all writers of bad checks. Implementation of the provision contemplates the circulation of "restitution demand forms" to potential victims (*i.e.*, merchants) and the availability of such forms to actual victims who have brought complaints. Ignoring the statute was accomplished by simply not making such forms available and not publicizing the possibility of this form of redress. The decision to divert or not thus remained entirely within the discretion of the criminal justice officials, who stated that they continued to prosecute "only criminals." Restitution was considered by these officials as morally and practically irrelevant. The decision to handle a bad check offense in non-criminal fashion rested, as it had prior to the statute, on whether the offender was typical of the class of white collar offenders; the decisions to prosecute would ensue if the offender of offense was atypical, involving a repeater, one with a record of other criminal behavior, or an amount of money which was exceptionally large. Criminal justice officials summed up their position as follows: "If it's a crime, it's a crime — the statute only complicates the question of when you can say that the crime has been committed." In their view, the relationship drawn by the statute between restitution and intent was too tenuous, and the equation between intent and criminality (subject to prosecution) unacceptable.

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[29] *See* F. MILLER, *supra* note 2, at 272-73.

[30] *E.g.*, MINN. STAT. ANN. § 609.535 (1963) and "Comments" thereto.

Restitution, they felt, did not necessarily disprove intent, nor did it turn a "criminal" into a harmless offender. Failure to make restitution did not automatically prove intent, let alone indicate criminality and the impropriety of diversion. The essence of their response was that dispositional decisions were too complex to be left to hard and fast statutory rules which ignored both the subtle and obvious realities of law enforcement experience and eliminated the practical tool — discretion — for dealing with these realities. It may be an obvious and trivial point to assert that formalization attempts do not work when they are ignored. What may not be so trivial, however, is the fact that the formalization was ignored because officials felt that it *could not* work.

The response of at least partial compliance with the statute in another jurisdiction is indicative of the problems created by formalization and perhaps envisioned by the non-complying officials. The situation in another of the cities visited involved a typical but "brand new" restitution statute which provided that the writer of a bad check would be given 10 days to satisfy the complainant and thus avoid prosecution. The newness of the statute might have accounted for the fact that at least partial compliance prevailed: criminal justice officials were only beginning to perceive the effects of the statute and such adjustments as might be made had not yet been made. Officials complained that their discretionary power, which they believed they had exercised on the basis of valid experience and intuition, had been subverted. The statute's universal applicability meant that bad check cases involving small amounts which were formerly ignored might now necessitate official action, despite the fact that the nature of the offense and attendant suppositions about the offender made informal resolution more appropriate. Alternatively, habitual or significant bad check offenses were now precluded from prosecution if the offender complied with the restitution demand. The quantitative impact of the statute was stated to be a "slight increase" in the number of formal charges filed. More important, however, were the non-quantifiable effects; what the figures did not reflect was that the application of the statute produced offsetting improprieties of result; nor did the figures measure the level of frustration of officials responsible for the enforcement of the statute. In sum, the legislation which sought to codify and regularize existing diversionary practices, instead changed practices, which in turn exerted pressure upon officials to revert to their informal approach by ignoring the statute or by way of a search for and

application of newly contrived criteria upon which diversionary decisions would be based.

The tension between formalized and discretionary diversion is extreme in this area of the law. The empirical evidence suggests that formalization will either be ineffectual or detrimental to rational processing. It would appear that statutes in this area should be limited to the role of legitimation and avoid circumscription of informal practices; but a statute which only legitimizes is virtually a non-statute.

B. *Restitution, Fines, and Shoplifting*

Formalization attempts in the area of shoplifting were met with a form of adjustment by criminal justice officials which did not materialize in the bad check area. The reaction to the shoplifting statutes was to ease the impact of formalization by restructuring the grounds upon which informal discretion could be exercised and old inclinations could be pursued. As in the bad check area, therefore, legislative efforts to make uniform and predictable the diversionary response seem to be failing. The underlying reasons are similiar as well: criminal justice officials believe that the dispositional pattern of diversion established by informal discretion is sufficiently evenhanded and predictable, while maintaining the advantage of regular processing of cases which because of special circumstances surrounding the offense or the offender fail to qualify for non-criminal handling. Formalization, they feel, takes away the option to make appropriate exceptions to the common response, or worse, it turns exceptions into rules.

