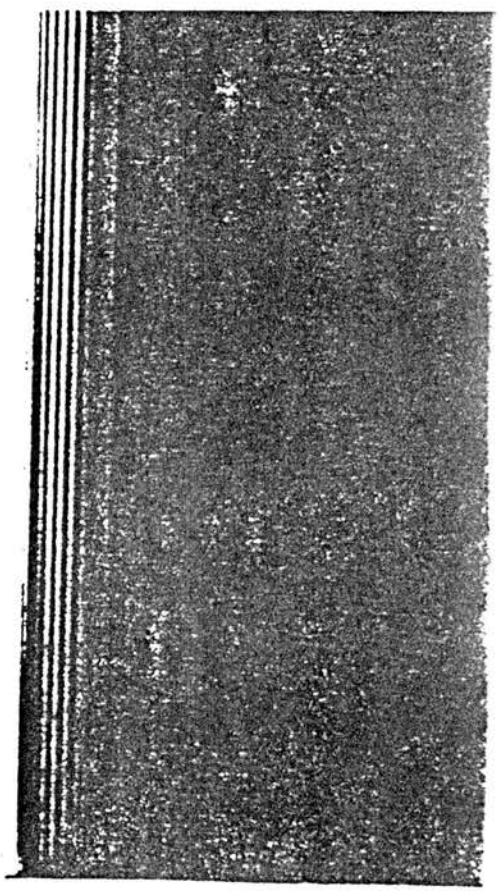
ATTORNEY-GENERAL OF QUEBEC et al. v. LECHASSEUR et al.

Supreme Court of Canada, Laskin C.J.C., Martland, Ritchie, Dickson, Beetz, Estey, McIntyre, Chouinard and Lamer JJ. November 3, 1981.

Constitutional law — Distribution of legislative authority — Criminal jurisdiction — Criminal Code provision permitting any person having reasonable and probable grounds to lay information charging indictable offence — Quebec Youth Protection Act providing that charges against juvenile may only proceed to Court through director of youth protection — Whether Criminal Code provision intra vires Parliament — Whether Quebec legislation inoperative by reason of conflict with federal legislation — Cr. Code, ss. 455, 129 — Juvenile Delinquents Act, R.S.C. 1970, c. J-3, ss. 3, 39 — Youth Protection Act, 1977 (Que.), c. 20, ss. 38, 40, 60, 61, 74, 75 — British North America Act, 1867, ss. 91(27), 92(14).

Constitutional law — Distribution of legislative authority — Juvenile delinquents — Criminal Code provision permitting any person having reasonable and probable grounds to lay information charging indictable offence — Quebec Youth Protection Act providing that charges against juvenile may only proceed to Court through director of youth protection — Whether Criminal Code provision intra vires Parliament — Whether Quebec legislation inoperative by reason of conflict with federal legislation — Cr. Code, ss. 455, 129 — Juvenile Delinquents Act, R.S.C. 1970, c. J-3, ss. 3, 39 — Youth Protection Act, 1977 (Que.), c. 20, ss. 38, 40, 60, 61, 74, 75 — British North America Act, 1867, ss. 91(27), 92(14).



Sections 40, 60, 61 and 74 (rep. & sub. 1979, c. 42, s. 14) of the *Youth Protection Act*, 1977 (Que.), c. 20, which, in effect, provide that where any person has reasonable cause to believe a child has committed an offence then a director of youth protection becomes seized of the case which may only proceed to Court with his consent, are inoperative by reason of their conflict with paramount valid federal legislation, namely, the *Juvenile Delinquents Act*, R.S.C. 1970, c. J-3, and s. 455 (rep. & sub. R.S.C. 1970, c. 2 (2nd Supp.), s. 5) of the *Criminal Code*. This latter provision permits any person who has reasonable and probable grounds, to initiate judicial process by laying an information charging an indictable offence and is validly enacted under Parliament's power in s. 91(27) of the *British North America Act, 1867* to legislate for criminal procedure. Section 455 is an integral part of the criminal process and the Province's authority to legislate in relation to the administration of justice in the Province under s. 92(14) of the *British North America Act, 1867* cannot be invoked to interfere with Parliament's legislative authority in the area of criminal procedure.

[*A.-G. B.C. v. Smith*, [1969] 1 C.C.C. 244, 65 D.L.R. (2d) 82, [1967] S.C.R. 702, 2 C.R.N.S. 277, 61 W.W.R. 236; *Lund v. Thompson*, [1958] 3 W.L.R. 594; *R. v. Hauser et al.* (1979), 46 C.C.C. (2d) 481, 98 D.L.R. (3d) 193, [1979] 1 S.C.R. 984, 8 C.R. (3d) 89, [1979] 5 W.W.R. 1, 16 A.R. 91, 26 N.R. 541; *R. v. Aziz* (1981), 57 C.C.C. (2d) 97, 119 D.L.R. (3d) 513, 19 C.R. (3d) 26, 35 N.R. 1, refd to]

APPEAL by the Attorney-General of the Province of Quebec from a judgment of the Quebec Court of Appeal, 22 R.F.L. (2d) 76, affirming a judgment of Legault J., 19 C.R. (3d) 1, [1980] Que. S.C. 662, refusing to grant prohibition.

H. Brun, *L. Crête* and *P. Monty*, for appellant, Attorney-General of Quebec.

D. L. Clancy and *P. A. Insley*, for appellant, Attorney-General of British Columbia.

W. Henkel, Q.C., for appellant, Attorney-General of Alberta.

B. Schwartz, for appellant, Attorney-General of Saskatchewan.

D. Piché, for respondent, Yolande Touchette.

Y. Cousineau, for respondent, Director of Youth Protection.

R. Langlois, *J. Mabbutt* and *B. Gravel*, for respondent, Attorney-General of Canada.

The judgment of the Court was delivered by

LASKIN C.J.C.:—This appeal, which is here by leave, arises out of an information laid by the mise-en-cause, Yolande Touchette, charging one Jean Bergeron, then under age 18, with robbery. The information invoked *Criminal Code*, s. 302(*b*), and s. 3 of the *Juvenile Delinquents Act*, R.S.C. 1970, c. J-3. Judge Lechasseur of the Quebec Youth Court rejected a defence contention that the *Youth Protection Act*, 1977 (Que.), c. 20, applied to preclude consideration of a complaint against a person under age 18 not brought in accordance with that Act. He held that the *Juvenile*

Delinquents Act prevailed in the circumstances and that he was entitled to act on the information laid by the victim of the robbery.

The Attorney-General of Quebec, who had intervened in the proceedings before Judge Lechasseur, sought prohibition which was denied by Legault J. of the Quebec Superior Court [19 C.R. (3d) 1, [1980] Que. S.C. 662]. An appeal to the Quebec Court of Appeal was dismissed [22 R.F.L. (2d) 76]. On leave being given to come here, four questions were posed for this Court's determination, as follows:

1. Are sections 40, 60, 61 and 74 of the Quebec *Youth Protection Act* (S.Q. 1977, Chap. 20) ultra-vires the Legislature of Quebec?
2. Is section 455 of the *Criminal Code* (R.S.C. 1970, Chap. C-34) ultra-vires the federal Parliament?
3. If sections 40, 60, 61 and 74 of the Quebec *Youth Protection Act* and section 455 of the *Criminal Code* are held valid, are the aforementioned sections of the Quebec *Youth Protection Act* constitutionally operative?
4. Does section 129 of the *Criminal Code* render sections 40, 60, 61 and 74 of the Quebec *Youth Protection Act* inoperative?

The *Youth Protection Act* is a comprehensive statute directed to the protection of children, defined to mean persons under age 18. It provides for the appointment of directors of youth protection who are given broad powers to take protective measures in the interests of children whose security or development is considered to be in danger as delineated in s. 38. Sections 40, 60, 61 and 74 [rep. & sub. 1979, c. 42, s. 14], referred to in the first and third questions before this Court, are as follows:

> 40. If a person has reasonable cause to believe that a child has committed an offence against any act or regulation in force in Quebec, the director shall be seized of the case before the institution of any judicial proceeding.
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> . . . . .
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> 60. Any decision concerning the directing of a child shall be taken jointly by the director and a person designated by the Ministre de la justice in the following cases:
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> (*a*) where an act contrary to any law or regulation in force in Quebec is imputed to the child;
>
> (*b*) where the parents of the child or the child himself, if he is fourteen years of age or older, disagree on the voluntary measures proposed;
>
> (*c*) where the director believes it advisable to seize the Court of the case of the child except where he must compel the parents or the child to consent to the application of an urgent measure contemplated in the second paragraph of section 47.
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> The director and the person designated by the Ministre de la justice under the first paragraph, the Comite or the arbitrator designated by it in the case contemplated in paragraph *f* of section 23 shall not seize the Court of the case of a child less than fourteen years of age for an act contrary to any act or regulation in force in Québec.

The person designated by the Ministre de la justice under the first paragraph shall not act in any capacity whatever in a judicial proceeding involving a child about whom a decision in which he participated was taken.

61. In the cases provided for in section 60, the director and the person appointed by the Ministre de la justice shall decide

(*a*) to commit the child to the care of the director for the application of voluntary measures;

(*b*) to seize the Court of the case; or

(*c*) to close the record.

. . . . .

74. Except in the cases of urgency contemplated in section 47, the Court shall be seized of the case of a child whose security or development is considered to be in danger or to whom an act contrary to any act or regulation in force in Quebec is imputed, only by the director acting in cooperation with a person designated by the Ministre de la justice, by the Comité or by the arbitrator designated by it in the case contemplated in paragraph *f* of section 23.

The Court may be seized of the case of a child by the child himself or his parents if they disagree with

(*a*) a joint decision of the director and a person designated by the Ministre de la justice or a decision of the arbitrator designated by the Comité under paragraph *f* of section 23, or

(*b*) the decision to prolong the period of voluntary foster care in a reception centre or a foster family.

Judge Lechasseur, in his reasons denying the provincial contention, agreed that the protection and welfare of children fell within provincial legislative competence but, at the same time, such provincial provisions as were set out in ss. 60, 61 and 74 of the *Youth Protection Act* could not operate where competent federal juvenile delinquency legislation applied, as it did in the case before him. The validity of the *Juvenile Delinquents Act* had been upheld by the Supreme Court of Canada in *A.-G. B.C. v. Smith*, [1969] 1 C.C.C. 244, 65 D.L.R. (2d) 82, [1967] S.C.R. 702. Moreover, the right to lay an information in respect of an alleged indictable offence was one of the rights recognized by Parliament in *Criminal Code*, s. 455 [rep. & sub. R.S.C. 1970, c. 2 (2nd Supp.), s. 5], reading as follows:

455. Any one who, on reasonable and probable grounds, believes that a person has committed an indictable offence may lay an information in writing and under oath before a justice, and the justice shall receive the information, where it is alleged

(*a*) that the person has committed, anywhere, an indictable offence that may be tried in the province in which the justice resides, and that the person

(i) is or is believed to be, or

(ii) resides or is believed to reside,

within the territorial jurisdiction of the justice;

(*b*) that the person, wherever he may be, has committed an indictable offence within the territorial jurisdiction of the justice;

(*c*) that the person has, anywhere, unlawfully received property that was unlawfully obtained within the territorial jurisdiction of the justice; or

(*d*) that the person has in his possession stolen property within the territorial jurisdiction of the justice.

In the result, Judge Lechasseur held that the *Youth Protection Act* was unconstitutional in respect of those of its aspects that were before him.

Legault J. of the Quebec Superior Court, in refusing the request for prohibition to Judge Lechasseur, held similarly, in extensive reasons that ss. 40, 60, 61 and 74 of the *Youth Protection Act* were invalid in the face of the *Juvenile Delinquents Act* and *Criminal Code*, s. 455. In affirming the refusal of prohibition, Turgeon J.A. of the Quebec Court of Appeal, Lajoie J.A. concurring, pointed out that although the *Youth Protection Act* has a valid provincial object, it cannot in its application abrogate or supersede the application to juveniles of the federal *Juvenile Delinquents Act* in respect of criminal matters, as in this case, arising out of an information charging an indictable offence. It was not open to the Province to deal with this particular matter non-judicially when the federal enactment prescribed judicial treatment. There was, in his view, a direct conflict between the provincial Act and the federal Act and the former must give way. McCarthy J.A., in concurring reasons, referred to the validity of *Criminal Code*, s. 455, and to the incompatibility of the relevant provisions of the *Youth Protection Act* with s. 455. This was enough to dispose of the appeal without challenging the intrinsic validity of the *Youth Protection Act*.

Two central issues emerged in the course of the hearing in this Court, issues similar to those that engaged the Courts below. The first was whether the *Youth Protection Act*, and especially the four sections set out above, could operate in the face of the *Juvenile Delinquents Act* where a young person who, by reason of age, was within both Acts under a charge of an indictable offence. The second issue, related to the first, was whether *Criminal Code*, s. 455, authorizing the laying of an information respecting the alleged commission of an indictable offence, was valid federal legislation or, even if valid, could have effect as against the *Youth Protection Act* and the particular provisions thereof set out above.

No attack is made against the validity of the federal *Juvenile Delinquents Act*. It is enough to refer here to one of its key provisions, s. 3(1), reading as follows:

> 3(1) The commission by a child of any of the acts enumerated in the definition "juvenile delinquent" in subsection 2(1), constitutes an offence to be known as a delinquency, and shall be dealt with as hereinafter provided.

If it applies to the facts herein, in association with *Criminal Code*, s. 455, it must follow that the specified sections of the *Youth Protection Act* become inoperative. That there would be a conflict between the two enactments is, to me, obvious. Although Q. 1 poses a direct issue of validity or invalidity, I do not think such an assessment is required in the present case. The impugned provisions are part of a statute which, in its relation to child welfare and child protection, appears to be within provincial legislative competence. I would be loath to fasten on any particular provisions as being *per se* unconstitutional rather than as courting inoperability because they cannot, under the circumstances herein, stand consistently with relevant and valid federal prescriptions.

It was suggested in the factum of the intervening Attorney-General of Canada that the *Youth Protection Act* itself yields to the paramountcy of the *Juvenile Delinquents Act* by reason of the second paragraph of s. 75 of the former *Act*. Section 75 is as follows:

> 75. Where an act contrary to any act or regulation of Quebec is imputed to a child, the provisions of the Summary Convictions Act (Revised Statutes, 1964, chapter 35) not inconsistent with this division apply, *mutatis mutandis*.
>
> Where an act contrary to any act or regulation of Canada is imputed to a child, the Juvenile Delinquents Act applies.
>
> In the other cases, the Court shall be seized by the filing of a sworn declaration containing, if possible, the names of the child and of his parents, their address, their ages and a summary of the facts justifying the intervention of the Court.
>
> Every officer of the Court and every person working in an establishment must, when so required, assist a person who wishes to file a declaration under the third paragraph.

I do not have to come to a conclusion on the merit of this contention but I am bound to say that the explanation of the second paragraph of s. 75 given by counsel for the Attorney-General of Quebec is appealing. The explanation, shortly put, is that s. 75 does not come into play until Court proceedings are taken and that it has no application where the provincial authorities intervene before the institution of judicial proceedings. This, of course, is the main contention of the Attorney-General of

Quebec and it requires consideration of whether it is open to a Province to preclude federally authorized proceedings by introducing provincial adjustment or corrective machinery of its own in place of or in advance of judicial proceedings. On this view of the matter, it is unnecessary to pursue the application of s. 75 either in the terms advanced by the Attorney-General of Canada or by the Attorney-General of Quebec.

Criminal Code, s. 455, thus becomes the pivotal provision, leading as it does to the application of s. 3(1) of the *Juvenile Delinquents Act* and other associated provisions which it is unnecessary to set out. Section 455 has already been set out above. The validity of this provision is challenged as being an invasion of provincial legislative authority in relation to "the administration of justice in the Province" under s. 92(14) of the *British North America Act, 1867*. Whatever this provision encompasses it cannot be invoked to interfere with the legislative authority of Parliament in relation to the criminal law, including the procedure in criminal matters, bestowed by s. 91(27) of the *British North America Act, 1867* and so bestowed notwithstanding, *inter alia*, anything in s. 92. Is, then, s. 455 a provision respecting criminal procedure as included in the governing grant of authority in relation to the criminal law?

Criminal Code, s. 455, is a long standing provision. It was in the original *Code* of 1892 as s. 558 and, as federal legislation, had its origin in 1869 (Can.), c. 30, s. 1, and see also the *Criminal Procedure Act*, R.S.C. 1886, c. 174, s. 30. Beyond this, it has its roots in English criminal law (see the *Indictable Offences Act*, 1848 (U.K.), c. 42, s. 1, replaced by the *Magistrates' Courts Act*, 1952 (U.K.), c. 55, s. 1 ("Criminal Jurisdiction and Procedure"), and reflects a fundamental precept in the right of an ordinary citizen, the victim of a criminal offence, to lay an information against the offender: see *Lund v. Thompson*, [1958] 3 W.L.R. 594, *per* Diplock J. Members of the community were thus given a role in the enforcement of public order, and their involvement in the criminal process carried over into Canadian prescriptions adopted by the Parliament of Canada.

That the present s. 455, no less than its forerunners, is within federal competence as an exercise of power in relation to the criminal law, including procedure in a criminal matter, appears to me to be incontestable. The section makes it possible for a charge of an indictable offence to be brought before a Justice of the Peace or a Magistrate to consider the issue of a summons or a warrant in respect of the charge. The criminal process is thus initiated and this initiation is integral to the process.

It is beside the point that an Attorney-General may stay proceedings initiated by the victim of a crime. That does not tell in favour of the provincial jurisdiction asserted in the present case, nor does it impeach the validity of s. 455. Nothing in this case engages the issues canvassed in *R. v. Hauser et al.* (1979), 46 C.C.C. (2d) 481, 98 D.L.R. (3d) 193, [1979] 1 S.C.R. 984, or in *R. v. Aziz* (1981), 57 C.C.C. 2d 97, 119 D.L.R. (3d) 513, 19 C.R. (3d) 26.

Although a question was put as to whether *Criminal Code*, s. 129, rendered ss. 40, 60, 61 and 74 of the *Youth Protection Act* inoperative, that issue fell away during the course of the argument in this Court. Indeed, I can see no ground upon which s. 129 could be brought into account to challenge the administration by provincial public officials of the aforementioned provisions of the *Youth Protection Act*. This can readily be seen from a mere perusal of s. 129 which reads as follows:

> 129. Every one who asks or obtains or agrees to receive or obtain any valuable consideration for himself or any other person by agreeing to compound or conceal an indictable offence is guilty of an indictable offence and is liable to imprisonment for two years.

The situation is, of course, different with respect to the conjoint application of the *Juvenile Delinquents Act* and *Criminal Code*, s. 455. Their effect is to make the provincial provisions inoperative in the present case.

One further point should be mentioned. Emphasis was laid upon s. 39 of the *Juvenile Delinquents Act* as itself making way for the application of otherwise valid provincial legislation. Section 39 is as follows:

> 39. Nothing in this Act shall be construed as having the effect of repealing or overriding any provision of any provincial statute intended for the protection or benefit of children; and when a juvenile delinquent, who has not been guilty of an act that is under the provisions of the *Criminal Code* an indictable offence, comes within the provisions of a provincial statute, he may be dealt with either under such statute or under this Act as may be deemed to be in the best interests of the child.

I can construe this provision in no other way than as preserving the paramountcy of the *Juvenile Delinquents Act* in the case of a charge of an indictable offence. The fact that the section speaks of a juvenile who has not been guilty of an indictable offence under the *Criminal Code* cannot mean that prior guilt is a condition of the application of the federal Act. Such a construction would erode it before it could have any effect.

Perhaps it would be a fitting opportunity for us to learn how far it is considered desirable to keep the power of private prosecution in serious crimes of this nature, and how far the Director of Public Prosecutions should, when a private prosecution is started, be permitted or encouraged to take over the prosecution. I hope I have indicated the nature of the inquiries that arise in connection with this responsibility. I hope we shall have from the Attorney-General a comprehensive statement on his powers and the principles upon which he exercises them.

8.51 p.m.

The Attorney-General (Sir Hartley Shawcross): I am glad to have the opportunity of talking about the position of the Attorney-General in connection with prosecutions because, as my hon. and learned Friend the Member for Leicester, North-East (Mr. Ungoed-Thomas), said, there has been some criticism that my enforcement of the criminal law was a matter of expediency. Indeed, it was seriously suggested that the operation of the law should be virtually automatic where any breach of it was known or suspected to have occurred. The truth is, of course, that the exercise of a discretion in a quasi-judicial way as to whether or when I must take steps to enforce the criminal law is exactly one of the duties of the office of the Attorney-General, as it is of the office of the Director of Public Prosecutions, who works under the direction of the Attorney-General.

It has never been the rule in this country—I hope it never will be—that suspected criminal offences must automatically be the subject of prosecution. Indeed, the very first regulations under which the Director of Public Prosecutions worked provided that he should intervene to prosecute, amongst other cases:

> "wherever it appears that the offence or the circumstances of its commission is or are of such a character that a prosecution in respect thereof is required in the public interest."

That is still the dominant consideration. I should perhaps say that, although he is called the Director of Public Prosecutions, constitutionally I am responsible for all his decisions, and as a Minister of the Crown I am answerable to the House for any decision he may make in particular cases.

So, under the tradition of our criminal law the position is that the Attorney-General and the Director of Public Prosecutions only intervene to direct a prosecution when they consider it in the public interest so to do. Lord Simon, who was once himself a most distinguished Attorney-General, put the position very clearly when he said in debate in this House:

> "there is no greater nonsense talked about the Attorney-General's duty than the suggestion that in all cases the Attorney-General ought to decide to prosecute merely because he thinks there is what the lawyers call 'a case' It is not true, and no one who has held that office supposes it is."—[OFFICIAL REPORT, 1st December, 1925; Vol. 188; c. 2105.]

My hon. and learned Friend then asked me how I direct myself in deciding whether or not to prosecute in a particular case. That is a very wide subject indeed, but there is only one consideration which is altogether excluded, and that is the repercussion of a given decision upon my personal or my party's or the Government's political fortunes; that is a consideration which never enters into account. Apart from that, the Attorney-General may have to have regard to a variety of considerations, all of them leading to the final question—would a prosecution be in the public interest, including in that phrase of course, in the interests of justice?

Usually it is merely a question of examining the evidence. Is the evidence sufficient to justify a man being placed on his trial? The other day, in a case of murder to which the hon. and learned Gentleman referred—a case which became the subject of a good deal of publicity—I personally decided not to prosecute. I examined the papers myself, and I came to the conclusion that it was not an appropriate case in which I should instruct the Director of Public Prosecutions on behalf of the Crown.

It is not in the public interest to put a man upon trial, whatever the suspicions may be about the matter, when the evidence is insufficient to justify his conviction, or even to call upon him for an explanation. So the ordinary case is one where one has to review the evidence, to consider whether the evidence goes beyond mere suspicion and is sufficient to justify a man being put on trial for a specific criminal offence.

[THE ATTORNEY-GENERAL.]

In other cases wider considerations than that are involved. It is not always in the public interest to go through the whole process of the criminal law if, at the end of the day, perhaps because of mitigating circumstances, perhaps because of what the defendant has already suffered, only a nominal penalty is likely to be imposed. And almost every day in particular cases, and where guilt has been admitted, I decide that the interests of public justice will be sufficiently served not by prosecuting, but perhaps by causing a warning to be administered instead.

Sometimes, of course, the considerations may be wider still. Prosecution may involve a question of public policy or national, or sometimes international, concern; but in cases like that, the Attorney-General has to make up his mind not as a party politician; he must in a quasi-judicial way consider the effect of prosecution upon the administration of law and of government in the abstract rather than in any party sense. Usually, making up my mind on these matters, I have the advice of the Director of Public Prosecutions and very often of Treasury Counsel as well. I have hardly ever, if ever, refused to prosecute when they have advised prosecution. I have sometimes ordered prosecution when the advice was against it.

I think the true doctrine is that it is the duty of an Attorney-General, in deciding whether or not to authorise the prosecution, to acquaint himself with all the relevant facts, including, for instance, the effect which the prosecution, successful or unsuccessful as the case may be, would have upon public morale and order, and with any other considerations affecting public policy.

In order so to inform himself, he may, although I do not think he is obliged to, consult with any of his colleagues in the Government; and indeed, as Lord Simon once said, he would in some cases be a fool if he did not. On the other hand, the assistance of his colleagues is confined to informing him of particular considerations which might affect his own decision, and does not consist, and must not consist, in telling him what that decision ought to be. The responsibility for the eventual decision rests with the Attorney-General, and he is not to be put, and is not put, under pressure by his colleagues in the matter.

Nor, of course, can the Attorney-General shift his responsibility for making the decision on to the shoulders of his colleagues. If political considerations which, in the broad sense that I have indicated, affect government in the abstract arise, it is the Attorney-General, applying his judicial mind, who has to be the sole judge of those considerations.

That was the view that Lord Birkenhead once expressed on a famous occasion, and Lord Simon stated that the Attorney-General:

> ". . . should absolutely decline to receive orders from the Prime Minister, or Cabinet or anybody else that he shall prosecute."

I would add to that that he should also decline to receive orders that he should not prosecute. That is the traditional and undoubted position of the Attorney-General in such matters.

Questions have been raised, I know, in regard to prosecutions in respect of illegal strikes under the Conditions of Employment and National Arbitration Order—Order No. 1305, as it is more familiarly called. The law laid down by that Order, as the hon. and learned Gentleman said, is not always easy to apply to all industrial disputes in peace-time. If one prosecutes too soon, it may only exacerbate the difficulties and impede the opportunities of settling the dispute by negotiation or arbitration. Prosecution may result in the individuals proceeded against being made martyrs in the opinion of their colleagues, and instead of leading to the observance of the law it may produce even greater disregard of it and so bring the law further into disrepute. But whilst I would never allow a threat of criminal action to be used as a kind of pawn in industrial relations, I shall not hesistate to prosecute in what "The Times" described as "appropriate cases" "and at the appropriate time." The public cannot be held to ransom nor the law as it is at present be brought into complete disrepute.

On the other hand, there may well be circumstances in which the public convenience is not affected by the strike or in which, for other reasons, the public interest is not served by prosecution. Lord Birkenhead, again, in one case felt that the public interest was best met by a withdrawal of proceedings which had

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already been started, on an undertaking by the individuals concerned to resume work. I cannot pretend to lay down in advance any rules on which I should act in these matters. I am always loth to proceed against the rank and file in an industrial dispute where the real inciters and leaders have succeeded in covering up their activities.

There have been some strikes in the past in which I could not prosecute under this Order because technically there was no trade dispute. There have been several where I was about to prosecute when the strike collapsed. I prosecuted in the case of the gas strike in North London recently because the public were being caused great inconvenience and hardship. Moreover, the information available to me showed that, whilst there was a pretence being made of urging strikers to return to work, the truth was that the Communists were anxious to see the strike continue.

There was a Mr. Berridge, who was the North London organiser for the Amalgamated Engineering Union, an avowed Communist, whose official duty it was to his union to secure a return to work, but who bent his unofficial efforts in the opposite direction. In his office, whether as a mere clerk, as nominally he is, or as an invigilator over Mr. Berridge, as in accordance with Communist technique he may be, was a Mr. Glading, a gentleman who was implicated in the Communist conspiracy in Meirut and who in this country in 1938 got six years' penal servitude for acting as a professional spy for Russia. In that case, the strike prosecution brought home to everybody that what was in point was not merely some matter of industrial regulation, but that the criminal law was being broken; and the prosecution had a salutary effect.

