ANNUAL JOURNAL

1982

PRETRIAL SERVICES ANNUAL JOURNAL
VOLUME V

Compiled and Edited by

Elizabeth Gaynes
Technical Assistance Associate

Supportive Staff:

Celia Dunayer
Production Manager

Roseanna Kaplan
Editorial Assistant

Patricia Warren
Typist

Pretrial Services Resource Center
918 F Street, N.W., Suite 500
Washington, D.C. 20004

THIS PUBLICATION IS SUPPORTED BY GRANT NUMBER 82-TA-AX-0001 AWARDED BY THE LAW ENFORCEMENT ASSISTANCE ADMINISTRATION, UNITED STATES DEPARTMENT OF JUSTICE. POINTS OF VIEW OR OPINIONS STATED IN THIS PUBLICATION ARE THOSE OF THE RESPECTIVE AUTHORS AND DO NOT NECESSARILY REFLECT THE OFFICIAL POSITION OF THE PRETRIAL SERVICES RESOURCES CENTER NOR THAT OF THE UNITED STATES DEPARTMENT OF JUSTICE. THIS IS A PROGRAM OF THE ADJUDICATION DIVISION OF THE OFFICE OF CRIMINAL JUSTICE PROGRAMS.

Acknowledgements

Twenty-one authors have contributed to this year's Annual Journal, and all are due special thanks--not only for sharing the products of their hard work with the pretrial field, but also for their patience and amiability in responding to the editorial and scheduling needs of the Journal staff. The uniform level of professionalism exhibited by contributing authors in complying with deadlines and editing requirements is no less a reflection of their commitment to excellence than the impressive quality of their work.

The authors and, in many cases, the people and programs described in these articles, illustrate that the pretrial field, as Professor Floyd Feeney stressed in his Introduction to this year's Journal, "has been blessed with an unusually high quality of leadership and an exceptional willingness to innovate and try new ideas." If this fifth Annual Journal serves its purpose, it will continue to be a vehicle for the expression of that leadership and the communication of these new ideas.

Finally, I would like to acknowledge the work of my colleagues at the Center in bringing these ideas to print; thanks to Patricia Warren for her usual excellent typing and to Celia Dunayer for her orchestration of the difficult lay-out and production processes. Special credit is due to Rosie Kaplan for the considerable time and care she took in writing and editing portions of this volume. I am particularly grateful to Alan Henry, former editor of the Journal and now director of the Center, for providing thoughtful guidance, for encouraging independence, and for keeping the Center afloat during the time it took to bring this work to completion.

Elizabeth Gaynes
Editor
Pretrial Services Resource Center
September 1982

Contents

Introduction

Throughout much of the past century and before, jails have been a national disgrace, and pretrial release often both grudging and discriminatory. Beginning in the early 1960s the Manhattan Bail Project and its progeny caused a different flame to burn. Equal treatment for the poor and an end to unnecessary detention became important public goals. This fire is now flickering, however. Many are willing to do almost anything to stop crime, the jails are fuller than ever, and concerns about justice and equality are not the order of the day. The question posed for the 1980s is thus a sharp one: Shall we return to the brutishness of the past or can we institutionalize the gains of the past 20 years as a permanent part of the system and move on to develop the full potential of pretrial services as a way of handling some of the massive problems of the jails and the courts?

It would be foolish to be too optimistic about how this question will be answered. Crime is not a figment of some politician's imagination but a reality that affects the quality of almost everyone's everyday life. Measures that offer some hope for its control deserve careful consideration even at the cost of some loss of liberty. Beyond this, pretrial services agencies--many now moving into the second decade of their existence--are no longer young, vigorous organizations with a clear sense of mission, but battle-scarred veterans of the bureaucratic wars--wiser perhaps, but more "realistic" and more conservative than a decade ago. Like public agencies everywhere, they are under budgetary attack and must hustle to survive. The field has also been plagued by a certain amount of faddishness, diluting both resources and the sense of direction.

There are also positive signs, however, and the picture is by no means entirely bleak. Much has been learned in the past 20 years and a priceless organizational infrastructure has been created. Among other things, the field has been blesssed with an unusually high quality of leadership and an exceptional willingness to innovate and try new ideas.

If the course is to continue forward rather than backward, however, all who are concerned about pretrial services must face the new realities squarely. The central dilemma is the conflict between public safety and fairness to individuals.

There are at least three ways of resolving this dilemma:

--Opt clearly for the avoidance of punishment prior to the establishment of guilt;

--Opt clearly for maximum public safety; and

--Opt for a hybrid system which involves some mixture of the two goals.

During much of the formative period of the reform movement it was widely assumed that the Constitution required the first solution, that the only permissible criterion for judging pretrial release was whether the defendant would appear in court. The issue of whether a defendant who was not likely to appear could be detained without bail was rarely faced, however, and it was an open secret--not seriously objected to by the reformers--that it was all right to detain really dangerous defendants by setting high bail as long as this was not talked about too much.

