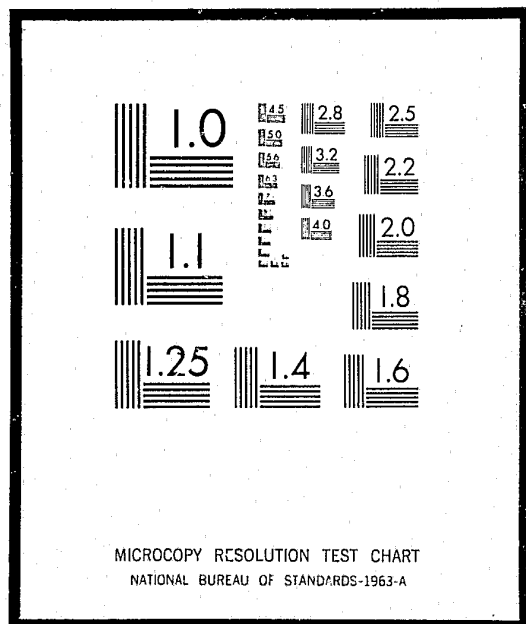


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OPTIMIZING LEGAL IMPACT: A CASE STUDY

John A. Robertson, LL.B.
Harvard Law School
Cambridge, Massachusetts

Phyllis Teitelbaum, M.A.
Department of Sociology
Harvard University
Cambridge, Massachusetts

32547

READING ROOM

I. INTRODUCTION

A study was undertaken to investigate the question of the impact of law and its ability to influence human behavior, using a case study of the effectiveness of one legislative change in a controversial area of criminal justice. The law studied was a pre- and post-trial drug diversion statute, introduced in Massachusetts in 1971. Diversion was chosen for study because of its special advantages to defendants and the courts, and because of its long-term implications for drug policy and for the social functions of criminal law.

Resources and methodological constraints limited the study to an inquiry into first-level effectiveness (the achievement of immediate goals). However, the second level of impact (social effects of the behavioral change) is unlikely to occur unless a first-level change has occurred.

II. THE LAW

A. Legislative History

The Massachusetts Comprehensive Drug Abuse Rehabilitation and Treatment Act grew out of perceptions by the Attorney General and the legislature in 1967 that existing state legislation was inadequate to deal with an expanding drug problem. The process by which the new law was made partially determined both its content and its subsequent impact. Our investigation of its legislative history showed that a handful of public officials, unsupported by organized pressure groups, initiated, drafted, and steered passage of the act. The bill was drafted in the Attorney General's office with few outside inputs. Judges, probation officers, and persons familiar with the criminal court system played no role at any stage. Animating the process was the perception of the Attorney General, a few lawyers in his office, and one or two active members of a legislative commission that inadequate drug treatment was a serious prob-

len. Enactment in the final analysis was dependent on who was sponsoring the bill, rather than on the bill's merits or on perceived constituent support.

B. Provisions of the Law

The statute represents one of the most progressive diversion statutes in the country. It provides for voluntary examination to determine drug dependency (flexibly defined to include both addictive and non-addictive drug use); pre-trial diversion, at the court's discretion, for offenders with drug charges only, and post-trial diversion ^{of} treatment in prison for others; use of both private and state-run treatment facilities; voluntary commitments of 1- 2 years maximum; and dismissal of charges for pre-trial diversion defendants who complete their treatment. The law also created a new administrative unit in the Department of Mental Health -- the Division of Drug Rehabilitation -- to coordinate all drug treatment in Massachu-

setts.

C. Implementation

Lack of staff and the absence of a central authority responsible for directing the implementation process hampered the implementation of the law. The Division of Drug Rehabilitation concerned itself with licensing and funding drug treatment facilities and delegated to the district courts its authority to place defendants in treatment programs.

