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Developments in the Public Prosecutor's Office in England and Wales

1. INTRODUCTION

In this chapter I will describe a very strange animal – the system of prosecutions in England and Wales – and will offer an evaluation of it, both in terms of its own objectives and in terms of wider conceptions of the prosecutorial function. I refer to it as a very strange animal for two main reasons. First, there is no unified system of prosecutions in the United Kingdom or in Great Britain. The Scottish system has always been different – in many ways, more like the prosecution systems of continental Europe – and I shall refer to it only briefly. There is also a separate prosecution system in Northern Ireland. And so the bulk of my remarks will relate to prosecution arrangements in England and Wales, and they will be described in some detail in part 2 below. Second, the role of the Crown Prosecution Service, the principal public prosecutor in England and Wales, is significantly different from the role of many other public prosecutor systems: the CPS has no power to direct the investigation or to require, let alone to participate in, the questioning of suspects or witness.[2] Its principal role begins only after the police have investigated the offence and have charged a suspect with an offence. In other words, as will be described in part 2 below, the police retain considerable power over prosecutions in England and Wales. There is also a third point to be made, although this is less unusual in European terms. The CPS only deals with cases prosecuted by the police. There are several other organisations which regularly bring prosecutions, on a wide range of matters such as customs violations, health and safety at work, environmental pollution, and trade and business offences. Moreover, most of these other prosecutors have the investigatory powers which the CPS do not have. More will said about these 'regulatory' prosecutors below.

After describing the role of the CPS in part 2, I will deal briefly with the constitutional position of the CPS in part 3, and even more briefly with the internal

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1. Oxford University.
2. For a comparative study of prosecution systems in the Netherlands, Germany, Scotland and England and Wales, *see* J. Fionda, *Public Prosecutors and Discretion: a Comparative Study* (Oxford 1995).

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organisation of the CPS in part 4.[3] The most extensive discussion will be reserved for part 5, where there will be an analysis not only of the powers of the CPS but also of research findings (both internal and external) on the way in which the CPS exercises its powers. The conclusions will develop some wider themes about the prosecutorial function.

2. THE CROWN PROSECUTION SERVICE

2.1. A Short general outline

For the first three quarters of the twentieth century it was the police who controlled prosecutions for almost all serious and most non-serious offences. There were a few other agencies which prosecuted serious cases, notably H.M. Customs and Excise, but the police were generally in charge. Not only did the police decide whether to prosecute, and for what offence to prosecute, but police officers also presented most cases in the magistrates' courts.[4] During the 1960s and 1970s many police forces began to employ lawyers to assist with their prosecution functions and (increasingly) to present cases in the magistrates' courts. These became known as prosecuting solicitors, and they occupied a strange position, being employed by the police and yet, as solicitors and therefore 'officers of the court', being subject to various professional constraints. In some police areas, however, there were relatively few processing solicitors and the police continued to exercise most prosecutorial functions themselves.

Arguments in favour of changing the system were heard at various times, but perhaps the most influential event was the publication in 1970 of a report by the British section of the International Commission of Jurists.[5] This report drew upon arguments of principle (that it was wrong for the police, who investigated crimes, to take decisions in relation to prosecution, which require impartiality and independence) and also more pragmatic arguments (that the police were experts at investigation, and it would be a better use of their time to focus on this rather than to undertake all these prosecutorial duties). This report was constantly referred to in the 1970s, but it took a spectacular miscarriage of justice to provide the impetus for reform. The report on the Confait case, published in 1977,[6] made criticisms of several aspects of the criminal justice system, and it included proposals that changes in the prosecution system

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3. For fuller details and discussions of the English system, see chapters 5 and 6 of A. Ashworth, *The Criminal Process: an Evaluative Study*, 2nd ed. (Oxford 1998) and chapter 5 of A. Sanders and R. Young, *Criminal Justice* (London 1994). For a more concise treatment, see A. Sanders, 'From Suspect to Trial', in M. Maguire, R. Morgan and R. Reiner (eds.), *The Oxford Handbook of Criminology*, 2nd ed. (Oxford 1997).
4. The magistrates' courts deal with around 90 per cent of criminal cases. The maximum sentence is 6 months' imprisonment (or 12 months on two or more convictions), but the magistrates have the power to commit a case to the Crown Court if they think that their own sentencing powers are inadequate.
5. JUSTICE, 'The Prosecution Process in England and Wales', *Criminal Law Review* (1970), pp. 668–683.
6. H. Fisher, *Report on an Inquiry into the circumstances leading to the trial of three persons on charges arising out of the death of Maxwell Confait*, H.M.S.O. (London 1977).

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should be considered. The arguments for and against change were then considered by the Royal Commission on Criminal Procedure. There was much discussion of the Scottish system, in which each area has a procurator-fiscal who directs the police in the investigation of crime, who interviews the suspect and witnesses, and who has several powers similar to those of a *juge d'instruction*.[7] On the other side there were vigorous arguments by the police that they should retain control over prosecutions. The Royal Commission reported in 1981 in favour of the establishment of an independent public prosecutor system, but one with far fewer powers than its Scottish counterpart.[8] After debates about the form which the new system should take, the Crown Prosecution Service was created by the Prosecution of Offences Act 1985.

The essence of the system is that the police retain the initial decision whether or not to prosecute. If they decide not to bring a prosecution, then the CPS have no function. Only if the police decide to bring a prosecution must they pass the file to the CPS. It follows from this that it is the police who decide on diversion from the court process, and it is the police who decide on the charges to be brought against a person, although there are provisions enabling the police to seek advice from the CPS before charging. However, the principal role of the CPS is that of legal review of the file. Once the file is passed to the CPS, the 1985 Act gives them the power to discontinue the prosecution or to alter the charges. The CPS should decide whether the case file has all that is required in order to indicate a 'realistic prospect of conviction' for the offence charged. If the case is to go to the magistrates' court, a Crown Prosecutor would normally present the prosecution case. If the case is serious enough to go to the Crown Court, the CPS would normally brief a barrister to act as prosecuting counsel.

This outline of the functions of the CPS is general: there are exceptions, new initiatives, and so on. For example, in some areas there is considerable cooperation between police and CPS before suspects are charged; and some Crown Prosecutors now have the right to present cases in the Crown Court. But the general description holds good for most cases in most areas. The CPS was created as a national service, with headquarters in London. Its head is the Director of Public Prosecutions. The office of DPP is not new, because there had been a DPP and a small department of public prosecutions since 1879, with the function of taking prosecution decisions in very serious cases (e.g. homicide) and also certain categories of sensitive case.[9] However, the role of the DPP is now much larger and more significant.

Since its inception in 1986, the organisation of the CPS has undergone major changes on at least two occasions, which may be taken as evidence of currents of dissatisfac-

7. For a concise recent statement, *see* P. Duff, 'The Prosecution Service: Independence and Accountability', in P. Duff and N. Hutton (eds), *Criminal Justice in Scotland* (Aldershot 1999). A fuller earlier study is that of S. Moody and J. Tombs, *Prosecution in the Public Interest* (Edinburgh 1982).
8. Royal Commission on Criminal Procedure, *Report*, H.M.S.O. (London 1981). A concise discussion of the Royal Commission's recommendations on public prosecutors, and the response to them, may be found in G. Mansfield and J. Peay, *The Director of Public Prosecutions: Principles and Practices for the Crown Prosecutor* (London 1987), pp. 1–7.
9. For the history, *see* J.L. Edwards, *The Attorney General, Politics and the Public Interest* (London 1964); for the operation of the DPP's department in the early 1980s, *see* G. Mansfield and J. Peay, *op. cit.*

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tion and discomfort. It is now organised on the same basis as the police, i.e. it is divided into 42 areas, and the whole of the criminal justice system is moving towards a more uniform division of this kind. Each area has a Chief Crown Prosecutor, and within each area there will be a number of branches (often 3, 4 or 5), each headed by a Branch Crown Prosecutor. In 1996 the CPS created an internal inspectorate, and in 2000 this inspectorate is to become an independent body. The Inspectorate has published a number of valuable reports on CPS practices, some of which are referred to in part 5 below.

2.2. Debates about the role and 'performance' of the CPS

It is fair to say that the criminal justice system of England and Wales has been in turmoil since the late 1980s. We have seen the exposure of major miscarriages of justice which resulted in people spending 15 years or longer in prison, having been convicted after all kinds of errors and irregularities by the police, prosecutors, scientific experts and judges.[10] The Royal Commission on Criminal Justice reported in 1993: not only was its report weak on issues of principle,[11] but some of its recommendations were ignored or subverted by the then Home Secretary.

