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ABSTRACT

This study examines a criminal diversion program. Of principle interest is the diversion program's effect on specific deterrence. This investigation utilizes a case study design. Individuals were selected from court dockets and mediation-diversion files. The cases were divided into three groups: diverted cases, cases that qualified but were processed by the court system, and cases handled by the court system. A follow-up looking for recidivism was performed. Additionally, personal data were gathered and the effects of age, education, occupation and ethnic group were controlled for in an analysis of covariance.

INTRODUCTION

In the current literature on courts, one feature stands out---there is a crisis. This crisis has been described from virtually all possible angles: Marcus (1979) writes of "judicial overload;" Barton (1975) notes the "legal explosion;" Ehrlich (1976) stresses "legal pollution;" Auerbach (1976) highlights the "plague of lawyers;" and Manning (1977) focuses on "hyperlexis." Numerous other statements (e.g.: Gillespie, 1976; Goldman et al., 1976; Rifkind, 1976; Adams, 1977; Freeman, 1977; and Bell, 1978) all center on the deficiencies of the present court system. One proposed solution to

ameliorate the crisis is the use of court diversion programs.

Diversion, refers to the "transfer of disputes from regular courts to some alternative forum: an administrative tribunal, an arbitrator, a mediation panel" (Johnson, et al., 1977:2). These alternatives to the justice institutions for dispute processing were used in the United States as early as the 1920's (Danzig, 1973: Fisher, 1975), however, the roots of informal justice can be traced back to as early as the mid-nineteenth century (Doo, 1973).

Diversion programs, it is suggested, have three advantages over the court system: first, they avoid delay; second, they reduce the costs involved; and third, they allow for increased expertise to be brought into the process (Johnson, et al., 1977). Others choose to highlight different features of diversion programs. Sander (1976) believes that diversion programs are better able to deal with three of the major drawbacks to the adjudicative court system: (1) the third party's coercive power; (2) the 'win or lose' nature of the decision; and (3) "the tendency of the decision to focus narrowly on the immediate matter in issue as distinguished from a concern with the underlying relationship between the parties" (P. 115). Although diversion programs can take different forms the underlying concern addressed is increased access to justice (Cappelletti, 1978-79).

As an alternative to the adjudicative system, Danzig (1973) and Danzig and Lowy (1975) propose the creation of community "moots" (Gibbs, 1963) for the processing of disputes. Gibbs' (1963) discussion of the Kpelle people of Liberia highlights the informal quasi-legal dispute-processing procedures of the moot. The Kpelle moot is an "informal airing of a dispute which takes place before an assembled group which includes kinsmen of the litigants and neighbors from the quarter where the case is being heard. It is a completely ad hoc group, varying greatly in composition from case to case" (Gibbs, 1963:3).

Gibbs outlines what he feels are some of the advantages of the moot proceedings over that of the Kpelle courtroom hearings which he describes as "coercive and arbitrary in tone" (P. 2). First, he acknowledges that the moot hearing allows for a more complete airing of the grievances than does a courtroom proceeding; thus a more appropriate settlement to the dispute may be attained. There

are several features of moot hearings that facilitate this: moot hearings take place shortly after the dispute arises: the moot convenes in familiar surroundings without the symbols of power that characterize courtroom proceedings: disputants rather than a judge control the proceedings in the moot; and everything said in the moot is deemed relevant to the dispute.

A second major advantage Gibbs attributed to moot hearings is that solutions in the moot are often consensual as opposed to the courtroom where decisions are often imposed on parties.

These authors, along with most current literature, favor mediation as the most desirable alternative to the adjudicative system for civil law cases.

But mediation has also been applied to criminal cases. In criminal cases, the mediation process is a method of resolving a criminal charge by having the defendant and the victim negotiate together with the assistance of an impartial third party (the mediator). The disputants are not forced, but are requested to participate in the mediation session, with the understanding that if an agreement cannot be reached or, the agreement is later defaulted upon, the case will be returned to the courts. In this process the focus is on the disputants resolving the problem themselves, and the role of the mediator is to promote agreement rather than to provide a solution or to impose a settlement.