The legal battle involving these issues is far from settled but the "appearance only" standard no longer holds the commanding heights. Where once John Mitchell stood almost alone, the courts have now begun to fill in the ranks. The Supreme Court has held that pretrial detention is not punishment and is not prohibited by the presumption of innocence, and a number of courts have upheld the constitutionality of preventive detention and the dangerousness criterion.

While the legal signals on preventive detention have turned from red to yellow and many states have adopted such measures, no jurisdiction has adopted anything like a maximum public safety proposal. Most are opting instead for some third solution that tries to ride both horses. Even the traditional leaders of the reform movement have embraced the need to detain highly dangerous defendants, arguing that if this is done it will then be possible to release virtually everyone else without the use of money bail.

In many ways this is a very appealing approach. It is more open and honest, avoids some of the problems of the past, and may provide a greater measure of public safety. It assumes, however, that high-risk defendants can be identified and that the political forces which focused attention on the public safety issue will be satisfied by detaining these defendants.

The first assumption is probably safe enough. While it is extremely difficult to predict which individuals are likely to commit dangerous acts, it is feasible to identify the high-risk groups. Detaining all of these is vastly overinclusive but apparently a price that society is now willing to pay despite the overcrowding and individual unfairness engendered.

The second assumption is much more questionable, however. Even low-risk defendants commit some crimes, including a few horrendous ones, and the pressure to extend detention to even lower risks will be substantial, particularly as it becomes clearer that detaining high-risk defendants does little to stop crime. Once the high ground of principle prohibiting detention on the basis of dangerousness has been breached, there may be no natural stopping place other than practicality.

Given present attitudes and directions, perhaps the best hope--for liberals and conservatives alike--is for more research and for more innovation like the quantitative experiments with risk assessment now being undertaken in the District of Columbia. At this late date we sadly still know virtually nothing about crime on bail. The few studies we have tend to treat arrests for public drunkenness while on bail the same as arrests for robbery and tell us much less than we need to know either to justify greater detention or to identify the high-risk groups.

In these circumstances it is particularly important that the work of organizations such as the Pretrial Services Resource Center continue. The Center has served as an invaluable resource for all who work in this field--improving the exchange of information, facilitating training and innovation, and adding directly to our knowledge of pretrial issues and solutions. The past is just the beginning, however. If the system is ever to be both fair and effective against crime, it needs the kind of sustained effort and expertise that the Center can provide.

Floyd Feeney
Professor of Law
University of California at Davis
August 1982

89691

BAIL REFORM IN CALIFORNIA: THE PASSAGE OF AB2

by

JAMES AUSTIN, Ph.D.
EDWIN M. LEMERT, Ph.D.

A controversial issue facing criminal justice systems across the country is how to abolish bail bonding for profit, as has been called for in virtually every national examination of pretrial release procedures. States have tried various methods including the expulsion of bail bondsmen from the criminal courts of the state, imposing strict regulations and accompanying sanctions on the bail bond industry, and providing alternative mechanisms for defendants to meet financial conditions of release.

One such alternative, ten percent deposit bail, permits the defendant to deposit with the court ten percent of the face amount of the bail set. The appeal of this system, according to its proponents, is that the deposit is returned to the defendant when the case is adjudicated, unlike the surety bail system where the defendant is required to pay a non-refundable premium to a bondsman to be released. But the opposition to such a change is often strong and persistent.

Assembly Bill 2 (AB2), discussed in this article, passed the California legislature in 1979 and allows for the use of deposit bail in misdemeanor cases for five years. The article describes the history of the passage of this bill and provides an insight into the impact the legislation has had on the pretrial release system in California. This impact is the subject of four-year study, currently in its second year, called for by the AB2 legislation and being conducted by the National Council on Crime and Delinquency (NCCD) Research Center.

James Austin, a senior research associate at the NCCD Research Center, is co-director of the "Evaluation of the Bail Reform Act of 1979 (AB2)." He is also co-director of the Supervised Pretrial Release Model Test Design Study now underway. Dr. Austin recently completed a study of a pretrial diversion project in California. He received his masters degree in sociology from DePaul University and a doctorate in the same field from the University of California at Davis.

Co-author Edwin M. Lemert is Professor Emeritus in the Department of Sociology at the University of California at Davis. Dr. Lemert, who received his doctorate in sociology and anthropology at Ohio State University, is a consultant to NCCD on the AB2 Evaluation.