The CPS, however, was only created in 1986 and therefore was not a large of this particular line of criticism. Nonetheless, the short life of the CPS has not been a happy one. From the very beginning it had critics in many quarters. In the early years the police missed few opportunities to criticise the CPS when things went wrong. The newspapers seized on a small number of clear cases of incompetence. The House of Commons Home Affairs Committee examined the performance of the CPS in 1989, and was critical of relations between the police and CPS;[12] a report of the Audit Commission in the same year also pointed to shortcomings.[13] During the 1990s co-operation between police and CPS improved, but there were many in the courts and elsewhere who continued to suggest that this was very much a second-class prosecution system, with too many inexperienced staff and poor organisation.[14] The Conservative Government paid little attention to this constant murmuring, but the Labour Party seized on it as part of its proposals for reforming the criminal justice system. When the Labour Government took office in 1997, it quickly announced that changes must take place and appointed the Glidewell Committee to review the CPS. The terms of reference for the Committee were confused,[15] and the report was disap-

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10. For a brief resume, *see* A. Ashworth (1998), *op. cit.*, pp 11–15.
11. Royal Commission on Criminal Justice, *Report*, H.M.S.O. (London 1993), criticised in M. McConville and L. Bridges (eds), *Criminal Justice in Crisis* (Aldershot 1994), S. Field and P. Thomas (eds.), *Justice and Efficiency? The Royal Commission on Criminal Justice* (Oxford 1994), and A. Ashworth (1998), *op. cit.*
12. House of Commons, *Crown Prosecution Service*, Fourth Report of the Home Affairs Committee, H.M.S.O. (London 1989).
13. Audit Commission, *Crown Prosecution Service* (London 1989).
14. Criticisms which receive some measure of support from the findings of the CPS Inspectorate, e.g., in report 2/2000 on disclosure, paras. 3.40 and 5.52.
15. See A. Ashworth (1998), *op. cit.*, pp 188–190.

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pointing in its focus on managerial matters and neglect of important policy issues.[16] However, some changes have subsequently taken place, notably in bringing the police and CPS into a closer working relationship at early stages of the process.

It must be said, however, that the CPS has always been under-resourced. It suffered acute shortages of staff in its early days, and the recruitment of good staff is still rendered difficult by the relatively low rates of pay offered to its lawyers. The Glidewell Report commented on low morale within the CPS. Part of the problem, as we will see, is that expectations of the CPS have been inconsistent: one of its key functions is to discontinue weak or unnecessary prosecutions, but then it has been criticised for doing so. The annual reports of the CPS are written in the language of Voltaire's Dr. Pangloss, giving the impression of a public service which is achieving most of its performance targets, is at the forefront of innovation in the criminal justice system, and has no significant problems. However, the many reports of the CPS Inspectorate, notably the thematic reports, identify a number of persistent shortcomings in CPS practice.[17] Many organisational changes have been made as a result of the Glidewell report. The current DPP is taking several initiatives to improve the performance of the CPS, and yet at the same time the CPS is under attack from other directions – the preliminary report of an inquiry, commissioned by the CPS itself, concludes that there is strong evidence of institutional racism within the organisation.[18]

2.3. The status of academic research on the CPS

There is a growing corpus of research into the CPS and its decision-making, although it is fair to say that the CPS has disputed many of the research findings and has put forward a different view. Almost all the externally funded academic research has been critical of the CPS, and the CPS have found it particularly difficult to deal with the critical results of academic research that was funded by the CPS itself It was both disappointing and significant that the Glidewell Report failed to refer to the findings of academic research into the CPS, even though those findings were specifically drawn to the committee's attention. The present DPP has attempted to open lines of communication between the CPS and the academic community, and it is hoped that a more fruitful relationship will follow. The findings of much of the available research will be discussed in part 5 below.

16. The Audit Commission published its second report on the CPS in 1997, assessing it against various financial and other targets.
17. *See* especially reports 2/98 on domestic violence, 3/98 on pre-charge advice to the police, 1/2000 on "Advocacy and Case Presentation", and 2/2000 on "Disclosure of Unused Material". *See*, for example, para. 14.6 of report 1/2000: "Once again, we have found it necessary to comment on the standard of endorsements, the quality of file management, and the need for CPS lawyers to be given time to prepare adequately for court."
18. *The Guardian*, 11 May 2000, p. 6; the report concerns racism in staffing policies, and a separate research project found little evidence of racial bias in decision-making (Barclay and Mhlanga 2000).

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3. THE CONSTITUTIONAL POSITION OF THE CPS

According to the Prosecution of Offences Act 1985, the Director of Public Prosecutions is the head of the CPS. By section 2 he or she is appointed by the Attorney-General (a Law Officer of the Crown, and a member of the government). By section 3 the DPP is made responsible to the Attorney-General. The Attorney-General is constitutionally answerable for the policies of the CPS, but not for decisions in individual cases. In constitutional theory the Attorney-General, the DPP and the CPS are independent of the executive (the Home Office). The CPS is also independent of the judiciary, so that leading judges have no control over the decision-making of the CPS. However, there have been occasions on which the DPP appears to have been influenced, in the creation of policy, by the Home Secretary;[19] and members of the judiciary do criticise particular decisions made by the CPS when they think it appropriate. In the final analysis, then, the CPS cannot be placed clearly within any of the three major branches of government – legislative, judicial or executive. Its closest connections are with the judicial branch, but the CPS remains separate from, and is not under the authority of, the judiciary. In particular, it should be recognised that judges do not play any part in leading the investigation into crimes, and there is no English official resembling the *juge d'instruction*.

By section 3 of the 1985 Act the CPS has the duty to take over all criminal prosecutions instituted on behalf of a police force (excluding certain minor offences). Section 23 of the Act gives the CPS the power to discontinue a prosecution. It should be recalled that there is still a right of private prosecution in England and Wales – the power of a private individual, or company, to bring criminal proceedings by applying to a court and presenting credible evidence. This power is not exercised frequently, but section 6 of the Act gives the DPP the power to take over any private prosecution. Once that power has been exercised, the CPS has the normal power to discontinue the prosecution if it thinks fit.

Section 10 of the Act requires the Director to publish a code for crown prosecutors, setting out the principles on which decisions should be taken. Section 9 of the Act requires the DPP to report annually to the Attorney-General on the work of the CPS. Several statutes stipulate that a prosecution for a particular offence may only be commenced 'with the consent of the Director of Public Prosecutions': the list of these offences is diverse and incoherent, and all these requirements antedate the creation of the CPS. In 1997 the Law Commission proposed that most of these requirements of consent be abolished,[20] but no action has been taken on this. There is also a small

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19. In 1994 the Home Secretary decided, evidently for political purposes, that the police should administer "police cautions" to fewer offenders and should prosecute more of them. The CPS immediately changed the wording of the Code for Crown Prosecutors, so as to be compatible with the new executive directions. This led to criticisms that the CPS had compromised its independence (A. Ashworth, and J. Fionda, 'The New Code for Crown Prosecutors: Prosecution, Accountability and the Public Interest', *Criminal Law Review* (1994), pp. 894–903), but the reply was that "there has to be a measure of co-ordination between the various limbs of the criminal justice system" (R. Daw, 'The CPS Code – a Response', *Criminal Law Review* (1994), pp. 904–909).
20. Law Commission, *Criminal Law: Consents to Prosecution*, Consultation Paper No. 149, H.M.S.O. (London 1997).

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number of offences, mostly on sensitive matters of national security (e.g. the Official Secrets Acts), which may only be prosecuted with the consent of the Attorney-General.[21]

4. THE ORGANISATION OF PROSECUTION SERVICES IN ENGLAND AND WALES

During the 14 years of its existence the CPS has been 'reorganised' frequently. Various combinations of national, regional and local organisation have been tried. In 1993 the CPS was re-organised into 13 regions, with strong central control from the London headquarters headed by the DPP. The Glidewell Report concluded that the 1993 re-organisation 'was on balance a mistake',[22] leading to over-centralisation and excessive bureaucracy. The Report agreed with the new government's preference for the creation of 42 separate CPS areas, co-extensive with the police areas, and added that more decisions should be taken locally than centrally. Devolution of most decisions to local areas was claimed to offer 'greater efficiency, better decisions, less delay, and more effective casework',[23] whereas CPS headquarters in London should 'similar, tougher, and more directly in control of matters with which it is properly concerned.'[24] The 42 areas came into existence in April 1999. There are around 2,000 CPS lawyers and 4,000 other staff.