Critics of mediation-diversion schemes raise several concerns. First, they suggest that these efforts increase the level of social control (see: Abel, 1982: Hofrichter 1982a, 1982b; Lazerson, 1982: Reifner, 1982: Santos, 1982: Tomasic, 1982). This charge may be true for civil cases as it appears that more individuals are willing to take their disputes to mediation than are willing to press for a resolve in the court system. But it becomes virtually impossible to verify this for criminal cases, and may be unwarranted, since defendants will be processed regardless. If the mediation process is separate from the courts then true social control is likely to decrease, in that an agreement made between individuals represents less social control than traditional repressive penalties. However, even if we grant the critics their position that social control is greater under mediation, there may still be benefits for the violator. A violator

who wishes to avoid the stigma of a criminal record---which often amounts to a form of social ostracism---may be willing to accept the short-run consequences of increased social control. Alternatively, the claim of coercion in criminal mediation sessions cannot be downplayed. Obviously there is a coercive element in the mediation session when one party is responding to a criminal charge.

Second, some critics suggest that mediation and other diversion schemes encourage offenders to continue their criminal activities, or to embark on a "life of crime," by removing the fear of court prosecution and traditional repressive penalties (e.g. prison sentence).

Additionally, there also exists some concern over the loss of due process rights for offenders. However, in virtually all of these cases there is no doubt as to the defendant's guilt and therefore the loss of due process rights presents little concern for offenders. Also remember that it is their choice whether or not to participate in the mediation process and that either party, victim or offender, may withdraw their participation at any time.

These concerns over mediation programs pose the sociologically significant question of whether diversion programs reinforce societal norms for both the victim and the offender. Obviously, the cessation of the offender's involvement in deviant activities would be evidence of his/her at minimal tolerance for, hopefully acceptance of, and at best reintegration with society's cherished norms.

The reinforcement of societal norms for the victim, however, is a more difficult assessment to make. First, one must determine who the victim is. To some, the victim is the individual(s) against whom an offense is committed. In this case the victim's active participation in the negotiation of the penalty will lead to satisfaction with that outcome and hence, reinforcement of society's norms through the attainment of a just outcome. To others, however, the victim may be seen as the society, since the laws that bind the society together have been violated. From this point of view, it is less obvious that mediation leads to the reinforcement of societal norms. Supporters of this persuasion believe that the best method of reconciling the wrongdoing against society, and

impressing the importance of society's norms on its members, is formal legal vengeance against the offender. This formal process allows all to witness the consequences of violating one of society's doctrines (see: Wilson and Herrnstein, 1985).

It might be argued that these concerns with the effectiveness of mediation programs have not been satisfactorily investigated. Hopefully, research such as this will assist in the assessment as to whether mediation acts to instill and enforce societal norms on deviant populations. The implicit belief surrounding the creation of a diversion program is that it will provide effective specific deterrence of criminal behavior. As such, the hypothesis that mediation-diversion programs are more effective in reducing recidivism than the traditional court system is, presents itself as an important area for investigation.

METHODS

Background

In April 1977 the John Howard Society, a nonprofit organization devoted to prison reform and to the prevention and control of crime and delinquency, began a criminal mediation-diversion program in Regina, Saskatchewan, Canada. Referrals to this mediation-diversion program were made by the Prosecutor's office in hopes that a mediated settlement could be reached by the parties involved. Selected offenses against the Criminal Code of Canada were targeted for inclusion into the program: causing a disturbance (CC 171); common assault, restricted to assaults that occur in a continuing relationship (CC 245); theft under $200 (CC 294B); taking a vehicle without owner's consent, i.e., joyriding (CC 295); possession of stolen property under $200 (CC 312B); fraudulently obtaining food and lodging (CC 320); false pretenses (CC 322); mischief (CC 387); and wilful damage (CC 388).