The courts were initially ill-prepared for the new law, although they improved with time. The Chief Justice of the District Courts, although not officially responsible for implementing the law, attempted to prepare the courts for the required new procedures, sending them memoranda, forms, and lists of approved treatment facilities. However, this communication took place after the law's effective date. The major burden of implementation fell on the individual district courts, which

developed a variety of procedures for treating defendants, with little centralized planning or coordination.

III. METHODOLOGY

The basic research design of the study was a simple one-group pre-test post-test model, comparing outcomes before the law's effective date with outcomes afterwards. The pre-test consisted of all adult drug cases commenced in a three-month period nine to eleven months before the effective date of the law. The post-test was a similar period one to four months after the law took effect. Since many cases continued for several months, the data collected actually reflect experience with the law in its first nine months of operation. Various procedures were used to control for seasonal variation and other independent variables. A total of 803 cases were studied, comprising 1552 drug complaints. They were drawn from four of the seventy-three Massachusetts district courts, selected for

convenience to Boston, heavy drug caseload, differential access to court clinics, and location in different kinds of communities. These four courts appear to represent experience with the law in the Boston metropolitan area and in the busier courts statewide.

Data gathered included statistics, generated from all available court records; interviews with criminal justice officials and attorneys in the four courts; in-court observations; and statistics obtained from the Division of Drug Rehabilitation.

IV. FINDINGS

The law did not increase treatment outcomes over-all, and it produced only a slight increase (2%) in the frequency of pre-trial diversion. Groups most in need of treatment (opiate users, those offenders, ...) received no more treatment in 1971 than in 1970. There was no significant difference between 1970 and 1971 defendants' dispositions. Only

the type of treatment changed marginally, with somewhat less treatment in 1971. These results were corroborated by Division of Drug Rehabilitation data and are not explicable by alternative hypotheses.

The law's provisions created a funnel effect where few defendants had examinations, fewer were found eligible for treatment, and fewer still were diverted or treated. The key decision point in this funnel was the request for an examination; 84% of defendants were disqualified by failing to file such a request. Opiate users were more likely to choose examinations than marijuana or other drug users, as were defendants with medium-long criminal records.

V. DETERMINANTS OF IMPACT

A number of factors account for the law's lack of impact, including ignorance of its provisions among judges, attorneys, and defendants; judicial hostility; insufficient incentives for

judges and defendants to use the law; restrictive eligibility requirements; the broad discretion given judges, psychiatrists, and defendants; and the lack of an organized constituency.

Ignorance of the law's provisions explains the lack of impact to a small but significant extent. The problem of communication was especially acute in this case because the law is complex and overly technical. Although judges displayed a wide variation in their knowledge of precise provisions, judicial ignorance probably had only a slight effect on defendant outcomes. Attorney ignorance contributed to defendant ignorance, and partially accounts for the low examination request rate by defendants and for the failure of seven defendants who were eligible for mandatory diversion to obtain it.

Judges were generally critical and sometimes hostile. The law's provisions, and the lack of better ones, had a small but important effect on defendant outcomes. In particular, the law provided no incentives for judges to grant pre-trial diversion

or to grant treatment to defendants with serious charges or long records, and judicial hostility may well have influenced the outcomes in such cases.

The lack of incentive for defendants to request examination and treatment explains a great deal of the law's ineffectiveness. Treatment in lieu of prosecution was not attractive to most of the defendants studied, since it provided in reality few benefits otherwise unavailable.

The law's definition of who was eligible for pre- or post-trial treatment significantly reduced the frequency of treatment outcomes. The eligibility criteria based on assumptions about drug use and the role of the criminal law, were quite restrictive. As mentioned above, they created a funnel effect that excluded nearly all defendants from treatment.

Another factor reducing the frequency of diversion and treatment was the discretionary nature of the treatment decision. Judge, psychiatrist, and defendant all had to agree

that the defendant was drug dependant and would benefit from treatment, and the judge had discretion to deny pre-trial or post-trial treatment in all but a few cases. Eliminating some or all of this discretion would have substantially increased treatment.