One further aspect of the Glidewell reorganisation should be mentioned. The Glidewell committee was concerned to improve efficiency and effectiveness in case preparation. Its proposal, now being implemented, was that in each major police station there should be a Criminal Justice Unit (CJU) in which police officers, crown prosecutors and CPS caseworkers[25] work together to take prosecution decisions, to ensure that files are prepared properly, and to monitor the progress of cases through the magistrates' courts. The hope is that this will be a more streamlined operation, which will release more CPS lawyers for the task of preparing cases for the Crown Court. The Glidewell committee found that the preparation of many case files for the Crown court was left in the hands of CPS staff who are not legally qualified, and it recommended a distinct change of emphasis with greater attention by Chief Crown Prosecutors and other lawyers to the quality of Crown Court files.[26]

In order to understand the prosecution arrangements in England and Wales, it is not sufficient to discuss the Crown Prosecution Service. A smaller number of prosecutions for offences of fraud over £5 million are brought by the Serious Fraud Office, which has much wider investigative powers than the CPS. Further, perhaps as many

21. For further discussion, see J.L. Edwards (1964), *op. cit.*
22. I. Glidewell, Sir, *The Review of the Crown Prosecution Service: A Report*, H.M.S.O. (London 1998) p. 40.
23. *Ibid.*, p. 199.
24. *Ibid.*, p. 165.
25. The reference to "CPS caseworkers" covers the many CPS employees who are not legally qualified but who are employed to apply "simple" legal criteria to case files in order to ensure that they have all the required information and documents relating to the charges for which a person is being prosecuted.
26. I. Glidewell, *op. cit.*, p. 135.

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as one quarter of all prosecutions are brought by agencies other than the CPS.[27] For example, the Health and Safety Executive brings prosecutions for offences concerning safety at work and in transport systems; H.M. Customs and Excise bring prosecutions for offences relating to the evasion or attempted evasion of customs duties and Value Added Tax; the Environment Agency brings prosecutions for offences of pollution; the Department of Trade and Industry brings prosecutions for financial offences; local consumer protection officers bring prosecutions for trading offences committed by shops and businesses; and so on. We have already noted one major difference between these agencies and the CPS, which is that all these agencies have both an investigatory function and the power to prosecute. Each of them therefore has control over all the relevant decisions. Another major difference between these agencies and the CPS is that there is no accountability structure for the various agencies. Each of them follows its own policies and practices, with no attempt at an overall strategy among different agencies, and few attempts to harmonise their policies with those of the police and the CPS.

The Environment Agency may be used to illustrate this point. The functions of the Agency include the regulation of pollution, waste disposal, wild life conservation, fisheries, and water resources. The Agency publishes its 'Enforcement and Prosecution Policy' (latest version, 1998), and also a more detailed document on the functions of the Agency with respect to particular types of offence.[28] The reader is immediately struck by the difference in emphasis from the CPS:

> 'The Agency regards prevention as better than cure … The purpose of enforcement is to ensure that preventative or remedial action is taken to protect the environment or to secure compliance with a regulatory system.'[29]

Combined with this difference in outlook is a difference in powers. Unlike the CPS, the Environment Agency has full investigate powers, and also many powers short of prosecution – such as the power to issue enforcement notices and/or prohibition notices, and the power to suspend or revoke environmental licences. 'Where a criminal offence has been committed, in addition to any other enforcement action, the Agency will consider instituting a prosecution, administrating a caution or issuing a warning.'[30] The guidance then goes on to list various 'public interest factors' which the Agency regards as relevant to the decision to prosecute.[31] Although there is a passing reference to

27. Although it conducts relatively few prosecutions, in total numbers, it is important to mention also the Serious Fraud Office, which investigates and prosecutes frauds to the value of £5 million or more.
28. Access to these is simple through the Agency's website at www.environment-agency.gov.uk/, with the detailed document at www.environment-agency.gov.uk/epns/pdf/functions.pdf.
29. Environment Agency, *Enforcement and Prosecution Policy*, www.environment-agency.gov.uk/epns/pdf/functions.pdf (1998), paras. 4 and 6.
30. *Ibid.*, para. 8.
31. *Ibid.*, para. 22. These factors are similar to those stated in the Code for Crown Prosecutors. Paragraph 20 of the document states that "the Agency recognises that the institution of a prosecution is a serious matter that should only be taken after full consideration of the implications and consequences. Decisions about prosecution will take account of the Code for Crown Prosecutors."

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the Code for Crown Prosecutors, both the powers and the policies of the Environment Agency differ considerably from those of the CPS, or indeed the police combined with the CPS.

Similar policies and practices are to be found in the work of the Health and Safety Executive. One part of its 'mission statemen' sets the tone: 'to secure compliance with the law in line with the principles of proportionality, consistency, transparency and targeting on a risk-related basis.' The difference of emphasis from the police and CPS is soon apparent:

> 'In most cases, information, guidance and advice are sufficient to ensure that health and safety requirements are complied with. Where formal action is appropriate, the issue of an improvement or a prohibition notice normally provides a quick and effective means of securing the necessary improvements. The HSC expects, through its Enforcement Policy Statement, that enforcing authorities will consider prosecution when, for example, there is judged to have been the potential for serious harm resulting from a breach, or when the gravity of a breach taken together with the general record and approach of the offender warrants it.'[32]

The Health and Safety Executive has a small staff and is unable to respond to all (or even most) incidents involving injury. Its scarce resources are stretched, not least because 'major incidents are high profile events and HSE has to respond appropriately and be seen by the public to be responding.'[33] Once again, preventive measures are the principal response to offences, and prosecutions are rare.[34]

The Environment Agency and the Health and Safety Executive have been chosen as examples of the many agencies which pursue a preventive or 'compliance' approach to enforcement, as distinct from a 'deterrence' or 'sanctioning' strategy which places greater emphasis on prosecution.[35] Compared with the approach of the police and CPS, the more lenient approach of these agencies raises questions of social justice. Companies, wealthy offenders, and middle-class offenders are more often dealt with by regulatory agencies, whereas the more disadvantaged members of society are more likely to find their conduct defined as a police matter. The different approaches are then likely to result in more frequent prosecution of disadvantaged people than advantaged people for offences that may be no different in terms of seriousness. This might be defended on the principle of parsimony, minimum intervention being given higher priority than equality of treatment. The effect of this would be to allow middle-class or white-collar offenders to benefit from diversion and other alternatives to prosecution, even though lower-class or blue-collar offenders were processed in the 'normal' way. To assimilate the treatment of the former group to that of the latter would increase the overall suffering, and some argue that it is wrong to insist on equality if

32. Health and Safety Commission, *Annual Report 1998–99* (London 1999) para. 1.107.
33. *Ibid.*, para. 1.117.
34. For statistics, *see* Table C below.
35. For further discussion, *see* A. Reiss, 'Styles of Regulatory Justice', in K. Hawkins and J. Thomas (eds.), *Enforcing Regulation* (Oxford 1984), K. Hawkins, *Environment and Enforcement* (Oxford 1984) and B. Hutter, *The Reasonable Arm of the Law* (Oxford 1998).

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it results in equality of misery.[36] However, there are surely other ways of tackling this inequality of treatment, notably initiatives to decriminalise minor offences or to introduce fixed penalty schemes. There are strong objections to any system that allows different investigate and prosecution agencies to pursue such divergent policies, without any attempt to address the problems of social injustice.

5. THE CROWN PROSECUTION SERVICE AND THE DISPOSAL OF CRIMINAL CASES

5.1. The available options

It has already been observed that the powers of the CPS differ significantly from the powers of public prosecutors in most other European legal systems. Thus the CPS has no power to offer a 'transaction' or prosecutor fine, although that power exists in Scotland.[37] The CPS has no statutory power to refer a person for mediation, although the absence of a specific power would not be regarded as preventing the CPS from taking this course. However, this is where we return to the essential feature of the English system: it is the police who take almost all diversion decisions. These decisions are taken before the case is referred to the CPS, since the principal function of the CPS is to review the files of cases in which it has been decided to prosecute. Occasionally, where the CPS decide that a prosecution should be discontinued, they might wish to recommend a 'police caution.' But they have no power to require the police to administer a caution: they can only make a request.