Discussions of shoplifting statutes and their impact,[31] while acknowledging that the incidence of prosecution of shoplifters has been negligible, have failed to relate this fact to the diversionary practices of law enforcement officials. Instead, the low volume of prosecutions has been attributed to the merchants' unwillingness to take the time and expense to prosecute,[32] and to their fear of countersuit for unwarranted apprehension and prosecution by suspected shoplifters. Analysis of the statutes and proposals for reform have thus focused on factors dealing with the procedural facilitation and the rights of merchants to be free from liability in the detection and pursuit of shoplifting offenses. While such an emphasis is not entirely misplaced, it does ignore the significant role played by diversion.

[31] *See, e.g.*, Note, *The Merchant, the Shoplifter and the Law*, 55 MINN. L. REV. 825 (1971).

[32] *See* note 19, *supra*.

Diversionary practices with regard to shoplifting have been formalized and circumscribed in the following manner: Offenses involving goods of small value (the cut-off point varying between $20 and $100) are implicitly or explicitly categorized as misdemeanors by the statutes; goods valued over the specifically stated dollar amounts are felonies.[33] Such categorization greatly reduces, if not eliminates, discretion in that the exercise of discretion often turns on the ability to label an offense according to the disposition desired. Law enforcement officials put it this way: "Discretion applies mainly to misdemeanors, we have very little of it in felonies." What they mean, in the context of shoplifting, is that when the statute takes away the discretion to label the degree of the offense, they are less free to exercise, if not totally inhibited from exercising, dispositional discretion. In concrete terms it means that the diversionary response — such as restitution and fine or the handling as a municipal violation — is no longer an open option when an "irrelevancy" such as a statutorily defined sum being exceeded is present. The hard facts of the offense rather than the manipulable nature of the offender have become the focus of decisionmaking. The statutes approximate the informal pattern which prevailed before their enactment, but by the shift in focus have the potential effect of rigidifying and transforming the informal pattern which prevailed previously.

Resistance on the part of criminal justice officials to this formalization takes the shape of differentially interpreting the dollar amount of the goods in question. In one of the jurisdictions studied, where the statutory division between misdemeanor and felony was placed at $20, the following process occurred: if a "typical" shoplifter — one who merits diversion because she meets the preconceptions of officials regarding such offenders — took something worth $40 from a shop, the officials would argue that the wholesale value (say only $19) was the relevant value, and hence that restitution and/or fine were the appropriate responses. Conversely, less favored offenders were sometimes prosecuted for goods priced $21 in the store.

To evaluate formalization attempts against the background of the reactions to them is problematic. Beyond question, the desire to eliminate discrimination or favoritism is laudable in the abstract. But the costs may be too great. The disadvantages of eliminating properly exercised discretion which accompanies

[33] *E.g.*, IOWA CODE ANN. § 709.20 (Supp. 1970). *See also* Note, *supra note* 31, at 835 n. 63 for a listing of shoplifting statutes.

formalization may outweigh the prevention of improperly exercised discretion. Unbalancing the criminal system's dispositional patterns and motivations produces undesirable consequences. At its worst, it could result in disruption and chaos through the overloading of the system's resources. Or it could lead to blatantly inappropriate dispositions.[34] Ultimately, however, it is unlikely that these consequences would be permanent because the tendency of the system is towards internal accommodation and adjustment. Consequently, the result will probably be in the nature of a subversion of statutory mandates through contrived interpretations which shift the surface features of decisionmaking, but in essence maintain the discretion and dispositional pattern as before. Alternatively, the response will be to wholly ignore the statutes. One might argue that compliance with the statutes should be forced upon the criminal justice officials who are professionally and legally bound to operate within their context. But it is more difficult to argue that this can be done.

C. *Peace Bonds and Family Disputes*

The discretionary handling of family quarrels is an area where legislatures have on the whole not intervened. Perhaps this restraint is attributable to the recognition that the power to divert is exercised largely on the police level and, hence, is not to be tampered with, absent knowledge of the range of situations and motivations which influence police practices. Legislative intervention is more commonly directed towards later, more conspicious stages of the criminal process. Legislators, rightly or wrongly, appear to feel that the field of prosecutorial or judicial powers is more within their range of understanding or expertise, whereas police practices remain a sacrosanct mystery, not to be defiled by the meddlings of the ignorant. Perhaps legislators are also aware of the exceptional delicacy of domestic disputes, their potential or actual seriousness, and the ambivalence of the participants, and have therefore refrained from the imposition of absolutes in this area.