Introduction

During the past two decades, considerable efforts have been made to reform America's bail system. Generally, these have resulted in liberalization of pretrial release policies; legislative and programmatic reforms have sought to increase the frequency of release after arrest and instill fairness and equity in release decisions. Yet it remains unclear today whether these reforms have realized their original purposes. Pretrial detention populations have not been significantly reduced, and inequities in pretrial release decisions continue to be reported. Moreover, a conservative movement toward restricting pretrial release through preventive detentions threatens to undermine the ameliorative efforts of the past. 1/

In 1979 the California legislature, after almost a decade of debate and intense controversy, made its own effort to liberalize the state's bail system through legislative decree. Known as Assembly Bill 2 (or AB2), the law provided an alternative means to release defendants from pretrial custody. 2/

AB2's advocates claimed that the new law would create no additional costs for local government, would not increase threats to public safety, and would eliminate inequities inherent in the bail system. Opponents countered that costs now borne by the private bail system would have to be paid by taxpayers, that costs would increase due to excessive rates of failure to appear, and that crime would increase as more criminals avoided prosecution and pretrial detention.

As events were to show, reforming judicial procedures and, more specifically, a firmly entrenched bail system, is a complicated and unpredictable enterprise. Numerous interest groups and powerful individuals with competing ideologies and values become involved in an intense struggle to use, compromise, or resist the reform for their own purposes. In the end, the original goals of the reform may be so compromised that it becomes more symbolic than real in its immediate consequences.

1/ Gerald R. Wheeler and Carol L. Wheeler, "Bail Reform in the 1980's: A Response to the Critics," Criminal Law Bulletin, Vol. 18, No. 3, May/June 1982, pp. 228-240.

2/ Specifically, AB2 assured misdemeanant defendants for whom a bail figure was established above $149, to be released upon deposit of ten percent of that amount and the execution of an appearance bond and release agreement. In essence, AB2 created a state bail system operated by the counties which competed with the traditional private bail system operated by bondsmen and insurance companies. Unlike private bail, AB2 mandated that almost all of the ten percent deposit be returned to the defendant after all required court appearances have been made.

The passage of AB2 provides a unique opportunity to understand how competing forces directly affect the social change process, as well as how conflict and compromise can, in the final analysis, severely dilute the prospects for meaningful reform.

The Context of Bail Reform in America

The earliest bail reform in the United States was directed at corrupt practices and the anarchy prevailing among bail bondsmen. Lack of financial responsibility or "straw bail" on the part of individual bondsmen led to government regulation through licensing. This opened opportunities for insurance companies to enter the field and more or less pushed bondsmen into becoming their agents. 3/ The activities of bail bondsmen continued to give concern, noted in appellate court cases raising issues about the powers of bondsmen with respect to arrest, detention, and handling of absconders or "bail jumpers" while transporting them between jurisdictions. Questions concerning the absolute right to bail and the meaning of "excesssive" bail continued to be raised in appellate actions. Confusion on these issues, to which was added a heightened awareness of problems of poverty and inequality as they affected "equal protection of the laws," made bail a fertile source of controversy and reform, especially during the decades of the 1960s and 1970s. The first conspicuous bail reform came in 1966 with federal legislation liberalizing the rules of pretrial release. These did not abolish bail, but they provided competitive alternatives of nonfinancial release by own recognizance (OR) and conditional release. 4/ In 1967 the President's Crime Commission recommended that bail reforms be considered by the states. An even stronger impetus to reform came from the Manhattan Bail Project (VERA), established in New York with private support. 5/ Fueled by LEAA funds, literally hundreds of pretrial release and pretrial diversion programs soon followed based on the Manhattan experience. 6/

3/ John J. Murphy, "State Control of the Operation of Professional Bail Bondsmen," Cincinnati Law Review, Vol. 36, Summer 1967, pp. 375-411.

4/ U.S. House of Representatives, Committee on the Judiciary, Hearings on Bills to Revise Existing Bail Practices in the Courts of the United States and for Other Purposes, 89th Congress, Second Session 1966.

5/ Charles Ares, Ann Rankin, and Herbert Sturrs, "Manhattan Bail Project: An Interim Report on the Use of Pretrial Parole," New York University Law Review, Vol. 38, pp. 67-95.

6/ James Austin, Instead of Justice: Diversion, unpublished doctoral dissertation, University of California (Davis), 1980.

Bail in California

The early history of bail in California was neither exceptional nor significantly different from that more generally characteristic of bail elsewhere. The basic bail statutes were enacted in 1871 and 1872. These noted that custody of the accused remains in effect because the bail, rather than the sheriff, becomes the jailer. The first reference to bail bonds in the penal code provisions occurred in 1927, and the first reform in bail practices came in 1937 with the qualification and licensing of bondsmen under the Insurance Code. Presumably corporate surety bail had become established by this time. Another reflection of the entry of insurance companies into the bail business was the progressive lengthening of the grace period for the forfeitures of bail bonds, from 30 to 60, 90, and ultimately 180 days. 7/

Amendments to California bail statutes were made in 1929, 1933, 1941, and 1945, plus several more in 1955. These do not seem to have been major changes, being more in the form of "tinkering"--small accretional changes deemed necessary to correct problems arising in different county jurisdictions. The first comprehensive criticism of California bail procedures was voiced in 1956 in an article in the California Law Review. 8/ This called attention to the "state of hopeless confusion in bail laws," noting that no commonly accepted meaning could be found in code terms such as "taking of bail" or "admission to bail." 9/ The article urged that legislative attention be given to which procedures were subject to bail provisions, the need for a uniform release system, simplification of forfeiture procedures, and clarification of conditions under which sureties are released or cash refunded. 10/