The main function of the CPS is therefore to deal with cases in which it has already been decided to prosecute. Although around 13 per cent of those prosecutions are discontinued, for reasons discussed in (5.2.) below, very few of those cases involve any measure of 'diversion'. Information about diversion in England and Wales is therefore information about the policies and practices of the police, and also the 'regulatory agencies', and these will be described briefly here.

The police have no statutory duties in respect of actual or probable crimes that come to their attention. There are many alternative courses of action, but there is no statutory framework or legislative authority (although there is now a statutory framework for young offenders – see below). The police may decide to take no further action; or they may give an informal warning; or they may administer a police caution, which is recorded as such and may be cited to a court if the person is subsequently prosecuted for another offence. The police may refer a person to a local mediation scheme (of which there is a small number of England and Wales, with no legislative founda-

36. The argument of N. Morris and M. Tonry, *Between Prison and Probation* (New York 1990) in respect of equality of treatment in sentencing, criticised by A. Ashworth, *Sentencing and Criminal Justice*, 3rd ed. (London 2000), chapter 7.

37. *See* further P. Duff, 'The Prosecutor Fine and Social Control', 33 *British Journal of Criminology* (1993) p. 481. A brief review of prosecutions by the Royal Commission on Criminal Justice, *Report*, H.M.S.O. (London 1993), para. 5.63 produced a recommendation that this power be given also to the CPS, but no action has been taken.

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tions), or they may refer a person to the local mental health services, as they think appropriate. It is difficult to estimate how many actual or suspected offenders are dealt with informally by the police, in the exercise of their 'discretion', usually away from the police station. It is clear that, in European terms, English decisions to prosecute correspond with the principle of opportunity, not the so-called principle of legality. However, once the police consider a formal caution, they are supposed to act according to a Home Office circular on the subject.[38] This circular sets out 'National Standards for the Cautioning of Offenders' which are similar to the guidance in the Code for Crown Prosecutors (see 5.2. below): in principle, a caution should not be given unless there is sufficient evidence to prosecute and the person consents to being cautioned. Serious offences should not result in a caution; where an offence is so minor that a court might give only a small penalty, a caution may be appropriate; there is a presumption against prosecuting the elderly or those who suffer from a mental disorder or serious physical illness; people with previous convictions should generally not be cautioned, but first offenders may be; and so on.

There are annual statistics on formal police cautions, which show the great significance of 'diversion' by the police in England and Wales (a function in which, of course, the CPS plays virtually no part). Table A sets the scene by showing the changes in recorded crime, convictions and cautions in the closing decades of the twentieth century. Table B gives details of the cautioning rate for male and female offenders of different ages: the cautioning rate is calculated by combining all persons cautioned or convicted, and then expressing the number cautioned as a percentage of that total. Thus almost all young female offenders are cautioned, and hardly any are prosecuted, whereas for adult males the proportion who are cautioned drops to around one quarter, and the majority are prosecuted. To repeat the point, cases which result in a caution are only rarely seen by the CPS at all.

These figures can no longer be taken at face value in one respect: the system for young defendants, aged under 18, is in a process of change. Sections 65 and 66 of the Crime and Disorder Act 1998 create a new system of reprimands and warnings, which will replace formal police cautions for offenders under 18. Section 65(1) is addressed to 'a constable [who] has evidence that a child or young person has committed an evidence,' and is therefore designed to displace all the informal warnings and more formal cautions given by the police. In effect, the Act provides a long overdue legislative basis for the practice of diverting young offenders through the cautioning (and 'caution plus') mechanisms, and its principles are similar to the 1994 circular on cautioning. Thus no young offender should receive more than one reprimand and one warning; and, if the offence is too serious for a mere reprimand, the officer must proceed straight to a warning. In cases where a warning is given, the constable must refer the offender to a Youth Offending Team, and the YOT must assess the offender

38. Home Office circular 59/1990, as amended by Home Office circular 14/1994. These circulars are issued by the Home Secretary to chief officers of police. Although the police are an independence force, and do not take direct instructions from the Executive, the appointment of the chief police officer for London is controlled by the Home Secretary, and all other forces depend on the government for their funding. The Chief Inspector of Constabulary conducts inspections on the basis that instructions in Home Office circulars are binding.

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Table A: Recorded Crime, Convictions and Cautions[1] *England and Wales, 1971–1998, all ages*

	(1) Indictable Offences Recorded by the Police	(2) C U R[2]	(3) Indictable Convictions	(4) % Dis ch[2]	(5) Indictable Cautions	(6) Total of (3) and (5) combined
1971	1,646,081	45	321,836	12	72,414	394,250
1976	2,135,700	43	415,503	15	97,681	513,184
1981	2,794,000	38	464,600	12	104,000	568,600
1986	3,847,410	32	384,000	14	137,000	521,000
1991	5,276,173	29	337,600	19	179,900	517,500
1996	5,036,550	26	300,600	18	190,800	491,400
1998	4,481,817	29	341,700	18	191,700	533,400

Notes:
1. Formal police cautions.
2. "Clear up rate", i.e. the percentage of recorded offences which are "cleared up" (e.g. traced to an offender) by the police.
3. The percentage of all sentences in the courts which were either an absolute discharge or a conditional discharge, i.e. a sentence which imposes no positive requirements onthe offender and does not result in a criminal record unless the offender commits another offence during the period of the conditional discharge: see further Ashworth (2000), chapters 10.2 and 10.3.

and, 'unless they think it inappropriate to do so, shall arrange for him to participate in a rehabilitation programme.'[39]

This discussion of diversion has emphasised the role of the police, but account must also be taken of the activities of the 'regulatory' agencies. There are no combined statistics which can be compared with the police statistics, but if it seems absolutely safe to state that agencies such as the Health and Safety Executive and the Environment Agency, discussed briefly above, bring prosecutions in a very low proportion of cases where they have evidence that an offence has been committed. Such agencies place much greater emphasis on prevention through diversion. Thus Table C shows the declining use of prosecutions by the Health and Safety Executive over the last decade, although the number of 'notices' (warnings) remains six times higher.

5.2. The CPS and its principles

The policies of the CPS are determined by the Director of Public Prosecutions. The primary document is the Code for Crown Prosecutors, which was first issued in 1986,

39. S 66(2)(b) of the Crime and Disorder Act 1998.

PURL: https://www.legal-tools.org/doc/1bfbbf/

amended in 1992, re-written in 1994, and is now undergoing a further revision (2000). The Code lays down guidance on all the major decisions that the CPS have to take. When they receive a file from the police, their primary task is to review it, and this review should focus on two linked questions. The first question is whether the available evidence indicates a 'realisttic prospect of conviction' for the offence(s) charged. The Code sets out a number of questions that must be considered, and further details are given in an 'explanatory Memorandum for use in connection with the Code for Crown Prosecutors' (1996). However, both of those documents deal with general principles, and neither of them discusses particular requirements for particular offences. These are set out in the five-volume 'Prosecution Manual', which was originally drafted in 1986 and has been updated many times since. This Manual remains confidential to the CPS, but consideration is being given to making it freely available, and perhaps placing it on the CPS website. The principles on which the Code and Explanatory Memorandum base their guidance can be contested (for example, should prosecutors take account of the reluctance of courts to convict certain types of defendant? Should prosecutors' decisions reflect local court practice or not?), but the issues cannot be discussed fully here.[40] The task of the CPS is to assess the strength of the evidence on the basis of the file: this is particularly difficult when the prosecutor has not met the witnesses at all. Often the prosecutor must accept the judgment of the police on this, thereby increasing the practical dependence of the CPS on the police.[41]

The second question – separate from, but interrelated with, the first – is whether it would be in the public interest to prosecute the defendant. This is a distinct acceptance of the principle of opportunity, and the grounds for discontinuing a prosecution are similar to those set out in the National Standards for Cautioning Offenders – minor offence, low penalty likely, very old or very young defendant, seriously ill defendant, etc. However, the terminology of the Code has altered. In the original 1986 version the principle was that a prosecution should only be continued if 'the public interest requires' it. In the 1994 version, it is stated that 'in cases of any seriousness, a prosecution will usually take place unless there are public interest factors tending against prosecution which clearly outweigh those tending in favour.'[42] This was probably the practice anyway, and such statements illustrate the close relationship between the two questions of evidential sufficiency and 'public interest'. There is further elaboration of 'public interest' questions in the 'Explanatory Memorandum' of 1996, and detailed considerations relating to particular offences may be found in the CPS Manuals.