In the printing trade dispute which occurred recently, where both parties were in breach of the law, although I think the initial illegality was on the part of the compositors, I did not in the earlier stages consider that the criminal law should be invoked, but as the strike went on, I caused police inquiries to be made with a view to prosecuting the leaders on both sides, and the dispute then came to an end. I just mention these as examples of particular cases in recent times. One has to look at each case on its merits as it arises. I shall apply my unfettered discretion to all these cases, prosecuting when, with a knowledge of all the circumstances, it seems in the public interest so to do.

Those who criticise me for prosecuting in one case and not in another are either unfamiliar, as they may very easily be, with all the facts and circumstances, or they are really saying that I should be influenced by political considerations in this matter, but that, of course, no Attorney-General could possibly allow himself to be, even if the course of pursuing that duty might involve him in personal unpopularity.

There was a case the other day in which I was asked whether or not something which had been published in one of the newspapers amounted in law to treason, and I said that I thought that what had been done was legally treason, but that, as at present advised, I did not propose to prosecute. That may sound very startling, but although the sentence for treason is always death, the offence itself is of varying degrees of gravity. In some ways it is akin to sedition. There, again, if I may quote Lord Simon, who was himself quoting that great constitutional authority Professor Dicey:

> "The legal definition of sedition might easily be used to assist to check a great deal of what is ordinarily considered allowable discussion, and would, if rigidly enforced, be inconsistent with the prevailing forms of political agitation."—[OFFICIAL REPORT, 1st December, 1925; Vol. 188, c. 2107.]

I do not think myself that law and order are necessarily promoted by prosecution in every case, but, of course, in talking of treason, it must be said that treason is a very grave offence, and nobody should think that I would lightly refrain from prosecuting in properly established cases.

The existence of this discretion and the utility of this discretion in the Attorney-General whether or not to prosecute in particular cases has been so well recognised that there has been an increasing tendency in recent years to provide that there shall be no proceedings as to particular classes of offences created by Statute without the consent of the Attorney-General or the Director of Public Prosecutions. That kind of provision has been made to ensure that there will be no automatic prosecutions and that there will be no frivolous and unnecessary prosecutions in such cases. That is a Parliamentary recognition, if any such recognition were required, that

[THE ATTORNEY-GENERAL.]
it is the duty of the Attorney-General and the Director to exercise their discretion in every case whether or not to invoke the machinery of the criminal law.

But where a provision of that kind does not exist, where it is not expressly provided that there shall not be any prosecution without the consent of the Attorney-General or the Director of Public Prosecutions, the general position in English law—I think it is different in Scotland where my right hon. and learned Friend the Lord Advocate prosecutes at his discretion in all cases—is that any private citizen can come along and set the criminal law in motion. That is really the safeguard if the Attorney-General and the Director of Public Prosecutions and the police all neglect their duties and do not prosecute in cases where, manifestly, prosecutions ought to take place.

That was how in the recent case, to which my hon. and learned Friend referred, it was possible to start a private prosecution in that case of murder. My hon. and learned Friend referred to the fact that the private prosecution having been initiated in that case, the Director of Public Prosecutions subsequently took over the conduct of the case, and that eventually the case was dismissed by the magistrates. In a case of murder, although a private citizen may initiate proceedings to the extent of applying for and obtaining a warrant for the arrest of some named individual, it is the statutory duty of the Director of Public Prosecutions to step in and take over the conduct of the case, no doubt because Parliament has thought that in cases of such gravity it is important that the prosecution should be conducted with all possible safeguards by an experienced official such as the Director of Public Prosecutions. He took over that particular case, he instructed Treasury Counsel of standing to conduct the proceedings, and, in the end, the magistrates, having heard the whole of the facts, decided that there was no *prima facie* case for the defendant to be called upon to answer.

But, apart from certain particular cases where, if proceedings are started, the Director of Public Prosecutions must intervene and take them over, the general rule of law is that if the Director, the Attorney-General or the police do not institute criminal proceedings themselves, then it is open to any private individual so to do. On the whole, I think that is a safeguard which we have to maintain in this country so long as the Attorney-General and the Director retain, as they always must, a discretion whether or not they are going to set the law in motion. They may make mistakes and may not initiate prosecutions when they ought to be initiated. I do not think that is likely to happen, but the safeguard against its happening is that anybody else can step in, and, if the justices think right, proceedings can be initiated and a criminal prosecution started.

Summing up the whole matter, I can only say that so long as I hold my present office, I shall try to the best of my ability to continue to administer the duties of the office in what appears to me to be the public interest, and to do whatever I can at least to maintain, if not to strengthen, the influence of the office in the promotion of justice, as well as its traditional independence and integrity.

9.13 p.m.

Mr. Lionel Heald (Chertsey): I think that the statement which the right hon. and learned Attorney-General has just made about the principles upon which he exercises his powers is one which will commend itself to the House. I can certainly say that it is one which commends itself very much to those who, like myself, have the privilege of belonging to the same great profession as he does, because, he being the head of our profession, we are always most insistent that he should proceed in precisely the way he has explained to us tonight.

My only reason for intervening is that I should like to pay my personal tribute to the way in which he does exercise those functions. Shortly before the Recess I asked him if he would inquire into certain happenings which had taken place at a large works at Park Royal outside London, with a view possibly to taking action with regard to intimidation. He promptly replied that he would inquire into the matter. The sequence of the matter was that he later informed me that, having inquired into the matter, he was satisfied that although there was certainly ground for the complaint that had been made, he was equally satisfied that the prompt action which had been taken, and with which I was glad to have been able to

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THE ATTORNEY GENERAL, POLITICS AND THE PUBLIC INTEREST

by

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13

Discretionary Factors in the Decision to Prosecute

The factors that control the outcome of discretionary authority in the area of law enforcement and criminal prosecutions have been aptly described as exhibiting the quality of low visibility.[1] Calls for the public disclosure of the reasons behind individual decisions is symptomatic of a growing unwillingness to accept unquestioningly the exercise of authority whether by government, statutory bodies or other public institutions. The model frequently invoked as epitomising openness and public accountability is the long established tradition of the judiciary in giving reasons in open court for their decisions. The nature of the adversary system supports judicial commitment to this ideal with its concern for identifying the legal issues before the trial commences and for confining the admissibility of evidence to what is relevant in accordance with well established rules. Far less certainty prevails in those other areas of the administration of justice that are concerned with the preliminary steps leading up to the actual trial of a criminal case.[2]

[1] J. Goldstein, "Police Discretion Not to Invoke the Criminal Process: Low Visibility Decisions in the Administration of Justice" (1960) 69 Yale L.J. 543 and see, too, W.R. La Fave, *Arrest: The Decision to Take a Subject into Custody*, (1965), pp. 67–143, and J. Vorenberg, "Narrowing the Discretion of Criminal Justice Officials" (1976) 4 Duke L.J. 651.

[2] For general discussions of the exercise of discretionary authority and the governing criteria pertaining thereto, see Glanville Williams, "Discretion in Prosecuting" [1956] Crim. L.R. 222–231 (one of the earliest examinations in the English literature of this growing topic); J.F. Wilcox, *The Decision to Prosecute*, (London, 1972), *passim.*, (written from the perspective of a former chief constable of a county police force); D.G.T. Williams, "Prosecution Discretion and Accountability of the Police" in *Crime, Criminology and Public Policy* (Ed. Hood), (1966), pp. 161–195; B.A. Grosman, *The Prosecutor*, Toronto 1969 (a Canadian perspective of the problem); K.C. Davis, *Discretionary Justice: A Preliminary Inquiry*, and a collection of essays edited by the same author, *Discretionary Justice in Europe and America*, (1976), particularly Chapter 2 which describes the highly formalised system of controlled discretion that prevails in West Germany, pp. 16–74. See, too, L.H. Leigh and J.E. Hall Williams, *The Management of the Prosecution Process in Denmark, Sweden, and the Netherlands*, (1982). For the most comprehensive examination of various aspects of prosecutorial discretion in the Australian context, see Enid Campbell and Harry Whitmore, *Freedom in Australia* (2nd ed.) (Sydney, 1973), pp. 96–124.

These manifold steps include decisions by the police whether or not to charge a citizen, whether to issue a summons or to arrest a suspect to ensure his appearance before the court, whether to support or oppose a bail application, and most importantly, whether and when to lay an information before a justice of the peace that sets the formal process of the criminal courts in motion. There may be some inexperienced police officers who believe that no discretion exists in the face of evidence that discloses the commission of a criminal offence. It is certainly not unknown to hear senior officers publicly claim that no discretion is exercisable by the police when confronted with otherwise unexplained circumstances pointing to an offence having taken place.[3] In truth, however, neither the law nor the practice of police forces recognises an inflexible rule that requires a prosecution to be launched irrespective of the particular circumstances surrounding the crime, the victim and the perpetrator. Whether the question arises at the initial contact of the police with the crime or at the level of intervention by the Director of Public Prosecutions or a Law Officer of the Crown, the basic principle that applies is enshrined in the passage from Sir Hartley Shawcross's speech in the House of Commons in 1951 when he declared[4]: "It has never been the rule in this country—I hope it never will be—that suspected criminal offences must automatically be the subject to prosecution. Indeed the very first Regulations under which the Director of Public Prosecutions worked provided that he should . . . prosecute . . . wherever it appears that the offence or the circumstances of its commission is or are of such a character that a prosecution in respect thereof is required in the public interest. That is still the dominant consideration." In deciding whether or not to authorise a prosecution, Shawcross added, the Director's office must have regard to "the effect which the prosecution, successful or unsuccessful as the case may be, would have upon public morale and order, and with any other considerations of public policy."[5] These views continue to represent the proper theory of criminal prosecution.

Whilst the general principle is correctly expressed in Shawcross's dictum it would be unrealistic to equate in any exact sense the evaluation of the relevant factors at every level of the criminal process. Thus, the exercise of judgment by uniformed police officers on the street or by detectives in the interrogation room is likely to be somewhat circumscribed by the knowledge that their initial response will be reviewed by senior officers in the force.[6] In difficult, important or highly sensitive cases this review will

[3] See Edwards, "Discretionary Powers by the Police and Crown Attorneys in the Criminal Law" (1970) 59 *Canadian Police Chief* 36.

[4] H.C. Deb., Vol. 483, col. 681, January 29, 1951 and see *ante*, pp. 318–324.

[5] *Ibid.*

[6] Among the important empirical studies of police work, to which reference should be made, are J. Skolnick, *Justice Without Trial*, (New York, 1966); P. Greenwood et al., *The Criminal Investigation Process*, Vol. III, 1975; and R.V. Ericson, *Making Crime A Study of Detective Work*, (Toronto, 1981).

likely extend upwards to include the chief constable. We have discussed at length in an earlier chapter the relationship that exists in English constitutional law between the chief constable and the local prosecuting solicitor.[7] It was noted then that the solicitor-client characterisation of their respective roles means that the final decision whether or not to prosecute is firmly in the hands of the chief constable, or such subordinate officer to whom the delegated power is given to make decisions of this kind. If the recommendations of the recent Royal Commission on Criminal Procedure are adopted and translated into legislation the authority of the prosecuting solicitor will change dramatically but that struggle for supremacy is essentially concerned with the location of the final decision-making power.[8] Our present concern is with identifying the considerations that guide those who have to make the decisions to prosecute or not to prosecute.

DISCRETION AND THE BALANCING OF COMPETING VALUES

Only in very recent years has there been any serious public airing of the discretionary factors that are taken into account by prosecutors. We have now had revealed for public examination some inkling of the balancing of competing values that is the hallmark of discretionary power. The major initiative in opening the windows of disclosure is attributable to the present holder of the office of Director of Public Prosecutions. Since assuming office in 1977 Sir Thomas Hetherington, unlike his predecessors,[9] has gone out of his way to explain in considerable detail how decisions are made in his department. National and regional newspapers,[10] the radio and television media,[11] and occasionally professional bodies and universities,[12] have afforded the Director opportunities to convey a better understanding of the role of the public prosecutor and his relationship to the police forces and to the Attorney General. The precedents set by Hetherington in England have been paralleled in other countries of which the United

[7] *Ante*, pp. 87–89.

[8] *Ante*, pp. 98–104.

[9] Comparison should be made with the contents of the public lectures given by Sir Theobald Mathew—see *The Office and Duties of the Director of Public Prosecutions*, (1950, University of London, Athlone Press) and *The Department of the Director of Public Prosecutions*, (1952, The Law Society). See, too, Sir Norman Skelhorn's interview "Between the Devil and the D.P.P.", *Punch*, November 24, 1976 and his chapter on "The Machinery of Prosecution" in *English Criminal Law: The Way a Briton Would Explain it to an American*, pp. 32–36.

[10] See, *e.g.* the extended interviews reported in the *Daily Mirror*, November 1, 1979; *The Times*, May 11, 1980; the *Sheffield Morning Telegraph*, May 19, 1980 and the *Sunday Times*, January 13, 1980.

[11] BBC Radio 4, *The World This Weekend*, April 19, 1981, and BBC Radio 4, *Inside Parliament*, February 16, 1980.

[12] Examples of Hetherington's public lectures include the Upjohn Memorial Lecture at King's College, University of London (November 2, 1979—see *post*, fn. 30); to Gray's Inn Moots (April 24, 1980) and to the Media Society (May 22, 1980).

States,[13] Canada,[14] Australia,[15] and New Zealand[16] can be cited for individual examples of releasing prosecution guidelines or *ex post facto* explanations for public scrutiny. Former Directors in charge of the Department of Public Prosecutions revealed as little as possible as to the actual operations of the institution and this approach was accepted as invevitable if the integrity of the system was to be maintained. The change of policy, instituted by the present Director, has now been in operation for sufficient years to demonstrate that the integrity of the Public Prosecutions' office can remain unimpaired notwithstanding the Director's determination to take the public into his confidence by frankly admitting his mistakes, when called for, or otherwise explaining repeatedly how complex and subjective is the process of reaching an impartial decision as to the enforcement of the criminal law.

In the main, the Director's remarks have been associated with the exercise of his "consent" powers or those conferred upon the Attorney General but with respect to which the Director of Public Prosecutions would normally be involved in advising the Attorney. The focus of these "revelations" has usually depended on the current *cause célèbre*, so that the involvement of a public figure or the contentious nature of prosecutions involving riots, obscenity, race relations, deaths in police custody, or corruption have all tended to figure prominently in the public discussion of the Director's activities. The opportunity for a more dispassionate analysis of the Director of Public Prosecutions' discretion arose in connection with the appearance of Sir Thomas Hetherington before the Royal Commission on Criminal Procedure. Prior to doing so, Hetherington had submitted a

[13] See (1978) 24 *The Criminal Law Reporter* 3001 which contains, in their entirety, United States Justice Department documents issued under the authority of a memorandum by Attorney General Edward H. Levi (January 18, 1977) on the exercise of prosecutorial discretion in such areas as decisions to prosecute, selection of charges, plea agreements and agreements to forego prosecution in return for cooperation. See, also, John T. Elliff, *The Reform of F.B.I. Intelligence Operations* (1979, Princeton), Appendices I, II, III and IV.

[14] e.g. in the province of Ontario 21 directives to the Crown Attorneys have been issued by, or in the name of, the Attorney General during the period from 1972 up to the present time. These cover a wide range of subjects including: plea discussions, disclosures to the defence, strict enforcement of new Criminal Code provisions relating to firearms, drinking and driving offences, child abuse prosecutions, prosecution of police officers who lie under oath, pornography and obscenity prosecutions, high speed police pursuits, child abduction, hockey violence, vandalism, sentences in sexual cases and preferring indictments for offences founded on evidence taken at a preliminary inquiry. Most of the directives are issued under the signature of the provincial Attorney General, with the others emanating from the Director of Crown Attorneys or the Assistant Deputy Attorney General.

[15] In early 1982 the Commonwealth Attorney General, Senator Peter Durack Q.C., announced that he would be tabling in the Australian Senate during the current session a statement setting out "the Australian Government's (*sic*) prosecution policy." Australia had decided to make public the principles which would guide it in such matters—see (1982) 8 *Commonwealth Law Bulletin* 826. The statement, *Prosecution Policy of the Commonwealth*, was tabled in the Australian Senate on December 16, 1982—see *post*, p. 432, fn. 25.

[16] See the numerous instances in recent years, referred to in the previous chapter, wherein both the Attorney General and the Solicitor General of New Zealand have provided elaborate *ex post facto* explanations of prosecution decisions that became the subject of public debate.

volume of written evidence which includes the most authoritative exposition of the factors underlying the decision to prosecute, as practised within the Department of Public Prosecutions.[17] It would be a signal omission, however, when dealing with this subject, not to recognise the even earlier exposure of the inner workings of the office of Director of Public Prosecutions prepared by Mr. Peter Barnes, then an Assistant Director, and delivered to a conference on the prosecution process held at the University of Birmingham in 1975.[18] Perhaps it was the cosy setting that prompted the latter to open his remarks by describing the view of the department probably entertained by the police as being rather like "a sort of voracious Whitehall monster which demands to be fed an unending flow of files and, what is more, sometimes repays all their hard work and kindness by flatly refusing the fare it is offered."[19]

As we have already noted, the police are obligated to submit to the Director of Public Prosecutions full reports, including witness statements and material documents, in all consent cases that require the statutory approval of the Director, the Solicitor General or the Attorney General before criminal proceedings can be commenced.[20] And, in accordance with the Prosecution of Offences Regulations, chief officers of police are also required to provide the Director's office with the same kind of information concerning those categories of offences that are specifically listed in the regulations or which the Director may direct to be the subject of reports to his office because of their individual importance or difficulty.[21] In all, these statutory directives generate some 14,000 cases annually that flow into the Department of Public Prosecutions to be assessed by the relatively small establishment of 53 barristers and 17 solicitors who comprise its full time professional officers.[22]

[17] *Written Evidence of the Director of Public Prosecutions*, December 1978.

[18] *The Prosecution Process*, an edited transcript of the proceedings of a conference held under the auspices of the Institute of Judicial Administration, University of Birmingham, in April 1975. Mr. Barnes' address on "The Office of the Director of Public Prosecutions" and the ensuing discussion is at pp. 22–36 of the *Proceedings*.

[19] *Ibid.* p. 22.

[20] See *ante*, p. 13.

[21] *Ante*, pp. 14–16. An interesting insight into the changing character of the Director's advisory and prosecuting roles was provided in Sir Thomas Hetherington's *Written Evidence* where it was pointed out that, whilst the total number of cases referred to the D.P.P. has increased steadily over the years (see *post*, fn. 22) the actual proportion of cases in which the Director has undertaken the prosecution, either directly or through a local agent, has declined. In 1977, the percentage of cases in which the Director assumed the conduct of the prosecution was 13·55 per cent., or 2130 cases out of the total of 15,724 cases referred to the D.P.P. The current feature emphasised by the D.P.P. was the increasing number of court days required to complete the more complex cases that are earlier processed through the department. "During the last three years at the Central Criminal Court" Hetherington wrote "I have prosecuted 37 cases lasting between 5 and 10 weeks; 17 cases which took 11 to 20 weeks and 3 cases which lasted far more than 20 weeks—one of the latter occupied 135 court days or 27 weeks in all." A not dissimilar trend was evident in the provinces—*op. cit.* pp. 69–70.

[22] A chart showing the professional staff structure as of October 1978 is included as Appendix 8 of the D.P.P.'s *Written Evidence* to the Royal Commission on Criminal Procedure (*ante*, fn. 17). Appendix 13 gives an overall summary of the volume of work

DECISION MAKING IN THE DEPARTMENT OF PUBLIC PROSECUTIONS

At the apex of this organisation, of course, is the Director, with a Deputy Director immediately beneath him.[23] The Department is divided into nine divisions, the responsibility for which is shared between two Principal Assistant Directors. Metropolitan London police cases occupy the attention of two of these divisions, the work of the central office being separated from that of the Metropolitan divisions. Three other divisions take care of police cases that emanate from the rest of England and Wales, which is divided into three parts, east, west and south, for purposes of administrative orderliness and an even distribution of case loads.[24] The remaining divisions are designed to deal with specialised work that has expanded in recent years. One of these, the research division, handles requests for advice from police forces, coroners and magistrates' clerks as well as preparing submissions, for example, to the Law Commission, the Criminal Law Revision Committee, or to the Parliamentary Counsel on points that arise in draft Bills and which impinge upon the Director's functions.[25] Another division, the fraud and bankruptcy division, concerns itself with major company frauds and the Director's responsibilities in connection with the making of criminal bankruptcy orders by the Crown Courts under the provisions of sections 39 to 41 of the Powers of the Criminal Courts Act 1973.[26]

Finally, there are two divisions of the Department of Public Prosecutions entirely devoted to the handling of public complaints of alleged offences committed by police officers. Under section 49(3) of the Police Act 1964[27] complaints made by a member of the public have to be reported to the Director of Public Prosecutions unless the chief officer of police is satisfied that no criminal offence has been committed. The number of such reports has risen steadily since 1964 and shows no sign of diminishing.[28] To gain a true appreciation of the significance of this development, in 1977 (the latest year for which statistics are available) the Director's office received 9068

processed through the department for the years 1950, 1955, 1960, 1965, 1970 and each of the succeeding years to 1977. For a comparison with the number of applications received and prosecuted by the Office of Public Prosecutions between 1895 and 1907, and 1949 and 1961, see Edwards, *Law Officers of the Crown*, p. 387, fn. 77.

[23] The description that follows draws heavily on both Hetherington's *Written Evidence* (*ante*) and Barnes' paper to the University of Birmingham Conference (*ante*, fn. 18).

[24] See Appendix 9 of the Director's *Written Evidence* which shows geographically the distribution of police forces in England and Wales among the respective divisions of the D.P.P.'s office.

[25] The D.P.P.'s role in handling extradition applications, which falls within the assigned responsibilities of the research division, rarely merits attention. Occasionally the foreign government will instruct its own solicitor but that practice is changing and the Director may find himself increasingly representing the foreign state involved or acting as *amicus curiae* in the Divisional Court in habeas corpus applications by the fugitive. *Written Evidence*, *op. cit.*, pp. 63–64.

[26] c. 62.

[27] c. 48.

[28] The relevant statistics for each of the years 1970–77 are usefully collected in Appendix 14 of the D.P.P.'s *Written Evidence*, *op. cit.*

such complaints, which accounted for just over half the department's total intake in terms of numbers of files received from every outside source. Not all of these complaints involved allegations of assaults, corruption of other serious crimes. On the contrary, the bulk of the complaints were concerned with relatively trivial matters such as careless driving and other minor infringements of the traffic laws. This burden on the Director's office is accepted as inevitable[29] and involves a very special category of discretionary power in the area of criminal prosecutions, to which we shall return in due course.

Whatever the assigned responsibilities of each division may be it is headed by an Assistant Director. The remainder of the professional officers, who may be solicitors or barristers, are distributed among the respective divisions according to the volume of work. The important thing to remember is that, by virtue of section 1(5) of the Prosecutions of Offences Act 1908, "an Assistant Director of Public Prosecutions may do any act or thing which the Director of Public Prosecutions is required or authorized to do by or in pursuance of any Act of Parliament or otherwise." Consequently, in any discussion of the decision to prosecute it is necessary to bear in mind that the Director's direct involvement in the assessment of the varying factors involved will be truly exceptional and not the normal course of procedure. Speaking in the course of delivering the Upjohn Memorial Lecture in 1979,[30] the present holder of the office of Director revealed that in the two and a half years during which he had been

[29] According to the present Director, the nature of most of the offences contained in complaints against the police are relatively trivial and are inconsistent with his policy of dealing only with major crime. Nevertheless, he added: " . . . in view of the anxiety of both the police and the public that all cases involving police officers should be considered by an independent body, I can see no viable alternative at the moment to the present practice continuing"—*Written Evidence*, p. 55. Changes, however, appear inevitable following the recommendations contained in the *Fourth Report of the Select Committee on Home Affairs* (H.C. 98–1 (1981–82)). In its considered reply to this report the Government has proposed a new set of police complaints procedures, the net effect of which, if adopted, will be a severe curtailment on the present burdensome involvement of the D.P.P.—see Cmnd. 8681 of 1982 and the comment in [1982] *Public Law* pp. 509–511. Moreover, an increasing body of opinion is being heard to the effect that the responsibilities of the Police Complaints Board are independent of, and not subject to the final disposition of a case by, the Director of Public Prosecutions—see *R.* v. *Police Complaints Board, ex p. Madden*, [1983] 1 W.L.R. 447 *per* McNeill J., who held that the board had wrongly concluded that the Police Act 1976, precluded the institution of criminal proceedings where the D.P.P. has determined not to bring criminal proceedings on the same or similar evidence. After receiving McNeill J.'s ruling, the Board issued a public statement expressing its view that the effect of the judgment in *Madden* is that the conduct of police officers may be subjected to disciplinary proceedings and notwithstanding the Director's view the Board may recommend or direct the preferment of a disciplinary charge on their own evaluation of the evidence—see *The Times*, February 11, 1983. See, too, the well informed discussion paper on "Complaints against the Police" by Professor Sir Roy Marshall (a member of the Complaints Board) prepared for the 1983 Meeting of Commonwealth Law Ministers, especially paras. 52–63.

[30] The Ninth Upjohn Lecture given at King's College, University of London, on November 2, 1979, and subsequently published in (1981) 14 *The Law Teacher* paras. 92. In it, Hetherington essays a biographical portrait and assessment of his predecessors, Sir Archibald Bodkin and Sir Theobald Mathew, and their handling of some of the prominent obscenity cases that occurred during their respective regimes.

in office he had never been required to take any decision on whether to prosecute in a murder case.[31] He added: " . . . in all I have taken the decision to prosecute, or been concerned in consultations with the police and with counsel, in not more than 10 or 12 cases a year—usually when they are exceptionally sensitive because of the subject matter or because of the persons involved."[32] The majority of cases brought to the attention of the Department of Public Prosecutions, either by way of mandatory edict, to obtain the formal consent of the Director or one of the Law Officers, or to be subject to the guiding discretion of the Director, will not proceed beyond the Assistant Director in charge of the appropriate division or the Principal Assistant Director responsible for co-ordinating the cluster of divisions assigned as his mandate within the department.