The first significant changes in pretrial detention procedures in California were introduced in 1957 and 1959. These allowed police to use field release and stationhouse release by means of citations for misdemeanors. These saw little immediate use; but after the establishment of the Manhattan Summons Project by the New York City police in 1964, several California police departments began experimenting with procedures for voluntary court appearance of

---

7/ This grace period remains a sore point with some county administrators who feel bondsmen abuse the 180-day wait period to accrue profits on interest bearing accounts.

8/ Roy A. Gustafson, "Bail in California," California Law Review, Vol. 44, 1966, pp. 815-832.

9/ Ibid.

10/ Ibid.

persons charged with minor offenses. Then in 1969 a new law required that police agencies investigate the possible use of citations in place of arrests in the instance of misdemeanors. 11/ Studies of the operation of citation procedures showed that the risks of nonappearance were minimal and that the cost savings were considerable. 12/ However, law enforcement agencies were never authorized to exceed the misdemeanant charge barrier in using OR releases.

Another major influence in California bail reform stemmed from a highly publicized program established in New York City in 1961, the previously mentioned Manhattan Bail Project. An equally important influence was a Washington, D.C., project modeled after that in New York and set in motion in 1964. Both programs demonstrated that it was possible to release "good-risk" defendants prior to trial without great adverse effects of increased failures to appear. 13/ At about this time, a move was begun to establish an experimental program to release indigent criminal defendants prior to trial in Oakland, California.

The politics surrounding the decision to put the Oakland project into operation foreshadowed later controversies over state legislation for bail reform. Partisans of the plan stressed that the local bail system was not working well and that money could be saved for taxpayers by adopting the new system. Resistance came from officials in the Oakland police department, who believed that there would be danger to the public from releasing criminally charged persons before trial. Local bondsmen, as might be expected, joined the opposition, echoing the negative police attitudes and arguing that bail allowed punishment of criminal suspects who otherwise could not be successfully prosecuted because of evidentiary problems. The final outcome of discussion and argument was a narrow one-vote-margin approval of the Oakland project by the county supervisors, with the financial argument of taxpayer savings winning the day. 14/

11/ The use of field release citations by law enforcement agencies for misdemeanor cases in retrospect proved to be the major bail reform legislation to occur in California. Field citations and later the proliferation of own recognizance programs quickly became the dominant means of pretrial release for this category of defendants.

12/ Floyd Feeney, "Citation in Lieu of Arrest: The New California Law," Vanderbilt Law Review, Vol. 25, pp. 367-394.

13/ David J. McCarthy and Jeanne Wahl, "District of Columbia Bail Project: An Illustration of Experimentation and a Brief for Change," Georgetown Law Journal, Vol. 53, pp. 675-748.

14/ Forrest Dill, Bail and Bail Reform, unpublished dissertation, University of California (Berkeley), 1972.

The Oakland project, although well funded by the Ford Foundation, did not produce impressive results. The number of defendants who could be processed was disappointing, running less than two-thirds of that which had been projected. Following a pattern already established in prior bail legislation and to be duplicated in the AB2 legislative battle, felony defendants and drunk-driving cases were excluded at the project's inception. The great bulk of eligible minor offenders were unaffected by the project and continued either to obtain bail, plead guilty at an early court appearance, or remain in detention.

Since the staff of the Oakland OR program were secured on loan from the Probation Department, there was a tendency for its work to be coopted into that of the court. This contrasted unfavorably with the work of volunteer staffs of law students and VISTA workers of the Manhattan and Washington, D.C., projects. Close study brought out signs that free use of OR releases as envisioned for the Oakland project thwarted informal practices in the court revolving around the negotiation of guilty pleas. The project was useful in certain ways to judges; but it also created problems for them, particularly in balancing requests of defense attorneys against those of district attorney deputies. 15/

A further symbolic liberalization of pretrial release came via a San Francisco County Superior Court, which announced the Van Atta v. Scott decision in 1976. 16/ This decision shifted part of the burden of proof in own recognizance decisions from the defense to the prosecutor. If challenged by the defense counsel, the prosecutor must now show why OR should not be granted, rather than release under bail. Theoretically, this decision should increase the court's use of OR. However, at least in one county it appears the decision has not significantly affected pretrial release. The Van Atta decision there did little to motivate compliance by defense attorneys and prosecutors:

> In interviews with prosecutors, judges, and others in Contra Costa County, it is evident that Van Atta has not had any noticeable effect to date. Defense attorneys have reportedly not pressed strongly for OR release using Van Atta, nor has the District Attorney been able to assign additional personnel to appear and present evidence at bail hearings. In any event, judges interviewed tended to respond that Van Atta would have little practical bearing on their rulings regarding bail and OR release. 17/

15/ Ibid., p. 154.