It has been emphasised here that the principal function of the CPS is to review decisions in favour of prosecution already taken by the police. However, there have been some attempts to modify this separation of functions, and two may be described briefly here. The first is the preparation of 'Charging Standards' for a few types of

40. *See* A. Ashworth (1998), *op. cit.*, pp. 180–184, and the pre-CPS book by G. Mansfield and J. Peay, *op. cit.*
41. *See* D. Rose, *In the Name of the Law: the Collapse of Criminal Justice* (London 1996), p. 134 and chapter 4 generally.
42. Code for Crown Prosecution Service Inspectorate, *Reports* (various) (London 1994), para. 6.2.

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Table B: Offenders cautioned by sex and type of offence in England and Wales (number of offenders (thousands))

Sex and type of offence	1988	1989	1990	1991	1992	1993	1994	1995	1996	1997	1998
Males											
Indictable offences											
Violence against the person	9.7	11.1	12.6	14.6	17.5	18.1	17.6	15.5	16.7	18.4	18.4
Sexual offences	3.5	3.4	3.3	3.3	3.4	3.2	2.9	2.2	2.0	1.9	1.7
Burglary	11.4	11.1	11.1	12.2	13.1	11.7	10.5	9.5	9.3	8.6	7.5
Robbery	0.2	0.3	0.5	0.5	0.6	0.6	0.6	0.5	0.5	0.5	0.5
Theft and handling stolen goods	65.5	56.4	67.2	70.9	82.8	75.7	69.9	66.0	69.1	52.7	51.4
Fraud and forgery	2.8	2.7	3.2	3.7	5.0	5.3	4.9	5.4	5.0	4.6	4.7
Criminal damage	3.9	3.3	3.8	3.4	3.6	3.6	3.8	3.4	2.8	2.4	2.4
Drug offences	8.3	11.8	16.9	19.1	24.8	31.6	39.9	43.4	42.4	50.9	52.3
Other (excluding motoring offences)	1.7	2.7	3.6	3.8	4.3	3.8	3.4	3.5	3.9	4.3	4.2
Total	107.0	102.8	124.2	136.4	155.0	153.6	153.6	149.3	142.6	143.3	142.9
Summary offences											
(excluding motoring offences)	80.7	86.9	88.2	83.1	90.0	86.3	83.6	73.8	79.2	75.7	76.9
All offences											
(excluding motoring offences)	187.7	189.7	212.4	216.7	245.1	239.9	237.2	223.2	221.8	219.0	219.8

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Females											
Indictable offences											
Violence against the person	2.9	3.6	4.2	4.8	6.0	6.0	5.9	4.9	5.2	5.3	5.1
Sexual offences	0.1	0.1	0.1	0.1	0.1	0.1	0.1	0.1	0.0	0.0	0.1
Burglary	0.9	0.8	1.2	1.2	1.3	1.1	1.0	0.9	0.9	0.8	0.9
Robbery	0.0	0.0	0.1	0.1	0.1	0.1	0.1	0.1	0.1	0.1	0.1
Theft and handling stolen goods	27.1	25.5	32.6	37.7	47.5	41.4	40.9	38.9	33.6	30.1	32.2
Fraud and forgery	1.3	1.4	1.5	1.9	2.5	2.8	2.7	2.5	2.5	2.6	2.7
Criminal damages	0.4	0.3	0.4	0.4	0.4	0.5	0.5	0.4	0.4	0.3	0.4
Drug offences	0.8	1.2	1.8	2.1	2.8	3.5	4.5	4.8	5.1	6.1	6.4
Other (excluding motoring offences)	0.2	0.2	0.3	0.3	0.5	0.4	0.5	0.5	0.6	0.7	0.8
Total	33.7	33.2	42.1	48.5	61.1	55.9	56.2	53.3	48.2	46.0	48.8
Summary offences (excluding motoring offences)	14.1	15.2	14.6	13.6	15.1	15.5	15.1	14.8	16.2	17.0	19.2
All offences (excluding motoring offences)	47.8	48.4	56.7	62.1	76.2	71.4	71.3	68.1	64.4	63.1	68.1

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Table C: The work of the C.P.S.

Magistrates' Courts, 1999		
Cases heard	985,498	73%
Discontinuances	161,112	12%
Committed to CC	93,157	7%
Of the cases heard:		
Guilty pleas	811,335	82%
Proof in absence	113,426	12%
Crown Court, 1999		
Cases heard	79,603	87%
"Discontinuances"	9,975	13%
Of the cases heard:		
Guilty pleas	59,374	75%
Convictions/trials	11,561	15%
Acquittals by jury	6,829	9%
Acquittals by judge	1,839	2%

offence. These documents are issued jointly by the police and the CPS, after committee discussions, and they incorporate detailed guidance on which offence should be charged in what circumstances. Their aim is to ensure that defendants are properly charged from the beginning, rather than waiting for the CPS to alter charges when they find that they have been wrongly selected. Currently there are 'Charging Standards' for three types of offence – offences of violence, serious motor vehicle offences, and offences against public order. It is not clear how closely they are followed in practice: some police officers and others are openly critical of them, on the ground that they encourage the 'downgrading' of offences or 'undercharging' of defendants.[43] A second initiative is to encourage the police to seek advice from the CPS before defendants are charged. This was originally attempted through the 'Lawyers At Police Stations' scheme in certain areas, but research found that the police sought advice from CPS lawyers in fewer than 2 per cent of cases, sometimes because police officers thought they had greater experience than the CPS lawyer.[44] Following the Glidewell reforms, the police and CPS lawyers will have to work together in local Criminal Justice Units, and this cooperation is intended to reduce the number of wrongly charged cases.

The CPS has specific policies for dealing with 'domestic violence' cases. The police and CPS have been criticised for 'dropping' cases when the victim informs them that she has decided she does not want her attacker to be prosecuted and that she will not give evidence against him. The document, 'CPS Policy for Prosecuting Cases of

43. For further deteails, *see* A. Ashworth (1998), *op. cit.*, pp. 179–180, 194–195.
44. J. Baldwin and A. Hunt, 'Prosecutors Advising in Police Stations', *Criminal Law Review* (1998), p. 521.

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Table D: The work of the Health and Safety Executive: Enforcement action, prosecutions and notices issued by HSE 1987/88–1998/99p

Prosecutions

	Duty-holders prosecuted (a)	Total offences prosecuted (b) (c)	Of which, offences leading to conviction	Average penalty per conviction (d)
1987/88 (e)	1,350	2,337	2,053	792 (f)
1988/89	1,409	2,328	2,090	541
1989/90	1,557	2,653	2,289	783 (g)
1990/91	1,397	2,312	1,991	903 (h)
1991/92	1,425	2,424	2,126	1,181 (i)
1992/93	1,324	2,157	1,865	1,390
1993/94	1,156	1,793	1,507	3,103 (j)
1994/95	1,111	1,803	1,499	2,873 (k)
1995/96	1,087	1,767	1,451	2,572
1996/97	861	1,490	1,195	5,274 (l)
1997/98	935	1,627	1,284	4,694 (m)
1998/99p	1,058	1,797	1,493	5,038 (n)

Notices issued by type

	Improvement	Deferred prohibition	Immediate prohibition	Total notices
1987/88	6,631	234	4,296	11,161
1998/89	6,693	189	4,664	11,546
1989/90	7,610	200	4,332	12,142
1990/91	8,489	227	4,022	12,738
1991/92	8,395	222	3,802	12,419
1992/93	7,462	201	4,251	11,914
1993/94	6,484	144	3,961	10,589
1994/95	6,512	124	4,172	10,808
1995/96	5,219	82	3,385	8,686
1996/97	3,770	165	3,509	7,444
1997/98	4,411	181	4,319	8,911
1998/99p	6,328	198	4,318	10,844

Domestic Violence', spells out the importance of ensuring that the victim's change of mind is voluntary, and emphasises that the CPS may, in some circumstances, continue with a prosecution even if the victim refuses to go to court.

Finally, the CPS has policies for dealing with victims and witnesses. In 1993 they issued a 'Statement on the treatment of victims and witnesses by the Crown Prosecution

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Service', and since then they have been involved in various initiatives to improve the position of victims and witnesses, such as the experimental use of victim impact statements in some areas.