A final cause of the law's limited effectiveness was the absence of an organized constituency to monitor implementation and engender commitment among affected actors. Unlike most instances where a law of far-reaching significance is passed, no organized interest group led the fight for the drug law, nor did organized support for vigorous implementation coalesce after passage. A well-organized interest group could have increased the law's impact.

VI. CONCLUSIONS: OPTIMIZING IMPACT

The Massachusetts diversion experience suggests several propositions about the conditions under which law alters behavior and initiates social change. Legal effectiveness de-

pends on (1) accurate identification of a problem situation and selection of means which, if carried out, will in fact alter the situation in the desired direction; (2) communication of the law to the affected persons, particularly to officials or elites directly responsible for its implementation; (3) a structure of positive and negative incentives sufficient to inspire the desired action and to counteract or circumvent inertia, resistance and hostility; and (4) existence of organizations with official or unofficial mandates for directing and monitoring the implementation process.

The first proposition assumes that all law contains implicitly or explicitly a model of the world and relations within it. For law to succeed, its model of reality must accurately conceive the problem and identify behavior that will alter the situation. The diversion law was deficient in both respects, since it assumed that most drug users were drug dependent, and that judicial discretion was the best means for

achieving increased treatment.

The second proposition recognizes the indispensability of complete and undistorted communication of new law. We emphasize this seemingly simple point because the assumption that official publication of new law informs relevant actors, or that self-interest will motivate lawyers to keep clients apprised of legal change, so often belies reality. The wide variation in knowledge exhibited by judges and lawyers in this study suggests the inherent weakness of primary reliance on official publication and the awareness of lawyers. To improve this situation, lawmakers must create channels of communication as provisions of new laws.

The third proposition merely operationalizes the assumptions about human behavior underlying the legal order, and approval level is a function of the degree of change required by the law, the actor's personal goals and interests, his respect for law as

such, and his perceptions of the costs and benefits (to him personally, and to the community) of compliance or non-compliance. Policy-makers can either increase rewards for compliance, or they can increase negative sanctions for non-compliance. Each of these requires intelligence about the incentive structures of particular actors, their perceptions of predicted consequences as positive or negative, and the likelihood that a set of incentives will induce the desired behavior. Enforcement mechanisms are essential whenever negative sanctions are employed. (Thus, in the case of the Massachusetts drug treatment law, judges who refused defendant requests for treatment faced no adverse consequences and had little to lose through overt non-compliance.) Negative incentives are likely to be more effective when focused on a few key actors. Finally, positive and negative incentive structures work best if law-makers have selected means that permit opposition forces the least scope of influence. Law-makers must look closely at the incentives likely to work in a given case, evaluate

their costs, and structure the law's provisions so that enforcement is provided and disincentives have the least sway possible.

Finally, legal effectiveness requires the existence of organizations that monitor communication and implementation processes, and which assure that response to the law is highly visible. These organizations may be publicly appointed or privately constituted. Their function is to focus constant attention and pressure on the persons obligated to implement law or alter behavior. If private lobbies do not appear, law-makers must create public agencies or facilitate the emergence of private ones to perform this watch-dog function. Such a group was clearly lacking in the case of the Massachusetts diversion law.

While none of these propositions will guarantee effectiveness in a given case, together they comprise a model with theoretical and policy implications. They constitute a framework for explaining past legal failure, predicting success pro-

babilities of future changes, and identifying measures which optimize legal effectiveness. However, there are limits to legal effectiveness. The full panoply of optimizing devices may not be available due to lack of information, political considerations, or limits on the substantive content of law. Thus, the limited impact of the Massachusetts statute is explained at bottom by the reflective nature of law. To have had substantial impact, the law would have had to include provisions which conflicted with prevailing assumptions about drug use, crime, and the needs for strict controls. We conclude that the impact of diversion on the criminal justice system is likely to be minimal until public attitudes and values shift away from a punitive response to drug use and towards decriminalization of drug offenses.

END