16/ California Superior Court, Docket #662-928; partially upheld 27 C.3d.

17/ Contra Costa County Board of Supervisors Adult Correctional Facilities Master Plan, 1982, Section 3, p. 30.

The Legislative History of AB2

The legislative change in bail procedure which was several times attempted and finally achieved by a California statute in 1979 was similar in aim to that of the nationwide bail reform movement. It was an effort to introduce a measure whose application would not be dependent on discretionary use by police or judges and which directly addressed the perceived problems of inequality in pretrial release practices.

The bail reform bills which began to be introduced into the California legislature beginning in 1971 were all variations of the so-called ten percent deposit bail plan, which returned most of the deposit to the accused if he appeared for his hearing as scheduled. The idea was first put forward in a New York City law in the early 1960s. 18/ Then in 1964 Illinois adopted the plan and at the same time eliminated bail bondsmen. 19/ In 1966 the ten percent plan was made part of the federal Bail Reform Act with one exception: the federal law returns the entire deposit to defendants who appear at all court hearings, whereas the Illinois statute allows the court to retain a small portion of the deposit to cover administrative expenses. 20/

Several other jurisdictions have now adopted similar laws, and others are considering such legislation. As of 1980 the status of ten percent legislation is as follows:

- Five states have a percentage deposit system as a defendant option with an accompanying administrative fee requirement.
- Fourteen states have percentage deposit as a court option with the administrative fee.
- Four states (including California) have some combination of the above depending on the charge. 21/

On its face, the ten percent bail scheme does not make bail any easier to obtain but rather it converts what historically was a cost or premium retained by the bondsmen into a deposit of cash which is returned to the accused. The semblance of traditional bail was preserved by provisions for forfeiture of bail, which became a claim the state must collect from the defendant. In a literal sociological sense, the defendant becomes his own bail--anomalous, to say the least, in light of the historical meaning of bail.

18/ National Council of Crime and Delinquency, Evaluation of Bail Reform Act of 1979 (AB2): Report #1 to the California Legislature, 1982.

19/ Ibid.

20/ Ibid.

21/ D. Alan Henry, Ten Percent Deposit Bail (Washington, D.C.: Pretrial Services Rescurce Center, 1980), p. 6.

The first such ten percent bail bill was introduced in the California legislature by Assemblyman William Bagley in 1971. This move apparently materialized from interpersonal contacts between Bagley and a staff member, Art Azevedo, who had been a Boalt Hall law student and who brought to his attention the draft of a bail reform act prepared by three other Boalt students at work on a criminal justice reform project. 22/ This became AB 2752. Surprisingly, Bagley was able to get his bill out of the Criminal Justice Committee, according to one informant, because members resented the so-called "street tactics" of the bondsmen lobbyists. Another explanation attributed this to the new liberal-urban image of the Committee, which later became known as the graveyard for conservative criminal justice legislation. But despite Bagley's early success, he was able to command only 14 votes in favor of passage against 49 nays in the Assembly. Bondsmen were joined in their opposition to the bill by the California Peace Officers Association, the California Sheriffs Association, and the District Attorneys Association.

Senator Arlen Gregorio also introduced a ten percent bail bill in 1971 and again in 1972 (SB329). Drafting for the latter was done by the San Mateo County Bar Association. Gregorio's bill seems to have aroused more media discussion and controversy than the Bagley proposal. It was endorsed by the State Bar Association, several county bar associations, and supported by the District Attorneys Association, the California Peace Officers Association, and the California Sheriff's Association, along with the Judicial Council of California. Just why law enforcement groups in this instance shifted away from their traditional opposition to Assemblyman Bagley's bill in 1971 is not clear. Despite the fact that SB329 was a relatively mild proposal to add ten percent bail deposit to other pretrial release alternatives, it could not be gotten out of the Senate Judiciary Committee. Bail bondsmen were again strongly organized against the bill, and the balance of votes lay with conservative senators.

By this time arguments against the ten percent bail reform had crystallized around a number of assertions: that in states where the procedure was installed there was an increase in failures to appear; that it was a boon to organized criminals; that pretrial crime increased; that the plan shifts the costs of bail from the defendant to the taxpayer; that forfeitures would be uncollectable; that relatives would be reluctant to post bail if they stood to lose property; and that courts would react to the new system by raising bail schedules.

22/ Boalt Hall Law School is part of the U.S. Berkeley campus and is frequently described by conservatives as a center for liberal and radical oriented law students who eventually find their way into the legislature or are appointed by Democratic administrators to key administrative or judicial positions.

In 1975 and again in 1976, Allen Seroty introduced ten percent bail bills covering both felonies and misdemeanors, at a time when he was chairman of the Assembly Criminal Justice Committee. Despite his strategic position Seroty was unable to get his bills out onto the floor. The likelihood of a veto by then-Governor Reagan partially explained Seroty's difficulties.