The fullest description of the actual functioning of the decision-making process in the Department of Public Prosecutions is contained in the address given to the conference on "The Prosecution Process" by Mr. Peter Barnes, presently the Deputy Director of Public Prosecutions.[33] In it, Barnes emphasised the high level at which decisions to prosecute are taken in the office, decisions which, in his words, "should only be taken after a very careful consideration of all the available evidence, quite calmly and in the light of day because a wrong decision either way can have pretty disastrous consequences."[34] He may well have had in mind the handling of the *Confait* case in 1972 and the strong criticisms subsequently levelled against the professional staff in the Department of Public Prosecutions by Sir Henry Fisher, the former High Court judge, who was appointed by the Home Secretary to conduct a public inquiry into the affair.[35] Three youths, aged 18, 15 and 14 years respectively, were convicted in 1972 of the killing of Maxwell Confait, a homosexual prostitute. They were freed three years later after a successful public campaign to prove their innocence. The entire case depended on confessions by the accused in which they admitted having gone to Confait's home for the purpose of stealing. The victim had been strangled and the three accused were said to have sprinkled paraffin about the home in order to destroy any fingerprints they may have left. At the conclusion of the trial, verdicts of murder, manslaughter by reason of diminished responsibility, and arson were returned by the jury. Leave to appeal against conviction was refused by the Court of Appeal but the case

[31] *Ibid.* p. 101.
[32] *Ibid.*
[33] See *ante*, fn. 18.
[34] *Ibid.* p. 26.
[35] *Report of the Inquiry into the circumstances leading to the trial of three persons on charges arising out of the death of Maxwell Confait and the fire at 27 Doggett Road, London S.E.6*—H.C. Paper 90 of 1977. The original trial took place in November 1972. Applications for leave to appeal were refused by the Court of Appeal in July 1973. Following fresh police enquiries instigated by the Home Office the Secretary of State in June 1975 referred the case back to the Court of Appeal under the terms of s.17(1)(*a*) of the Criminal Appeal Act 1968. As a result, the original convictions were quashed and a warrant issued setting up the Fisher Inquiry in November 1975.

was referred back to the court three years later following the emergence of fresh pathological evidence. It informed the court that a substantial amount of time had elapsed between the setting fire to the house and the death of the victim. In direct contradiction to the confessions obtained by the police there was incontestable evidence that the three youths were elsewhere at the time of the fire. The prime suspect for the murder, a transvestite who lived in the same house as Confait, hanged himself in 1974. He gave evidence at the original trial about the time the fire had started.

Evidence adduced before the Fisher inquiry as to the handling of the papers in the *Confait* case indicated that the professional officer concerned in the Department of Public Prosecutions had treated the case as straightforward because of the independent nature of the respective confessions and their having been repeated in the presence of the youths' parents.[36] He was not aware that there had been another suspect. Sir Norman Skelhorn, the then Director of Public Prosecutions, expressed doubts as to whether the discrepancies, revealed later, should have been spotted and regarded as important by the professional officer who first reviewed the file and whose recommendations were adopted by his superiors.[37] This view was rejected in forthright terms by Sir Henry Fisher, the chairman of the departmental inquiry, who concluded: "It seems to me clear that it was [the professional officer's] duty to look for weaknesses or contradictions in the prosecution's case, and to see whether there were matters which should be further enquired into . . . If (as he said) he did not notice anything which required further investigation or specific reference to counsel, then in my view he was at fault, though in extenuation it can be said that he was under great pressure of work. If (as the police say) his attention was drawn to them and he did nothing, then his fault was greater."[38] Before leaving the subject of his inquiry, Sir Henry Fisher turned his attention to the administrative practices then in force in the office of Director of Public Prosecutions. Noting that the Director had not seen fit to criticise his subordinate's handling of the *Confait* case, the chairman of the inquiry concluded that "the experienced and conscientious officer did as much as under prevailing practice was expected of him."[39] Based on this assumption the procedures then in place were condemned as unsatisfactory.[40] The lessons of that case are unlikely to be readily forgotten within the Department of Public Prosecutions.

Describing the present mode of administering the Department, it has been authoritatively explained that under no circumstances can a decision to prosecute be made by anyone below the rank of Assistant Director who, before obtaining that rank, will generally have served in the department

[36] *Op. cit.* p. 213.
[37] *Ibid.* paras. 26.6 and 26.8, p. 216.
[38] *Ibid.* para. 26.7, p. 216.
[39] *Ibid.* para. 26.8, p. 216.
[40] *Ibid.*

for something like 17 years on average.[41] All cases, in the first instance, are sent to the Assistant Director in charge of the particular geographical area where the crime occurred. Short, straightforward cases can be dealt with expeditiously by the Assistant Director reaching a decision himself and communicating at once with the chief constable giving any necessary advice regarding charges and evidence. In all other cases the files will be allocated between the senior legal assistants who constitute the backbone of the division concerned. The individual officer who takes charge of the police file will read the case in greater detail, eventually returning the file to the Assistant Director with a minute summarising the salient facts, identifying any legal or evidential problems and registering his opinion as to the proper disposition of the case. Depending on the seriousness, sensitiveness or difficulties of the case the resolution of the decision to prosecute will be made from among the senior echelons of the office, often after informal discussions that ensure the exercise of all the accumulated experience that is at the disposal of the Director. In addition, if the case is of a highly complex character, either as to its facts or the legal issues involved, the Director may invoke the assistance of counsel. In London, this is likely to be one of the eight senior and ten junior Treasury Counsel who conduct all Crown prosecutions at the Central Criminal Court and the Inner London Crown Courts, or one of the supplementary counsel whose name is on the Attorney General's list drawn from the various circuits.[42] Normally, counsel are not instructed by the Director of Public Prosecutions until after committal for trial but this practice will be departed from if the circumstances warrant it and then the same counsel will likely take charge of the committal proceedings. Resort to the opinion of counsel, in the circumstances described above, means exactly that and no more. It does not entail the transfer of responsibility for making the prosecutorial decision from the Director to Treasury Counsel. As Sir Thomas Hetherington explained to the Royal Commission on Criminal Procedure, in the initial stages of a prosecution brought or taken over by the Director of Public Prosecutions he has complete control. It is entirely for the Director to decide against whom proceedings should be brought and on what charges.[43] Once the case has been committed to the Crown Court, however, as Hetherington went on to elaborate, "the position is not so straightforward, since the view is taken that the final responsibility for the

[41] In recommending a revision of the Prosecution of Offences Regulations 1946, Sir Henry Fisher noted that "the demands made of the Director's professional staff are excessive . . . If the present system is to continue, there can be no assurance that cases like the *Confait* case will not recur if the Director's staff is not increased"—*op. cit.* pp. 30, 207–208. Sir Henry Fisher's disposition to see a greater measure of involvement of the D.P.P.'s staff in supervising the police investigation of those cases which the Director is under a statutory duty to "institute, undertake or carry on" was opposed by Sir Norman Skelhorn, *ibid.* pp. 24–27, 30–31. With reference to the handling of the *Confait* case itself by the professional officer in the D.P.P., see esp. the conclusion reached at p. 216.

[42] Hetherington, *Written Evidence*, *op. cit.* paras. 165–167.

[43] *Ibid.* para. 170, p. 60.

conduct of the trial rests with counsel instructed by me to appear for the Crown. The convention, though, is that where questions of substance arise, for example, the acceptance of a plea to a lesser offence than that charged in the indictment, counsel consults me before arriving at a final decision. It is rare that there is any fundamental disagreement between us, but should such a situation arise, the arrangement is that the matter would be referred to the Attorney General."[44]

SUFFICIENCY OF THE EVIDENCE: THE FIFTY-ONE PER CENT RULE

At whatever level of authority the decision is ultimately taken to prosecute or not to prosecute, the evaluation process involves three separate but inter-related stages. It is possible to compress these exercises into two stages but the position will probably be made clearer if we adhere to the tripartite division of the assessment procedure. How separate the various stages are actually observed in practice may well be open to question, given the years of experience that most of the professional staff can draw upon in reaching their conclusions on the succession of files assigned for their attention.[45] It may be stretching credulity to be asked to believe that each and every such review is conducted with an inflexible adherence to the cycle of analysis that is about to be described. However compressed may be the evaluation of the run of the mill cases that occupy most of the professional officer's time on a regular basis, the following analysis is necessary in order to identify the separate issues that must be resolved in reaching the eventual decision to prosecute or not to prosecute.

The first objective is to ensure that there are no insuperable legal or jurisdictional obstacles that could constitute a fatal flaw to the prosecution of a case. Was the offence, for example, committed outside the jurisdiction of the English courts? Have any pertinent time limits for prosecution already passed? Are there any definitional problems that require compliance and which are deficient in the evidence accumulated by the police? It is possible that some of these deficiencies can be rectified by further police investigation, and advice to this effect will be conveyed by letter or in person to the police force concerned. In the absence of such a possibility it stands to reason that it is pointless to pursue the merits of the case if the essential legal underpinnings are not in place.

The second stage must next be addressed. It is concerned with the issue whether the evidence in the case is sufficient to justify instituting criminal proceedings. The present Director of Public Prosecutions has repeatedly sought to explain to all and sundry the criterion that applies throughout his department, at whatever level of authority the operational decision is made. Different wording has been used on occasion to explain the

[44] *Ibid.*

[45] For a realistic analysis of the relationship between theory and practice in adhering to the successive stages leading up to decision making in individual cases, see Barnes, *op. cit.* pp. 26–32.

governing test, some less felicitous than others, and we can begin by referring to the Director's written submission in 1978 to the Royal Commission on Criminal Procedure in which Hetherington stated: "The test normally used in the Department . . . is whether or not there is a reasonable prospect of a conviction; whether, in other words, it seems rather more likely that there will be a conviction than an acquittal. We set an even higher standard if an acquittal would or might produce unfortunate consequences. For example, if a man who has been convicted of some offence is subsequently acquitted of having given perjured evidence at his trial, that acquittal may cast doubt on the original conviction. Likewise, an unsuccessful prosecution of an allegedly obscene book will, if the trial has attracted publicity, lead to a considerable increase in sales. In such cases we are hesitant to prosecute unless we think the prospects of a conviction are high. We also tend to adopt a somewhat higher standard if the trial is likely to be abnormally long and expensive and the offence is not especially grave."[46]

On another occasion, this time in a memorandum prepared in 1980 for the House of Commons Select Committee on Deaths in Police Custody, the Director of Public Prosecutions confirmed that the standards applied in police complaint cases are the same as those invoked in all other cases reported to the department. The first consideration, the memorandum stated, is "whether the totality of the available evidence is of such quality that a reasonable jury (or magistrate, in respect of summary offences) is more likely than not to be satisfied beyond reasonable doubt that the accused is guilty of the offence charged. If so, the evidence is sufficient to justify proceedings. If it fails that test, we would not consider it proper to prosecute."[47]

In thus delineating the standard of sufficiency the Director of Public Prosecutions was very conscious of the contrary school of thought that maintains it is incumbent upon the Crown to prosecute whenever there is a "bare prima facie case" and that to raise the minimum standard any higher is to "usurp the proper function of the courts."[48] According to this view, in the absence of unassailable evidence that the prospective Crown witnesses are lying, it is not the function of the prosecutor to decide whether he believes a witness or not. Where the question is whether the prosecution's evidence is likely to be believed, it is argued, this is strictly a matter for the jury (or the magistrate in summary cases) and not the Director to decide.

[46] *Written Evidence, op. cit.* p. 33, paras. 92–94. The criterion "whether or not there is a reasonable *prospect* of conviction," repeatedly referred to by Hetherington in his public utterances should be compared with the formula "a reasonable *certainty* of conviction" used by his predecessor as the D.P.P., Sir Norman Skelhorn (*ante*, fn. 9) at p. 35. In his memoirs, *Public Prosecutor* (1982), Skelhorn describes the acid test, used during his period as D.P.P., to be "whether on the evidence before us, if that evidence stood up in court and was not eroded, there was in our considered opinion a likelihood that a conviction would result," *ibid.* p. 70 but *cf.* his formulation on p. 71.

[47] H.C. Paper 401—iii, February 14, 1980, see p. 27.

[48] *Written Evidence, op. cit.* p. 34, para. 95.

Hetherington's response to this argument is an outright rejection of its underlying thesis. The resolution of the sufficiency of evidence test, in the opinion of the present Director of Public Prosecutions, requires that proper attention be paid to the credibility of the witnesses since "the universal adoption of a prima facie case standard would not only clog up our already overburdened courts but inevitably result in an undue proportion of innocent men facing criminal charges."[49]

The elucidation of the key passages in the above extracts from the Director's written submissions, *viz.* "the reasonable prospect of a conviction" and it is "more likely that there will be a conviction than an acquittal" resemble the difficulties in giving realistic meaning to the task imposed upon examining justices in deciding whether there is "sufficient evidence" to warrant committing the accused for trial,[50] and upon a trial judge when explaining to a jury the standard of "proof beyond a reasonable doubt" in a criminal case,[51] or in deciding whether the evidence is sufficient to justify him in withdrawing the case from the jury and which is determined according to "whether or not there is any evidence upon which a reasonable jury properly instructed could return a verdict of guilty."[52] It is not my intention to venture into a comparative analysis of the respective meanings accorded by the appellate courts to the various criteria mentioned above. These comparable situations are introduced in order to draw attention to the difficulties experienced in applying such nebulous standards, and the additional problem encountered by the Director in explaining to the general public how he and his staff approach the task of defining "sufficiency of evidence." In a no doubt sincere attempt to elucidate this piece of legalise, Hetherington has acquired for himself the immortal title of "Mr. Fifty-one per cent.," a reference to his resort to mathematical percentages as a vehicle for simplifying the

[49] *Ibid.* and see the exchange of views on this question with the Director defending his position before the Select Committee on Home Affairs, (*ante*, fn.4), p. 35.

[50] The Magistrates' Courts Act 1952 (15 & 16 Geo. 6 & 1 Eliz. 2, c.56) s.7(1), and *Archbold*, (41st ed.), para. 4–193, afford little assistance in interpreting the "sufficiency of evidence" test, stating only that the function of the committal proceedings is "to ensure that no one shall stand trial unless a prima facie case has been made out." And see *R.* v. *Epping & Harlow Justices, ex p. Massaro* [1973] Crim. L.R. 109. In interpreting a similar provision in the Criminal Code, s.475, the Supreme Court of Canada (in *U.S.A.* v. *Sheppard* [1977] S.C.R. 1077) has declared (by a majority) that "sufficiency of evidence" to warrant committal for trial bears the same meaning as that accorded the same formula when deciding whether to withdraw the case from the jury, *viz.*, "whether or not there is any evidence upon which a reasonable jury properly instructed could return a verdict of guilty."

[51] The leading authorities are reviewed in *Cross on Evidence*, (5th ed. 1979) pp. 110–115, according to which the *locus classicus* remains the judgment of Denning J., in *Miller* v. *Minister of Pensions* [1947] 2 All E.R. 372 at pp. 373–374. See, too *Archbold, Criminal Pleading, Practice and Procedure*, (41st ed., 1979), para. 4–426.

[52] The decision to uphold or reject a submission of no case to answer does not depend on whether the adjudicating tribunal (if compelled to do so) would at that stage convict or acquit—Practice Note issued by the Divisional Court, [1962] 1 All E.R. 448; and see *R.* v. *Mansfield* [1977] 1 W.L.R. 1102.

governing criterion.[53] Formulated in these terms the question to be asked in contemplating a prosecution is this—is there a better than 50 per cent. chance that a jury will find the accused guilty on the evidence that the prosecution are in a position to present? Hetherington's words of caution, uttered in another public lecture, that it is not possible to evaluate to a percentage degree of accuracy have been lost sight of in the public's preference for simple, uncomplicated metaphors.[54] Talk of cases falling within the marginal 49 to 51 per cent. category are equally unhelpful because of the false conception implicit in such language that the prosecutor's decision-making bears the stamp of scientific objectivity. Nothing could be more misleading insomuch as it obscures the reality of the situation. An experienced Assistant Director disclaimed any ability on his part to offer a neat yardstick as to how to assess the prospects of a conviction or an acquittal. "All I can say" he frankly admitted "is that we do our best to call upon the experience that we have accumulated over the years, and that in itself is a strong reason for the high level at which our decisions are taken."[55] The truth of the matter lies closer to recognising the subjective nature of the prosecutorial decision in individual cases, it being at least likely that something less than identical answers would be forthcoming if the same set of files were to be given to a sample of, say, 20 or 50 professional officers all working in the same Department of Public Prosecutions.[56] With the restriction of the actual decision-making to the small coterie of senior staff of Assistant Directors and above, vagaries of subjectivity are probably kept to a minimum.

A special consideration that we should look at is the weight attached to an earlier police decision to charge, before the papers in the case have been submitted to the Director's office. This election by the police to go ahead may be necessary, for example, where there are substantial grounds for believing that the accused will leave the country, interfere with witnesses or commit further crimes. In these circumstances it is understandable that the police should wish not only to charge the suspected person but to strongly oppose bail. Other situations, however, arise when the Director's consent is refused on policy grounds notwithstanding the existence of ample evidence to support a prosecution, and it is obviously preferable if the issue of consent is first determined before a formal charge is laid by the police. Pre-emptive action of this kind by the police, it has been readily acknowledged, exerts pressure upon the Director of Public Prosecutions and his staff in sustaining the objective of a dispassionate decision.[57] It is

[53] See, *e.g.* the headline in the *Sunday Times*, January 27, 1980, which compounds the difficulties by dubbing the present Director as "Mr. Fifty per cent." Hetherington himself refers to "the 50 per cent rule" in his address to the Media Society, *ante*, fn. 12.

[54] *Op. cit.* Media Society address, at pp. 7–8.

[55] Barnes, *op. cit.* p. 27.

[56] The likelihood of such an outcome was readily acknowledged by the Deputy D.P.P. in the course of my discussion with him in his office on July 7, 1980.

[57] Barnes, *op. cit.* pp. 25–26.

also understandable that a team of detectives who have worked laboriously and conscientiously for an extended period in solving a case should feel an acute sense of having been let down by the Director if approval to the bringing of criminal proceedings is not forthcoming. The police may be firmly convinced of the guilt of the suspect, but if the evidence is insufficient in terms of the probability of a conviction the policy of the Department of Public Prosecutions, as stated by its Director, is to oppose the initiation of a prosecution.[58] Any substantiated indications that the Director of Public Prosecutions and the staff of the Department are prone to succumb to police pressures in making their decisions instead of adhering to the principle of fearless impartiality would surely contribute to the erosion of public confidence. It may be assumed that nowhere is this fact better appreciated than in the office of the Director of Public Prosecutions itself.

AN EVALUATION OF SOME RECENT CONTROVERSIAL DECISIONS

Criticisms of particular decisions made by the Director have usually centred around cases that have already attracted public attention, in which cultural or political prejudices are readily given rein. In the early years of the office of Public Prosecutions the practice of the Director was to defer a public response to criticisms of his decisions until he prepared his annual report for Parliament.[59] This avenue for defending the Department's actions has long since disappeared[60] and it is doubtful whether, in present day conditions of accelerated communication, public opinion would be satisfied to await a yearly accounting of the Director's work. What is evident is the readiness of Sir Thomas Hetherington to defend his record after the event by whatever media resources are placed at his disposal.

Some of the more notorious cases in recent times have centred on the narrow question of the sufficiency of evidence. In the *Blair Peach* case in 1979, for example, one of several situations where a suspect has died in police custody in suspicious circumstances, Hetherington has admitted that the reason why there was no prosecution against any particular officer is that it was impossible to tell which of any policemen committed the crime. In an interview with *The Times*,[61] and referring expressly to the *Blair Peach* case, the Director stated: "I am not absolutely certain that he was hit on the head by a police officer, but I think it is probable that he was. There was no evidence as to which one, literally no evidence, and no evidence really as to what the weapon was, except that it was a blunt

[58] One qualification to this policy is the reluctance of the D.P.P.'s office to turn around a police decision to charge, unless the evidence is totally without substance. If there is some evidence to support the original police charge, the tendency is to let the lower court make the decision not to commit for trial by "soft pedalling" the evidence in support of the prosecution's case. *Per* the Deputy D.P.P. in discussion with the author, July 7, 1980.

[59] Edwards, *Law Officers of the Crown*, pp. 377–387.

[60] *Ibid.* p. 386.

[61] *The Times*, May 11, 1981.

instrument. We don't have the evidence. What they did in fact was to remain silent, which they are entitled to do."[62] This unusually frank disclosure of the thinking that contributed to the decision not to prosecute in that case should not be extended by inference to the 26 other cases involving complaints against a police officer or police officers that resulted from deaths in suspicious circumstances over a period of 10 years between 1970 and 1979.[63] According to figures published by the Home Office in February 1980, a total of 274 people had died while in the custody of the police during the same period.[64] 48 deaths, the highest total in any single year, occurred in 1978 during which the number of persons taken into custody was 1·25 million. The disparity in the respective totals mystified many people at the time, including the members of the House of Commons Select Committee. The explanation for the lower figure is that these cases represent those where a public complaint was registered and where the particular chief constable felt it incumbent upon him to submit the papers to the Director of Public Prosecutions under the test laid down in section 49 of the Police Act 1964.[65] The remainder would be cases in which either no complaint was received or the chief officer of the police was satisfied that no criminal offence could have been committed. Furthermore, the suspicious circumstances surrounding the deaths were not necessarily confined to deaths that took place while the victim was "in police custody," a phrase that can encompass a variety of situations ranging from an arrest in the home or on the street to the actual detention of the person concerned in a police station or in a hospital.

Prominent among the cases generally referred to as having given rise to widespread public concern, in addition to *Blair Peach*, are those of *James Kelly* (1979) and *Liddle Towers* (1976), who died after release from custody. The continuous attention devoted to these cases in the press[66] and in Parliament was reinforced by the remarkable fact that, arising out of the 26 situations in which the deceased allegedly died at the hands of the

[62] *Ibid.*

[63] This is the figure adhered to by the D.P.P. in the course of his evidence before the Home Affairs Committee—see *Report*, February 14, 1980, H.C. 401-iii. A breakdown of the 26 cases where the deceased allegedly died at the hands of the police or as a result of action taken by the police formed part of the Director's written memorandum to the Committee. Annex I (p. 29) analyses the statistics according to the attributed cause of death (7 being due to natural causes, 4 to misadventure, 4 to suicide, 2 to accidental death, 2 to lawful killing—the remainder are classified as no inquest, inquest adjourned or no known cause). Annex II (p. 30) indicates that 11 of the deaths took place in hospital, 5 while the deceased was in police custody, 7 as having taken place "elsewhere," and 3 "not known."

[64] *Justice of the Peace*, February 23, 1980, pp. 111–112. At first, the Home Office refused to disclose the names of the deceased "because of the disproportionate cost involved" (*The Times*, January 7, 1980), but later provided the relevant information (*The Times*, January 14, 1980).

[65] *Minutes of Evidence* of the Home Affairs Committee, H.C. Paper 401-iii, at p. 31. For a further elaboration of the responsibilities defined in section 49 see *post*, p. 419.

[66] See, *e.g. The Times* editorial, January 14, 1980; the *Sunday Times*, January 6, 1980 (reporting the call by Sir Harold Wilson for a public inquiry into the death of James Kelly in a police cell).

police, in different parts of the country, not one prosecution had been instituted by the Director of Public Prosecutions. Questioned on this subject by the members of the House of Commons Select Committee, the Director stated that in each of the 26 cases the decision not to prosecute was based on the failure to surmount the first hurdle of meeting the sufficiency of evidence test.[67] Sir Thomas Hetherington disclosed that he had personally considered 3 of the 26 deaths, presumably the most controversial cases, and that he had been fully satisfied in each case that there was no further witness that needed to be interrogated and that no further inquiries needed to be undertaken.[68] In some of the cases the papers had been referred to outside counsel whose conclusions were the same as those eventually reached by the Director.[69] Experience and statistics alike, however, confirm the fact that it is only in the very strongest of cases that a jury will convict a police officer of assault. The same pattern of a very high rate of police acquittals exists with respect to all types of indictable offences. Thus the overall acquittal rate in cases brought against police officers is 59 per cent. compared with a national rate in trials on indictment against other citizens of about 17 per cent.[70] Like it or not, juries appear to view with a high degree of scepticism the testimony of prosecution witnesses who have a criminal record or whose background casts a shadow on their degree of credibility. Another statistic which requires some explanation is the remarkably low figure of cases, involving complaints of assault by the police, in which the Director has initiated prosecution of the police officer(s) concerned. In 1979, for example, which is the last full year for which results are available, the percentage of assault cases prosecuted was slightly in excess of 2 per cent.[71] A partial explanation for this state of affairs is the demonstrated tendency on the part of chief constables, anxious to avoid public criticism that they have sought to protect their own, to send forward for the Director's consideration cases that do not have the semblance of sufficient evidence to support a prosecution.[72] Many of the circumstances involve nothing more than

[67] *Ante*, fn. 65, p. 31, Q. 152. To the chairman's supplementary question "So in these [26] cases of death in custody which you were considering, you do not think that the public interest criterion came into it all?" the D.P.P. answered "No, we never got to that stage" (*ibid.* p. 32).

[68] *Ibid.* p. 33, Q. 164.

[69] *Ibid.*

[70] Barnes, *op. cit.* p. 27.

[71] *Per* the D.P.P. in the course of an interview with the *Daily Telegraph*, February 15, 1982. This represents an average of 47 prosecutions out of an annual total of 2,600 assault complaints.

[72] See *Written Evidence*, *op. cit.* p. 54. Referring to the Police Act 1964, s.49(3) of which requires that complaints made by a member of the public have to be reported to the D.P.P. unless the chief officer is "satisfied that no criminal offence has been committed," Hetherington commented: "In practice almost every chief officer is extremely anxious to divest himself of responsibility for deciding whether one of his officers should be prosecuted, however trivial the allegation, so that there can be no suspicion of improper bias. Hence they normally report all cases involving an officer even if the evidence is virtually non-existent and regardless of whether the complaint has been made by a member of the public"—*loc. cit.*

technical assaults. Even so the perception of different standards being applied is not such that it can be dismissed and there will be a constant need to explain the Director's policies in this regard.

Adherence to the same strict standards as to the quantum of evidence necessary to justify prosecution is confirmed by the attitude of the Director of Public Prosecutions in the *Cowley Shop Stewards* case in 1966, several years before the formulation of Hetherington's "51 per cent. rule." Questions were asked in the House of Commons as to why criminal proceedings had not been brought against the stewards who had admittedly conducted a "kangaroo court" and expelled several workers for not taking part in an official strike.[73] Quintin Hogg (as he then was) had earlier accused the Attorney General of failing to prosecute for improper motives[74] and Randolph Churchill had trotted out the ghosts of the Campbell affair in 1924 as a warning of the fate that might befall the Government because of the Attorney General's decision not to prosecute.[75] Sir Elwyn Jones, the then Attorney, explained that he had been consulted by the Director but that there was insufficient evidence to justify proceeding against any identified individual.[76] Confirmation of this wholly non-political explanation for the decision became available years later when Mr. Peter Barnes in his Birmingham address, referring to circumstances that seem to match the Cowley case in 1966, stated: "We eventually managed to satisfy him that that the evidence really was insufficient but I was left with no doubt whatsoever that the Attorney General was anxious that there should be a prosecution if possible, although I had equally no doubt that such a prosecution would have been embarrassing to his Government from the political point of view."[77]

The failure to institute major prosecutions arising out of the revelations contained in the Bingham report to the alleged violations of the Rhodesia Oil Sanctions orders has already been addressed in an earlier chapter.[78] In the present context it is only necessary to remind ourselves of the explanation proferred by the Director of Public Prosecutions in defence of the decision not to launch criminal proceedings against the international companies involved in circumventing the statutory prohibitions. According to Sir Thomas Hetherington the true explanation lay in the inability of the Crown to satisfy the 51 per cent. standard.[79] The Director had sought the advice of outside counsel, Mr. Michael Sherrard Q.C., who concluded that, whatever the Bingham report may have revealed about political and economic realities, the evidence it contained would not alone justify a

[73] H.C. Deb., Vol. 727, Oral Answers, April 27 and May 18, 1966.
[74] *Sunday Express*, March 13, 1966.
[75] *Evening Standard*, March 16, 1966.
[76] *Ante*, fn. 73.
[77] Barnes, *op. cit.* p. 32.
[78] *Ante*, pp. 325–333.
[79] The *Sunday Times*, January 13, 1980. As illustrative of the evidentiary obstacles to a successful prosecution the Director disclosed: "We do not even have the documents to prove that oil was carried from Mozambique to Rhodesia."

prosecution.[80] An investigation in search of the necessary evidence would have taken several years, involving uncooperative witnesses who were outside the purview of the British courts' jurisdiction. Even then, in Hetherington's judgment, there was insufficient likelihood of obtaining convictions. As with other high profile cases, it is often difficult to separate convincingly the evidentiary reasons for a negative decision as to prosecution and those other public interest considerations that tend to loom large in the decision-making process.

