

LOGICAL REASONING VERSUS UNANTICIPATED CONSEQUENCES: DIVERSION PROGRAMS AS AN ILLUSTRATION

*Jim Hackler**

If reasonable men of good will get together and think through a problem, an effective strategy will emerge. This is a common assumption among many advocates of social reform. Logical reasoning is a good place to begin and Working Paper 7 is a lucid and coherent document. It is, however, only a first step. The dynamics of social systems have a rationality of their own. Unfortunately, many "reasonable" men are not flexible enough to incorporate our growing understanding of social systems into strategies of reform. The purpose of this paper, then, is to alert policy makers to some of the potential unanticipated consequences of diversion attempts in the criminal justice system. The goal is not to denigrate diversion schemes, but to caution enthusiastic supporters that worthwhile programs could be ineffective unless we are alert to certain dangers.

Working Paper 7 notes that the criminal law and its processes are a last and limited response when it comes to dealing with social conflict. When called upon to deal with trouble, the criminal law is not always an effective tool. There has been a growing disappointment with the over-reliance on the law and the courts as a means of dealing with social problems. Similarly, treatment and rehabilitation have not lived up to the promise of earlier claims. Careful consideration of various techniques for diverting individuals from the potentially negative consequences of processing through the criminal justice system deserves serious consideration. However, diversion programs can be potentially hazardous if the *informal* workings of the criminal justice system are poorly understood. Most writings in Canada focus on the *formal* workings and on how the system *should* work. John Hagan's studies in Alberta¹ and John Hagorth's study of Ontario² are among the few which help us understand the dynamics of criminal justice.

The diversion projects being studied in Calgary, Kingston, and East York should add to our knowledge, but in the meantime it is worthwhile

* Professor, Department of Sociology, University of Alberta.

¹ Hagan, *Law, Ordering, and Sentencing: A Study of Attitude in Action*, 38 SOCIOLOGY 374 (1975). Hagan, *Criminal Justice and Native People: A Study of Incarceration in a Canadian Province*, 12 CAN. REV. SOCIOLOGY & ANTHROPOLOGY 220 (1975).

² J. HOGARTH, *SENTENCING AS A HUMAN PROCESS* (1971).

examining the consequences of diversion programs in places like Los Angeles County, where forty-seven independent police departments co-exist. As of October, 1974, thirty-two of these cities had diversion programs.³

I would like to focus on five questions: 1) Could diversion lead to an increase in the "treatment" of juveniles and other problem individuals? 2) Do we understand the importance of less studied roles within the criminal justice system, such as that of clerks, who may be crucial to the success of diversion programs? 3) Have we taken into account the differing structural characteristics of communities or organizations? 4) Will diversion screen out the advantaged and leave the disadvantaged behind in a criminal justice system which has become less tolerant? 5) Will attempts at assessment create so much friction that potentially valuable projects will have to be abandoned?

A Possible Increase in "Treatment"

Working Paper 7 notes⁴ that diversion programs could actually result in greater, not less, exposure to the criminal justice system. In Los Angeles County, diversion sometimes was viewed as an opportunity for the police to do *something* with the juvenile as opposed to "letting him off scot-free". Those juveniles who would normally get "counsel and release" were those most likely to be diverted. Instead of reducing the overload and purview of the justice system, diversion may extend it by involving other agencies. Rehabilitation, rather than being directed toward juvenile offenders, might apply only to those who have been released. A harder line might be taken toward more serious offenders.⁵

Understanding Crucial Roles

Usually we assume that judges and police play crucial roles in the justice system, but the way they play those roles and interact with others is still poorly understood. For example, the family court handles many cases where a man has failed to pay alimony to his ex-wife and children. Theoretically, it is the judge who decides on the case. In fact, only a portion of the cases involving alimony problems come to court. Men who have been unemployed or have other "reasons" for failing to make payments frequently do not appear. Who screens these cases? Possibly the court clerk. Who, then, makes most of the *crucial* decisions that affect lives? Would not these same roles be the crucial ones in diversion projects?

In Vienna, a complex information network involving youth officials, police, and court social workers supplied fifteen judges with data so they

³ Teilmann, Klein, & Styles, *The Diversion Explosion* (April, 1975) (paper presented to Special Session on Diversion, Pacific Sociological Association, Victoria, British Columbia).

⁴ LAW REFORM COMMISSION OF CANADA, *DIVERSION*, WORKING PAPER 7, at 24 (1975).

⁵ *Supra* note 3.

could make decisions. A good portion of the crucial information was funneled through a single "liaison" officer who advised the judges.⁶ This person may have been the most influential person in the entire system and might play the most crucial role in any attempts at diversion.

The PARC project in Calgary emphasizes restitution. Working out a "contract" is not easy and requires the cooperation of the court clerk. This role might easily be the most crucial to a diversion project of this sort.

The importance of these roles to the informal workings of bureaucracies are sometimes overlooked when "reasonable men of good will" (usually lawyers) get together to draft legislation or devise a program. Such rational thinking may not take into account the way in which social interaction within a system can make or break a program.

Structural Characteristics

A review of the diversion projects in Los Angeles County revealed that they could either be *in-house* or *outside referral* programs.⁷ Some of the police departments had programs that were self-initiated, self-developed, and self-funded. They included "committed" practitioners of diversion. Others had been induced from the outside to begin programs about which they were not particularly enthusiastic. The primary inducement was government money. What happens when the money is withdrawn?

It appears that the Frontenac Project in Kingston was initiated from within. Others will be launched through the encouragement of governmental funds in areas where diversion will not be regarded so optimistically. It would be worthwhile to note some of the structural characteristics of these projects and their implications for future programs.