The criteria for exclusion from the mediation-diversion program, as established by the John Howard Society with the Attorney General's Department and the city of Regina's Chief Prosecutor were: (a) The incident leading to the charge involved the use of or threatened use of firearms or other restricted weapons; (b) The incident occasioned the infliction of serious physical harm; (c)

The respondent or complainant is not normally a resident of the area in which the incident occurred; (d) The incident is identified as part of the respondent's pattern of present and persistent criminal behavior. Existence of one of the four criteria automatically excluded the individual from participating in the mediation-diversion program.

After the referral of a case, the John Howard Society contacts the complainant (the person who filed the complaint) and inquires into his/her willingness to participate in a mediation session to resolve his/her dispute with the respondent (the person the complaint is against), rather than having a decision rendered by the formal court process. If mediation is agreeable to both complainant and respondent, a convenient time for both parties to meet is scheduled.

At the mediation session the parties are introduced to a mediator. The mediator is a "neutral" third person whose task it is to see that everyone gets a fair hearing and not to act as judge assigning guilt or innocence. On occasion the mediator may suggest some possible alternatives if an agreement cannot be reached by both parties. In a mediation session the complainant[1] speaks first and describes the incident and any problems that may have resulted from the respondent's action(s). The respondent is then asked to recount his/her version of the incident along with any information which may have a bearing on the case. Then the complainant is asked what he/she perceives as a suitable resolution to the incident and an agreement between the parties is negotiated. There are three stipulations regarding the nature of the agreement. First, agreements must be positive in nature precluding any promise to cease engaging in certain behavior. This stipulation, it is hoped, will require the parties to seek reparative solutions rather than ones that simply avoid future problems. Second, the agreement must be measurable. This requirement maintains the agreed-upon focus on

[1]Often, especially in cases of theft under $200 (e.g., shoplifting), the complainant is a business or organization. In these cases a representative of the organization such as a member of the store's security personnel, a department head or a store manager will appear as the complainant.

"behavior" rather than on attitudes or feelings. Finally, the John Howard Society imposes a three month time period for completion of the agreement.

At the mediation session lawyers may be present, but their presence is that of a "friend" and not as counsel; they are not permitted to speak on anyone's behalf. Similarly, witnesses and interpreters (e.g. for those who may be deaf or if a language barrier exists) are allowed to attend the mediation proceedings; however, witnesses are restricted to speaking only about the facts of the incident and may not be involved in the negotiation of the settlement.

If an agreement is reached, an agreement form is completed and signed by the parties. If a settlement cannot be found, or is later defaulted upon by either party, the case is referred back to the Prosecutor's office. There is no cost or fee to the participants nor is there any stipend for participating in the mediation program. It is therefore hoped that through this voluntary participation the complainant and respondent will be more satisfied with the dispensing of justice: the complainant, not only because he/she is made aware of the outcome, but also because of his/her participation in the creation of that outcome, and the respondent, because the case has proceeded quickly, because a criminal record — has been avoided, and because it has forced him/her to accept responsibility for his/her action.

The data for the present study were collected by the John Howard Society. This paper represents a secondary analysis of these data.

Research Design

To test the program's specific deterrence impact, offenders ideally would have been randomly assigned to either diversion or the traditional court system. Then, a simple comparison of recidivism rates would have been sufficient to determine the program's specific deterrence effect. Unfortunately, the ideal situation was not attained owing to the strict guidelines regarding admittance into the diversion program. However, data were obtained that provided not two groups but three: (1) a diverted group, which met all the

guidelines of the mediation- diversion program and were therefore diverted into the program: (2) a not-referred group who also met all the guidelines of the mediation-diversion program but for various reasons (e.g., the refusal of one of the parties to participate in mediation, the inability to contact the victim, or simply non-referral by the prosecutor), were not diverted into the program but were processed by the traditional court system: and (3) a traditionally processed group that did not meet the guidelines for diversion and thus were also processed by the traditional court system.