There are, of course, numerous instances in which the go-ahead signal is given by the Director of Public Prosecutions and the outcome is a spectacular failure, when judged in the narrowest terms of a conviction against an acquittal. The *Jeremy Thorpe* case will often come to mind in this kind of comparison,[81] demonstrating as it does the unpredictability of juries or, if it is preferred, the fallibility of the judgments reached in the calm atmosphere of the Department of Public Prosecutions. Asked about the outcome of the Thorpe prosecution, Hetherington rejected any feeling of embarrassment and instead gave the verdict a sense of perspective by declaring that it would be stored away as evidence to guide his instinct when similar facts present themselves again for assessment.[82] Asked whether given another chance he might have prosecuted on different charges, Hetherington insisted that the charges of conspiracy to murder were absolutely right on the evidence before him.[83] More recently, speaking publicly on the legal dilemma concerning well-meaning doctors who deliberately accelerate the death of a patient, Sir Thomas Hetherington described as "his most difficult prosecutorial decision" the institution of a murder charge in 1981 against *Dr. Leonard Arthur*, a consultant paediatrician of unimpeachable reputation, who admitted to taking steps to hasten the death of a baby suffering from Down's syndrome.[84] The child died after only 69 hours of life. It had been rejected by its natural parents and the prosecution maintained that the accused had thought it more humane and more in keeping with informed medical opinion to let the mongoloid baby die. In consequence of the parents' rejection Dr. Arthur ordered nursing care only and prescribed the drug dihydrocodeine to relieve distress. Other effects of the drug are a suppressed appetite and impaired breathing. Evidence from other leading paediatricians confirmed that Dr. Arthur had acted within accepted medical limits. Following the

[80] See *ante*, pp.328–329.

[81] See also *ante*, pp. 52–57 for the respective roles played by the D.P.P. and the Attorney General in reaching the decision to proceed with the prosecution in the *Thorpe* case.

[82] The *Sunday Times*, January 13, 1980.

[83] *Daily Mirror*, November 1, 1979. In the course of the same interview Hetherington stated: "I thought there would be a conviction but I was wrong. Having decided that I thought there would be a conviction, I then had to consider whether it was in the public interest to go ahead. I had no doubt at all that it would be in the public interest. It would have been quite wrong to have covered it up. I still think I was right about that."

[84] *Daily Telegraph*, February 15, 1982. For the related contempt proceedings against the *Daily Mail*, arising out of the *Arthur* case, see *Att. Gen.* v. *English* [1982] 2 W.L.R. 959.

cross examination of the Home Office consultant pathologist, who had performed the post mortem on the child and whose findings were subsequently reversed by the same witness, the murder charge was withdrawn from the jury's consideration. The jury later acquitted the accused of the remaining charge of attempted murder. Speaking to the press several months later after the high emotions of the highly publicised trial had died down, the Director of Public Prosecutions stated that if the prosecution had known in advance of the expert medical evidence to be produced by the defence "it might have changed the whole course of the trial. We might not have charged murder in the first place." The uncertainties of the criminal law, Hetherington maintained, had left no scope in which to bring another charge other than murder.[85]

The *Bristol Riot* case, on the other hand, in retrospect appears to have been a genuine error of judgment on the part of the Director and he candidly admitted as much after the original trial which produced eight acquittals and four jury disagreements.[86] In a charge of riotous assembly, the legal requirement of establishing a common purpose among the various defendants illustrates the importance of the very first stage in the process leading a decision to prosecute. As it transpired, the fatal defect in the prosecution's case was not recognised in the initial evaluation of the evidence. The jury's verdict at the original trial demonstrated the danger of re-indicting those accused with respect to whom there had been jury disagreements. So it came as no great surprise to learn that, after consultations between the Attorney General, the Director of Public Prosecutions, Crown counsel and the chief constable of Avon and Somerset it was agreed that it was not in the public interest to proceed with a second trial of the four defendants in respect of whom the jury had failed to agree upon a verdict.[87]

[85] *Loc. cit.* Hetherington also issued a warning to the medical profession that, unless and until a legal solution is found to the problem of a doctor who eases the pain and suffering of a terminal patient, "if there is clear evidence that a doctor has deliberately ended the life of a baby, then because of the position of the law as it stands, we shall certainly have to consider whether the public interest requires a prosecution"—*loc. cit.* It seems likely that the D.P.P. had in mind the public statement attributed to the secretary of the British Medical Association, immediately following the acquittal in the *Arthur* case, who had stated: "I hope that the D.P.P. will now realise that it is not appropriate to bring criminal proceedings against eminent and distinguished paediatricians." There can be no doubt, however, as to the correctness of the D.P.P.'s position under the existing law, the classic statement being that of Devlin J.'s direction to the jury in the *Bodkin Adams* case: *The Times*, April 9, 1957; [1957] Crim. L.R. 365. See, too, the D.P.P.'s recent decision to authorise a charge of attempted murder of an aborted baby against the senior consultant gynaecologist of a hospital—*The Times*, July 1, 1983.

[86] Speaking on the BBC Radio 4 programme *The World This Weekend*, April 19, 1981 and reported in *The Times*, April 20, 1981. Hetherington re-affirmed the same sentiments in his extended interview with the present editor of *The Times*, May 11, 1981, emphasising the significance of the judgment expressed by the local chief constable as to the likely repercussions of a further trial being instituted.

[87] *The Times*, April 7, 1981 and see H.C. Deb., Oral Answers, April 16, 1981, p. 262.

THE BOUNDARIES OF RELEVANT PUBLIC POLICY FACTORS

We turn next to the final stage in the process leading up to the ultimate determination whether to prosecute or not. That decision, it should be emphasised, is not sufficiently explained in terms of answering "Yes" or "No" to the question of prosecution. The decision may involve a choice between the following alternative dispositions: (a) to prosecute if no charge has yet been preferred by the police or other governmental authority; (b) to proceed with any charge(s) already laid; (c) to reduce (or increase) the offence already charged; (d) to charge any other person with the offence; (e) to ask the police to make further inquiries; (f) to discontinue further police investigations in favour of the decision not to prosecute for any offence. Having decided that the evidence is sufficient to justify criminal proceedings, the Director and his senior colleagues must then go on to consider whether the provable facts and the whole of the surrounding circumstances are such that it is incumbent upon them, in the public interest, to institute a prosecution and with respect to what offence(s). This final decision is, without doubt, the most difficult of all since it involves a subjective attempt to determine what course of action will best reflect the interests of the community as a whole. No ready made yardsticks are available to solve the myriad circumstances recorded in the files submitted to the Director for his decisions. What is apt to be misleading is the impression conveyed in Sir Thomas Hetherington's written submission to the Phillips Commission and repeated in his public statements explaining how the department functions. The description of the process as an orderly sequence of cumulative judgments, each separated from the other but each requiring an affirmative resolution in order to achieve the final judgment, ignores the impact that public interest considerations are bound to make in borderline cases. Rigid adherence to the separation of the evidentiary and public interest questions is a standard incapable of fulfilment and it is unhelpful to exaggerate the exclusive nature of the separate exercises.

The boundaries of public policy factors that can properly be taken into account when making prosecutorial decisions are slowly becoming identified. This is a positive contribution towards public understanding and support for the substantial element of discretion that is involved in every such decision.[88] Several of these factors are relatively non-contentious and can be described as exculpatory or mitigating in their possible impact. Staleness of the crime will likely influence the Director's eventual decision, it being stated that there is much hesitation to prosecute if three or more

[88] One of the recommendations of the Royal Commission on Criminal Procedure (see *Report*, *op. cit.* pp. 173–175, 188) urged the preparation of a statement setting forth the appropriate criteria that should govern the decision whether or not to prosecute. Action to this end has produced a document entitled "Criteria for Prosecution" which, bearing the seal of authority of the Attorney General, has been distributed to prosecuting solicitors and police forces for their guidance—see *ante*, p. 112, fn. 27.

years have lapsed between the date of the offence and the probable date of trial.[89] The gravity of the offence will naturally diminish the significance of the element of staleness and the same applies if the complexity of the case explains the prolonged police enquiries. A similar response will likely occur if the accused has contributed to the staleness by disappearing or covering his tracks. Lack of diligence on the part of the police, on the other hand, will tend to enhance the relevance of the time interval.[90]

The youthfulness or advanced age of the accused will have to be taken into consideration in appropriate cases. In sexual cases, for example, high regard for the respective ages of the persons involved is generally regarded as a proper balancing of the values at stake. The consenting nature of the victim's participation and the issue of corruption will also bear heavily on the way in which discretion is exercised.[91] In other cases, the younger the offender the greater must be the inclination to examine alternative possibilities such as a caution if the accused has no previous blemishes and, in addition, has a good home background and employment record. Against these positive qualities must be set the seriousness of the crime and the extent to which it has aroused public concern. With respect to a defendant who is of advanced age there must always be concern as to whether he is likely to be fit enough to stand trial. Apart from such a practical matter, there is general reluctance to prosecute anyone who has passed his seventieth birthday and is infirm, unless there is a real possibility that the offence will be repeated or, of course, that the offence is of such a grave character that a prosecution cannot be avoided.[92]

Caution is called for when the mental condition of the accused is brought into the discussions preceding the decision to prosecute.[93] Its relevance during court proceedings is unquestioned and the court has broad powers to authorise psychiatric examinations if called for in the particular case. No one can doubt either the importance of evidence of mental illness to the issue of criminal responsibility. What we are presently concerned with is the possible impact that evidence of mental instability should have in avoiding the subjection of the accused to a criminal trial. The initiative in this regard will usually come from the defendant's solicitor who may point to the dangers of a permanent worsening of his client's condition if the prosecution goes ahead. The possible spurious nature of any such claim can be met in part by ensuring an independent examination of the defendant's mental condition. The healthy scepticism that prevails in the Director's office in such matters is perhaps best captured in the view expressed by Mr. Peter Barnes that: "On the one hand it is somewhat distasteful to

[89] See the D.P.P.'s *Written Evidence*, *op. cit.* p. 38 and Barnes, *op. cit.* p. 29.
[90] *Ibid.* The same reaction is to be expected if there has been dilatoriness "on the part of those who have some sort of moral responsibility for reporting the matter to the police in the first place."
[91] *Written Evidence*, *op. cit.* pp. 38, 40–41, and Barnes *op. cit.* pp. 29–30.
[92] *Written Evidence*, *op. cit.* p. 39 and Barnes, *op. cit.* p. 29.
[93] *Written Evidence*, *op. cit.* pp. 39–40.

prosecute someone who is mentally subnormal but on the other hand that very subnormality or abnormality may itself increase the risk of an offence being repeated and so it may be necessary for us to prosecute in the hope that this may result in some form of effective treatment."[94]

Perjury is an offence that the public might be forgiven for believing that it has become as much of a dead letter crime as, say, bigamy. In his evidence to the Royal Commission on Criminal Procedure, the Director of Public Prosecutions acknowledged that experience has shown that the modern tendency is for the judges to impose no more than a nominal penalty in cases of bigamy unless there are exceptional or aggravated circumstances. Faced with this reality very few prosecutions for bigamy are nowadays approved, the normal advice being to issue a caution against any repetition of the offence.[95] With perjury, on the other hand, a far more serious view is taken of the crime and it is pertinent to note the principles that guide the Director in his approach to such cases.[96] A clear distinction is drawn between alleged perjury by a witness and that sought to be laid at the door of the accused. In the case of the former, assuming there is sufficient corroboration as required by the Perjury Act 1911 and a reasonable prospect of a conviction, the Director's office will sanction a prosecution if the perjured evidence goes to the heart of the issue before the original trial. On the contrary, should the evidence, whilst technically in breach of the Act, relate to a peripheral issue and the intent of the witness is more to protect his own skin than to prevent the course of justice, then it is most likely that a prosecution will be approved.

The position of a defendant who commits perjury is seen in a different light, especially if his effort is unsuccessful and a conviction has been registered in the case. In these circumstances, the Director's submission to the Commission stated: " . . . it is necessary to have regard to the punishment inflicted by the court and to assess whether a subsequent prosecution for perjury would be likely to result in any substantial increase of the sentence. It is also essential that the evidence should be so exceptionally strong that a conviction is virtually certain, because of the doubts which an acquittal would cast upon the verdict of guilty in the original case. Usually, although not necessarily, it is the emergence of some additional and compelling evidence, after the original trial, which removes the last trace of doubt. Even, however, where there is abundant evidence against a defendant who has unsuccessfully lied without involving others, I would not normally think it right to prosecute unless there are aggravating factors."[97] The imperative obligation to balance subordinate considerations one against the other is well illustrated in the further observation that the Director's office "will consider whether the lies

[94] Barnes, *op. cit.* p. 30.
[95] *Written Evidence*, *op. cit.* p. 43.
[96] *Ibid.* pp. 41–42.
[97] *Ibid.* p. 42, paras. 121–122.

necessary involved an attack on the truthfulness (as opposed to recollection or ability to identify) of one or more prosecution witnesses; whether the lie was clearly planned before the hearing or arose on the spur of the moment during cross-examination; and the degree of persistence in maintaining the lie."[98]

This kind of analysis of the conflicting considerations that must be taken into account when contemplating possible proceedings for perjury highlights the impracticality of ever laying down hard and fast rules that will confer a high degree of predictability as to the result of their application. The very nature of discretionary authority requires resistance to any attempt to develop rigid rules that cannot encompass every possible contingency. Take another factor, that of public expense in maintaining a long drawn out trial. Any suggestion of imposing upon the police or the Director of Public Prosecutions a predetermined ceiling as to the costs that can be incurred in connection with different categories of prosecutions would be abhorrent to the principles of justice and law enforcement. At the same time, lack of any restraint in the face of predictable major expenditures in bringing accused persons to trial would likewise be regarded as irresponsible. Hence the careful balancing of costs against the purposes to be achieved through prosecution that must occupy the minds of the decision-makers in the office of Public Prosecutions when the magnitude of the bill to be paid out of the public purse cannot be ignored.[99]

As one illustration of this unusual factor reference can be made to the crop of potential defendants enmeshed in the *Poulson* affair.[1] By mid-1974 the list of candidates for investigation and possible prosecution for corruption numbered around 300, most of whom were individuals in subordinate positions whose involvement was relatively trivial. In the event only the leading figures in the conspiracy were brought to trial. Commenting on the decision to single out the principal conspirators in this fashion, Sir Thomas Hetherington has stated; "It is not necessarily in the public interest to prosecute every minnow connected with an offence, provided the whales are tried . . . In the Poulson case . . . after the prosecution of John Poulson, Dan Smith, George Cunningham and other public servants there were still a number of leads which had not been investigated fully . . . They were retired, old, and a lot more money would have to be spent. Was it really in the public interest to go ahead?"[2] The Director of Public Prosecutions has frequently found himself the target of public criticism as a result of his authorising prosecutions that have involved enormous public costs and resulted in the acquittal of the accused. The implication, whether intended by the critics or not, is that it is

[98] *Ibid.* p. 42, para. 123.
[99] Barnes, *op. cit.* p. 30. The D.P.P. made no reference to the public expense factor in his written submission to the Royal Commission.
[1] See *ante*, pp. 81–85.
[2] *The Times*, May 11, 1981.

acceptable to proceed if convictions are obtained, otherwise the ends do not justify the costs incurred. This is asking the impossible of the Director of Public Prosecutions and it is doubtful if there has been any serious criticism of the Director's judgment by those whose responsibility it is in government to guard against the extravagant use of public money.

Another amorphous factor that is difficult to pin down relates to the attitude of those who, directly or indirectly, can be said to have a special stake in the outcome of a prosecution. Mention has already been made of the indefinable relationship that occurs between the professional officers who have been in charge of the case up to the point where the papers are transmitted to the Director for decision. The imperceptible pressures engendered by this relationship cannot be dismissed, a senior member of the Director's office going so far as to acknowledge the Department is reluctant to turn around a police decision to charge, unless the evidence is totally without substance.[3] If there is some evidence to support the original police charge the tendency is to let the court make the decision not to commit for trial by soft-pedalling the evidence in support of the charge. The attitude of victims and complainants may not exert as powerful an influence, there always being the possibility that the accusation was made in the heat of the moment or as the last straw in a relationship that has been simmering in intensity for some time. A change of heart on the part of the complainant, be it a person (in a case of assault) or a company (in a case of fraud) will be assessed in the light of the seriousness of the offence and the harm inflicted, as well as exploring any suspicion that the withdrawal was actuated by fear.[4] Then there is the current mood of the local community, which may have given expression to its concerns as to the prevalence of the offence in its area, or as in the *Bristol Riot* case where the views expressed by the chief constable of Avon and Somerset as to the detrimental effects which a new trial would have on racial harmony in the city appears to have been a powerful factor in persuading the Attorney General and the Director not to pursue charges against the remaining four defendants.[5]

There remains the sensitive aspect of the position occupied in society by the defendant, and his or her previous character. At times, it may be difficult to separate these variables and it may even be more of a challenge to demonstrate that equality before the law has been adhered to in the decision to prosecute or not to prosecute, as the case may be. The circumstances surrounding the handling of the prosecution of *Jeremy Thorpe*, and in particular the transfer by the Attorney General to the Director of Public Prosecutions of responsibility for making the decision in that case, have already been examined in detail in this work.[6] Apropos our

[3] *Per* the Deputy Director of Public Prosecutions in the course of my talk with him in his office on July 7, 1980; and see, too, Barnes, *op. cit.* pp. 25–26, expressing much the same views in relation to circumstances where the Director's consent is a pre-requisite to launching a prosecution.

[4] *Written Evidence*, *op. cit.* p. 43.

[5] *Ante*, p. 422.

[6] *Ante*, pp. 52–57.

present concern, it can readily be imagined that Sir Thomas Hetherington was acutely conscious of the public position occupied by the suspect, and at the same time sensitive to the enormity of the charge of conspiracy to murder and the penalty for such a crime. Questioned by *The Times* representatives in the course of a wide ranging interview on the Director's handling of prominent cases during his tenure of office, Hetherington was asked what his response would have been if Mr. Silkin had instructed him not to prosecute Jeremy Thorpe. The Attorney's instruction, the Director replied, would have been "most unconstitutional."[7] In the event of his proving unsuccessful in persuading the Attorney to change such a hypothetical ruling, Hetherington declared that he would probably have resigned. "It was so basic," he said, "that I wouldn't have been able to carry out my duties thereafter."[8]

The position of the Director becomes more vulnerable where he decides against prosecuting and the proposed charge involves a prominent public figure. Allegations of bias and of protecting "the Establishment" will surface quickly in this kind of situation, presenting the Director and the Attorney General with the choice of riding the storm in silence or responding quickly in a way that is calculated to dispel uninformed criticism. A case in point was that involving *Sir Peter Hayman*, formerly this country's High Commissioner in Canada.[9] In 1978 a packet containing obscene literature and other written material was found in a London bus. The subsequent police investigation revealed the existence of correspondence of an obscene nature, involving young children, between Hayman and a number of other persons. Altogether a total of seven men and two women were named in the report submitted by the Metropolitan London Police to the Director of Public Prosecutions, as possible defendants to charges under section 11 of the Post Office Act 1953. A further report revealed that one of the nine men, not Sir Peter Hayman, was also carrying on correspondence with another person which indicated that the two shared an obsession about the systematic killing by sexual torture of young people and children. In view of the extreme nature of this latter material the Director decided to prosecute them for conspiring to contravene the 1953 Act.

There was no evidence that Hayman had ever sent or received material of this kind through the post. Simultaneously with these inquiries, the police investigation into the activities of the "Paedophilic Information Exchange" resulted in a separate trial for conspiracy to corrupt public morals, the defendants being involved in the management or organisation of the body concerned. Hayman did not fall within this group. With respect to the original group of nine persons, which did include Sir Peter Hayman,

[7] *The Times*, May 11, 1981.
[8] *Ibid.*
[9] The facts set out in the text above are based on the Attorney General's statement, H.C. Deb., Vol. 1(6s.) Written Answers, cols. 139–140, March 19, 1981.

the Director advised against the bringing of criminal proceedings,[10] the principal factors being stated to be, first, that the correspondence had been contained in sealed envelopes passing between adult individuals in a non-commercial context and, secondly, none of the material was unsolicited. The Attorney General defended the Director's decision in a full statement to the Commons, saying that he was in agreement with the decision.[11] Previously, before Hayman's name was disclosed to the Commons by a Labour back-bencher, the Attorney General had appealed to the Member of Parliament concerned to spare Sir Peter and his family public humiliation in naming him when the decision had been taken not to prosecute Hayman or any of the potential defendants.[12] Subsequently, the Director explained that the public position occupied by Hayman had had nothing to do with his decision. It had been dictated by the fact that the spirit of the Post Office Act offence had not been infringed, given that it is no offence to possess indecent material and the recipients had not been unwilling victims of the obscene literature in the sense of being shocked and disgusted by the contents.[13]

DECISIONS NOT TO INSTITUTE PROCEEDINGS—THE NEED FOR RESTRAINT IN PUBLIC EXPLANATIONS

This kind of explanation, in such detail, has come to be expected from the present Director. It should be noted, however, that there is a general reluctance to elaborate on the particular considerations that led to a decision *not* to institute proceedings in specific cases. Such reluctance is explained on two grounds. First, whilst it is reasonably safe to expound in abstract terms on the kind of discretionary factors, reviewed in this chapter, which enter into the decision-making process, there is a marked

[10] For conflicting views on the merits of the D.P.P.'s decision see *The Times*, March 26, 1981 and Sir David Napley's statement to the press, *ibid.* March 20, 1981 and his letter to the editor, *ibid.* March 27, 1981. Napley was the defending solicitor in the case.

[11] *Ante*, fn. 9.

[12] *The Times*, March 18, 1981.

[13] *The Times*, May 11, 1981. Elaborating on the reasoning that lay behind his decision not to prosecute Hayman, the D.P.P. stated: "It would be quite wrong of me to say that Parliament should have repealed the Act and it hasn't, and therefore I am never going to prosecute anyone for sending obscene literature through the post. It is for Parliament to decide whether an offence should be on the statute book, but it is part of the constitution law that I have a discretion to prosecute. Parliament is really saying: 'This is the offence. We haven't abolished it but we leave it to you, director, or to the police, to decide whether, in the individual circumstances, it requires prosecution'. Sending indecent material through the post, bearing in mind that it is no offence to possess indecent material, is not the sort of offence that affects members of the public. The only people who can be affected by it are the postmen, if it is written on the outside of the packet, which it wasn't, or the unwilling recipient, who is shocked and disgusted, which wasn't the case. And therefore the spirit of the statute was not infringed and that is why we didn't prosecute." It is impossible to estimate whether Hetherington's explanation, fortified by the Attorney General's view that the right decision was reached, has succeeded in dissipating public suspicions of the kind exemplified in a feature article "Pain, Anguish and the DPP" in the *Sunday Times*, March 22, 1981. For an analysis of the current law, the enforcement policies of the Post Office and recent proposals for reform, see Colin Manchester, "Obscenity in the Mail" [1983] Crim.L.R. 64.

resistance to disclosing publicly the specific in-house policies that have been developed to guide the professional staff in their approach to certain kinds of offences. The explanation for this resistance, departed from so visibly in the Peter Hayman situation, is that "it would not be in the public interest to risk it becoming known that certain offences of medium or minor importance can in fact be committed with relative impunity."[14] This remark, on the part of the present Deputy Director, contains more than a hint of exaggeration in its basic assumption that the incidence of criminal activity is directly related to the level of prosecutorial activity. The fundamental questions implicit in this assumption have been addressed in the parallel context of law enforcement activity with little evidence to support the proposition that a strong statistical nexus exists between levels of police action and the levels of criminal activity.[15] This conclusion, it is acknowledged, does not control the public's perception of how the criminal justice system functions and it is these perceptions that principally influence individual behaviour.

As for the other ground on which the Director and his colleagues studiously maintain a veil of silence in relation to specific cases, the explanation is principally dictated by the ethics of the Director's relationship to the police, the undisclosed witnesses and the defendant himself. Pressed by the Select Committee on Deaths in Police Custody to go beyond the Department's customary resort to explaining its decision in terms of the insufficiency of the evidence, Sir Thomas Hetherington drew no distinction between police complaint cases and other cases.[16] To make public the grounds on which the evidence was judged to be insufficient to secure the likelihood of a conviction would, in the first place, breach the confidentiality of police reports and statements taken by the police from potential witnesses. Disclosure of the reasons for not believing prospective witnesses might require revealing the criminal record of those witnesses. The same reasons would apply to making public details about the defendant with the result that there would be a public "trial" of the potential defendant without his or her having all the safeguards that are an integral part of a criminal trial in open court. Much as a very substantial body of public opinion might savour the opportunity to engage vicariously in this kind of trial by the media, the Director's adherence to the contrary principles favouring non-disclosure is to be preferred. This choice is not as easy to make as might sometimes be supposed, and the present Director has confessed to the frustration that he has experienced in the more emotive cases, such as *Blair Peach* and *James Kelly*, in not being able, because of the principle of confidentiality, to answer publicly the bombardment of criticism to which he and his Department have been subjected.[17]

[14] Barnes, *op. cit.* p. 30.
[15] See *post*, p. 446, fn. 15.
[16] *Ante*, fn. 47, at pp. 34–35.
[17] The *Sunday Times*, January 13, 1980.

In its Report the Select Committee recommended that the Director of Public Prosecutions should make it his normal practice to supply a complainant with at least a summary of the considerations which led him to decide against prosecution.[18] It also proposed that the police investigation report be made available to the legal representatives of the deceased when appearing at the ensuing coroner's inquest.[19] Both recommendations were rejected by the Director, a decision supported by the Attorney General, for the same grounds as those explained to the Select Committee as governing established practice.[20] That indefinable concept, the public interest, might in exceptional circumstances deem it sufficiently imperative to enforce full public disclosure but it would have to be done after the most careful balancing of the conflicting principles at stake, and with the necessity of requiring the Attorney General to defend before the House of Commons a decision that runs counter to the general practice faithfully observed by the Director of Public Prosecutions.