Howard Berman first submitted a bail reform bill in 1977 (AB 1233). This, like its predecessors, allowed for ten percent deposit bail; but it also required an appearance bond and imposed conditions in connection with the deposit, along with procedures for release on recognizance and regular bail. Failure to appear for hearings after release on a misdemeanor charge was itself made a misdemeanor, and a felony if the defendant failed to appear on a felony charge. Four other bail bills were introduced into the Assembly in 1977, all reflecting the growing interest in reform.

Berman's bill was supported by the State Bar Association, the Los Angeles Bar Association, and by the District Attorneys Association "in principle." However, the American Civil Liberties Union and the Public Defender Association withheld approval because they wanted stronger legislation. Stiff opposition came from the bail bondsmen; the California Peace Officers Association also opposed the measure, as did the Superior Court judges of Santa Clara county. The net result of hearings before the Criminal Justice Committee and its deliberation was a five to three vote against bringing the bill out. However, permission was given to bring the bill before the Committee again in 1978.

Berman's 1978 version again failed to make it out of the Committee, and it was not until 1980 that ten percent legislation cleared the Committee, passed both houses, and was scheduled to go into effect January 1, 1981. But the passage of AB2, as it was known, proved to be one of the most controversial and fiercely fought pieces of legislation in the 1979-80 legislative session.

Viewed in retrospect, California bail reform had several distinctive features: the relatively long period during which attempts at reform legislation failed; the intense controversy surrounding the ultimate successful passage of the reform bill; and the spurious aspects of the process by which passage was secured. These will be discussed under a number of interpretive headings: The Ideology of Bail Reform, The Coalescence of Power, Group Support, The Opposition, and Credibility and Compromise.

The Ideology of Bail Reform

One easy explanation as to why bail reform finally came to fruition in California is that it was an idea whose time had come. This assumes that there was some kind of efflorescence of public opinion which pervaded attitudes of legislators, making them favorable to changing the bail law. There was ample support for this conception in the nationwide movement for reform beginning with the Illinois bail reform of 1964, plus the popularity of pretrial OR release and diversion programs funded by LEAA. By the time reform was given full consideration in California, 15 other states besides those mentioned had instituted ten percent bail procedures in one form or another. Literature on the subject had grown large, and awareness of the related problems was widespread.

But intensified exposure to the new conception of bail through reading and demonstration projects obviously did not immediately transform the effective views of legislators on the subject. Something had to happen to overcome the inattention, the inertia, the unpopularity of defendant-oriented legislation, and the sense of political hazard it conveyed. On its face the ten percent bail bill pretty well emasculated the age-old notion of surety for those accused in crime; it attacked interests who were sources of campaign support for a number of legislators; it posed complex questions about its possible effects on government; and it struck at some deeply rooted attitudes about the respective roles of public and private enterprise.

The more immediate awareness of the need for bail reform most likely resulted from a cumulative process within the legislature itself, based on the repeated introduction of reform bills during the 1970-80 decade. This was done by several different assemblymen and senators, who along with their staff might be considered a kind of loose constituency of bail reformers within the legislature.

Equally significant was their common training in law which set them apart from the business-oriented bondsmen. 23/ They saw bail reform as a legal issue bearing directly on problems of due process. Numerous studies and their own practical experiences reinforced their belief that excessive and unnecessary detention unduly biased criminal court dispositions. They were uneasy over situations in which insurance agents made profits from pretrial release decisions, decisions which also affected court dispositions. Although they portrayed themselves as advocates of the poor who felt the financial burden of the commercial bail system, in fact there was little evidence that the momentum for reform came from the lower

---

23/ Bondsmen frequently are not totally immersed in the bail bonding industry. They tend to be diversified in other aspects of the insurance industry including the sale of auto and home owner fire and theft insurance premiums.

socio-economic classes. In fact, a recent California public opinion poll found that low-income groups were as opposed to liberalizing pretrial release policies as middle- and upper-income groups. 24/

The bail reformers not only became familiar with the problem itself but also with the tactics and arguments of the opponents of reform: Peter Jensen, for example, had been on Allen Seroty's staff when he introduced the 1975 and 1976 bills and was later on Berman's staff. Former Assemblyman Bagley was another bail reformer who returned in 1979 to play a role in advocating what was "after all my bill." 25/

Meanwhile bail issues had repeatedly come before the State Bar Association and different county bars. Some legislators, district attorneys, and individual attorneys had experiences with pretrial release programs in different California counties. There was concern with issues raised in several bail cases which had come before the state Supreme Court. 26/ A final important consideration in converting the ideology of bail reform into a basis for action was an interim study of the issue ordered after the failure of Berman's 1977 bill. Sometime thereafter, Berman's staff person, Peter Jensen, a representative of the Governor's Office, five members of the Criminal Justice Committee, and a representative of the Surety Advisory Board visited Illinois, Washington, D.C., Philadelphia, and New York, and "saw for themselves" how ten percent bail and other release procedures worked in other jurisdictions. The net effect of this junket was not to change any views so much as to solidify the commitments of Berman and supporters through seeing and hearing practical evidence that such a plan was indeed workable.