Although this aspect of the research lacks the precision of randomness, demographic data were collected on individuals in these three groups. These variables (age, occupation, education, and ethnic group), were introduced as covariates. This provided for greater precision in isolating the specific deterrence impact of the diversion program. To test for this, a one-way analysis of covariance (ANCOVA) was performed on the three groups. The ANCOVA allows for the examination of an individual's score, (here the number of times an individual recidivates after the treatment)[2] while controlling for the effects of certain specified variables (age, occupation, education, and ethnic group). The individual's

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[2]Under Canadian law only one charge per criminal incident may be brought against a defendant. The American practice of filing several counts or multiple charges is viewed as placing the defendant in double jeopardy. As Laskin, J., stated for the majority in **KIENAPPLE V. THE QUEEN:**

...the term **res judicata** best expresses the theory of precluding multiple convictions for the same delict, although the matter is the basis of two separate offenses... Where there has been a previous conviction of an accused, whether in a former trial or on one count of a multicount indictment, issue estoppel is obviously an inappropriate term to urge against a further conviction of another offense. So, too, would be **autrefois convict** in its strict connotation; hence the utility of **res judicata.**

recidivism was measured as the number of criminal charges brought against the individual after receiving either court or mediation processing.

To further probe the results of the ANCOVA, a modification of Tukey's Honest Significant Difference Test, the Tukey-Kramer procedure (Kirk. 1982:119-120) was utilized.

This analysis represents a secondary analysis of data obtained by the John Howard Society in Regina, Saskatchewan, Canada, covering the period from June 1, 1976 to May 31, 1979. The sample groups were generated by selecting the names of all persons charged with divertible offenses on every sixth working day, as appearing on the Regina City court dockets. These names were then divided into three categories: diverted cases, not referred cases, and traditionally processed cases. Questionnaires were distributed to the individuals in all three groups to obtain personal and demographic data. The accuracy of these data was improved and supplemented by the Royal Canadian Mounted Police FPS computer records for about one-fifth of the sample. This procedure generated the following sample groups: Diverted (N = 127): Not Referred (N = 229): and, Traditionally Processed (N = 371). The results are presented in Tables 1 and 2.

RESULTS

Table 1: Results of Analysis of Variance

Source of Variation	DF	Sum of Sq.	Mean Sq.	F Value
Model	2	784.47	392.23	45.61*
Error	724	6226.61	8.60	
Corrected Total	726	7011.09		

* p>.0001

Table 1 shows the results of a single ANOVA, testing the program's overall effectiveness in reducing recidivism. Table 2 gives an ANCOVA controlling for the possible confounding effects of age, occupation, education, and ethnicity. These tests were designed to measure effect of mediation-diversion program on those who were allowed to participate in it as compared with those who were not.

The Tukey-Kramer procedure was then performed to compare the different groups to each other. The results of the Tukey-Kramer procedure clearly show that a statistically significant difference exists. The results of these pairwise comparisons are presented in Table 3.

Table 2: Results of Analysis of Covariance With Age, Education, Occupation and Ethnicity as Covariates

Source of Variation	DF	Sum of Sq.	Mean Sq.	F Value
Model	9	1226.76	136.30	16.90*
Error	717	5784.32	8.06	
Corrected Total	726	7011.09		

* p > .0001

Table 3: Results of Pairwise Comparisons Using Tukey-Kramer Procedure

Group	N	Group Mean	Standard Error
Diverted (A)	127	0.55	.30
Not Referred (B)	229	1.58	.24
Traditionally Processed (C)	371	3.17	.20

Comparison Groups	Difference Between Means	Alpha
Group A - Group B	1.03	.005
Group B - Group C	1.59	.001
Group A - Group C	2.62	.001