PUBLIC DISCLOSURE OF PROSECUTION GUIDELINES

Most of what has been written in this chapter will have equal application whatever the jurisdiction in which the decision to prosecute or not to prosecute has to be made. There are growing signs too of a disposition to follow the example set by Edward H. Levi, an outstanding Attorney General of the United States who, during his term of office in 1977, embarked on a programme of formulating the principles upon which prosecution decisions should be made. In his prefatory note to the document setting forth such principles[21] Attorney General Levi stressed that the materials being circulated were not to be construed as Department of Justice "guidelines" and that they imposed no obligations on United States Attorneys, their Assistants, or other attorneys acting on behalf of the United States Government.[22] Ascribing the most modest of objectives to this pioneering initiative Mr. Levi said that it was intended solely for use by government attorneys to the extent that the principles were found to be appropriate in discharging their responsibilities as federal prosecutors.[23] The Attorney General's "materials" covered such topics as the decision to prosecute, the election of charges, plea negotiations and, a procedural feature that is peculiar to United States law, opposition to *nolo contendere* pleas.[24] Not surprisingly, there is much common ground between the

[18] H.C. Paper 631 of 1980, pp. 30–40.
[19] *Ibid.* p. xiv.
[20] H.C. Deb., Written Answers, Vol. 993, cols. 150–153, November 11, 1980.
[21] "U.S. Department of Justice Materials Relating to Prosecutorial Discretion" (1978) 22 *The Criminal Law Reporter*—see Text Section, pp. 3001–3008.
[22] *Ibid.* p. 3001.
[23] *Ibid.*
[24] *Ibid.* pp. 3005–3006. See also *Federal Rules of Criminal Procedure*, Rule 11(a) and (b) and *American Bar Association Standards Relating to the Administration of Criminal Justice*, Vol. 18, 1974, "Pleas of Guilty", pp. 299–308.

relevant factors that are said to guide the Director of Public Prosecutions in England and Wales, and those expressed in the Levi documents as the advisable guideposts within the federal criminal justice system of the United States. In Australia, the impact of the Levi statement of principles has been immediate, the Attorney General of the Commonwealth of Australia breaking new ground in bringing together in a public document the guidelines that will govern the actions of all counsel and Crown solicitors whose authority derives from the senior Law Officer of the Crown and who are engaged in the prosecution of Commonwealth offences. The policy paper containing the guidelines and considerations upon which prosecutorial decisions are to be made within the federal sphere of jurisdiction was tabled in the Australian Senate in December 1982.[25] Included within this precedent-setting statement is a reaffirmation of the "Shawcross doctrine" as a fundamental tenet that must govern the Attorney General's personal involvement in prosecution decision making.[26] Added to which the document contains the necessary reminder that this philosophy was accepted by the Government in the speech made by Prime Minister Fraser on the occasion of the Endicott resignation debate in September 1977.[27] None of these prosecution blueprints is in the nature of hard and fast rules. Within any such sets of guidelines, including those issued by the Attorney General of England and Wales on the effects of jury vetting and disclosure, and now the criteria for prosecution,[28] there is a considerable measure of discretion as to how the relevant standards are to be applied in the particular circumstances.[29]

[25] *Prosecution Policy of the Commonwealth*, tabled in the Australian Senate on December 16, 1982 on behalf of the Commonwealth Attorney General, Senator Peter Durack Q.C. Among the subjects covered are (i) who may institute and conduct Commonwealth prosecutions, (ii) the decision to prosecute and police involvement, (iii) private prosecutions and stays of proceedings, (iv) no bill applications, (v) granting of indemnities or pardons to witnesses, (vi) plea negotiations, (vii) special prosecutors. So far as I am aware, no comparable statement exists in any of the States of Australia, each of which has its own body of criminal law and procedure. Adherence to the principles set forth in the Commonwealth policy statement is explicitly acknowledged by the Attorney General (Senator Gareth Evans) in the detailed opinion prepared for the Prime Minister with respect to the *Mick Young* case—see *ante*, p. 371, fn. 64.

[26] *Ibid.* p. 9.

[27] *Ibid.* and see *ante*, pp. 384–385.

[28] On the subject of prosecution guidelines see *ante*, p. 423, fn. 88 and on the issues of jury vetting and disclosure to the defence see *post*, Chapter 14, pp. 476–490.

[29] Despite the disclaimer by former Attorney General Levi that his expansive treatment of the various items included in the Justice Department's memorandum was nothing more than "suggestions," it is noticeable that each principle is accompanied by detailed comments as to the meaning that is intended to be attached to the several propositions. Moreover, the language used in the comments have the distinct ring of departmental expectations that the policies enunciated in the document will be either followed strictly or an explanation provided for any departure from the existing departmental policies. The same level of expectation runs through the growing number of policy directives issued by the Attorney General of Ontario, referred to *ante*, p. 406, fn. 14. For the arguments in favour of seeking Parliamentary approval of prosecution guidelines, see the note by Francis Bennion in (1981) 125 S.J. 534.

This discretion, moreover, attaches to each of the documents that have been referred to, irrespective of whether they are described as "guidelines" or "appropriate considerations that are not to be regarded as departmental requirements," and whether they emanate from the office of the Attorney General in London, Canberra, Toronto or Washington. They do not, it is true, carry the force of a "practice direction" similar to those issued from time to time by the Lord Chief Justice after consultation with the Judges of the Queen's Bench and Family Divisions. These latter statements of practice have the same binding force as all other rules of procedure that derive their statutory authority from the Supreme Court of Judicature Acts.[30] Nevertheless, since the Prosecution of Offences Act 1879, section 2 ordains that the Attorney General is the Minister responsible for the actions of the Director of Public Prosecutions and can issue directives to his subordinate official with respect to any of his functions, it cannot be doubted that there exists a secure statutory basis for the Attorney General's emerging forays into the setting of guidelines concerned with subjects that lie within the Law Officers' prerogative authority. In this respect, the approach favoured by the Attorney General of the United States in expressly disclaiming any mandatory component for the guidance afforded to the United States Attorneys would be a highly inappropriate parallel to use in describing the modest incursions of the English Attorney General into the same field. At the same time it is interesting to note that, as the federal Minister of Justice in charge of the United States Department of Justice, Attorney General Levi attached no qualifications to the series of formal guidelines that he imposed upon the Federal Bureau of Investigation when executing his policy of bringing that agency back into the fold of ministerial control and accountability.[31] This fascinating exercise must regrettably be left to others to recount,[32] as we

[30] See Supreme Court of Judicature (Consolidation) Act 1925, (c.49), s.99.

[31] For authoritative descriptions of the legacy of F.B.I. abuses left by its founder J. Edgar Hoover at his death in 1972 see United States House of Representatives, Committee on the Judiciary, Subcommittee on Civil and Constitutional Rights, *Hearings: FBI Oversight*, Serial No. 2, Parts 1–3, 94th Congress, 1st and 2nd session, 1975–76; and United States Senate, Select Committee to Study Governmental Operations with respect to Intelligence Activities, *Hearings*, Vols. 2–6, 94th Congress, 1st sess. 1975, and *Final Report*, Books I–IV, 94th Cong, 2nd sess. 1976.

[32] The best informed and succinct account of this exercise is contained in John T. Elliff's *The Reform of the F.B.I. Intelligence Operations*, (Princeton, 1979), see especially pp. 37–76. Among the guidelines promulgated by Attorney General Levi during his tenure of office were those relating to (1) F.B.I. Domestic Security Investigations (released March 10, 1976), (2) Reporting on Civil Disorders and Demonstrations involving a Federal Interest (released March 10, 1976) and (3) White House Personnel Security and Background Investigations (ditto) and (4) Informants in Domestic Security, Organised Crime and Other Criminal Investigations (released December 15, 1976). These guidelines are conveniently reprinted in Elliff, *op. cit.* Appendices 1 to 4. The machinery for preparing the guidelines, in which the F.B.I. under its new Director, Clarence M. Kelly, took a fully cooperative part, is described by the same author, *op. cit.* pp. 58–61. Levi had made a commitment to prepare new guidelines for the F.B.I. during his confirmation hearings before the Senate but had not completed the task by the time he left office following a change in the office of United States President—*ibid.* pp. 55 and 60.

move on to describe the substantial restriction on the powers of the Attorney General for England and Wales, and by derivation those of the Director of Public Prosecutions, in the matter of preferring an indictment without prior resort to a preliminary hearing. This powerful discretionary jurisdiction, frequently exercised in such Commonwealth countries as Canada, New Zealand, and Australia is not available to the English Attorney General. At least, not in relation to his functions in England and Wales. On assuming the duties of Attorney General for Northern Ireland, however, the same Law Officer inherited the power of presenting a direct Bill of indictment in the Northern Ireland courts, a power created by the Stormont Parliament when it abolished the grand jury.[32a]

PREFERRING BILLS OF INDICTMENT—BRITISH AND COMMONWEALTH DIFFERENCES

Prior to 1933 the Attorney General or the Solicitor General exercised concurrent jurisdiction with a judge of the High Court in sanctioning the presentation of a voluntary bill of indictment by a private citizen. These restrictions on private accusations were introduced by the Vexatious Indictments Act 1859[33] to counter the abuse and hardship incurred by those accused of crimes who had no right to appear before or to be heard by the grand jury before it decided whether or not to return a true bill. Proceedings to determine whether leave should be granted,[34] by one of the Law Officers[35] or by a High Court judge, was always *ex parte*[36] and the grand jury's subsequent involvement of returning a true bill became a mere formality. Under the provisions of the Administration of Justice (Miscellaneous Provisions) Act 1933[37] the grand jury was recognised as a useless anachronism and abolished.[38] At the same time the discretionary power of the Attorney General and the Solicitor General to authorise the presentation of a bill of indictment, that would effectively by-pass the

[32a] See Grand Jury (Abolition) Act (N.I.) 1969, c.15, s.2. I am indebted to Mr. David Haggan of the Law Officers' Department for drawing my attention to this unique feature of Northern Ireland statute law pertaining to the powers of the Att. Gen. for Northern Ireland.

[33] 22 & 23 Vict. c.17, s.1. The restrictions extended to the following offences only: perjury, subornation of perjury, conspiracy, false pretences, keeping a gaming or disorderly house, indecent assault.

[34] An indictment could also be preferred "by the direction" of the same authority.

[35] Both of the Law Officers were named in the legislation thus conferring equal authority to act in their own right. No instance is on record, however, paralleling the extraordinary events in Australia in the *Mercantile Bank* case in 1893—see *ante*, pp. 372–379.

[36] The earlier background to the *ex parte* procedure resorted to in such cases was examined in considerable detail by the Court of Appeal in *R.* v. *Raymond* [1981] 3 W.L.R. 660 at pp. 665–667. Despite subsequent legislation, repealing the 1859 statute, and the introduction of new rules of procedure the court unanimously held that the defendant was not entitled to be heard in person before leave is granted to prefer a bill of indictment. For the transformation in the practice of hearing the parties concerned, prior to the Attorney General's issuance of a *nolle prosequi*, see Edwards, *op. cit.* pp. 229, 236.

[37] 23 & 24 Geo. 5, c. 36.

[38] *Ibid.* s.1.

procedure of a preliminary inquiry before examining justices, was likewise terminated.[39]

The avenues remaining to a prosecutor in England and Wales who seeks to bring an accused person to trial by indictment are two-fold. The first, and most regularly followed, is by way of committal to the Crown Court following either the taking of depositions as part of the preliminary hearing or by resort to the accelerated procedure which, since the coming into force of the Criminal Justice Act 1967, s.1,[40] allows a committal, in given circumstances, without consideration of the evidence. Briefly, the circumstances require that all the evidence be in the form of written statements or exhibits and that no objection is voiced by the defendant or his lawyer that there is insufficient evidence to put the defendant to trial by jury for the offence(s) charged.[41] What have come to be known as "section 1 committals" cannot be resorted to if the defendant is not legally represented.[42] The second avenue open to a prosecutor is to circumvent the committal procedure altogether by way of seeking the leave of a High Court judge *ex parte* in accordance with the provisions contained in section 2(2) of the Administration of Justice (Miscellaneous Provisions) Act 1933 which states: " . . . no bill of indictment charging any person with an indictable offence shall be preferred unless either—(a) the person charged has been committed for trial for the offence; or (b) the bill is preferred . . . by the direction or with the consent of a judge of the High Court or pursuant to an order made under section 9 of the Perjury Act 1911."[43] These powers merely replicate the jurisdiction originally conferred on the High Court under the terms of the Vexatious Indictments Act 1859.[44] It is this procedure which the Director of Public Prosecutions, like any other private prosecutor, has to invoke when faced with unexpected obstacles that arise in the course of seeking a normal committal by the examining justices.

A prolonged preliminary hearing, for example, with little prospect of an expedited committal, may prompt drastic action by the Director as occurred in the *Terence May* case in 1981 when 15 black youths were charged with a variety of offences including murder, affray, and riotous assembly following the death of a motor cyclist in South London.[45] The

[39] *Ibid.* s.2(7).

[40] c.80. Such statistical evidence as is available points to the virtual supplanting of the conventional preliminary hearing (under the Magistrates Courts Act 1952, s.7) by the expedited committal procedures (under section 1 of the 1967 Act)—see the Report of the Royal Commission on Criminal Procedure, p. 70. For the further recommendations of the Commission see *ibid.* pp. 181–183.

[41] *Ibid.* s.1(1)(*b*).

[42] *Ibid.* s.1(1)(*a*).

[43] 24 & 24 Geo. 5, c.36.

[44] See *ante*, p. 434. There is no longer any restriction on the list of indictable offences with respect to which the procedure of preferring a bill of indictment applies.

[45] *The Times*, October 23 & 24, 1981 and November 7, 1981. The D.P.P.'s action was prompted by a request from the chairman of the Croydon magistrates' court that committal be sought by way of a voluntary bill of indictment. This move was explained by the magistrates' "profound concern at the lack of progress." Leave to prefer a bill of indictment was granted

conduct of several counsel representing the defendants at the committal hearing was the subject of a formal complaint made by the Attorney General to the Professional Conduct Committee of the Bar Council, a step that was later repeated at the conclusion of the actual trial.[46] In another recent situation, involving the unexplained death of *Barry Prosser*, an inmate of Winson Green Prison, Birmingham, and a second refusal of the examining magistrate to commit the three accused prison officers to trial because of the insufficiency of the evidence presented by the Crown, the Director of Public Prosecutions changed his mind after first stating that the case was closed.[47] After consultations with the Attorney General, *ex parte* proceedings were begun that resulted in the Director obtaining leave from Stephen Brown J., for the presentation of a direct indictment against the prison officers concerned.[48] At the subsequent trial in Leicester Crown Court all three accused were acquitted of murder.[49] In yet another case, *R. v. Raymond*,[50] that eventually found its way before the Criminal Division of the Court of Appeal, it was said that the defendant "gave such unmistakable indications of an intention seriously to disrupt the committal proceedings as to make a mockery of them"[51] that counsel for the Crown decided to abandon them and sought leave to prefer a bill of indictment from a High Court judge. The principal ground of the appeal against conviction of the accused for theft of more than £2 million worth of currency from the storerooms of Heathrow Airport was the failure of the judge, hearing the *ex parte* application, to afford the appellant an opportunity to be heard if he wished to do so. After carefully reviewing the entire history of preferring bills of indictment, Watkins L.J., speaking for the court, rejected the argument that the 1933 Act had conferred any such

by Michael Davies J., on the basis that "there was no prospect of committal proceedings, if they continued, being completed within a reasonable or tolerable time. Any trial by jury would thus be delayed for an excessive and unacceptable period." Sitting as the presiding judge at the Central Criminal Court, Lawson J., refused to disturb the decision to grant the bill, stating that he was only empowered to quash the bill if there had been an excess of jurisdiction in making the original decision. No such grounds had been established before him. Verdicts of guilty were subsequently returned against the 10 accused charged with various offences ranging from riot to manslaughter that arose from the stabbing to death of Terence May, a crippled teenager—*The Times*, April 16, 1982.

[46] *The Times*, October 23, 1981 and see also *The Times*, April 15 and 16, 1982. Following a three-day hearing by a disciplinary tribunal of the Bar Council, presided over by Staughton J., Mr. Narayan, the Secretary of the Society of Black Lawyers, was found not guilty of professional misconduct when he issued a press statement accusing the Attorney General and D.P.P. of being "corrupt, incompetent and an unholy alliance with the National Front." The defendant claimed that he had issued the statement not as a barrister but in his capacity as chairman of an organisation called "Black Rights U.K." *The Times*, April 9, 1983. The tribunal issued a formal reprimand with respect to charges of abusing the D.P.P.'s staff during a murder trial at the Old Bailey and ordered that Mr. Narayan be suspended for 6 weeks on the other charges of professional misconduct. *The Times*, June 25, 1983.

[47] *The Times*, October 2, 1981.

[48] *The Times*, October 24, 1981.

[49] *The Times*, March 1, 17 and 20, 1982.

[50] [1981] 3 W.L.R. 660.

[51] *Ibid.* at p. 664.

rights[52] or that the elimination of the roles formerly associated with the Attorney General and Solicitor General was an indication that the executive element was dispensed with leaving only procedures in which the High Court was required to conform to the *audi alteram partem* rule.[53] In his concluding remarks Watkins L.J. said: "There can be no doubt that the defendant is becoming, if he has not already become, a practised disturber of court proceedings. In agreeing to receive and consider the written representations made by his solicitor on the defendant's behalf, Michael Davies J., probably paid him much more regard than he ever deserved."[54]

By English standards, the legislation of many Commonwealth countries confers extraordinary authority upon the Attorney General and his agents who are empowered to prefer an indictment irrespective of whether a preliminary inquiry has or has not been held or that such an inquiry has resulted in the accused being discharged.[55] There is, for example under the Canadian Criminal Code, the parallel procedure whereby a private individual can seek leave to prefer a direct indictment by order of a judge of a provincial Supreme Court, or in certain limited circumstances a county or district court judge sitting as a court of criminal jurisdiction, or from the Attorney General.[56] In some circumstances the Attorney General may elect to proceed by way of seeking leave from the court,[57] notwithstanding

[52] *Ibid.* at p. 665. Speaking of the 1933 legislation, the court (*coram* Watkins L.J., Boreham & Hodgson JJ.) stated: "The Act merely did away with a virtually useless anachronism, the grand jury, and with the powers of the Attorney-General and Solicitor-General. It perpetuated the other existing procedures along with the existing powers of a High Court judge and justices. We reject the submission that the Act of 1933 did not have this effect, and disagree with the proposition that a precise effect of it was to substitute the High Court judge for the grand jury. The powers of a High Court judge, be it noted, find identical expression in the Acts of 1859 and 1933." Parliament, it was inferred, must have been aware that prior to the Act of 1933 High Court judges had been using their powers under the Act of 1859 by a procedure which was exclusively *ex parte*. According to the Court of Appeal the Indictments (Procedure) Rules 1971 (S.I. 1971 No. 2084 L.51), enacted under the Lord Chancellor's rule-making power (1933 Act, s.2(6)), must be taken as a determination to perpetuate the *ex parte* procedure which had been in effect since 1859. The Rules contained no reference to the defendant and expressly conferred judicial power to act without requiring the attendance before the High Court judge of the applicant, counsel or any witnesses (*ibid.* rule 10).

[53] *Ibid.* at p. 667.

[54] *Ibid.* at p. 672.

[55] Criminal Code R.S.C. 1970, c.C-34, ss.505(4) and 507(3). For the historical background to these provisions see esp. *R.* v. *Harrison* (1975) 33 C.R.N.S. 62 *per* Henry J. The original provisions in the Criminal Code of 1892, s.641(2) and (3) were derived from the English Draft Code of 1879, s.505, as to which Stephen wrote (*H.C.L.* i. 293–294): "The Criminal Code Commissioners of 1878–9 recommended that this Act [the Vexatious Indictments Act, 1859] should be applied to all indictments whatever, and that the power of secret accusation . . . should be taken altogether away." Under a proposed amendment to the Canadian Code, made known in a recent information paper released by the federal Minister of Justice in July 1983, only the appropriate Attorney General or Deputy Attorney General could consent to the preferring of a direct indictment by Crown prosecutors, *op. cit.* p. 5. No alterations are proposed in the procedure involving private prosecutors, *ibid.*

[56] *Ibid.* ss.505(1)(*b*) and 507 (1) and (2).

[57] *Ibid.* ss.505(1)(*b*) and 507(2).

his having jurisdiction in his own right to prefer an indictment.[58] Electing to proceed by the former route might be explained, in some situations, by the desire of an Attorney General not to risk further criticism in unilaterally re-activating a prosecution that failed to secure a committal by the examining justice.[59] There is a similar sensitivity evident in the accepted judicial view that "If the Attorney General has definitely refused to prefer, or to consent to the preferring of a charge, the court should hesitate to order or consent to the laying of the charge as to which his refusal has been made, and should refuse its order of consent when it is made to appear that the administration of justice is being prejudiced or jeopardised by the proper action of that officer who by custom, tradition and constitutional usage, as well as by law, is charged with the administration of justice in the province."[60] It is by virtue of the co-equal jurisdiction conferred upon the court in preferring indictments, under the provisions of sections 505 and 507 of the same Code, that in this instance a departure is justified from the fundamental proposition that the Attorney General's prosecutorial discretion is not examinable by any court but is subject to review by the legislature, to whom the Attorney General is answerable.[61]

[58] *Loc. cit.* For the Crown's right to indict under s.307(2) for offences disclosed by the evidence taken on a preliminary inquiry but for which the accused was not specifically charged, see *R.* v. *Chabot* [1980] 2 S.C.R. 985 and (1981) 23 Crim. L.Q. 454, and *R.* v. *McKibbon* (1982) 35 O.R. 124.

[59] *Cf., e.g.* the judicial positions taken in *R.* v. *Brooks* (1971) 6 C.C.C. (2d) 87 and *R.* v. *Murphy and Saik* (1972) 19 C.R.N.S. 236 with that expressed in *R.* v. *Nellis et al.* (1981) 64 C.C.C. (2d) 470. Even more calculated to arouse public criticism would be the situation canvassed in *Nellis* (*supra*) that: "There is nothing in the Criminal Code to prohibit the Attorney General from bringing a direct indictment *after* the Court has adjudicated on an application for consent. I do not see this possibility as being one intended by Parliament yet it could hardly be avoided in those circumstances where there is no indication the Attorney General is refusing to indict or is at least equivocal"—*ibid.* p. 476.

[60] *Re Johnson and Inglis et al.* (1980) 17 C.R. (3d) 250 at p. 261 *per* Evans C.J., High Court of Ontario (adopting the view previously expressed in *Maloney* v. *Fildes* (1933) 60 C.C.C. 7 at p. 13). *Cf.* the statement by Haultain C.J.S. in *R.* v. *Weiss* (1915) 23 C.C.C. 460, 463 " . . . there is nothing in the Criminal Code to prevent me from consenting to a charge being preferred by any person but I think that very strong reasons should be shown to justify me in taking such a step, in face of the deliberate action of the Crown authorities. If the evidence taken on the preliminary inquiry disclosed such a strong prima facie case against the accused as to suggest an abuse of his judicial discretion by the A.G., or an attempt to stifle a proper prosecution, I should have no hesitation about consenting to a charge being preferred."

[61] For a strong and unequivocal acceptance of the basic constitutional position see *Re Johnson and Inglis et al., supra* (at pp. 267–268), in the course of which the Chief Justice added: "This power to prosecute . . . must be distinguished from the s.507 power to grant a consent to the preferring of an indictment. This latter statutory power is given to both the Attorney-General and the court and is one which places them in positions of equality. While the court cannot interfere with the Attorney-General's exercise of his discretion, so too the Attorney General cannot interfere when a court sees fit to grant a consent. A court may, in exercising its discretion, choose to consider the position taken by the Attorney-General in any given case. This does not mean, however, that it must do so, or that if it does it is compelled to adopt his position. Our jurisdictions are and must remain separate but equal." 17 C.R. (3d) 268. This analysis, as Evans C.J., himself recognised (*loc. cit.*), is incomplete since there remains the residual power of the Attorney General to enter a stay to an indictment preferred with the approval of the court. The possibility of such a clash might be extremely remote but its implications cannot be ignored.

This principle of judicial deference to the Attorney General in matters pertaining to the institution of criminal prosecutions makes it totally unrealistic to contemplate the adoption in Canada and other Commonwealth countries of the law that now prevails in England and Wales in which, as we have seen, the leave of a High Court judge is the only route open to the Attorney General, the Director of Public Prosecutions or any private person who seeks to present a bill of indictment as the most expeditious procedure for commencing a trial on indictment. Until the Criminal Law Act 1967, there was always the possibility that the Attorney General could invoke his prerogative authority to file an *ex officio* information, the origins of which are traceable as far back as the reign of Edward I. A full account of this procedure's chequered history is set forth in my previous study.[62] The Divisional Court's condemnation in *R.* v. *Labouchere*[63] of the laxity with which, in the early part of the nineteenth century, the normal process of presentment and indictment was by-passed, exerted a powerful restraint upon holders of the office of Attorney General in resorting to their prerogative discretion of filing an *ex officio* information. The last recorded instance in which a criminal trial was launched in this manner was *R.* v. *Mylius* in 1910 when Sir Rufus Isaacs, as Attorney General, without resort to a preliminary inquiry, filed an *ex officio* information charging the accused with criminal libel against King George V.[64] This special privilege of the Attorney General survived the legislative scythe that, in the Administration of Justice (Miscellaneous Provisions) Act 1938, abolished outlawry proceedings, the exhibiting of articles of peace in the High Court, and criminal informations "other than informations filed *ex officio* by His Majesty's Attorney General."[65] The Criminal Law Revision Committee in its Seventh Report, observing that the procedure had not been used since 1911, described the Attorney General's prerogative right as "plainly unnecessary" and recommended that it should be abolished.[66] The final demise of the Attorney's *ex officio* information was effectuated in the Criminal Law Act 1967,[67] section 6(6) of which declared that "Any power to bring proceedings for an offence by criminal information in the High Court is hereby abolished." No voices in opposition to this move were raised during the passage of the Bill through Parliament. We must presume, therefore, that the Law Officers, as well as

[62] Edwards, *op. cit.* pp. 262–267.

[63] (1884) 12 Q.B.D. 320.

[64] *The Times*, February 2, 1911 and see Edwards, *op. cit.* p. 186 fn. 31 and also p. 266.

[65] 1 & 2 Geo. 6, c. 63, s.12.

[66] Cmnd. 2659, para. 63, the full extent of the Committee's treatment of the subject being contained in a single paragraph that reads as follows: "For misdemeanour, though not for felony, a person may be tried on a criminal information *ex officio* filed by a Law Officer instead of an indictment. This procedure has not been used since 1911, and it is plainly unnecessary and should be abolished."

[67] 1967, c. 58. Action to the same end in Canada had been taken in the revised Criminal Code 1955, s.488(2), and in New Zealand, by implication, under the provisions of the Crimes Act 1961, s.345—see Adams, *Criminal Law and Practice in New Zealand*, (2nd ed.), pp. 705–706.

past holders of those offices, were reconciled to the need to obtain the leave of a High Court judge as the most expeditious procedure for bringing accused persons speedily to trial.

One interesting postscript, from Australia, is the confirmation by its High Court in *Barton* v. *R.* in 1981[68] that *ex officio* informations (or *ex officio* indictments as they are there described) are alive and well in New South Wales in accordance with the powers conferred by the Westminster Parliament in the Australian Courts Act 1828.[69] This law was intended to confer upon the colonial counterparts the same prerogatives as those practised by the Attorney General of England.[70] Due note was taken in *Barton* of the abolition in 1967 of the English Attorney General's former

[68] *Sub nom. Gruzman* v. *A.G. for N.S.W. & Others* (1980) 32 A.L.R. 449.