24/ Field Institute, Attitudes of Californians Towards Prisons, Jails, Punishment, and Other Aspects of the Criminal Justice System, August 1981.

25/ Personal communication, Fall 1981. (As part of their role in the evaluation of AB2, the authors reviewed public testimony and, in the fall of 1981, interviewed lobbyists, bondsmen, and legislators.)

26/ Testimony by John Van de Kamp before the Assembly Criminal Justice Committee on AB2, April 2, 1979, Los Angeles County District Attorney Department memo.

The Coalescence of Power

No matter how widespread and convincing was the belief in the need for bail reform, successfully legislating such reform required a marshalling of action by persons in positions of power whose values were favorable to the passage of AB2. This took the form of a coalition of persons influential in the law-making process. Newly elected Governor Brown made bail reform part of his official program by putting it in his State of the State message, calling bail "an obvious tax on the poor people of California" and adding that "thousands of people languish in the jails of this state even though they have been convicted of no crime." The Governor's support not only removed the threat of possible veto, it also meant that the considerable powers of his office could be involved to aid passage of AB2.

Howard Berman, who carried AB2, has a very agile mind and is a skillful and persuasive legislator. His concern with pretrial release problems was rooted in experience with an OR program in San Francisco, and he had lectured on the topic in Oregon. Apart from this personal interest in the substantive issues of bail, Berman in a real sense put his reputation to the test by sponsoring AB2 inasmuch as he had little to gain politically from its passage and possibly something to lose.

Another key person among the coalition of those wielding power to bring AB2 to passage was Anthony Kline, Governor Brown's Secretary of Legal Affairs and later appointed to California's Superior Court in San Francisco. He had been one of the Boalt Hall law students who worked on the criminal justice reform project prior to 1979 and later one of a group of public advocates who were brought into the Brown Administration. His access to the Governor and his voice in recommending appointments gave him both the substance and the illusion of power. He was said by others to have a sense of outrage over the unjust nature of bail and was probably the most strongly motivated of any of those pursuing reform:

> On a certain level the bail system is a device whereby a tax is imposed for being arrested, on people (who are) least able to pay it, for the benefit of a very small group of people, who are, in effect, extracting profits from the poor in our society. It is basically a tax not levied by the state--it is a private tax on the poor. 27/

Still another important figure in the history of AB2 was John Van de Kamp, the Los Angeles County District Attorney. He had been a U. S.

27/ As quoted in Hall Rubin, "The Drive to Kill the Bail Bond Business," California Journal, March 1979, pp. 109-111.

Attorney and federal public defender, much interested in installing some form of the federal Bail Reform Act of 1966 in California. His immediate concern was to forestall decisions on bail cases pending before the state Supreme Court so that a more desirable legislative solution for the bail problem could be found. Van de Kamp did the drafting of the 1978 and 1979 bills which were introduced by Berman and, of course, actively lobbied for them in the name of one of the largest county criminal justice systems in the nation.

To solidify legislative support, Leo McCarthy, Speaker of the House and a powerful democratic leader, was enlisted to assist Berman in guiding AB2's passage through the legislature. A considerable coalition of liberal state legislators and their aids were now prepared to carry the bail reform act through the legislature, backed by the Governor's office and the District Attorney of Los Angeles. Never before had the opponents of bail reform faced such a powerful foe.

Group Support

The coalition of power in support of AB2 included groups as well as important individuals. The array of groups which were enlisted in the fight for the bill was probably as great as any ever orchestrated to promote legislation in California. Somewhere around 40 groups and organizations were listed in legislative files as endorsing the ten percent bail reform. Impressive as this was, it must be remembered that official endorsement of a bill does not mean that there was full support or consensus by organization members. Thus the California District Attorneys Association and its executive board were split on AB2, and its endorsement signified no more than that of a majority on the board. From one point of view, its endorsement and advocacy of the bill by Van de Kamp were anomalous in that, ordinarily, those who represent law enforcement and community protection would be expected to oppose legislation benefiting defendants. More specifically, district attorneys have an organizational interest in preventive detention, which certainly could not be furthered by making pretrial release more accessible to all defendants.

It was to be expected that a number of minority groups would lend their support to the backers of AB2; these included the NAACP, the California Association of Black Lawyers, the Mexican American Bar Association, the California Association of Japanese Lawyers, and Chinese For Affirmative Action. However, these formal endorsements have to be weighed against the fact that minority members of the legislature were split among themselves on the merits of the bill. There was no evidence of grassroots support among minority voters. In the background of this was the fact that a high percentage, perhaps half, of all bondsmen were blacks who were all entrenched politically in their localities. For example, the black president of the Bail Bonds Association was active in the Los Angeles NAACP.