Examination of the differences between groups revealed that individuals referred for mediation-diversion committed significantly fewer criminal violations than those who did not qualify for the program. More importantly, individuals who completed mediation-diversion committed significantly fewer criminal violations than those who qualified for mediation- diversion but were not referred. Individuals who completed the mediation-diversion program committed .55 criminal violations while those who were eligible but

not referred committed 1.58 violations. While those who qualify for mediation-diversion have different characteristics from those who do not qualify, the single difference between the diverted group and the not referred group is the form of legal processing they received, and this appears to be a significant variable.

The effect that this mediation-diversion program has on the individual warrants consideration by the criminal justice system. That mediation-diversion is more effective in reducing recidivism than the traditional court system for those who qualified for the program is shown by the data, but the effect that mediation-diversion has on repeat offenders is unknown due to their exclusion from the program. For those, however, who qualified for mediation-diversion and went through the program as opposed to those who qualified but went through the traditional court system, significantly fewer acts of recidivism occurred.

DISCUSSION

The focus of this study has been on the specific deterrent effect of a mediation-diversion program. Unlike many evaluations of diversion programs which are simply efficiency reports adopting standards borrowed from cost accounting; or studies which define 'success' as little more than measurements of time per case, cost per case, and inquiries into complainant/ respondent satisfaction. This study endeavors to gain some insight into the social impact of such programs.

Mediation-diversion programs appear to be an effective form of specific deterrence. Those individuals who went through the mediation-diversion program recidivated less. Future information is needed on the impact of such programs on the habitual offender, who in most programs does not qualify for inclusion. The individuals who presently qualify for most mediation-diversion programs pose less of a risk of becoming repeat offenders than those who go through the court process. Research is needed to discover how those offenders who currently do not qualify for this or similar programs would respond.

One major problem facing most research of this type is that

the random assignment of individuals is virtually never attempted. In this particular study, random assignment would have provided greatly needed information on the effects that mediation-diversion might have for those who did not qualify for the program. Under a random assignment system, a criminal would not know beforehand which form of legal processing would be assigned after apprehension. The individual thus might be deterred from engaging in criminal activity to the degree that one form of legal processing, either traditional court processing or mediation-diversion, is feared more than the other.

Another area for future investigation involves the attempt to determine those crimes best suited to a mediation-diversion program as well as identifying those offenses where applicability may be limited. Finally, there exists a need to examine how these programs should be implemented in relation to the traditional courts. Here there are an indefinite number of possible combinations, but we should seek to discover what combinations produce the most favorable results.

References

Abel, Richard L. 1982. "The Contradictions of Informal Justice. In Richard L. Abel (ed.) *The Politics of Informal Justice.* (Volume 1: The American Experience.) New York: Academic Press 267-320.

Adams, William H. 1977. "Would We Rather Fight Than Settle? The Litigation Explosion: Two Fundamental Causes." *Florida Bar Journal* 51: 496-499.

Auerbach, Jerold S. 1976. "Plague of Lawyers." *Harpers* 253: 37-44

Barton, John H. 1975. "Behind the Legal Explosion." *Stanford Law Review* 27: 567-584.

Bell, Griffin B. 1978. "Crisis in the Courts: Proposals for Change." *Vanderbilt Law Review* 31: 3-15.

Cappelletti, M. (ed.) 1978-79. *Access-to-Justice.* (Four Volumes) Millan: Guiffre and Alphen aan den Rijn: Sijthoff and Noordhoff.

Danzig, Richard 1973. "Toward the Creation of a Complementary Decentralized System of justice." *Stanford Law Review* 26: 1-54.

Danzig, Richard and Michael J. Lowy 1975. "Everyday Disputes and Mediation in the United States: A Reply to Professor Felstiner." *Law and Society Review* 9: 675-694.