[69] 9 Geo. 4 (U.K.), c. 83, s.5 of which provided "that until further provision be made as hereinafter directed for proceedings by juries, all crimes, misdemeanours, and offences, . . . shall be prosecuted by Information, in the name of His Majesty's Attorney General, or other officer duly appointed for such purpose by the Governor of New South Wales and Van Diemen's Land respectively." For a recent illustration, arising out of the Street Commission's findings dismissing allegations of interference with the course of justice against the Premier of N.S.W. (Mr. Wran) but leading to the laying of ex-officio indictments by the Attorney General (Mr. Landa) against the Commissioner of the N.S.W. Rugby League and a former chief stipendiary magistrate, see *The Australian*, October 19, 1983.

[70] Each of the Australian States has conferred upon its Attorney General a statutory power to file an indictment whether the accused person has been committed for trial or not. The language chosen to accomplish this purpose, however, displays the confusion that can arise in failing to keep distinct (1) the original common law power of the Attorney General of England to file an *ex officio* information in the Queen's Bench Division without a previous indictment and (2) the statutory power first created under the Vexatious Indictments Act 1859, that effectively controlled the right of any person to prefer an indictment before a grand jury by requiring, if no committal proceedings had taken place, "the direction or consent of a Judge or the Attorney General." For examples of this confusion see the Queensland Cr. Code, s.561: "Ex officio informations. A Crown Law Officer may present an indictment . . . for an indictable offence. . . . "—interpreted and commented upon in *R.* v. *Webb* [1960] Qd. R. 443 and *R.* v. *Johnson & Edwards* (1979) 2 A. Crim. R. 414; the Tasmanian Cr. Code, s.42: "A Crown Law Officer may, without leave, file an indictment (herein called an ex officio indictment) for any crime." The proper distinction is maintained in the Victoria Crimes Act between the power of the Attorney General, or Solicitor General or any prosecutor for the Queen in the name of a Law Officer, to make presentation for any indictable offence (s.353(1)) and the later provision that "Nothing herein contained shall in any manner alter or affect the power which the A.G. possesses at common law to file by virtue of his office an information in the Supreme Court etc.," (s.355), a clear reference to the transposition to Victorian law of the English *ex officio* information. The New Zealand Crimes Act, s.345 empowers "the A.G., or any one with the written consent of a judge of the Supreme Court or of the Att. Gen., to present an indictment for any offence." Adams, *Criminal Law & Practice in New Zealand*, (1971), unhesitatingly points to the historical connection between the above section in New Zealand's Criminal Code and the British Vexatious Indictments Act 1859, the principles of which were re-enacted for N.Z. in that country's Vexatious Indictments Act 1870, and subsequently incorporated into New Zealand's Criminal Code Act 1893. The present section 345 is essentially on a par with the Canadian provisions (Code ss.505 and 507) examined earlier, but Adams, *op. cit.* para 2755 is seriously wrong in claiming that "substantially the same result has been arrived at in England by section 2 of the Administration of Justice (Miscellaneous Provisions) Act, 1933." As we have seen (*ante*, pp. 434–435) the 1933 legislation in England effectively eliminated the former jurisdiction of the Attorney General and Solicitor General to direct or to grant leave for the preferment of an indictment, the exclusive control over this form of expedited procedure now resting in the hands of the judiciary.

privilege of filing an *ex officio* information in the Queen's Bench Division of the High Court, but there was no disposition to urge that similar action be instituted in the Australian legislative bodies. The remarkable feature of the High Court's decision was the lengths to which a majority of the justices were prepared to go in according the accused a fundamental right to have the prosecution present its case through a preliminary inquiry. No suggestion was made that the Attorney General's decision to commence a prosecution was examinable by the courts.[71] Rather, the approach was more indirect in its adoption of the position that "a trial held without antecedent committal proceedings, unless justified on strong and powerful grounds, must necessarily be considered unfair."[72] According to the majority of the justices of the High Court: "It is for the courts, not the Attorney General, to decide in the last resort whether the justice of the case required that a trial should proceed in the absence of committal proceedings. It is not for the courts to abdicate that function to the Attorney General, let alone to Crown Prosecutors whom he may appoint . . . If the courts were to abdicate the function there is the distinct possibility that the *ex officio* indictment, so recently awakened from its long slumber, would become an active instrument, even in cases in which it has not been employed in the past, notwithstanding the criticism which has been directed to it and the assertions of commentators that it was appropriate for use of in a very limited category of cases."[73] Reconciliation of the two principles adumbrated by the High Court of Australia is to be found in the unanimous assertion that, notwithstanding the non-reviewability of the Attorney General's decision to launch the prosecution, the courts may postpone or stay the ensuing trial on indictment in circumstances where such action is necessary to prevent an abuse of process and ensure a fair trial for the accused person.[74]

Stephen and Wilson JJ., refused to subscribe to the theory that a prima facie case of abuse of process would arise whenever the accused was denied the essential prerequisite of committal proceedings.[75] The detriments associated with a preliminary hearing, they maintained, could be overcome by resort to speedier and less cumbersome forms of pre-trial discovery.[76]

[71] (1981) 32 A.L.R. 449 at pp. 455–459. The High Court rejected the contrary view advanced by Fox J. in *R.* v. *Kent, ex p. McIntosh* (1970) 17 F.L.R. 65, and overruled that decision.

[72] *Ibid.* at p. 463, *per* Gibbs and Mason JJ.

[73] *Ibid.*

[74] *Ibid.* at p. 459 (*per* Gibbs and Mason JJ.) and at p. 465 (*per* Stephen J.).

[75] *Ibid.* at pp. 466 and 470.

[76] Murphy J., in lending his support to the views of Stephen and Wilson J., cited with approval J. Seymour, *Committal for Trial, An Analysis of Australian Law Together with an Outline of British and American Procedures*, (Australian Institute of Criminology, 1978), a study to which the present writer is also indebted. In Canada, likewise, there are distinct signs that the preliminary hearing, with the taking of depositions, is destined to be replaced by procedures analogous to those of "section 1 committals" under the English Criminal Justice Act 1967. The abolition of committal proceedings, described as "a cumbersome and expensive vehicle for obtaining discovery," was recommended by the Law Reform Commission of Canada in 1974, *Working Paper No. 4 on Discovery*. A somewhat more

In each jurisdiction, except New South Wales, it is possible for th committal to rest on written statements. And in four of the Australia states, Victoria, Queensland, Tasmania and Western Australia, what i tantamount to the English procedure of "section 1 committals" (under th Criminal Justice Act 1967) is already in place.[77]

This attention to the Australian High Court's ruling in the *Barton* case less important for the actual decision, that pertains to the unique characte of New South Wales law, than the deeper issues it explores in connectio with the court's role in examining the prosecutorial discretion exercised b the Attorney General. We have seen that the Australian justices adhere closely to the constitutional separation of powers doctrine that impels th English courts likewise to reject any jurisdiction by way of reviewing th Attorney General's decision to institute criminal proceedings,[78] to enter *nolle prosequi*, to seek an injunction to prevent the commission c repetition of a serious offence, or the Director's intervention to take over private prosecution and to end the proceedings by offering no evidence The same general principles govern the approach of the Canadian courts i declining to become too closely involved, except when required to do so b express statutory provision, in questions that will decide whether prosecution should be commenced.[79] When the ultimate function of th court is to determine the accused's guilt or innocence it is rightly conclude that the judges should not be seen to be associated with the initial step c allowing the prosecution to take place. The broad consistency of th judicial approach to this problem is departed from in dramatic fashic under present English law when the issue of approving the presentment c a bill of indictment, without resort to a committal hearing, is conferre exclusively upon a judge of the High Court.

This extraordinary jurisdiction is of moderate antiquity dating back t the Vexatious Indictment Act 1859, and it is doubtful whether its exercis has ever been so frequently resorted to as in the turbulent years of recer memory. The elimination in 1933 of the former concurrent jurisdiction c the Attorney General and the Solicitor General to grant leave in th regard may well have been dictated by the desire to provide safeguarc against the abuses associated with the filing of *ex officio* informations in th eighteenth and nineteenth centuries. In remedying one possible ground c public dissatisfaction with the criminal process, Parliament may unwittin ly have laid the foundations for a future conflict of purpose between th judiciary and the Law Officers of the Crown.

cautious approach, recommending a period of voluntary experimentation with a pre-tri disclosure system prior to the enactment of reform legislation, is reflected in the report of th influential Ontario committee on preliminary hearings 1982, chaired by Mr. Justice G. Arth Martin, Ontario Court of Appeal.

[77] *Ante*, fn. 76.

[78] *Ante*, fn. 71.

[79] *Ante* fnn. 60 and 61.

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is a matter for the judge; that it is thereafter unnecessary to leave the same matters to the jury; but that the jury should be told that what weight they attach to the confession depends on all the circumstances in which it was taken, and that it is their right to give such weight to it as they think fit.

That was exactly what this chairman did, and in the opinion of this court, if he did not leave the matter to the jury in the way that previously judges have done, that is a matter on which he was fully justified having regard to the recent decision.

[His Lordship considered the other grounds of appeal, which do not call for a report, found that there were no grounds for interfering with the verdict, and continued:]

The court would like to say this. Their attention has been drawn to the fact that some inquiry is pending in regard to the allegations that have been made by the defendant, allegations which could have been made at the trial as well, into the conduct of Detective Constable Symonds. The court has no knowledge as to what the truth of that matter is, and of course they have decided this appeal on the evidence before them. Should anything hereafter turn out which would throw doubt on the evidence of Symonds or any other police officer in the case, then, as is well known, the defendant may petition the Home Secretary, and the Home Secretary has the power, if he so desires, to refer the matter once again to this court.

Appeal dismissed.

Solicitors: *Sotheby & Co.; Solicitor, Metropolitan Police.*

S. S.

[COURT OF APPEAL]

C.A. 1968 Jan. 24, 25, 26, 29

LORD DENNING M.R., SALMON and EDMUND DAVIES L.JJ.

REGINA
v.
COMMISSIONER OF POLICE OF THE METROPOLIS, *Ex parte* BLACKBURN

Court of Appeal—Jurisdiction—Criminal cause or matter—Mandamus—Order directing Commissioner of Police of Metropolis to reverse decision not to enforce law—Whether "criminal cause or matter"—Supreme Court of Judicature (Consolidation) Act, 1925 (15 & 16 Geo. 5, c. 49), s. 31 (1) (a).

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Crown Practice—Mandamus—Commissioner of Police of Metropolis—Whether order available to compel performance of duty—Enforcement of betting and gaming statute—Whether private citizen sufficient interest.

Metropolis—Police—Commissioner—Status—Duty of law enforcement—Whether owed to public—Responsibility—Whether answerable to law alone—Whether mandamus available to compel performance of duty—Discretion not to prosecute—Power to make policy decisions—Whether absolute.

*Police—Duties—Law enforcement—Commissioner of Police of Metropolis—Whether duty of law enforcement owed to public—Whether performance of duty compellable—Enforcement of duty—Whether mandamus available—Discretion not to prosecute—Power to make policy decisions—Whether discretion absolute—Policy decision not to enforce Gaming Acts—Whether mandamus available to secure reversal of decision—Betting, Gaming and Lotteries Act, 1963 (c. 2), s. 32 (1) (a).**

Gaming—Game of chance—Odds favouring banker—Duty of police to prosecute.

As a consequence of a policy decision made in April, 1966, by the respondent, the Commissioner of Police of the Metropolis, the police did not attempt to enforce section 32 (1) (*a*) of the Betting, Gaming and Lotteries Act, 1963, in gaming clubs in London. The applicant, a private citizen, complained that illegal gaming was being carried on, and applied to the Divisional Court for, inter alia, an order of mandamus directing the respondent to reverse the policy decision. The application was refused and the applicant appealed to the Court of Appeal. In December, 1967, the respondent orally announced a new policy of enforcing, and steps were taken to enforce, section 32 (1) (*a*) of the Act, and he undertook on appeal that the policy decision of April, 1966, would be officially revoked.

On the contentions that the respondent owed no duty to the public to enforce the law and had an absolute discretion not to prosecute, and that the appeal was in a criminal cause or matter within section 31 (1) (*a*) of the Supreme Court of Judicature (Consolidation) Act, 1925,[1] so that the court was without jurisdiction in the appeal:—

Held, (1) that the respondent owed a duty to the public to enforce the law (post, pp. 136A, 138G, 148G—149A) which he could be compelled to perform (post, pp. 136G, 138G, 148G—149A); that (*per* Lord Denning M.R. and Salmon L.J.) while he had a discretion not to prosecute his discretion to make policy decisions was not absolute (post, pp. 136D, F, 139A); but that, since the respondent had undertaken to revoke the policy decision of April, 1966, equally favourable to all the players . . ."

[1] Supreme Court of Judicature (Consolidation) Act, 1925, s. 31 (1): "No appeal shall lie (*a*) . . . from any judgment of the High Court in any criminal cause or matter . . ."

* Betting, Gaming and Lotteries Act, 1963, s. 32 (1): ". . . gaming shall be lawful if, but only if . . . (*a*) . . . (i) the chances in the game are equally favourable to all the players; or (ii) the gaming is so conducted that the chances therein are

and had taken steps to enforce section 32 (1) (*a*) of the Act, and more could not be reasonably be expected, no order should be made on the appeal (post, pp. 138B, 145D, 147C).

Fisher v. *Oldham Corporation* [1930] 2 K.B. 364; 46 T.L.R. 390; and *Attorney General for New South Wales* v. *Perpetual Trustee Co. Ltd.* [1955] A.C. 457; [1955] 2 W.L.R. 707; [1955] 1 All E.R. 846, P.C. considered.

Mills v. *Mackinnon* [1964] 2 Q.B. 96; [1964] 2 W.L.R. 363; [1964] 1 All E.R. 155, D.C., doubted.

(2) That the reversal of the policy decision was not "a criminal cause or matter" within section 31 (1) (*a*) of the Supreme Court of Judicature (Consolidation) Act, 1925, (post, pp. 134F, 145B, 147F–G), and accordingly, the Court of Appeal had jurisdiction to hear the appeal.

Ex parte Alice Woodhall (1888) 20 Q.B.D. 832, C.A. and *Amand* v. *Home Secretary* [1943] A.C. 147, considered.

Quaere: Whether the applicant had a sufficient interest to be protected by mandamus (post, pp. 137C, 145C 149A).

APPEAL from Divisional Court (Lord Parker C.J., Winn L.J. and Widgery J.).

On April 22, 1966, an instruction was issued from the office of the Commissioner of Police of the Metropolis, the respondent, by the assistant commissioner of "A" department, to senior officers of the Metropolitan Police in the following terms:

> "Confidential Instruction. Gaming in registered or licensed clubs. For the time being all applications for authority for an inside observation in licensed or registered clubs for the purpose of detecting gaming are to be submitted to A.1. branch for my covering approval. . . ."

By affidavit sworn in June, 1967, Robert Alfred Bearman, assistant secretary, A.1. branch, administration department, New Scotland Yard, stated as follows:

> "It is a fact that in April, 1966, the then assistant commissioner 'A' department ordered as a matter of policy that no observations by police were to be kept in licensed or registered clubs for the purpose of detecting offences under the Betting, Gaming and Lotteries Act [1963] without his covering approval. . . . I was informed verbally by the assistant commissioner referred to, who is now the deputy commissioner, that he considered that in view of the uncertainty of the law, the expense and manpower involved in keeping gaming observations in such clubs were not justified unless there were complaints of cheating or reason to suppose that a particular club had become the haunt of criminals. At the time when this decision was taken the Kursaal case [*Kursaal*

Casino Ltd. v. *Crickitt* [1] . . . was believed to be going to the House of Lords on the point certified by the Divisional Court. Had this been decided in favour of the prosecution, it was felt that roulette and other games where the bank had an advantage would have been clearly illegal and would, therefore, have come to an end in any reputable clubs or have been very easy to detect and prosecute. . . ."

As a consequence, police observation was stopped, and the police did not attempt to enforce section 32 (1) (*a*) of the Act of 1963 in large gaming clubs in London.

In 1966 the applicant, Albert Raymond Blackburn, a private citizen, alleged to the respondent that illegal gaming was taking place in casinos in London. By letter dated March 15, 1967, he repeated the allegation that in virtually every London casino games were played which manifestly contravened the provisions of section 32 of the Act of 1963 in that the bank had a permanent advantage and roulette with a zero was being played, he named two clubs, and asked for assistance by the respondent in enforcing the provisions of the Act of 1963.

On March 21, 1967, the applicant was informed by Robert Alfred Bearman that there were difficulties in enforcing the provisions of the Act of 1963, that the way in which police manpower was used was a matter for the respondent's discretion, that it was felt that, as the gaming law stood, there were higher priorities for the deployment of manpower, and reference was made to the policy decision of April 22, 1966.

On July 11, 1967, the applicant in person moved the Divisional Court for an order of mandamus directed to the respondent in the following terms:

> "requiring him to assist the applicant and such other persons as may have good grounds for requesting his assistance in the prosecution of gaming clubs in the metropolitan police area which contravene the provisions of the [Betting] Gaming [and Lotteries] Act, 1963; and in particular to assist the applicant in respect of the complaint lodged by him with the [respondent] on March 21, 1967, concerning the Golden Nugget Club, Piccadilly; and requiring him to reverse or procure the reverse of the policy decision [dated April 22, 1966] taken by him or his superiors that the time of police officers will not be spent on enforcing the provisions of the Act of 1963."

The application was supported by a written statement of the

[1] [1966] 1 W.L.R. 960; [1966] 2 All E.R. 639, D.C.

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applicant's submissions. The Divisional Court refused the applicant's motion with costs.

The applicant appealed on the grounds, inter alia, that the decision was contrary to law and should be reversed. The respondent gave notice that, in addition to grounds relied on by the Divisional Court, the decision should be affirmed on further grounds as follows:

> "That as a matter of law an order of mandamus will not issue against a chief officer of police in respect of any of the matters set out in the applicant's notice of motion and statement because (a) the respondent has no legal duty to the applicant in regard to any of those matters, and (b) each one of the matters is a matter lying only within the discretion of the respondent; that the order of mandamus which the applicant seeks would amount either directly or indirectly to an order to prosecute certain persons both specified and ascertainable, and as a matter of law an order of mandamus will not issue for such latter purpose; that an order of mandamus ought not to issue as there are alternative remedies available to the applicant in that he might himself (a) lay informations, or (b) apply for voluntary bills of indictment."

The respondent also gave notice of intention to rely upon the additional ground that the court had no jurisdiction to hear the appeal since it was in a criminal cause or matter within section 31 (1) (*a*) of the Supreme Court of Judicature (Consolidation) Act, 1925.

On December 19, 1967, judgment in the appeal to the House of Lords in *Kursaal Casino Ltd.* v. *Crickitt (No. 2)*,[a] was given and consequent on that decision police officers made visits to London gaming clubs.

On December 30, 1967, the respondent issued a statement in the following terms: "It is the intention of the Metropolitan Police to enforce the law as it has been interpreted."

At the hearing of the appeal the applicant abandoned his application for orders directing the respondent to assist him and others in the prosecution of gaming clubs, and in particular to assist him in respect of the named club. He adduced evidence about practices in the Golden Nugget Casino Club and the Victoria Sporting Club.

The respondent produced schedules of prosecutions under section 32 of the Act of 1963, for 1964, 1965 and 1966, and by counsel undertook that the policy decision of April 22, 1966,

[a] [1968] 1 W.L.R. 53; [1968] 1 All E.R. 139, H.L.(E.).

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would be revoked. The court was informed that reports by police officers on gaming in big clubs in London were to be referred to the Director of Public Prosecutions.

Further facts are stated in the judgments.

The applicant in person. Three questions arise on this appeal, namely, first, whether appeal lies to this court under section 31 (1) (*a*) of the Judicature Act, 1925; secondly, whether mandamus will issue against a chief officer of police for failure to enforce the law; and, thirdly, whether mandamus should issue since it has been suggested that, if the applicant had sufficiently strong feelings, a private prosecution could be brought by way of laying information or application for voluntary bills of indictment. These are technical questions, and it is not suggested that the applicant has a clear-cut case on the technicalities.

Mandamus will issue against the respondent for the following reasons. In relation to duties of law enforcement the police are not responsible to the Secretary of State for Home Affairs or to police authorities. The views of the Government as stated in 1958 were that the full responsibility for enforcement is a matter which is reserved entirely to the chief officer of police; in the exercise of this responsibility he is answerable to the law alone and not to any police authority: *per* Lord Chesham, Hansard, 213 H.L.Deb. 58, col. 7. The Secretary of State for Home Affairs cannot give orders to the respondent or to other members of the force with regard to their duty of enforcing the law: The Home Office, by Sir Frank Newsam (1954), p. 45. It follows that, if the police are not responsible to the courts for the discharge of duties "faithfully according to law" (to quote the oath of police officers), they are responsible to no one. The police are under the law, and it is the law which is the policeman's master: Public Administration, by Sir John Anderson (1929), p. 192. A chief officer of police can, and should, be made the subject of an order of the court where he issues orders or makes policy decisions which are manifestly illegal and ultra vires, or if he is guilty of persistent and serious failure to ensure that the law is enforced in relation to any significant part of the law, and seeks to usurp the function of the judges as sole interpreters of the law who alone may declare a statute vague, ambiguous and unenforceable. The court has a wide discretion, and it is important to rule that the police are responsible to the court for the duty of law enforcement. Mandamus is the only practical remedy for enabling such matters to come before the court.

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The facts show that the respondent has failed to enforce the law. The policy decision of April, 1966, is illegal and ultra vires section 5 of the Metropolitan Police Act, 1829. The law is not, and has not been, uncertain in section 32 (1) (*a*) of the Betting, Gaming and Lotteries Act, 1963: *Kursaal Casino Ltd.* v. *Crickitt* (*No. 2*).[4] Because of failure to enforce the law the country has become a gambler's paradise: *per* the Secretary of State for Home Affairs in "The Times" newspaper, September 13, 1966. The Act of 1963 failed to achieve its purpose because of failure to enforce it: "The Times" newspaper, January 2, 1968.

This appeal is not within section 31 (1) (*a*) of the Judicature Act, 1925, in that the words "criminal cause or matter" therein refer to a breach of law where an act is illegal or criminal and where a prosecution has been or is about to be brought or is pending. No criminal cause or matter is even pending here.

As to a private prosecution. The applicant is a private citizen and feels strongly about individual freedom. An indictment of the respondent by a private citizen is not a proceeding he could be expected reasonably to undertake. A private citizen is not now the proper person to undertake the duty of general law enforcement. The applicant does not wish to bring a private prosecution. In so far as the respondent claims that he owes no duty to the public to enforce the law the claim is made to the possession of power without responsibility. This matter is fundamental to the status of the police as a whole.

Michael Worsley for the respondent. The submissions for the respondent may be summarised as follows. The order is applied for in a criminal cause or matter in which section 31 (1) (*a*) of the Judicature Act, 1925, deprives the court of jurisdiction. Alternatively, if that submission is wrong, the submission is as follows. As a matter of law an order of mandamus will not issue against the respondent in respect of any matter set out in the notice of motion because, first, the respondent has no legal duty to the applicant in regard to any of the matters complained of; and, secondly, each of the matters lies only within the discretion of the respondent. Further, the order sought would amount either directly or indirectly to an order to prosecute certain persons both specified and ascertainable. As a matter of law mandamus will not issue for the latter purpose. Mandamus ought not to issue because the applicant has the remedies of laying informations or applying for voluntary bills. Lastly,

[4] [1968] 1 W.L.R. 53.

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having regard to what, on instructions, the court will be told has been done, is being done and will be done by the respondent's department, mandamus ought not to issue.

No proceedings will lie by which a private person may compel the respondent to prosecute or assist in prosecuting or to reverse his policies, which is what it is sought to do here. The respondent has no duty to prosecute and owes no duty to the applicant.

[Lord Denning M.R. Suppose a chief officer of police were to say "I do not like this Act, I shall not enforce it, and I am supported by my watch committee," what is there to compel him to prosecute?]

The status of the respondent differs from that of a chief constable. A chief constable is now provided for by the Police Act, 1964, and the Secretary of State for Home Affairs has power to require him to retire. The status of the respondent derives from the Metropolitan Police Act, 1829, s. 1, as amended by the Metropolitan Police Act, 1856, s. 1. He is appointed by, holds office during pleasure of, and may be dismissed by the Crown which would probably act on the advice of the Secretary of State for Home Affairs. The respondent has the status of a justice of the peace, takes the oath of a justice but does not sit judicially, and has all the duties of a justice for keeping the peace. He is not attested as a constable. The Secretary of State for Home Affairs has power to set up a local inquiry to inquire into the policing of any area and so is in a position to advise the Crown; the power is to be found in the Police Act, 1964, s. 32 (1), s. 62, and Sch. 8. At any such inquiry no doubt the respondent could be heard. No sanction other than dismissal can be found as against a chief officer of police himself. Any constable under him is subject to disciplinary regulations: section 33 of the Police Act, 1964. Mandamus is not available to compel the respondent to prosecute; and, except perhaps by some extra-legal means such as persuasion, he cannot be forced to prosecute because he has no duty to prosecute. The only place in which a duty might be said to originate is the oath of a justice which the respondent takes on his appointment; however, this is peculiar to him and is not taken by chief constables. In any event he has not the forces available to enforce all the laws all the time. It is conceded that mandamus will lie against a justice of the peace in respect of a judical duty and provided that an applicant is a person to whom the duty is owed.

In approaching the question whether or not a duty to prosecute exists it is necessary to consider the history, practice and law

as to the bringing of prosecutions. No general duty exists to prosecute in any particular case. Only a right to prosecute exists. It is frequently used by the police; in exceptional cases consent has to be obtained from, e.g. the Director of Public Prosecutions to bring a prosecution. The respondent has the right to prosecute in common with his constables and with all persons. Unlike the position in most other countries, and especially on the continent, the police are in the same position as all other subjects of the Crown in regard to the bringing of prosecutions: Stephen's History of the Criminal Law of England (1883), vol. I, p. 493. The absence of the existence of any duty to prosecute is correlative in law and practice with the right of all citizens to prosecute. The respondent adopts as part of his submissions The Office and Duties of the Director of Public Prosecutions, by Sir Theobald Mathew (1950), pp. 3 to 13. Until 1829 there was no legal duty to prosecute other than the general duty on all persons to prosecute such malefactors as they might have evidence against. The Metropolitan Police Act, 1829, was the foundation of all modern legislation on the police. No duty to prosecute is imposed thereby on the police. No statute and no common law decision is to be found imposing a legal duty to prosecute. In practice the police frequently do prosecute; but they assume as a matter of practice the job of prosecuting. If any duty to prosecute exists in the respondent it is owed to the Crown whose servant he is; it is not owed to any member of the public: *Reg.* v. *Lewisham Union Guardians*.[8]

[EDMUND DAVIES L.J. Is not legislation contemplated to abolish the capacity of a private citizen to prosecute?]

If such legislation were to be introduced the whole history, law and practice would have to be reviewed and the question considered whether the Director of Public Prosecutions or the police should have a duty to bring prosecutions. It would be wrong to abolish the private right to prosecute without taking those matters into account.

