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OPINION

Pay-As-You-Go Street Justice

Gary Slapper*

*Professor of Law, and Director of the Centre for Law, at the Open University,
door tenant at 36 Bedford Row*

Not all disputes require resolution in a law court. If you return a library book late, and at the desk you are asked to pay a fine, the librarian would react with surprise if you said you would not pay unless both the library's argument and your excuses were arbitrated by an independent judge after both sides had had an opportunity to put their case with supporting evidence in an open forum. People behind you in the queue might also get a little restless.

In some situations we take it for granted that the machinery of justice is unnecessary. Where, however, a situation involves someone having been assaulted or raped or having been the victim of theft, instant justice in the form of a caution or a penalty notice is commonly an inappropriate response.

That approach, however, is a progressively common feature of modern British life. It is bordering on a state of affairs in which officers carry credit card payment handsets as standard kit. Within sight of an officer, a football thug might approach a supporter of a rival club, punch him with one hand and give a bank card to the officer with the other. Pay-as-you-go offending. That is improbable but when you reflect on exactly why it could not happen, you can see there is, in fact, not much between where we are now and the society that could host such events.

Justice is not traduced by this new instant-solution solely in terms of guilty people getting a soft sanction; it is also traduced because it is likely that a proportion of innocent people caught in unfortunate circumstances are persuaded to accept a penalty notice or caution as a better risk than going to court and exposing themselves to a full hearing. There is a significant risk that suspects will feel pressured to accept a caution (and necessarily admit guilt) unaware that this will remain on their record.

The truth is that there has been an exponential rise in the use of penalty notices for disorder (PNDs) since their introduction under the Criminal Justice and Police Act 2001, and this has commercialised justice. Someone has removed the statue of Justitia with her scales and sword and supplanted a cash register on top of the criminal justice system.

Consider theft from shops. Crimes against business cost the UK economy £19 billion every year according to the British Chambers of Commerce. The cost to small businesses of shoplifting alone in 2008–09

* The views expressed in this article are those of the author and do not necessarily reflect the views of The Open University or *The Journal of Criminal Law*.

ran to £1 billion according to the Federation of Small Businesses. In 2007–08, more than 290,000 incidents of shop theft were recorded.¹ A great many of these incidents are being dealt with by PNDs but the sanctions are spectacularly ineffective. The police find PNDs attractive because they reduce paperwork and liberate police time. As the victims of theft, retailers are exasperated that PNDs do not match the value of goods stolen. The average value of goods stolen is £149,² but the initial fine that is incurred is £80, with a penalty of only a further £40 if that is not paid. And, remarkably, over 50 per cent of all fixed penalty notice fines go unpaid. So, the state ends up paying huge sums administratively to try to deal with fine defaulters. It is a monumentally ridiculous system.

Since 1998–99, the number of recorded offences of shoplifting has averaged 295,000 each year. That is equivalent to nearly 6,000 offences a week. In 2004, 1.8 per cent of shoplifting cases attracted a penalty notice, but that proportion had risen to 27 per cent by 2006. The offence is thus, *de facto*, being gradually decriminalised. From 2002 to 2007, there was a 27 per cent decrease in the number of people prosecuted for theft from shops.

The Magistrates' Association, drawing on years of collective experience of dealing with these sorts of offences, has noted that:³

... most offenders are driven to theft because of poor budgeting and lack of support or abuse of alcohol and/or drugs. The use of a fixed penalty only serves to cause even greater financial hardship and in no way tackles the underlying cause of the offending behaviour. If the matter is put before a court then magistrates have the discretion to impose a penalty that would address the causes of the offending and help in reducing such crimes, which have a significant impact on society.

If a police officer is occupationally encouraged to keep cases out of court and simply to stick a penalty notice into the hand of an offender, like a car-park attendant sticking a notice on to a car window, and this becomes an endemic response to crime, then criminal conduct becomes gradually reclassified as a minor error. Punching someone and carelessly overrunning your car park ticket time might thus come to be taught in the same law school lecture.

It was reported in 2008 that adult and youth courts in the Midlands were being cancelled because more offenders are being given on-the-spot fines. Magistrates agreed to reduce the number of criminal courts sitting because fewer offenders are being taken to formal court proceedings⁴.

The number of crimes dealt with by convictions in the courts was overtaken for the first time in 2006 by the number handled by the police through cautions and fixed-penalty fines. The number of penalty notices issued for disorder in the 43 police forces in England and Wales rose by 37 per cent from 146,500 in 2005 to 201,200 in 2007. The largest

1 Anne McIntosh MP, *Hansard*, 11 March 2009, col. 297.

2 *Ibid.*

3 *Ibid.* at cols 298–299.

4 Richard Ford, *The Times*, 28 August 2008.

numbers of these were for behaviour likely to cause harassment, alarm or distress and being drunk and disorderly. About 40,000 assaults a year are dealt with by way of a caution.⁵ The number issued for shoplifting rose from 23,800 in 2005 to 42,700 in 2006. Magistrates' court proceedings for shoplifting have fallen by 29 per cent in the past four years, for drunkenness by 51 per cent and for being drunk and disorderly by 44 per cent.⁶

In short, therefore, hundreds of thousands of cases have been shifted from courts to streets and police stations. There is evidence that government recognises the nature of the problem. In November 2009, the Justice Secretary, Jack Straw, ordered a review of the use of out-of-court disposals following the discovery that some violent offenders were being allowed to avoid court. The Justice Secretary acted after *The Times* revealed that a 15-year-old boy was given a caution for rape and a man who smashed a beer glass into a landlady's face received a caution.

The solicitor of the boy in the rape case, Richard Haigh, said he was dealing with this boy on another matter—he is now 17—and the rape caution was on his record.

The rape, two years before, involved oral penetration of a younger boy. When the clerk told me about this case I was extremely concerned. An offence like this that involves a younger boy makes it even more of a concern. Understandably, the lad hadn't wanted this to end up in the Crown Court, so he was happy to take the caution. But it really concerns me that none of this is open to public scrutiny. No one sees what goes on in the police cells.⁷

There are more than 9,000 different types of offence in English law. They are committed by very diverse sorts of people; any given offence can be committed in varied circumstances and with assorted degrees of culpability. It is therefore entirely sensible that, to suit such a variety of possible commissions of crime, we have a system of multiple and varied sanctions. That range of sanctions must, of course, include quick out-of-court penalties and cautions for use in limited circumstances. It is clear, though, that as we are now dealing with over 700,000 offences a year outside the courts, there is a growing perception that law courts are for offences such as murder and arson, and the pavement is where most other crimes are sanctioned.

In ancient Rome if a citizen was assaulted he was entitled to three pence in damages. But this sum gradually became worthless as the value of money fell. There was one citizen in Cicero's time who used to walk along the streets with his slave and when he met an enemy, he would hit him in the face. The slave would then give the victim three pence.⁸ In modern Britain, the less pavement law, the better for all.

5 Frances Gibb, *The Times*, 9 November 2009.

6 Richard Ford, *The Times*, 28 August 2008.

7 Gibb, above n. 5.

8 Aulus Gellius, *Noctes Atticae*, XX i.