5.3. The CPS in practice

We have seen that, when the CPS review a file passed to them by the police, one of their powers is to discontinue the prosecution. There seem to be conflicting expectations here. The rate at which the CPS discontinue cases passed to them by the police is around 11 to 13 per cent. On the one hand there has been criticism of the CPS for discontinuing too many cases; on the other hand there has been criticism that too many Crown Court cases end in acquittal, suggesting that the CPS is not fulfilling its function of weeding out weak cases. A first step in disentangling the various strands is to consider the reasons for discontinuance. A Home Office survey in the early 1990s found that, of non-motoring cases discontinued, some 58 per cent were dropped on evidential grounds, 34 per cent on public interest grounds, and among the remainder were some cases where the defendant could not be traced.[45] The CPS's own discontinuance survey in 1994 found that in 43 per cent of cases there was insufficient evidence to proceed, in 28 per cent a prosecution was not in the public interest, and in 19 per cent of cases the prosecution was unable to proceed, largely because of the non-attendance of a key witness.[46]

The next step, then, is to focus on discontinuances for evidential reasons. The Home Office survey found that the top three reasons were a lack of supporting evidence (39 per cent), unreliability of witnesses (35 per cent), and evidence lacking a key element in the offence (19 per cent).[47] In practice, many of these case files will have been discussed with the police, upon whom the CP reviewer may often have to rely for judgments about reliability. In his research for the CPS, John Baldwin found that many of the difficult cases turned on the evidence of a single witness, and judgment about whether to proceed was finely balanced.[48] It seems that in many of the cased discontinued on evidential grounds, the police would have been in agreement about the poor prospect of conviction. On the other hand, Baldwin's research uncovered a distinct tendency among some prosecutors to proceed with a case despite a probable or manifest weakness. At one level, this meant that 'some prosecutors remain stubbornly of the view that the defendant may do the decent thing and plead guilty even though the prospects of conviction might look precarious on paper.'[49] At a deeper level, Baldwin confirmed that:

45. D. Crisp and D. Moxon, *Case Screening by the Crown Prosecution Service: How and Why Cases are Terminated*, Home Office Research Study 137, H.M.S.O. (London 1995), p. 16.
46. National Audit Office, *Crown Prosecution Service* (London 1997), p. 42.
47. D. Crisp and D. Moxon, *op. cit.*, p. 19, referring to non-motoring cases.
48. J. Baldwin, 'Understanding Judge Ordered and Directed Acquittals in the Crown Court', *Criminal Law Review* (1997), pp. 536, 546.
49. *Ibid.*, p. 548.

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> 'some prosecutors share a common value system with the police, a core element of which is that serious cases ought to be prosecuted, almost irrespective of considerations as to evidential strength. Cases have developed a considerable momentum by the time of committal, and expectations build up that cases will proceed to the Crown Court. In such circumstances, it is easy to understand why some prosecutors, particularly when lacking in experience or self-confidence, hesitate in making hard decisions in complex or serious cases.'[50]

In offering three reasons why prosecutors may fail to take the proper decisions at case review stage (shared value system with police, inexperience, lack of self-confidence), Baldwin is concerned to examine why too few cases are discontinued. His sample of cases was constructed with a view to casting light on that issue, which will be discussed further in the next paragraph. It suffices to comment here that many of the cases that were discontinued should probably not have proceeded as far as they did, because there was insufficient reliable evidence from the outset. The criticism that the CPS are discontinuing too many cases on evidential grounds is therefore hard to accept. To prosecute when the evidence is insufficient inflicts unjustified anxiety on the defendant and wastes public resources. Paragraph 4.1 of the Code for Crown Prosecutors states clearly that 'if the case does not pass the evidential test, it must not go ahead, no matter how important or serious it may be.'

Much depends, of course, on the quality of judgment within the CPS; in comparison with many prosecutors, the CPS are at the disadvantage that they never question or even meet the witness or victim, and so they are largely reliant on police judgments. A recent rise in the numbers of ordered and directed acquittals in the Crown Court raises questions about the effectiveness of CPS reviews, although more in the direction of failures to discontinue than of over-zealous discontinuances. In the years since the CPS was introduced the number of acquittals by judge has increased so that they now outnumber acquittals by jury. In 1980 acquittals by judge accounted for 42 per cent of all Crown Court acquittals; the proportion peaked at 58 per cent in 1990, and has since receded slightly to around 55 per cent in the late 1990s. The CPS takes comfort from this small recent decline in the number and proportion of both ordered acquittals and directed acquittals,[51] but there remains the question whether many of the these cases could and should have been terminated earlier. A judge-ordered acquittal occurs where the prosecutor informs the court that the CPS do not wish to proceed, and the judge formally orders the jury to acquit. A directed acquittal occurs during or at the end of the prosecution's case in court, if the judge decides that there is insufficient evidence on one or more elements of the offence. Research by Block, Corbett and Peay in the early 1990s suggested that dispassionate scrutineers could identify weak cases among those that ended in acquittals by the judge: a minimum of 22 per cent of acquittals were regarded as foreseeably flawed in the opinion of a trained prosecutor,[52] and the researchers' own assessments led them to state that

50. *Ibid.*, p. 551.
51. Crown Prosecution Service, *Annual Report 1998–99* (London 1999), Charts 8 and 10.
52. B. Block, C. Corbett and J. Peay, *Ordered and Directed Acquittals in the Crown Court*, Royal Commission on Criminal Justice Research Study No. 15, H.M.S.O. (London 1993).

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> 'although fewer than half of ordered acquittals were considered definitely or possibly foreseeable, three quarters of directed acquittals were so classified. This supports our view, derived from the study, that directed acquittals result largely from weak cases that should have been discontinued, whereas ordered acquittals result largely from unforeseeable circumstances.'

Baldwin conducted a somewhat similar enquiry for the CPS in 1995, with a sample of around 100 cases ending in acquittal by judge and some 70 other cases. He found that the ordered acquittals occurred chiefly where a key witness retracted a statement or failed to arrive at court (48 per cent), the judge took the view at the outset that the case was too weak (16 per cent), or the case terminated following the convictions of other people (14 per cent). The directed acquittals occurred chiefly because a key witness failed to 'come up to proof', i.e. failed give oral evidence as cogent as her or his written statement (34 per cent), or there were problems of law or admissibility of evidence (32 per cent), or the judge ruled the evidence insufficient (12 per cent).[53]

The important question is how many of these were foreseeable and ought to have led to eralier discontinuance. Baldwin found that around 41 per cent of all cases resulting in acquittal had reservations of a prosecutor entered upon them at an early stage, and a further 35 per cent of files mentioned reservations but discounted them. His conclusions run along two main lines. One is the acute diffuclty of judging witeness credibility and reliability, on the basis of either case files or discussions with police officers on the case. Moreover in certain types of case, particularly child abuse, rape and 'domestic' violence, there is the risk that very few prosecutions would come to court at all if doubts about witnesses 'coming up to proof' were taken seriously. It is almost inevitable, in the current system, that as Jane Morgan and Lucia Zedner found: 'prosecutors rely heavily on the expertise of the specialist police officers who interview children alleging abuse to provide an expertise of the specialist police officers who interview children alleging abuse to provide an indication of the child's credibility as a witness.'[54] There is thus a conflict between being seen to take complaints seriously by bringing prosecutions, and the risk a fairly high rate of acquittal, many being acquittals by judge.[55]

When the CPS Inspectorate has reviewed cases ending in acquittal by the judge, it has generally found that the prosecutors' decisions were correct when taken.[56] The Inspectorate's review of 'adverse cases' found that some 78 per cent of cases in which a judge or magistrates' court dismissed the prosecution were cases which

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53. J. Baldwin (1997), *loc. cit.*, p. 539.
54. J. Morgan and L. Zedner, *Child Victims* (Oxford 1992), p. 122.
55. See further, J. Gregory and S. Lees, 'Attrition in Rape and Sexual Assault Cases', 33 *British Journal of Criminology* (1996), p. 1.
56. CPS Inspectorate 11/99, paras. 6.63–6.66, reporting on the performance of the Central Casework branch at CPS Headquarter. That report followed two even more critical appraisals of Central Casework, one by Judge Butler and the other by the Glidewell Committee. The primary criticism was poor monitoring and management of cases, but there was also criticism of the quality of case review and decision-making: see CPS Inspectorate 11/99, paras. 2.6–3.1.