Doo, Leigh-Wei 1973. "Dispute Settlement in Chinese-American Communities." *American Journal of Comparative Law* 21: 627-663.

Ehrlich, Thomas 1976. "Legal pollution." (Feb. 8) *New York Times Magazine* 17-21, 24.

Fisher, Eric 1975. "Community Courts: An Alternative to Conventional Criminal Adjudication." *American University Law Review* 24: 1253-1291.

Freeman, Richard C. 1977. "Crisis in the Federal Courts: A District Judge's Analysis." *Georgia State Bar Journal* 13: 130-131.

Gibbs, James L., Jr. 1963. "The Kpelle Moot: A Therapeutic Model for the Informal Settlement of Disputes." *Africa* (Journal of the International African Institute) 33: 1-11.

Gillespie, Robert W. 1976. "The Production of Court Services: An Analysis of Scale Effects and Other Factors." *Journal of Legal Studies* 5: 243-265.

Goldman, Jerry, Richard L. Hooper and Judy Mahaffey. 1976. "Caseload Forecasting Models for Federal District Courts." *Journal of Legal Studies* 5: 201-242.

Hofrichter, Richard 1982a. "Justice Centers Raise Basic Questions." In Roman Tomasic and Malcolm M. Feeley (eds.) *Neighborhood Justice: Assessment of an Emerging Idea.* New York: Longman 193-202.

——— 1982b. "Neighborhood Justice and the Social Control Problems of American Capitalism." In Richard L. Abel (ed.) *The Politics of Informal Justice.* (Volume 1: The American Experience.) New York: Academic Press 207-248.

Johnson, Earl, Jr., Valerie Kantor and Elizabeth Schwartz, 1977. *Outside the Courts: A Survey of Diversion Alternatives in Civil Cases.* Denver: National Center for State Courts.

Kienapple v. The Queen 1974. 15 C.C.C. (2d) 524, 26 C.R.N.S. 1 (5:4) (S.C.C.).

Kirk, Roger E. 1982. *Experimental Design: Procedures for the Behavioral Sciences.* (Second Edition.) Belmont: Brooks/Cole Publishing Company.

Lazerson, Mark H. 1982. "In the Halls of Justice, the Only Justice is in the Halls." In Richard L. Abel (ed.) *The Politics of Informal Justice.* (Volume 1: The American Experience.) New York: Academic Press 119-163.

Manning, Bayless 1977. "Hyperlexis, Our National Disease." *Northwestern University Law Review* 71: 767-782.

Marcus, Maria L. 1979. "Judicial Overload: The Reasons and the Remedies. *Buffalo Law Review* 28: 111-114.

Reifner, Udo. 1982. "Individualist and Collective Legislation: Theory and Practice of Legal Advise for Workers in Prefascist Germany." In Richard L. Abel (ed.) *The Politics of Informal Justice.* (Volume 2: Comparative Studies.) New York: Academic Press 81-123.

Rifkind, S. 1976. "Are We Asking too Much of our Courts?" *Federal Rules Decisions* 70: 96-110.

Sander, Frank E.A. 1976. "Varieties of Dispute Processing." *Federal Rules Decisions* 70: 111-134.

Santos, Boaventura de Sousa 1982. "Law and Community: The Changing Nature of State Power in Late Capitalism." In Richard L. Abel (ed.) *The Politics of Informal Justice,* (Volume 1: The American Experience.) New York: Academic Press 249-266.

Tomasic, Roman 1982. "Mediation as an Alternative to Adjudication: Rhetoric and Reality in the Neighborhood Justice Movement." In Roman Tomasic and Malcolm M. Feeley (eds.) *Neighborhood Justice: Assessment of an Emerging Idea.* New York: Longman 215-248.

Wilson, James Q. and Richard J. Herrnstein 1985. *Crime and Human Nature: The Definitive Study of the Causes of Crime.* New York: Simon & Schuster, Inc.