Although no strict legal duty to prosecute exists in the respondent, provision is made for communicating information about certain offences to the Director of Public Prosecutions: see The Prosecution of Offences Regulations 1946 (S.R. & O. 1946, No. 1467/L.17). The Director of Public Prosecutions is under the general superintendence of the Attorney-General who is answerable to Parliament.

[8] [1897] 1 Q.B. 498.

The foregoing submissions may be summarised by saying that until 1892, when the foundation of modern police forces began, there was no legal duty on any particular person to prosecute, and since then there has been no common law or statutory provision imposing a duty on the police to prosecute, and there has been nothing since then apart from a mere practice in the majority of cases.

Ex parte Napier[6] is the fons et origo of recent learning on mandamus and shows that the substratum on which mandamus rests is a common law, a contractual or a statutory duty, and that practice does not amount to a legal obligation. The authorities are: *Reg.* v. *Lewisham Union Guardians*[7]; *Grant* v. *Secretary of State for India in Council*[9]; *Reg.* v. *Secretary of State for War*[9]; *Reg.* v. *Caledonian Railway Co.*[10] and *Reg.* v. *Commissioners of Inland Revenue, Ex parte Nathan*.[11] *Julius* v. *Bishop of Oxford*[12] shows the kind of interest an applicant has to have and the duty there has to be towards him in particular as distinct from a duty to the public in general.

As to the respondent's discretion. When the respondent considers the question of prosecution he has to take many factors into account, including the manner of deployment of the forces available to him, and he has a discretion how, when and for what purpose to use those forces. He cannot be under a duty to prosecute willy nilly either in a particular case or in a particular class of cases; for example, some people think that the police ought to enforce the speed limit more strictly, and others think likewise about the Litter Act, 1958; but, if the police were to attempt to enforce those provisions of the law as strictly as possible, very few policemen would be left to perform other duties. His discretion is similar to that of the Director of Public Prosecutions who rightly has a general policy in regard to, and rarely prosecutes in, certain classes of offences such as perjury and unlawful sexual intercourse by young persons.

The earlier words in the mandamus sought may be interpreted in one of two ways, namely, first, in substance, mandamus to prosecute, and secondly, literally, mandamus to assist the applicant and others to prosecute. As to the first, mandamus will not issue to order any person to prosecute: *Reg.* v. *Southampton Port Commissioners, Ex parte Southampton Burgesses*[13]; *Elwood* v.

[6] (1852) 18 Q.B. 692.
[7] [1897] 1 Q.B. 498.
[8] (1877) 2 C.P.D. 445.
[9] [1891] 2 Q.B. 326, C.A.
[10] (1850) 16 Q.B. 19.
[11] (1884) 12 Q.B.D. 461.
[12] (1880) 5 App.Cas. 214, 225, 226, 227, 230, 244.
[13] (1862) 1 Best & Sm. 5; (1870) L.R. 4 H.L. 449.

Belfast Corporation.[14] As to the second, the terms of the application are too general in that, if mandamus were to issue, the respondent would be ordered to assist not only the applicant but also anybody in the land choosing to request assistance in the prosecution of almost anybody else for gaming. The words are bad for generality as imposing an impossibly wide duty on the respondent.

The order sought cannot be served, and if any part of the mandamus sought is in " a criminal cause or matter " the order will not issue: *Rex v. Governor of Brixton Prison, Ex parte Savarkar*.[15] If, on the other hand, severance is possible now that rules of pleading are less strict than used to be the case, what is left is an application for mandamus to assist the applicant and others in the prosecution generally of gaming clubs and one in particular which has been named. Clearly then the application is in a criminal cause or matter: *Provincial Cinematograph Theatres Ltd. v. Newcastle-upon-Tyne Profiteering Committee*,[16] *per* Lord Sumner,[17] as interpreted in *Amand v. Home Secretary*[18] and especially by Lord Porter.[19]

The application is made in a criminal cause or matter. The point is taken out of duty to the court. The authorities are: *Ex parte Alice Woodhall*[20]; *Ex parte Pulbrook*[21]; and the *Provincial Theatres* case.[22]

The application is unprecedented.

The point about alternative remedies available to the applicant is made not in an attempt on behalf of a public officer to strain a technicality but following the lead given by Lord Parker C.J. on the applicant's ex parte application for leave and in the judgment appealed against.

On the facts the respondent has brought prosecutions under the Act of 1963 from 1964 to 1967 and has taken action since December 19, 1967, when the decision was given in *Kursaal Casino Ltd. v. Crickitt (No. 2)*.[23] Since the policy direction of April 22, 1966, has been withdrawn orally and the respondent is prepared to undertake that not only will that direction be withdrawn in writing but that it will be replaced with fresh written instructions to accord with the new policy as announced following *Kursaal Casino Ltd. v. Crickitt (No. 2)*,[24] in all the

[14] (1923) 57 Ir. L.T. 138.
[15] [1910] 2 K.B. 1056, C.A.
[16] (1921) 27 Cox C.C. 63; 37 T.L.R. 799, H.L.
[17] (1921) 27 Cox C.C. 63, 67, 68.
[18] [1943] A.C. 147, H.L.
[19] Ibid. 164.
[20] (1888) 20 Q.B.D. 832.
[21] [1892] 1 Q.B. 86.
[22] 27 Cox C.C. 63.
[23] [1968] 1 W.L.R. 53.

circumstances, both on the merits and in law, it would be wrong for the court, if it has jurisdiction, to order the writ to go.

The applicant in reply: *Kursaal Casino Ltd. v. Crickitt (No. 2)*[24] shows that the law as it appeared from *Kursaal Casino Ltd. v. Crickitt*[25] was sufficiently strong for enforcement, and did not justify inaction by the respondent.

Submissions in reply should be made on general principles. Whatever the outcome of the appeal the court is invited to rule on two matters, namely, first, whether on the facts the respondent has failed or otherwise to enforce the provisions of section 32 (1) (*a*) of the Act of 1963, and, secondly, on the claim made for the respondent that he has no duty to the public to enforce the law but has merely an unenforceable responsibility to the Crown.

It is accepted that this application is unprecedented. The respondent has a duty to assist in prosecution for contravention of the Act of 1963 because the special position of the police is recognised by section 51 of the Act in that a search warrant is obtainable exclusively by a police officer. What it is sought to do by the appeal is to ensure enforcement of the provisions of section 32 (1) (*a*). So much of the application as relates to an order directing assistance in prosecution is withdrawn.

Much of the argument for the respondent was directed to the proposition that he has power without responsibility. The court does not accept the view that such power exists. Those submissions may be described as arguments which might have been put with force to the Court of Star Chamber: see *Liversidge v. Anderson*,[26] where Lord Atkin said[27]: ". . . arguments which might have been addressed acceptably to the Court of King's Bench in the time of Charles I." *England v. Davidson*[28] is authority for the proposition that performance by a police officer of his public duty furnishes no consideration for a reward offered for his services; accordingly he owes a duty to the public and not merely to the Crown as contended on behalf of the respondent.

If the court is able to control an unquestionably improper policy decision made by a chief officer of police, it follows that some remedy must be available against him. The court has inherent jurisdiction to act; it cannot act ex proprio motu. If there is no remedy, then there is no right; ubi remedium ibi jus, and the converse. The court is invited to vindicate the rule

[24] [1968] 1 W.L.R. 53.
[25] [1966] 1 W.L.R. 960; [1966] 2 All E.R. 639, D.C.
[26] [1942] A.C. 206, H.L.
[27] Ibid. 244.
[28] (1840) 11 Ad. & El. 856; 3 Per. & Dav. 594; 9 L.J.Q.B. 287.

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on law and to show in the language of *Tzortzis* v. *Monark Line*,[a] *per* Salmon L.J.[a] that the law and its administration in this country has not been devalued.

LORD DENNING M.R. Mr. Blackburn, the applicant, moves for a mandamus against the Commissioner of Police of the Metropolis, the respondent. He says that it was the commissioner's duty to enforce the law against gaming houses: and he has not done it. He seeks an order to compel the commissioner to do it. This motion, thus made, raises questions of constitutional significance. I will deal with them separately.

1. The Law as to Gaming houses

The common law of England has always condemned gaming-houses. This is not because gambling is wicked in itself, but because of the evils attendant on it. Hawkins in his Pleas of the Crown (Book I, c. 75, s. 6, 1716 ed. p. 198) says . . .

> ". . . all common gaming houses, are nuisances in the eye of the law, not only because they are great temptations to idleness, but also because they are apt to draw together great numbers of disorderly persons, which cannot but be very inconvenient to the neighbourhood."

The statute law of England has likewise condemned gaming-houses. As early as 1541 in the time of Henry VIII (33 Hy. 8, c. 9, para. 11) Parliament enacted that no person should for his gain keep a gaming-house. The reason then was because gambling disturbed the military training. It distracted the young men from practising archery which was needed for the defence of the country. Several statutes have been passed since. All of them condemned gaming houses because of the mischiefs attendant on them.

When roulette was first introduced over two hundred years ago, Parliament tried to stop it. A statute of 1744 (18 Geo. 2, c. 34), recited that the "pernicious game called roulet, or roly-poly" was practised. It prohibited any person from keeping any house for playing it.

But all those statutes proved of no avail to prevent the mischief Blackstone (Commentaries, Book IV, c. 13, s. 8, 8th ed., 1778, pp. 171, 173) said that the legislature had been careful to pass laws to prevent "this destructive vice," but these laws had failed

[a] [1968] 1 W.L.R. 406; [1968] 1 All E.R. 949, C.A.

[a] [1968] 1 W.L.R. 406, 414; [1968] 1 All E.R. 949, C.A.

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to achieve their object. The reason for the failure was because the gamblers were too quick-witted for the law to catch them. He said (Commentaries, Book IV, c. 13, 8th ed., p. 173) that ". . . the inventions of sharpers being swifter than the punishment of the law, which only hunts them from one device to another." So much so that by the beginning of the nineteenth century gaming-houses were a scandal. The Victorian legislation, aided by the Victorian judges in *Jenks* v. *Turpin*,[1] reduced the evil but did not exterminate it.

History has repeated itself in our own time. Parliament made an attempt in 1960 to put the law on a sound footing. It had before it the Report (1949–1951) (Cmd. 8190) on the subject. The report drew a clear distinction between promoters who organised gaming for their own profit (which was an evil) and those who arranged gaming for the enjoyment of others without making a profit out of it themselves (such as gaming in a members' club, which was innocent). The Royal Commission (Cmd. 8190, p. 125, para. 412) thought that "the main object of the criminal law should be to prevent persons being induced to play for high stakes for the profit of the promoter." They recommended legislation to achieve this object. The draftsmen set to work and produced the Bill which became the Betting and Gaming Act, 1960, since re-enacted in the Betting, Gaming and Lotteries Act, 1963. The old common law was abolished. The old statutes were repealed. New sections were enacted with the intention of ensuring that promoters did not make high profits out of gaming, either in clubs or elsewhere.

These sections have lamentably failed to achieve their object. Just as in Blackstone's time, so in ours. The casino companies have set up gaming houses and made large profits out of them. They always seem to be one device ahead of the law. The first device they used after the Act of 1960 was to levy a toll on the stakes. They used to promote roulette without a zero and demand sixpence for themselves on every stake. That device was declared unlawful in *Quinn* v. *Mackinnon*.[2] Next, they claimed that they could take sixpence from every player on every spin of the wheel. That device too was held to be unlawful in this court in *Allan (J. M.) (Merchandising) Ltd.* v. *Cloke*.[3] Then they claimed

[1] (1884) 13 Q.B.D. 505, D.C.

[2] [1963] 1 Q.B. 874; [1963] 2 W.L.R. 391; [1963] 1 All E.R. 570, D.C.

[3] [1963] 2 Q.B. 340; [1963] 2 W.L.R. 899; [1963] 2 All E.R. 258, C.A.

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that they could charge every player 10 shillings for every 20 minutes. That too was found to be unlawful in *Kelland* v. *Raymond* [4]

But one of their devices at this time succeeded. It was in chemin-de-fer. The promoters charged every player £5 for every "shoe" which took about 35 minutes. This was held to be lawful in *Mills* v. *Mackinnon*.[5] I must say I doubt that decision. I should have thought that £5 for every 35 minutes was worse than 10 shillings every half hour. At any rate, it is more profitable.

After those cases, the casino companies thought out a new device which proved to be far more profitable. They promoted roulette with a zero. This is a game in which the chances over a long period mightily favour the holder of the bank. Under this new device, the organisers so arranged things that they themselves nearly always held the bank. But they claimed it was lawful because the croupier every half hour "offered the bank" to the players. Very rarely, if ever, was the offer accepted: for the simple reason that it may be ruinous to hold the bank for only a few spins of the wheel. It is only worth holding if you can hold it for a long time, such as a week or a month. Nevertheless the organisers claimed that this "offer of the bank" rendered the gaming lawful. They were supported, we were told, by the opinion of some lawyers in the Temple, but there were conflicting views. At any rate, this device was highly profitable. For a time it was surprisingly successful, provided it was skilfully worked. It was not worked very skilfully in the first two cases: and the casino companies were convicted, one in Blackpool, *Casino Club (Bolton) Ltd.* v. *Parr*,[6] and the other in Southend, *Kursaal Casino Ltd.* v. *Crickitt*.[7] But this device was worked skilfully in the third case, and the casino company was acquitted in the Divisional Court in *Kursaal Casino Ltd.* v. *Crickitt (No. 2)*.[8] That case has, however, recently been overruled by the House of Lords.[9] The device of "offering the bank" will no longer work.

But the casino companies do not seem to be unduly worried. They have not stopped their gaming. They have put on their thinking-caps and brought out another device. They do not trouble now to "offer the bank" to a player. They give a winner two kinds of chips, ordinary chips on which he collects his

[4] [1964] 2 Q.B. 108; [1964] 2 W.L.R. 662; [1964] 1 All E.R. 564, D.C.
[5] [1964] 2 Q.B. 96; [1964] 2 W.L.R. 363; [1964] 1 All E.R. 155, D.C.
[6] (1966) 64 L.G.R. 155, D.C.
[7] [1966] 1 W.L.R. 960; [1966] 2 All E.R. 639, D.C.
[8] [1967] 1 W.L.R. 1227; [1967] 3 All E.R. 360, D.C.
[9] [1968] 1 W.L.R. 53; [1968] 1 All E.R. 139, H.L.(E.).

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winnings, and special chips which he throws back. No doubt they hope that the same will happen with this device as with the others. It will have to be tested in the courts. Meanwhile they expect to carry on with their gaming. If this is then held to be unlawful, they will try to think of another device. And so on ad infinitum: at least they may think so.

What are the consequences? They were stated with striking clarity by the Secretary of State for Home Affairs, Mr. Roy Jenkins, in "The Times" newspaper of September 13, 1966. He is reported as saying:

> "The Betting and Gaming Act, 1960, has led to abuses, particularly in the field of gaming clubs, which were not foreseen by its promoters. This country has become a gambler's paradise, more wide open in this respect than any comparable country. This has led to a close and growing connection between gaming clubs and organised crime, often violent crime, in London and other big cities. The fat profits made by proprietors (often out of the play itself and quite contrary to the intention of the 1960 Gaming Act) made them sitting targets for protection rackets. In addition, gaming on credit, with gaming debts unenforceable at law, means that strong-arm methods are sometimes used to extort payment from those who have gambled beyond their means."

Mr. Blackburn says that this state of affairs is due to the failure of the police to enforce the law and seeks to compel them to do it.

2. The steps taken by Mr. Blackburn.

In 1966 Mr. Blackburn was concerned about the way in which the big London clubs were being run. He went to see a representative of the Commissioner of the Police of the Metropolis and told him that illegal gaming was taking place in virtually all London casinos. He was given to understand, he says, that action would be taken. But nothing appeared to be done. On March 15, 1967, Mr. Blackburn wrote a letter to the commissioner in which he again stated that illegal gaming was taking place. He asked the commissioner to assist him in prosecuting several London clubs. Following that letter he was seen by Mr. Bearman on behalf of the commissioner. Mr. Bearman explained to him that there were difficulties in enforcing the provisions of the Act. He added that the way in which police manpower was used was a matter for the discretion of the commissioner; and that it was felt that, as the gaming law stood, there were higher priorities

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for the deployment of police manpower. He also stated that it would be contrary to a policy decision for him to promote or assist in the promotion of a prosecution for breach of section 32 of the Act of 1963.

Mr. Blackburn was dissatisfied and made application to the Divisional Court for a mandamus directed to the commissioner requiring three things: (1) to assist him and others to prosecute gaming clubs; (2) to assist him in a particular complaint against a named club; and (3) to reverse the policy decision. The Divisional Court rejected his application. He appeals in person to this court.

Mr. Worsley, for the commissioner, took an objection to the jurisdiction of this court. He argued that this was an appeal from a judgment of the High Court "in a criminal cause or matter," and that an appeal did not lie to the Court of Appeal, see section 31 (1) (*a*) of the Supreme Court of Judicature (Consolidation) Act, 1925. He referred us to several cases on the subject, particularly *Provincial Cinematograph Theatres* v. *Newcastle-upon-Tyne Profiteering Committee* [10] in the House of Lords. I think there might perhaps have been something in this objection if Mr. Blackburn had persisted in his first two requests. They might be said to be steps in a criminal matter. But Mr. Blackburn withdrew those two and confined himself to the third, i.e., requiring the commissioner to reverse his policy decision. It seems to me that this is not a step in any "criminal cause or matter." Mr. Blackburn can appeal, I think, to this court on the matter. So I turn to it.

3. The Policy Decision.

The policy decision was a confidential instruction issued to senior officers of the Metropolitan Police. Mr. Bearman exhibited it in his affidavit in these proceedings. It was dated April 22, 1966, and was in effect an instruction to take no proceedings against clubs for breach of the gaming laws unless there were complaints of cheating or they had become haunts of criminals. The actual terms of the instruction were as follows:

> "Confidential instruction. Gaming in registered or licensed clubs. For the time being all applications for authority for an inside observation in licensed or registered clubs for the purpose of detecting gaming are to be submitted to A.1. branch for my covering approval."

[10] (1921) 27 Cox C.C. 63; 37 T.L.R. 799, H.L.

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Mr. Bearman explained in his affidavit that the reason for the instruction was:

> "In view of the uncertainty of the law, the expense and manpower involved in keeping gaming observations in such clubs were not justified unless there were complaints of cheating or reason to suppose that a particular club had become a haunt of criminals."

It appeared in evidence before us that this policy decision was made under a misapprehension. It was thought that *Kursaal Casino Ltd.* v. *Crickitt* [11] was going to the House of Lords, in which event the law would be settled about the "offer of the bank." But in point of fact that case was not going there, and the commissioner's officers do not seem to have known of it. I do not know that that misapprehension would have made much difference. The commissioner got to know later that that case was not going there, and he did not revoke the policy decision even then. It was the Southend police who took action, as they had done before. The Metropolitan Police did not take action: it was the enterprising Superintendent Crickitt of Southend.

At any rate, the result of the policy decision of April 22, 1966, was that thenceforward, in this great metropolis, the big gaming clubs were allowed to carry on without any interference by the police. We were told that in one or two cases observations had previously been started: but after this policy decision they were discontinued. No prosecutions were instituted in the metropolis against these clubs. That is what Mr. Blackburn complains of. He says that the policy decision was erroneous and that it was the duty of the commissioner to prosecute. To this I now turn.

4. The Duty of the Commissioner of Police of the Metropolis.

The office of Commissioner of Police within the Metropolis dates back to 1829 when Sir Robert Peel introduced his disciplined force. The commissioner was a justice of the peace specially appointed to administer the police force in the metropolis. His constitutional status has never been defined either by statute or by the courts. It was considered by the Royal Commission on the Police in their Report in 1962 (Cmnd. 1728). But I have no hesitation in holding that, like every constable in the land, he should be, and is, independent of the executive. He is not subject to the orders of the Secretary of State, save that under the Police Act, 1964, the Secretary of State can call

[11] [1966] 1 W.L.R. 960.

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upon him to give a report, or to retire in the interests of efficiency. I hold it to be the duty of the Commissioner of Police of the Metropolis, as it is of every chief constable, to enforce the law of the land. He must take steps so to post his men that crimes may be detected; and that honest citizens may go about their affairs in peace. He must decide whether or no suspected persons are to be prosecuted; and, if need be, bring the prosecution or see that it is brought. But in all these things he is not the servant of anyone, save of the law itself. No Minister of the Crown can tell him that he must, or must not, keep observation on this place or that; or that he must, or must not, prosecute this man or that one. Nor can any police authority tell him so. The responsibility for law enforcement lies on him. He is answerable to the law and to the law alone. That appears sufficiently from *Fisher* v. *Oldham Corporation*,[12] and *Attorney-General for New South Wales* v. *Perpetual Trustee Co. Ltd.*[13]

Although the chief officers of police are answerable to the law, there are many fields in which they have a discretion with which the law will not interfere. For instance, it is for the Commissioner of Police of the Metropolis, or the chief constable, as the case may be, to decide in any particular case whether inquiries should be pursued, or whether an arrest should be made, or a prosecution brought. It must be for him to decide on the disposition of his force and the concentration of his resources on any particular crime or area. No court can or should give him direction on such a matter. He can also make policy decisions and give effect to them, as, for instance, was often done when prosecutions were not brought for attempted suicide. But there are some policy decisions with which, I think, the courts in a case can, if necessary, interfere. Suppose a chief constable were to issue a directive to his men that no person should be prosecuted for stealing any goods less than £100 in value. I should have thought that the court could countermand it. He would be failing in his duty to enforce the law.

A question may be raised as to the machinery by which he could be compelled to do his duty. On principle, it seems to me that once a duty exists, there should be a means of enforcing it. This duty can be enforced, I think, either by action at the suit of the Attorney-General or by the prerogative writ of mandamus.

[12] [1900] 2 K.B. 364; 46 T.L.R. 390

[13] [1955] A.C. 457; [1955] 2 W.L.R. 707; [1955] 1 All E.R. 846, P.C.

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I am mindful of the cases cited by Mr. Worsley which he said limited the scope of mandamus. But I would reply that mandamus is a very wide remedy which has always been available against public officers to see that they do their public duty. It went in the old days against justices of the peace both in their judicial and in their administrative functions. The legal status of the Commissioner of Police of the Metropolis is still that he is a justice of the peace, as well as a constable. No doubt the party who applies for mandamus must show that he has sufficient interest to be protected and that there is no other equally convenient remedy. But once this is shown, the remedy of mandamus is available, in case of need, even against the Commissioner of Police of the Metropolis.

Can Mr. Blackburn invoke the remedy of mandamus here? It is I think an open question whether Mr. Blackburn has a sufficient interest to be protected. No doubt any person who was adversely affected by the action of the commissioner in making a mistaken policy decision would have such an interest. The difficulty is to see how Mr. Blackburn himself has been affected. But without deciding that question, I turn to see whether it is shown that the Commissioner of Police of the Metropolis has failed in his duty. I have no doubt that some of the difficulties have been due to the lawyers and the courts. Refined arguments have been put forward on the wording of the statute which have gained acceptance by some for a time. I can well understand that the commissioner might hesitate for a time until those difficulties were resolved; but, on the other hand, it does seem to me that his policy decision was unfortunate. People might well think that the law was not being enforced, especially when the gaming clubs were openly and flagrantly being conducted as they were in this great city. People might even go further and suspect that the police themselves turned a blind eye to it. I do not myself think that was so. I do not think that the suggestion should even be made. But nevertheless the policy decision was, I think, most unfortunate.

The matter has, I trust, been cleared up now. On December 19, 1967, the House of Lords in *Kursaal Casino Ltd.* v. *Crickitt (No. 2)*[14] made it quite clear that roulette with a zero was not rendered lawful simply by the "offer of the bank". Following that decision, on December 30, 1967, the commissioner issued

[14] [1968] 1 W.L.R. 53.

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a statement in which he said: "It is the intention of the Metropolitan Police to enforce the law as it has been interpreted." That implicitly revoked the policy decision of April 22, 1966; and the commissioner by his counsel gave an undertaking to the court that that policy decision would be officially revoked. We were also told that immediate steps are being taken to consider the "goings-on" in the big London clubs with a view to prosecution if there is anything unlawful. That is all that Mr. Blackburn or anyone else can reasonably expect.

5. Conclusion.

This case has shown a deplorable state of affairs. The law has not been enforced as it should. The lawyers themselves are at least partly responsible. The niceties of drafting and the refinements of interpretation have led to uncertainties in the law itself. This has discouraged the police from keeping observation and taking action. But it does not, I think, exempt them also from their share of the responsibility. The proprietors of gaming houses have taken advantage of the situation. By one device after another they have kept ahead of the law. As soon as one device has been held unlawful, they have started another. But the day of reckoning is at hand. No longer will we tolerate these devices. The law must be sensibly interpreted so as to give effect to the intentions of Parliament; and the police must see that it is enforced. The rule of law must prevail.

SALMON L.J. The chief function of the police is to enforce the law. The Divisional Court left open the point as to whether an order of mandamus could issue against a chief police officer should he refuse to carry out that function. Constitutionally it is clearly impermissible for the Secretary of State for Home Affairs to issue any order to the police in respect of law enforcement. In this court it has been argued on behalf of the commissioner that the police are under no legal duty to anyone in regard to law enforcement. If this argument were correct it would mean that insofar as their most important function is concerned, the police are above the law and therefore immune from any control by the court. I reject that argument. In my judgment the police owe the public a clear legal duty to enforce the law—a duty which I have no doubt they recognise and which generally they perform most conscientiously and efficiently. In the extremely unlikely event, however, of the police failing or refusing to carry

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out their duty, the court would not be powerless to intervene. For example, if, as is quite unthinkable, the chief police officer in any district were to issue an instruction that as a matter of policy the police would take no steps to prosecute any housebreaker, I have little doubt but that any householder in that district would be able to obtain an order of mandamus for the instruction to be withdrawn. Of course, the police have a wide discretion as to whether or not they will prosecute in any particular case. In my judgment, however, the action I have postulated would be a clear breach of duty. It would be so improper that it could not amount to an exercise of discretion.

Mr. Worsley has argued that the discretion is absolute and can in no circumstances be challenged in the courts. He instances the policy decision not to prosecute, save in exceptional circumstances, young teenage boys who have had sexual intercourse with girls just under the age of sixteen. But this, in my view, is an entirely different and perfectly proper exercise of discretion. The object of the Criminal Law Amendment Act, 1885, which made it a criminal offence to have sexual intercourse with girls under 16, was passed in order to protect young girls against seduction. Unfortunately, in many of the cases today in which teenage boys are concerned, it is they rather than the girls who are in need of protection. These are not the kinds of cases which the legislature had in mind when the Criminal Law Amendment Act, 1885, was passed. Moreover, experience has shown that if young boys are prosecuted in such circumstances, the courts usually take the humane and sensible course of imposing no penalty. The object of the statute which made housebreaking a crime was quite simply to prevent housebreaking in the interests of society. Similarly, the object of sections 32 to 40 of the Betting, Gaming and Lotteries Act, 1963, and the corresponding provisions of the Betting and Gaming Act, 1960, which the statute of 1963 replaced, was quite simply to protect society against the evils which would necessarily follow were it possible to build up large fortunes by the exploitation of gaming. The statutes of 1960 and 1963 were designed to prevent such exploitation and would have been entirely effective to do so had they been enforced. Regrettably they have not been properly enforced. As a result, and entirely contrary to the intention and contemplation of Parliament, an immense gaming industry, particularly in London, has been allowed to grow up during the last seven years. This has inevitably brought grave social evils in its train—

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protection rackets, crimes of violence and widespread corruption. There are no doubt a few large establishments which are respectably run and from which these evils are excluded. But for every one of these, there are scores of others. As long as it remains possible for large fortunes to be made by the private exploitation of gaming, the evils to which I have referred will grow and flourish until they threaten the whole fabric of society. Since large fortunes can be made out of the exploitation of gaming, naturally a great deal of ingenuity has been exercised to devise schemes for the purpose of evading the law. With a little more resolution and efficiency, these schemes could and should have been frustrated.