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'failed for reasons that the CPS could not have foreseen.'[57] Setting the remaining cases against the large numbers of CPS prosecutions suggests that the CPS is 'at fault' in only some 0.2 per cent of cases. To some extent, moreover, the problems may stem from wider structural issues about English criminal justice, including such matters as the treatment of victims, the admissibility of evidence in court (such as videotapes of the complainant's early interviews with the police), or limits on the cross-examination of complainants about their sexual history. Reforms introduced by the Youth Justice and Criminal Evidence Act 1999 attempt to address these difficulties through changes in law and procedure.[58]

Structural problems of this kind should not be neglected, but Baldwin also uncovered attitudes and practices in the CPS which suggest other, avoidable causes of acquittals by judge. As is apparent from the quotation set out above, Baldwin identified inexperience, lack of self-confidence and the sharing of values with the police as three reasons why some cases were not terminated as early as they should have been. Lack of self-confidence may in some cases stem from the relationship of the CPS, or a particular prosecutor, with the local police: it may take considerable strength of character for a relatively young prosecutor to tell a long-serving police officer that a case has to be dropped, and it may be easier to accede to the police desire to 'run it'. Indeed, there are some weak cases that may result in a conviction, either through a defendant's late decision to plead guilty or through a jury verdict, and this may be regarded as a reason for 'running' such a case, especially if the defendant is thought to be an unworthy type. Even more worrying, although not surprising, is the finding that some CPS lawyers 'share a common value system with the police.'[59] This shows that the CPS has not been successful in inculcating an independent ethical approach, based on the model of the 'Minister of Justice', in the minds and conduct of certain crown prosecutors.[60] Of course Baldwin's interview sample was fairly small, but it would be unwise to dismiss his findings on that account. For one thing, the CPS documentation reveals no concerted effort to set out the ethics of prosecuting, with goals and good practices indicated. This one step could not be expected to overcome a culture opposed to any such approach, but it is a step that ought to be taken.

As for inexperience and lack of self-confidence, these might be related to the crisis of resources in the CPS, where expectations of performance seem to run ahead of funding. Whether the CPS is able to recruit and retain sufficient staff of the right quality is still, 14 years after its creation, a question for debate. A report by the CPS Inspectorate on the Central Casework section at CPS Headquarters found that one of the causes of inadequacies in its performance was a shortage of suitably qualified

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57. CPS Inspectorate 1/99, para. 2.4
58. For discussion, *see* the articles by D. Birch, 'A Better Deal for Vulnerable Witnesses', *Criminal Law Review* (2000) p. 223, L. Hoyano, 'Variations on a Theme by Pigot: Special Measures Directors for Child Witnesses', *Criminal Law Review* (2000), p. 250 and N. Kibble, 'The Sexual History Provisions: charting a course between inflexible legislative rules and wholly untrammelled judicial discretion?', *Criminal Law Review* (2000), p. 274.
59. J. Baldwin (1997), *loc. cit.*, p. 551.
60. *See* further A. Ashworth (1998), *op. cit.*, pp. 78–89, and M. Blake and A. Ashworth, 'Some Ethical Issues in Prosecuting and Defending Criminal Cases', *Criminal Law Review* (1998), p. 16.

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and experienced staff.[61] Whilst there is no doubt that CPS management could be improved, the funding of the CPS also needs some review.

A final and related point on discontinuance for evidential reasons concerns the role of counsel in Crown Court cases. Both the research by Block, Corbett and Peay[62] and the interviews conducted by Baldwin'[63] suggest that counsel are not performing the kind of role one might expect. Crown counsel ought to study the brief and advise that the case be dropped if the evidence seems insufficient or inadmissible. Yet there are various reasons why this rarely happens, notably where counsel only takes over the brief at a relatively late stage or where counsel is afraid that to advise dropping the case might reduce the prospect of further briefs from the CPS. The Glidewell Report recommended changes in the arrangement on the return of a brief by counsel and the use of particular sets of barristers' chambers by the CPS.[64]

This discussion of discontinuance should not omit reference to 'public interest' factors, which account for 28 per cent of all discontinuances in the magistrates' courts. On CPS figures, half of these are cases in which a very small or nominal penalty is thought likely, and a further quarter are cases in which a caution is thought more appropriate.[65] Insofar as it is these cases that give rise to the criticism that the CPS discontinue too many cases, there is one source of comparison that should not be neglected. That is the proportion of sentences in court that are 'very small or nominal.' It is difficult to find a precise figure for this, since there is no record of the number of small fines handed down by the courts; equally, it could be argued that in some circumstances a conditional discharge is neither very small nor nominal. But it is worth pointing out that the proportion of discharges (absolute or conditional) granted for indictable offences has increased considerably since 1986, and that, as we saw in Table A, in 1998 some 18 per cent of sentenced offenders received a discharge from the court. At the very least, this suggests that there is scope for more discontinuances rather than fewer.

A further issue is whether the CPS 'downgrade' cases unjustifiably, either by reducing the charge to a lower level or by accepting a guilty plea to a lesser offence. In order to explain the issues here, it is necessary to outline two features of the English criminal justice system that are different from most other systems. First, most cases in the courts of England and Wales involve a plea of guilty, which means that the court does not examine the facts. The court accepts the prosecutor's version of the facts (unless, exceptionally, the defence disputes them) and moves to the task of sentencing. Section 48 of the Criminal Justice and Public Order Act 1994 states that courts should take account, when sentencing, of the fact that a defendant has pleaded guilty and of the stage in the proceedings at which that plea was entered. An early guilty plea usually attracts a discount of one third of the sentence. This system is said to offer benefits to the defendant (quicker trial, lower sentence) and to the

61. CPS Inspectorate 11/99, paras. 4.33 and 7.1.
62. B. Block, C. Corbett and J. Peay, *op. cit.*, pp. 67–70.
63. J. Baldwin (1997), *loc. cit.*, pp. 552–554.
64. I. Glidewell, *op. cit.*, p. 139.
65. *Ibid.*, p. 42.

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prosecution.[66] On the CPS' own figures, defendants pleaded guilty in 82 per cent of cases in the magistrates' courts and 75 per cent of Crown Court cases in 1998–99.[67] One crucial question is how frequently the CPS accept a plea of guilty to a lesser charge, or to fewer charges, than might be objectively justified by the available facts.[68] Paragraph 9.1 of the Code for Crown Prosecutors declares that:

> 'Prosecutors should only accept the defendant's plea if they think the court is able to pass a sentence that matches the seriousness of the offending. Crown Prosecutors must never accept a guilty plea just because it is convenient.'

In view of the known hazards of trials and the cost-effectiveness of guilty pleas, there is significant structural pressure on the CPS to take a flexible view of paragraph 9.1. There is plenty of research that shows the ready recourse of the CPS to various forms of charge reduction (often involving plea negotiation with the defence): for example, Gretney and Davis remark on the frequency with which charges of non-fatal violence were reduced,[69] as does Carolyn Hoyle in her study of responses to domestic violence.[70] Another crucial question is how often defendants, tempted by the sentence discount, plead guilty to a lesser charge when they have arguments for an acquittal.[71] Research findings suggest that the answers to these questions would not necessarily favour the CPS, but it is difficult to have the issues discussed at the level of principle. Every public discussion of pleading guilty and 'plea bargaining' is dominated by 'practicalities', real or alleged.

A second relevant feature of the English criminal justice system is that the CPS do not have the power to decide whether a prosecution goes to a magistrates' court or to the Crown Court.[72] In brief terms, the 'mode of trial' decision for most cases of moderate seriousness is made either by the defendant (who has the power to choose Crown Court trial) or by the magistrates, after hearing representations from the prosecution. However, the CPS have the *de facto* power to ensure that a certain case stays in the magistrates' courts by amending the charge to an offence which may only be tried in those courts (a 'summary only' offence). In formal terms, the CPS may conclude, on reviewing a file, that the case ought to be tried in the magistrates' court. To achieve this they may drop the higher charge and substitute a lower one, although they are not supposed to do this after a defendant has elected Crown Court trial on an either-way charge.[73] Paragraph 8.2 of the Code for Crown Prosecutors

66. For a critical view, *see* A. Ashworth (1998), *op. cit.*, chapter 9.
67. Crown Prosecution Service, *Annual Report 1998–99* (London 1999), Charts 4 and 9. In the magistrates' courts an additional 12 per cent of cases were proved in the absence of the defendent, and therefore not contested.
68. What the 'available facts' are, and what is 'objectively justified', would themselves be contentious issues. It would take a carefully constructed research project to deal with these points convincingly.
69. A. Cretney and G. Davis, *Punishing Violence* (London 1995), p. 138.
70. C. Hoyle, *Negotiating Domestic Violence: Police, Criminal Justice and Victims* (Oxford 1998), pp. 159–162.
71. For further references, *see* A. Sanders and R. Young (1994), *op. cit.*, chapter 7 and A. Ashworth (1998), *op. cit.*, chapter 9.
72. In Scotland the procurator fiscal does have such a power.
73. For full explanation of the relevant issues, see A. Ashworth (1998), *op. cit.*, chapter 8.