About the only "diversionary" legislation pertaining to domestic offenses derives from the practice of issuing peace bonds to intrafamily disputants. In most cities the peace bond

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[34] "Inappropriate" refers here to the view (shared by many criminal justice officials as well as commentators) that the law is a blunt instrument, the full force or harshness of which should be used sparingly. The criminal law is perceived to be designed to deal only with "hard cases," to be applied not equally but in essence unequally — *i.e.*, with discretion to divert or mitigate if the circumstances surrounding the offense or the offender so warrant, or if pressures on the system compel it.

is today regarded as an ineffective deterrant to future misbehavior and has fallen into disuse.[35] Similarly, the statutes which speak to this practice have ceased to be of practical relevance. The peace bond was a peculiar method for handling family quarrels in non-criminal fashion. It was also of dubious legality. The bond, which was usually not even paid by the offender, served ostensibly as an alternative to criminal processing, imposing a threat that liberty or money would be summarily forfeited in case of a recurrence of misbehavior. That this dubious practice was ever legislatively sanctioned reveals, more than anything else, that police work is regarded as beyond interference.[36] Discretion in the domestic dispute area thus remains unchecked. This may well be sound in an area of such complexity and unpredictability, where one the primary motivations for diversion is the conservation of criminal justice resources — a motivation which does not lend itself easily to legislative expression without embarrassment.

Assuming formalization be deemed desirable in this area, on the other hand, the thrust of it should be directed toward facilitating and improving the selection process. That is, rather than rigorously defining those cases which may or may not be diverted, formalization attempts might best be framed in terms of providing for special departmental units on both police and prosecutorial levels trained to handle family crisis situations.[37] The aim would be to place qualified and numerically adequate personnel in charge where the need for intervention is greatest, as determined by soundly exercised discretion.

D. *Deferred Sentences, Court Employment Programs, and First Offenses*

Those who have sought to formalize diversion in the first offense category adopt the equation made by criminal justice officials between first offenders and youthful offenders: the formalization proponents use these designations interchangeably when speaking of their programs or proposals. The equation provides the justification for and explains the motivation behind formalized diversion in this area.

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[35] *See* F. MILLER, *supra* note 2, at 266-71.

[36] For a different view of peace bond procedures, see AMERICAN BAR FOUNDATION, LAW ENFORCEMENT IN THE METROPOLIS Ch. 3, "Charging" (D. McIntyre ed. 1967).

[37] A big step in that direction is the New York City Police Department's "Family Crisis Intervention Unit" (FCIU). For a description and evaluation of the FCIU, see M. BARD, TRAINING POLICE AS SPECIALISTS IN FAMILY CRISIS INTERVENTIONS (Final Report to LEAA, G.P.O. — 70-1 (1970); Parnas, *The Response of Some Relevant Community Resources to Intra-Family Violence*, 44 IND. L.J. 159 (1969).

The armed services disposition has not been subjected to the process of formalization and it remains within the discretion of criminal justice officials to apply this brand of diversion to "appropriate" individuals. Deferred sentences, however, have become formalized processes in several cities, and proposals or pressures to formalize exist in several other urban centers.[38]

Deferred sentences as a formal process are associated in several cities with administratively established "court employment programs."[39] Of interest is the fact that these programs appear to provide the impetus and motivation for the judicial decision to defer sentence, rather than the other way around. This is the case despite the fact that formalization schemes generally are conceived as responses to informal situations and that court-employment programs are designed specifically to provide follow-up services subsequent to the decision to defer. The formalization or programmatization of the practice to defer sentence does not involve the elimination or structuring of discretion which characterizes the other formalizing attempts discussed. Judicial discretion remains essentially untouched, and it is only the conspicious availability of follow-up services which may serve to change the informal pattern of whom, or how many, shall be selected. It is on this matter of selection that attention will be focused here.

Court employment programs provide services in the nature of job-training, education, job-seeking, and so forth, during the informal probationary period which ensues upon deferral of sentence. The services are thus designed to help the offender prove that he merits having the sentence ultimately dismissed.

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[38] A judge in one city where the deferred sentence was still a matter of informal discretion exercised exclusively by that particular judge stated that he was lobbying to "have this practice written into the law." What made his efforts peculiarly noteworthy was that this judge on the whole expressed strong opposition to attempts to formalize informal diversionary practices. His reason for expecting the deferred sentence matter from his more general viewpoint appeared to derive from the fact that he was unable to persuade his judicial colleagues to adopt this practice as an informal scheme, and thus forced to resort to the admittedly risky formalization approach so as to extend what he felt was a desirable dispositional option.

The function of the formalization proposed by the judge was clearly one of publication and legitimation of existing informal practices. The problem is whether written legislation can be so limited. Perhaps the absence of formal authority to divert is especially inhibiting on the judicial level. If so, legislation which seeks to legitimize may be worth the risks inherent in formalization. It would appear, however, that discretion on the police and prosecutorial level is exercised with less inhibition. A recognition of this fact should have a bearing on whether, to what ends, and on what level, informal diversionary practices should be formalized.