In the present case we are concerned chiefly with the game of roulette played with a zero. For the reasons which appear in the evidence before us, so long as the odds offered against any one number are no more than 35 to 1, the chances favour the bank by 3 to 10 per cent., according to the way the bets are laid. If the house holds the bank, the house in the long run is bound to win. It follows that this contravenes section 32 (1) (*a*) and (*b*) of the Act of 1963, for the "chances in the game are not equally favourable to all the players" (of whom the bank is one) (subsection (1) (*a*)), and the "gaming is so conducted that the chances therein are not equally favourable to all the players" (subsection (1) (*b*)). We have all heard of the very old song "The Man who Broke the Bank at Monte Carlo." The bank could, of course, have a very bad run of luck during one evening and lose heavily. It could perhaps have a very bad run of luck for days and even for weeks, but month in and month out, it is bound to win. This, amongst other reasons, is why the house which holds the bank month in and month out is bound to be more favourably placed than any player who may hold it sporadically for comparatively short periods of time.

In *Kursaal Casino Ltd.* v. *Crickitt* [16] which was decided in the Divisional Court on March 23, 1966, the justices had held that for the house to hold the bank contravened the law. The point taken by the prosecution, which to my mind was manifestly a good point, was that whoever held the bank was ex hypothesi a player and accordingly the game could not be equally favourable to all players and was therefore illegal. It would, therefore, make no difference that the house went through the motions of offering the bank to the players and that very occasionally the offer was

[16] [1966] 1 W.L.R. 960.

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accepted for short periods of time. The defence had argued that as the bank was offered at regular intervals to all the players, the chances were equal for all. The justices convicted. Incidentally, they also held that as there must be very many players who could not afford to take the bank, the offer, therefore, was in any event neither genuine nor realistic. The Divisional Court [17] upheld the conviction and concluded that there was ample evidence to support the finding that the offer of the bank was neither genuine nor realistic. It is perhaps a pity, if this was regarded as a test case, that the prosecution were not advised to call evidence, which could easily have been supplied by any actuary or anyone conversant with the game, that whatever the means of the players or however their liability might be limited, it would be quite impossible to offer the bank on any conceivable terms which could possibly result in the gaming being so conducted that the chances therein would be "equally favourable to all the players." This does not depend on questions of fact or degree or the circumstances of any particular case. It is something which is inherently impossible—as the House of Lords in *Kursaal Casino Ltd.* v. *Crickitt (No. 2)* [18] subsequently decided. The Divisional Court certified [17] a point of law of general public importance but refused leave to appeal to the House of Lords.

On April 22, 1966, after the time for applying for leave to appeal to the House of Lords had expired, the then assistant commissioner issued the following written confidential instruction:

> "For the time being all applications for authority for an inside observation in licensed or registered clubs for the purposes of detecting gaming are to be submitted to A.1. branch for my covering approval."

According to the affidavit of Mr. Bearman, the assistant secretary of the A.1. branch, the then commissioner

> "considered that, in view of the uncertainty of the law, the expense and manpower involved in keeping gaming observations in such clubs were not justified unless there were complaints of cheating or reason to suppose that a particular club had become a haunt of criminals."

This, I think, can only mean that, save in the circumstances postulated, no steps were to be taken to bring any prosecution in respect of roulette or other games in which the bank held an advantage: that is to say, there should be no prosecution in respect of games contravening section 32 as such.

[17] [1968] 1 W.L.R. 53.

[18] [1966] 1 W.L.R. 960.

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The affidavit continues as follows:

"At the time when this decision was taken, the *Kursaal* case [17] was believed to be going to the House of Lords on the point certified by the Divisional Court. Had this been decided in favour of the prosecution, it was felt that roulette and other games where the bank had an advantage would have been clearly illegal and would therefore have come to an end in any reputable club"—mark these words—"or have been very easy to detect and prosecute."

This can only mean that if the decision of the Divisional Court stood, there would have been no difficulty in the way of prosecution, but that the law was thought to be still uncertain because the *Kursaal* (*No.* 1) case [17] was believed to be going to the House of Lords and therefore no step should be taken meanwhile. No-one has or could possibly impugn the good faith of the assistant commissioner. It is, however, a very great pity that he apparently did not even take the trouble to discover that the time for asking the House of Lords for leave to appeal (which had been refused by the Divisional Court) had already expired by the date of his confidential instruction of April 22, 1966, and that therefore there was no possibility of any appeal to the House of Lords. Every month which went by added tens or perhaps hundreds of thousands of pounds to the profits made from illegal gaming, and, as the Secretary of State for Home Affairs said on September 13, 1966, the connection between gaming clubs and organised crimes continued to grow.

In the meantime the Kursaal casino devised a scheme under which the bank was offered to the players in circumstances supposed to ensure that they could limit their liability to any sum they liked to name. The Kursaal continued playing roulette under this new scheme. They were prosecuted again by the vigilant Superintendent Crickitt of Southend and duly convicted on December 2, 1966: that is to say, more than seven months after the confidential instruction. During this period nothing had been done to enforce the law in London, apparently because of the belief that there was to be an appeal to the House of Lords in *Kursaal Casino Ltd.* v. *Crickitt*.[17] This is the appeal that never was and which the slightest enquiry would have revealed never could have been at any time after April 20, 1966.

The inactivity after the conviction in *Kursaal Casino Ltd.* v. *Crickitt* (*No.* 2) [18] on December 2, 1966, is sought to be excused

[17] [1966] 1 W.L.R. 960. [18] [1967] 1 W.L.R. 1227.

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in Mr Bearman's affidavit by the fact that it was known that that conviction was to be tested in the Divisional Court.[18] No steps, however, were taken (since no inside observations were kept) to see whether the London gaming houses offered the bank to the players under conditions which allowed the players to limit their liability. There was thus no reason to suppose that the London gaming houses had even the defence open to them which had failed before the justices in *Kursaal* (*No.* 2).[18]

Another seven months went by before *Kursaal* (*No.* 2) [18] was decided in the Divisional Court on July 10, 1967, in favour of the defence. Apparently still no steps were taken to ascertain on what terms, if any, the bank was being offered to players in London and still the gambling empires were left undisturbed. Then on December 19, 1967, the decision of the Divisional Court in *Kursaal* (*No.* 2) [18] was reversed by the House of Lords.[19] We have been told that that decision and its implications are being carefully studied. The study should not take long. Lord Pearson's speech,[20] in which all the other law lords concurred, made the law pellucidly clear. In no circumstances can roulette be legal when played with a zero and when the odds are 35 to 1 or less against any one number turning up. The correct odds are, of course, 36 to 1, since including zero there are 37 numbers on the roulette wheel.

According to the evidence before this court, however, most of the gaming houses in London, in direct defiance of the law as laid down by the House of Lords, are still playing roulette, unmolested, in exactly the same way (save for one immaterial variation to which I will refer) as they were doing prior to December 19 last. The variation is as follows: If the number backed by a player for, say, one chip turns up, he receives 35 ordinary chips and one special chip of a different colour. He is not allowed to play with this chip or to exchange it for an ordinary chip. The normal practice is for the players to toss the special chips back to the croupier. Clearly the players are under no illusion. They realise that these special chips are but a hollow sham devised to deceive the exceptionally gullible into thinking that the odds being paid out are 36 to 1 when in reality they are 35 to 1. If anyone with a special chip chooses (and very few of them do) to take it to the cash desk to be cashed, it is duly cashed but the player concerned has to pay a fee, for example, of £10 in the

[17] [1967] 1 W.L.R. 1227
[18] [1968] 1 W.L.R. 53
[19] Ibid. 61.

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Golden Nugget Casino Club and £50 in the Victoria Sporting Club. It may be that gamblers are reluctant to cash the chips because they do not like paying the fee or because, rightly or wrongly, they fear they may be barred—and most gamblers would rather sacrifice a shade of odds than lose the chance of gambling.

However that may be, it is obvious that in reality the odds on the overwhelming number of bets remain at the rate of 35 to 1 against a single number turning up. What otherwise could be the object of having a different coloured chip to make the odds up to 36 to 1 and charging a fee for cashing it? At most it amounts to giving a player an option either to pay a fee or to play in a game in which the chances are not equally favourable to all players. There is certainly nothing here for a test case. This could only serve to give the gaming houses a further breathing space for another long spell, at the end of which no doubt an equally transparent ruse would be devised. What is now urgently needed is that energetic steps should immediately be taken to prosecute a substantial number of major London gaming houses in which the law is being defied. It may be that even when very heavy fines are imposed, they will be ineffective, in which event the Attorney-General would no doubt consider the advisability of bringing relator actions to restrain the present abuses by injunction.

Mr. Blackburn has abandoned the first two parts of his application: only the third part remains which asks for an order of mandamus requiring the commissioner to reverse the policy decision that the time of police officers will not be spent in enforcing the provisions of the Act of 1963. Mr. Worsley, on behalf of the commissioner, has given an undertaking to this court that the confidential instruction of April 22, 1966, will be immediately withdrawn and the whole matter referred to the Director of Public Prosecutions. Moreover, he has given an assurance that since December 19 last, the policy decision referred to in Mr. Bearman's affidavit has been reversed and that observation has been kept on many of the principal gaming houses in London, including those referred to in the affidavits filed by Mr. Blackburn. Had it not been for this undertaking and assurance, I should, I think, have been in favour of making an order.

I am not impressed by the argument that Mr. Blackburn has an equally effective and equally convenient remedy open to him and that, therefore, the order of mandamus should in any event

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be refused in the court's discretion. It seems to me fantastically unrealistic for the police to suggest, as they have done, that their policy decision was unimportant because Mr. Blackburn was free to start private prosecutions of his own and fight the gambling empires, possibly up to the House of Lords, single-handed. Nor, as at present advised, do I accept the argument that this is a "criminal cause or matter" and that therefore, by reason of the Supreme Court of Judicature (Consolidation) Act, 1925, section 31 (1) (*a*), no appeal lies to this court from the Divisional Court. No doubt the words "criminal cause or matter" must be given a very wide construction, but I am not convinced that they relate to proceedings in which neither party is at risk of being prosecuted as a result of the order sought or made (see *Amand* v. *Home Secretary* [1]). I would prefer to keep that point open as it does not directly arise for decision. The only doubt I should have had would have been as to whether Mr. Blackburn had a sufficient personal interest in order to obtain an order of mandamus. As it is, no order is necessary and I agree that, accordingly, none should be made.

Before parting with the case, I would, however, like to say that I entirely agree with the observations made by Lord Denning M.R. in regard to *Mills* v. *Muckinnon*.[2] That was a decision which rested on some very special facts found in that case. Should there be another prosecution in relation to chemin-de-fer and the prosecution were to call a number of respectable people who thoroughly understood the game, I should be surprised if the decision were the same.

Edmund Davies L.J. It would be difficult to exaggerate the importance of these proceedings. If there are grounds for suspecting that a grave social evil is being allowed to flourish unchecked because of a sot policy of inaction decided upon by a pusillanimous police force, public confidence must inevitably be gravely undermined. We have ranged far and wide in this case—both chronologically (from Anglo-Saxon times to the present day) and geographically (from Las Vegas to the Edgware Road)—but we have not travelled an inch beyond that made necessary by the urgency and importance of the issues raised.

It is, to say the least, singularly unfortunate that, the conviction in *Kursaal Casino Ltd.* v. *Crickitt* [3] having been upheld

[1] [1943] A.C. 147.
[2] [1964] 2 Q.B. 96.
[3] [1966] 1 W.L.R. 960.

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by the Divisional Court on March 23, 1966, and the time for applying to the House of Lords for leave to appeal having expired, the assistant commissioner issued on April 22 the "Confidential Instruction" regarding "Gaming in registered or licensed clubs," to which Lord Denning M.R. and Salmon L.J. have already referred. What prompted it has been one of the disturbing questions raised by these proceedings. This court was given no answer to that question directly emanating from its author, the assistant commissioner, but it appears from the affidavit of Mr. Bearman of the administration department of New Scotland Yard that the assistant commissioner

> ". . . considered that, in view of the uncertainty of the law, the expense and manpower involved in keeping gaming observations in such clubs were not justified unless there were complaints of cheating or reason to suppose that a particular club had become a haunt of criminals."

In other words, no steps were to be taken to investigate whether breaches of the Betting, Gaming and Lotteries Act, 1963, as such were being perpetrated, and it is conceded by Mr. Worsley for the respondent that in consequence observation in some of the biggest gambling clubs in the West End was immediately stopped. Small wonder, then, that on January 2 last "The Times" newspaper boldly asserted that,

> "It is now clear that the Act has failed to achieve its purpose not so much because it could not be enforced as because the police failed to do so."

The timing of this directive was as maladroit as the reasons given to this court for its publication. It prevailed for nearly two years after *Kursaal Casino Ltd.* v. *Crickitt*,[33] notwithstanding that Mr. Bearman in his affidavit stated in effect that, as long as that decision remained undisturbed, it rendered "roulette and other games where the bank had the advantage . . . clearly illegal." As long as the directive remained operative, it has understandably created perturbation in the minds of many, and the fact that it apparently continued in force even after *Kursaal Casino Ltd.* v. *Crickitt (No. 2)*[34] was decided on December 19 last, served to perpetuate that anxiety. Indeed, it was only on the penultimate day of this hearing that Mr. Worsley, in answer to a direct question by a member of the court, intimated that oral instructions have been spread around that the directive no longer remains operative.

[33] [1966] 1 W.L.R. 960.

[34] [1968] 1 W.L.R. 53.

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But a more satisfactory stage was reached when, in the concluding stages of his address, Mr. Worsley undertook on behalf of the respondent that the criticised directive will be expressly and immediately withdrawn and replaced by a new directive emphasising the intention of the Metropolitan Police to enforce the law against "roulette with zero and all other forms of gaming where the bank has an inherent advantage over players. . . ." The *main* object sought to be attained by the applicant in these proceedings was that by mandamus the respondent be required "to reverse or procure the reverse of the policy decision . . . that the time of police officers will not be spent on enforcing the provisions of the Act of 1963." The undertaking now given to this court has for all practical purposes secured for the applicant the relief he sought and accordingly no grounds remain in respect of which it would any longer be proper to consider granting mandamus.

That is the practical outcome of these proceedings, and from the public standpoint a very useful outcome it is. But how stands the law? Lord Denning M.R. and Salmon L.J. have already dealt with it in extenso, and I propose to deal quite briefly with but some of the points raised by the respondent.

I deal first with jurisdiction. It is urged that these proceedings relate to "a criminal cause or matter" and that accordingly an appeal from the Divisional Court lies directly to the House of Lords and not to this court—see section 31 (1) (*a*) of the Supreme Court of Judicature (Consolidation) Act, 1925. I need not again go through the long line of cases relied upon in this connection by the respondent, beginning with *Ex parte Alice Woodhall*.[35] In my judgment they have no bearing upon the quite general application now made that the commissioner be compelled to reverse a policy directive regarding the enforcing of a statute. Such an application has no reference to any particular criminal cause or matter, and is not even a remote step in relation to a criminal cause or matter, but is designed simply and solely to ensure that the police do not abdicate, in consequence of a policy decision, their functions as law enforcement officers. I therefore agree with my lords in holding that this court has jurisdiction to hear and determine the present appeal. But it is necessary to add that I am persuaded so to hold by reason of the abandonment of all but the last portion of the motion, for the earlier parts (and particularly that which related to the prosecution of a specific, named

[35] (1888) 20 Q.B.D. 832, C.A.

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club) seems to me truly open to the objection as to jurisdiction raised by the respondent. In this context, I am not for the present prepared, with respect, to adopt the view expressed by Fletcher-Moulton L.J. in *Rex* v. *Governor of Brixton Prison, Ex parte Savarkar* [16] that—

> "if *any* portion of an application or order involves the consideration of a criminal cause or matter, it arises out of it, and in such a case this court is not competent to entertain an appeal."

Be that as it may, nothing there said can, in my judgment, apply to a case (such as the present) where the applicant for relief abandons those parts of his motion which offend, or may offend, against the rule, and I see no reason why this court should thereafter be prevented from adjudicating upon the validity of that which remains.

So far, so good, from the applicant's point of view. But even so it is said that he could not in any event have succeeded in these proceedings. In this context Mr. Worsley has addressed to the court an elaborate and learned argument in support of the bald and startling proposition that the law enforcement officers of this country owe no duty to the public to enforce the law. Carried to its logical limit, such a submission would mean that, however brazen the failure of the police to enforce the law, the public would be wholly without a remedy and would simply have to await some practical expression of the court's displeasure. In particular, it would follow that the commissioner would be under no duty to prosecute anyone for breaches of the Gaming Acts, no matter how flagrantly and persistently they were defied. Can that be right? Is our much-vaunted legal system in truth so anaemic that, in the last resort, it would be powerless against those who, having been appointed to enforce it, merely cocked a snook at it? The very idea is as repugnant as it is startling, and I consider it regrettable that it was ever advanced. How ill it accords with the seventeenth-century assertion of Thomas Fuller that, "Be you never so high, the law is above you." The applicant is right in his assertion that its effect would be to place the police above the law. I should indeed regret to have to assent to the proposition thus advanced on behalf of the respondent, and, for the reasons already given by my Lords, I do not regard it as well founded. On the contrary, I agree with them in holding that the law enforcement officers of this country certainly owe a legal

[16] [1910] 2 K.B. 1056, 1065, C.A.

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duty to the public to perform those functions which are the *raison d'etre* of their existence. How and by whom that duty can be enforced is another matter, and it may be that a private citizen, such as the applicant, having no special or peculiar interest in the due discharge of the duty under consideration, has himself no legal right to enforce it. But that is widely different from holding that no duty exists, enforceable either by a relator action or in some other manner which may hereafter have to be determined.

It was further urged that, assuming jurisdiction in this court and even assuming that the respondent is under the duty which this court now unanimously holds he does owe, nevertheless the applicant should be denied the relief sought inasmuch as it is open to him to lay an information or apply for a voluntary bill of indictment. The law is, as I believe, that relief by way of a prerogative order will not be granted if there is available any other legal remedy, equally convenient, beneficial and appropriate. Having regard to the course these proceedings have taken, no final consideration of this submission is called for, and I content myself with the simple observation that only the most sardonic could regard the launching of a private prosecution (a process which, incidentally, is becoming regarded with increasing disfavour in this country) as being equally convenient, beneficial and appropriate as the procedure in fact adopted by this appellant.

I began by saying that these are important proceedings. They have served useful public purposes (a) in highlighting the very real anxiety which many responsible citizens manifestly entertain as to the adequacy of the steps hitherto taken to exterminate a shocking and growing cancer in the body politic; and (b) in clarifying the duty of the police in relation to law enforcement generally. Accordingly, while, for the reasons given by my Lords, there must be a formal dismissal of this appeal, it may well be that the applicant and his supporters will nevertheless feel as they leave this court today that in truth theirs has been the victory.

No order on appeal. Order of Divisional Court as to costs set aside.

Solicitors: *Solicitor, Metropolitan Police.*

L. N. W.

Law Reform Commission of Canada
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legal status of the police

CRIMINAL LAW SERIES

DY PAPER

This ruling is not easily reconciled with the decision of the same court in the *Hawkins* case, except possibly on the ground that the power of arrest is one that is specifically recognized as belonging to a constable by virtue of his status as a peace officer, whereas his authority to lay an information is no different from that of any other private citizen. Although direct confrontation between a constable and his chief constable over the initiation of a prosecution has arisen in England (see "Constable May Face Discipline Proceedings after Private Prosecution of Tory M.P.", *Times*, July 6, 1974; Gillance and Khan, 1975), it has apparently never been resolved by the courts there.

Similar concerns have arisen in Canada, and in 1970 allegations that senior officers had been improperly intervening to withdraw charges laid by a constable of the Metropolitan Toronto Police Force were the subject of an inquiry held by the Board of Commissioners of Police of Metropolitan Toronto (Toronto, Board of Commissioners of Police, 1970). In its report on the inquiry, however, the Board specifically eschewed laying down any precise resolution of the proper relationship between a constable and his senior officers:

> The question of when, *by whom*, and under what circumstances, a decision not to prosecute is proper exercise of discretionary power, can never be satisfactorily defined in precise terms. Any attempt to lay down rules so that discretion could be exercised in a uniform manner does not seem to offer any hope that suspicions of its improper use would never arise in the future. Indeed, if some such rule was in existence, it could actually discourage the use of quite proper discretion under some circumstances. (p. 92 — Emphasis added)

Noting that such discretion had in fact been exercised by officers at various levels of the force (up to the level of deputy chief) in relation to the cases it had inquired into, the board concluded that:

> Criticizing a judgment must not be interpreted as a restriction on the ability of and the need at times for senior officers to use their judgment and their discretion. As long as it is exercised impartially, fairly, and with reason, it should not be discouraged. (*Ibid.*)

Not surprisingly, given the absence of judicial attention to such questions, the board did not cite a single authority in support of these conclusions. As a result, they remain legally uncertain (see e.g., "Police Quotas? Not Enough Tags a Ticket to the Boss's Office", Toronto *Globe and Mail*, December 13, 1980, p. 5). Most recently, however, the whole question of the relationship between a police officer and his senior officers has been brought directly before the Federal Court of Canada, and has been the subject of a preliminary ruling by that court.

In *Wool* v. *The Queen and Nixon* (Federal Court of Canada, Trial Division, Dubé J., June 8, 1981, not yet reported) a staff sergeant of the R.C.M.P. was seeking an interim injunction to restrain his commanding officer (in charge of an R.C.M.P. Division) from interfering with a criminal investigation which the staff-sergeant, in his capacity as co-ordinator for commercial crime

investigations in the Division, had been undertaking. The investigation involved allegations against the Premier and the Minister of Justice of the Yukon Territory. After the investigation had continued for a considerable time, involving the expenditure of substantial resources, and after legal advice had been obtained from R.C.M.P. headquarters, from the Assistant Deputy Attorney General of Canada and from a special prosecutor hired by the federal Attorney General, the commanding officer of the division had ordered the applicant to discontinue the investigation, had transferred him from a plain clothes to a uniform position, and had recommended his transfer from the Division. It was against these orders that the applicant sought the injunction. Wool contended that his commanding officer's order to discontinue the investigation was "not a lawful order in that it purports to limit his rights as a peace officer and a citizen under section 455 of the *Criminal Code*, and his duty under section 18 of the *Royal Canadian Mounted Police Act*" (p. 3). Section 455 of the *Criminal Code* provides that "(a)ny one who, on reasonable and probable grounds, believes that a person has committed an indictable offence may lay an information in writing and under oath before a justice . . .". Section 18 of the *R.C.M.P. Act* lists the duties of members of the force, including the "apprehension of criminals and offenders and others who may be lawfully taken into custody". The section, however, opens with the words: "It is the duty of members of the force who are peace officers, subject to the orders of the Commissioner, . . .". From this, the court, in dismissing the application, concluded that "whereas the plaintiff has a right to lay an information, that right is not absolute, but subject to the orders of the Commissioner" (p. 6). The court held that the commanding officer (Nixon) also had a duty to fulfil in relation to the investigation, and observed that:

> In my view, the duty of Nixon with reference to the investigation is towards the Crown, or the public at large. He owes no duty to the applicant, and the applicant has demonstrated no particular personal individual right, aside from whatever right he may hold as a member of the general public, to see that the administration of justice is properly carried out. A Commanding Officer is accountable to his superior and to the Crown, not to a staff-sergeant under him. He has the administrative discretion to decide what proportion of his resources will be deployed towards one particular investigation. Generally, the Court has no jurisdiction at the suit of a subject, or at the suit of a member of the force, to restrain the Crown, or its officers acting as servants, from discharging their proper discretionary functions. . . .
>
> . . . The view that the plaintiff, albeit a competent investigator, has been too long with the case and may have lost the proper perspective of it is a judgment call within the purview of the authority of a Commanding Officer (Vide *R. v. Commissioner of Police of the Metropolis, Ex parte Blackburn*). (pp. 6-7)

Observing that "(i)t is most certainly not for the Federal Court of Canada, upon an application of a non-commissioned officer, to order a Commanding Officer to proceed with the investigation of a case, merely because the former has reasonable and probable grounds to believe that an offence has been committed" (p. 8), the court concluded that "the plaintiff has no absolute right to continue the investigation without the orders of his superiors" (p. 9).

The decision in the *Wool* case is, to the author's knowledge, unique in squarely addressing these issues. Since it is only a preliminary ruling concerning a request for an interim injunction, the matter can be expected to occupy further judicial attention at trial, and possibly on appeal.

The difficulty of generalizing from Dubé J.'s decision in this case, of course, springs from his substantial reliance on the opening words of section 18 of the *R.C.M.P. Act*. As we have noted in Chapter Three of this paper, the legislation prescribing the duties of police constables in many jurisdictions in Canada does not specify that their duties are subject to the orders of superior officers. It remains a matter of speculation, therefore, as to whether the courts would necessarily reach the conclusions of the *Wool* case if they were interpreting provisions relating to the duty of police constables that were not qualified in this manner (see e.g., section 57 of the Ontario *Police Act*). The few relevant judicial *dicta* that can be gleaned from a review of Canadian case-law, however [see e.g., *Bowles* v. *City of Winnipeg*, [1919] 1 W.W.R. 198 (Man. K.B.) at 214-215; *Re Copeland and Adamson* (1972), 7 C.C.C. (2d) 393 (Ont. H.C.); and *Re Metropolitan Toronto Board of Commissioners of Police and Metropolitan Toronto Police Association* (1974), 5 O.R. (2d) 285 (Div. Ct.) at 297-298], would seem to suggest that they probably would.

B. Conclusions

By now, it will be apparent that he who ventures to generalize about the legal status of the police in Canada, and about its implications, does so at his peril. The police operate under a variety of statutes, which contain significantly different provisions respecting the status and accountability of the police. These statutory provisions, by themselves, leave many important questions unanswered. The courts have rarely had the opportunity to address these questions directly, let alone answer them. On those few occasions when the courts have suggested answers (almost always through *obiter dicta*), they have rarely agreed on them. Thus, while many police statutes provide that police governing authorities (be they Ministers or police Boards) may give "direction" to the police, the courts have not provided a clear answer as to what such terms comprehend. While we can say with confidence that the terms do not comprehend instructions or orders to break the law (*Re Metropolitan Toronto Board of Commissioners of Police and Metropolitan Toronto Police Association* (1974), 5 O.R. (2d) 285 (Div. Ct.)) the courts have not provided clear answers as to whether, and to what extent, such directions may relate either to general or specific matters of law enforcement.

If we ask whether the police have an independent right to lay criminal charges or investigate criminal offences without interference, few clear answers are to be found. In some provinces (e.g., New Brunswick) this has been