Southern California provides more useful insights in the contrast between the Pomona Valley and Mid-Valley Juvenile Diversion Projects.⁸ Mid-Valley did not have as many advanced educational institutions and social service agencies. Residents were receptive to a strong centralized agency. In a sense the region was hungry for an organization to provide an enhanced public image.

Pomona Valley, on the other hand, had a plethora of community resource agencies vying for funds and influence. A new agency with external funding was seen as an interloper. It takes little imagination to see that the diverse ethnic and political characteristics of different regions in Canada will guarantee a variety of responses to suggestions coming from higher levels of government. It is possible that Canada has always paid more attention to local autonomy than the United States and may be able to contribute insights into the problems of funding activities over large regions containing

⁶ Hackler, *The Flow of Information in Court: The Juvenile Court in Vienna as an Illustration*, 17 CAN. J. CORR. 57 (1975).

⁷ *Supra* note 3.

⁸ Dennison, Humphreys, & Wilson, *A Comparison: Organization and Impact in Two Juvenile Diversion Projects* (April, 1975) (paper presented to Special Session on Diversion, Pacific Sociological Association, Victoria, British Columbia).

disparate social and political elements. Perhaps diversion programs should be confined to relatively small regions and medium-sized bureaucracies. In addition, procedures that appear effective in one setting may be quite inappropriate for another.

Rational and reasonable recommendations may frequently flounder when introduced without a feeling for local sentiments and social structure, but, it is possible that there are certain "trigger mechanisms" that would achieve the same goal. For example Working Paper 7 notes that there are pressures on the police to charge wrongdoers whenever possible.⁹ It might be appropriate to reward police for *not* charging suspects. In other words, if one keeps the needs of bureaucracies and the needs of those working within such bureaucracies in mind, it might be easier to accomplish goals indirectly. It is naive to believe that individuals or systems will adopt practices that "are for the public good" when they are contrary to other interests. If we are sincere about bringing about change, we need to explore these "trigger mechanisms" more thoroughly and consider the possibility that rather mundane changes may accomplish more than persuasive rhetoric and logic.

A Possible Increase in Injustice

Diversion could lead to more injustice. Middle-class children and those who have certain desirable characteristics may be favoured by this informal process. Indians, other minority groups, the repulsive, and those from "inadequate" families may not qualify for diversion. These "undesirable" cases may be left in the formal justice system, which may in turn lose some of its empathy and tolerance if many of the "better" cases have been diverted.

Restitution compounds the problem. Middle-class children may be better able to compensate the victim and more able to "be actively engaged in undoing his wrong". The lower-class, poorly socialized child might not view his behaviour as wrong. In other words, diversion contains the same seeds of potential bias that have always existed, and could lead to even *greater* stigmatization for those who are *not* diverted from the system of justice.

The Working Paper notes other possible areas of injustice. The present practice of pleading guilty to avoid the hassle and delay of a contested trial, could become more common if diversion is seen as another aspect of plea-bargaining. On the other hand, some of the advantages that plea-bargaining provides for sophisticated criminals might become available to those less experienced in the criminal justice system.

The Evaluation of Diversion

A typical response to innovative programs is that they should be carefully evaluated to see if they are "effective". I have argued elsewhere that

⁹ *Supra* note 4, at 8.

the evaluation process can create problems of its own and can negatively influence imaginative attempts at reform.¹⁰ It is possible that characteristics of diversion projects, particularly those being supported by funds from federal or provincial governments, may actually increase the hazards already associated with evaluation.¹¹

The Working Paper makes a suggestion that offers an alternative to the chaos created by many evaluations when it recommends more thorough data collection.¹² While seemingly a minor point in the Working Paper, there are few points that are more relevant to assessing the impact of social reform. Our courts keep records that make it very difficult to get a systematic picture of ongoing processes. While our police use the computer effectively, our courts use data handling procedures that are badly outdated. If computer technology were applied to *all* aspects of the criminal justice system, the impact of diversion projects could be examined more profitably without the loss of privacy that characterizes those research programs that require searching through files. Another advantage is that data could be continuous so that those involved in a project would be in a better position to monitor changes. Instead of having an "independent" researcher come in to see if the project is "good", research skills might focus on generating information to answer specific questions, while raising new issues to be explored.

One type of information needed is the explanation of why a diversion program fails. The Working Paper notes the importance of understanding the unsuccessful cases,¹³ but without an effective data gathering procedure such information is usually lost.

Conclusion

The cautious tone of these comments should not be construed as pessimism. However, rehabilitation programs and other types of reform have been disappointing in the past two decades, and should lead us to be suspicious of new fads. While the "diversion explosion" can be seen as a fad, it could also be a promising innovation. Unfortunately, enthusiasm for a reform can blunt our sensitivity to unanticipated problems. We are not wise enough to anticipate many of the factors that will nullify a well reasoned and humane proposal, but experience should teach us that logical suggestions rarely produce the expected results in complex social settings. Working Paper 7 is a good beginning; unfortunately, some people seem to feel that putting such recommendations into practice will automatically lead to a "solution".

¹⁰ J. HACKLER, *WHY DELINQUENCY PREVENTION PROGRAMS IN CANADA SHOULD NOT BE EVALUATED* (1975).

¹¹ MCALEENAN, *The Politics of Evaluation in a Juvenile Diversion Project* (April, 1975) (paper presented to Special Session on Diversion, Pacific Sociological Association, Victoria, British Columbia).

¹² *Supra* note 4, at 13-14.

¹³ *Id.* at 19.