[39] Some of the major U.S. cities having such programs are New York, Washington, D.C., Boston, Cleveland, and Minneapolis.

They also turn his informal conditional status into — at least theoretically — a more formal, more closely supervised arrangement, thus providing a better basis for the eventual (second) exercise of judicial discretion of whether the sentence against the offender shall be enforced or avoided.

Court employment programs have been criticized as doing formally and at great expense the same that used to be done informally at no expense. This assessment may be somewhat overly cynical. The services provided are often real and worthwhile, and less likely to be accorded to an offender absent the formal program. It must be deemed common knowledge by now that existing service agencies, because of lack of coordination and contact with the criminal system, often fail to reach those they are designed to service — *i.e.*, individuals diverted or released from the criminal system. This is a strong argument in favor of the court employment programs.

The negative assessment of court employment programs may be seen, more appropriately, as a reaction to inflated claims of success by the programs themselves. "Failure rates" in the programs tend to be minimized by the self-serving nature of the selection which extracts only those who are most likely to succeed and who may be least in need of the services offered. Moreover, it is conceivable that judges exhibit a partiality to participants in the program and are influenced to decide upon dismissal of sentence largely on the mere fact of participation. These would be serious shortcomings of the court employment programs. It is suggested here that if such programs are to be adopted, that special efforts be made to include those offenders who by virtue of family, social or racial background are *not* so likely to succeed. It would be better to maintain the incompleteness of the informal deferred sentence system than to waste scarce resources in order to divert a few favored first offenders into programs which concentrate excessively on achieving high success rates.[40]

CONCLUSION

Non-criminal handling of less-serious criminal offenses is a fact — an inescapable, if not very observable, fact, of the operation of the criminal justice process in both urban and rural

[40] For a description and evaluation of a deferred sentencing system, see S. RUBIN, THE LAW OF CRIMINAL CORRECTION 446-51 (1963) on New York's Youthful Offender Procedure. Rubin feels that the New York experience was "successful" and deplores what he describes as the politically motivated repeal of the procedure. "Politically," here is used in contradistinction to a repeal on the merits.

areas. The frequency and efficacy of this type of response is not readily measurable, in part because it is mostly an informal response, as well as a conceptually complex one. In most instances, quantifications are not made, records are not kept, and categorizations are avoided. The decision to divert, moreover, depends upon subtle and not-so-subtle pressures upon criminal justice philosophies and resources; the motivations behind discretionary decisions accordingly vary in kind and in perceptibility; and rare is the criminal justice official who intellectually recognizes and ably articulates the diversion he practices. Even rough statements as to frequency and efficacy are difficult to come by. Finally, the formalization of diversion is selective and sporadic. Such attempts are often nonconducive to general inferences because newly established, misleading because disruptive of earlier motivational and dispositional patterns, or inconsequential because ignored. While these formalization attempts provide an indirect indication of the merits of at least a measure of informality and discretion, they fail to yield more than the indefinite data which emerge from the informal practices.

A comprehensive evaluation of the practice of non-criminal disposition of criminal cases would constitute a monumental, if not impossible, task. The lack of quantification and articulation is only a small part of the problem. An evaluative statement would have to deal with a weighing of complex, interrelated, often subjective, values; it would have to confront serious methodological problems of access and time in the effort to gauge the effects of diversion on those diverted; it would seek to measure what is essentially immeasurable in an objective sense; it would inevitably limit itself to isolated assertions detached from a larger and inseparable context. This is not to say that the concept of diversion is not worthy of further study, but only that the subject be approached with a sense of caution and modesty. What is now needed in the area of diversion are studies with more specific and intensive foci on particular issues and problems. "Diversion" is a complex and varied topic: inquiries in the nature of all-inclusive fishing expeditions are unmanageable and unfruitful for other than exploratory purposes, and the need for exploratory information is diminishing. One of the values of the survey upon which this article is based is the recognition of these facts. The article itself is a small impressionistic step, a description of selected diversionary practices and their rationales coupled with some thoughts on the propriety of these practices and some caveats

regarding the attempts to formalize them. Its purpose is to lend a measure of understanding to, and provoke interest in, this area of criminal justice, and by its suggestions and omissions prompt further inquiry.[41]

[41] Presently, the American Bar Foundation, as a second phase of its project on Non-criminal Dispositions of Criminal Cases, is making an intensive study of court, prosecution, and police records in several cities so as to shed light — both quantitative and qualitative — on some of the issues.