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states that speed should never be the only reason for trying to keep a case in the magistrates' court, whereas any greater delays and stress on witnesses might be an adequate reason. Critics view this as 'down-grading' the charge: a possible advantage to the defendant is that the maximum penalty will be fairly low, but a strong advantage to the prosecution is that there is a much higher proportion of convictions in the magistrates' courts than in the Crown Court. To make an empirical assessment of the extent of any down-grading by the CPS is difficult, although Baldwin's research (above) gives some indications. The CPS Inspectorate have noted that:

> 'The percentage of police charges that were correct was 75.9 per cent, which means that almost a quarter of all police charges require amendment to reflect the appropriate charge disclosed by the evidence.'[74]

One interpretation of this is that neither of the initiatives mentioned in (5.2.) above, the 'Charging Standards' for some offences and the availability of pre-charge advice from the CPS, has yet had a great effect. Another interpretation might be that the CPS sometimes alter the charge in order to ensure that a case is heard in a certain level of court.

We saw in (5.2.) above that the CPS have special guidelines on cases of domestic violence. How closely are these guidelines followed? The guidelines suggest that the CPS should not regard the victim's withdrawal of her evidence as conclusive, and should be willing to proceed with the prosecution (and to compel the witness) if necessary. In her research Carolyn Hoyle found that, in practice, the CPS 'rarely proceeded with a case once the victim has withdrawn.'[75] In fact the police did not even charge many of these cases, in anticipation that the CPS would not proceed without the victim. Thus, despite the other possible courses set out in the CPS guidelines, 'it had become an almost inviolable working rule that victim withdrawal marked the end of the case.'[76] Hoyle's research was carried out before the CPS policy statement of 1995,[77] and since then the CPS Inspectorate has examined the extent to which the stated policy is being implemented.[78] It found that in many cases the police were not supplying the background information necessary for proper CPS decision-making, and that prosecutors rarely made any attempt to obtain the missing information. Moreover, in those difficult cases where a complainant wishes to withdraw her evidence, 'we are not satisfied that the policy is being applied correctly or, on occasions, at all.'[79] The report raises a number of other concerns about the handling of these sensitive cases, suggesting that little has changed since Hoyle's detailed research.

We also saw in (5.2.) above that the CPS have special guidelines on the treatment of victims and witnesses. How closely are these guidelines followed? The evidence on this suggests that CPS practices are variable, and in its thematic review of advocacy

74. CPS Inspectorate (1999), para. 6.10.
75. C. Hoyle (1998), *op. cit.*, p. 170.
76. *Ibid.*, p. 180.
77. *See* note above.
78. CPS Inspectorate 2/1998.
79. *Ibid.*, para. 12.3.

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and case presentation the CPS Inspectorate was moved to suggest that prosecutors should be reminded of their duties: 'whenever possible, they should make themselves known to prosecution witnesses before the start of a trial and … they should treat them with understanding and sensitivity throughout the proceedings.'[80]

Brief comment may also be made on the role of the CPS in the disclosure of evidence to the defence. In the adversarial English system there is no single case dossier to which both prosecution and defence have access. Instead, the police collect the evidence, and then they pass certain parts of it to the prosecution. The prosecution have a duty to disclose the evidence on which they will rely, but there has been constant controversy over so-called 'unused material.' This is material which the police collected but which has not been given to the CPS or the defence. The English system, under the Criminal Procedure and Investigations Act 1996, places on the police the responsibility of providing a list of unused material, which the CPS should then check and pass on to the defence, so that the defence may request any item which may be of interest to them. An inquiry by the CPS Inspectorate contains strong criticisms of the police for failing to carry out their duties properly in significant numbers of cases,[81] but also recognises some 'laxity' among crown prosecutors in failing to check the contents of the lists. It concludes that 'the [occasional] failure by prosecutors to pick up on basic omissions by disclosure officers undermines the system and destroys its credibility.'[82] There is much more that the CPS could and should do in order to check the schedules and examine some unused material themselves, but it appears that the CPS simply does not have sufficient resources to devote more time to this.

6. ENGLISH PROSECUTIONS IN A WIDER EUROPEAN CONTEXT

It is unlikely that the English 'system' of prosecutions will be regarded as a model for any other country. The CPS has severely limited powers, and even if it were to overcome its staffing and organisational problems it would labour under the great disadvantages of having no investigatory powers, no contact with witnesses, and little influence over the initial decision whether to prosecute or to divert. Moreover, the CPS has no role in relation to the many other agencies which bring prosecutions for what are often described as 'regulatory offences': their policies and practices are in a state of anarchy, with little control or accountability, let alone any attempt to move towards an integrated approach to prosecutions which would give greater weight to principles of fairness and social justice. However, this brief study does raise some of the issues which ought to be confronted when considering the future of prosecution services, and four such issues may be mentioned in conclusion.

First, more attention must be given to the notion that prosecutors have a 'quasi-judicial' role. What exactly does this mean? It ought to imply that prosecutors should be bound by a strict ethical code, which directs them to act in the spirit of impartial officers who uphold not merely the letter of the criminal law but also those

80. CPS Inspectorate 1/2000, para. 5.9.
81. CPS Inspectorate 2/2000, paras. 4.137 and 6.11.
82. *Ibid.*, para. 13.13.

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legal values which belong to fundamental human rights and the idea of a Rechtstaat. This approach is not consistent with the notion of a prosecutor who aims for convictions above all.

Secondly, the 'quasi-judicial' role raises certain questions about the role of prosecutors in sentencing. Where prosecutors have powers of diversion, such as a prosecutor fine or *transactie*, they are acting as sentencers, and are assuming the role of judge. At a minimum it should be open to the defendant to challenge prosecutors' decisions in a court. But, more strongly, it is important that such decisions be made openly, according to published criteria, and accompanied by reasons where the stated policy is not followed in an individual case. This should apply to decisions for or against prosecution, respecting the fact that a decision not to offer a prosecutor fine may have a considerable impact on the individual.

Thirdly, the 'quasi-judicial' role also raises questions about the role of the prosecutor *vis-à-vis* the victim of the crime. In some countries the prosecutor has some duties to safeguard the interests of the victim, whereas in others the victim has the possibility of separate representation. There are deep questions here. It is one thing for prosecutors to give sympathy and interest to witnesses for the prosecution, and particularly the victim. It is quite another thing to suggest that the prosecutor should somehow 'represent' the victim or press the claims of the victim. Although there are arguments in favour of prosecutors ensuring that courts requiring the offender to compensate victim, it would otherwise be wrong for prosecutors to act as if they represent the victim;s interests. The prosecutor should represent the public interest, not the interest of any particular individual.[83]

Fourthly, the 'quasi-judicial' role suggests that prosecutors should enjoy a certain independence in matters of policy-making. The prosecutorial function should probably be placed under the judicial branch, for constitutional purposes, but what the English system shows plainly is the consequences of a failure to insulate prosecutors from the executive. Indeed, in the English 'system' the police exercise prosecutorial powers, even though they cannot be regarded as a 'quasi-judicial' body in any sense. But there is also the question of who should determine policy on diversion from prosecution. In England and Wales it is assumed that this is an executive function. Thus in 1994 the Home Secretary decided that prosecution policy should be 'tightened': he instructed the police to change their policy, and the CPS immediately made the same change. Thus the question is: if diversion is a proper function of prosecutors, should it also be their function to determine policies of diversion (subject only to legislative directions)?

In conclusion, I would suggest that further discussion of prosecution systems should give greater emphasis to principles and policies, and to ethical and constitutional issues, rather than to the organisational details. There is much that needs to be debated at this level, where comparative perspectives can point to different approaches and solutions which ought to illuminate the analysis of principle.

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83. For further argument, see A. Ashworth, 'Victims' Rights, Defendants' Rights and Criminal Rrocedure', in A. Crawford and J. Goodey (eds.), *Integrating a Victim Perspective within Criminal Justice* (Aldershot 2000).

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