The support for AB2 had an appreciable degree of partisan, liberal democratic coloration, emphasized by the opposition of a number of Republicans. While the bill attracted the favor of a spectrum of civil rights and civic groups, including an association organized to defend nude beaches, still there were, in addition to the unresponsive minority legislators, liberal Democrats who sided with the opposition. Some observers contended that this was due to contributions made by bondsmen to their political campaigns.

Whether the extensive lineup of groups and associations giving their approval of AB2 won over many legislators is doubtful. A goodly number of the organizations had no direct interest in the bill, and legislators typically are much more sensitive to attitudes of persons and groups likely to be affected in their necessary tasks or duties. Proportionately, more of the latter were found among the opposition; namely, law enforcement personnel and the bail bondsmen.

The Opposition

The opposition to AB2 consisted of the Attorney General, the California Sheriffs Association, the California Peace Officers Association, the California Association of Police Chiefs, the California Advisory Board of Surety Agents, and the bail bondsmen. For ten years the core of this opposition had defeated all efforts to change the bail laws of the state. Early opposition was led by Packy McFarland, a University of San Francisco Law School dean, retained by the Surety Agents Advisory Board. Later Gerald Desmond became counsel for the Board; and he, too, proved to be a skilled and talented lobbyist, at times even getting bills introduced into the legislature himself.

These lobbyists effectively defended their clients' interests up to the advent of AB2. At this time, in 1979, some problems arose for the opposition because the rank-and-file bond agents through their association decided to strike out on their own and make separate arrangements for lobbying. In addition, there were a number of individual bondsmen, not happy with representation by either group, who contacted legislators directly. At times this led to confusion as to who spoke for the bondsmen. The appearance and tactics of some of the working bondsmen (not knowing, as it were, the "rules of the game" dictating informal interaction within the legislature) may have counted against them.

While the law enforcement people were generally against AB2, there were also splits in their opposition, the most conspicuous, of course, being the favorable position taken by the district attorneys through their association. Only the Attorney General stood fast. There were also some defections among sheriff's departments; namely, the Sacra-

mento, San Diego, and also the Los Angeles County sheriffs, who felt AB2 would be a means for better controlling their pretrial jail populations.

While it might be said that the active interest and stands taken for and against AB2 determined that some kind of action was imminent, it was difficult to forecast what the outcome of legislative interaction was likely to be. This was because the central issue became one of credibility and the kinds of reactions legislators were likely to have to structured ambiguity.

Credibility and Compromise

Most of those involved agreed that the legislative interaction surrounding AB2 was one of intense conflict and heated controversy. Much of this materialized in committee hearings, with bail bondsmen pitted against the bail reformers. The strong feelings were generated by the bill's threat to the livelihood of the business-oriented bondsmen and by the strong sense of injustice and moral indignation felt by the legally trained reformers. The problem for the legislators was how to choose between them and, essentially, which one to believe. This was recognized by observers on both sides of the conflict; one put it as follows:

> The strength of the bondsmen is explained by their ability to contradict the statistical arguments for AB2. We were stuck in our philosophical differences and they in theirs with no way to prove our case to the legislature. It was their ability to point out that we really didn't know what would happen that counted heavily. No one had valid information and no one knew what the costs would be. 28/

And in truth there were very few studies made of the issues raised by AB2, and the facts which were available could be interpreted in different ways. For example, although Governor Brown had asserted that "thousands of people languish in jails of California although convicted of no crime," a 1964 survey of three California counties concluded that only about 9 percent of persons arrested and detained could be deemed "victims" of the bail system; and a 1967 survey in San Mateo County found the figure to be 4 percent. 29/ This amounted to eight persons out of the 201 who were booked into jail during the survey period in the latter county. An extrapolation of this ratio to California's jail population as of 1975 would make the figure of bail victims more nearly that of "hundreds" rather than "thousands."

28/ Personal communication.

29/ John Hoskins, "Tinkering with the California Bail System," California Law Review, Vol. 56, 1968, pp. 1134-1177.

The numbers of persons unable to make bail for economic reasons was only one of several AB2 issues that were clouded by ambiguity and insufficient information: the number and amount of forfeitures of bail bonds to be expected; the probable effects of the bill on jail populations; the effects of the bill on the failure-to-appear rates; the possible effects of cheap bail on recidivism rates; whether bail schedules would be raised after the passage of AB2; the cost of administering the contemplated system; and possible appellate challenges to the new law.

In 1972 information was submitted by the bail bondsmen to show that forfeiture rates increased in Cook County, Illinois, after adoption of ten percent bail there and that it remained difficult for the poor to make bail because bail schedules were elevated by the court to counteract the intention of ten percent bail. Later the advcocates of the ten percent plan brought in testimony to rebut these claims. Unfortunately, this was often little more than statements that the ten percent plans appeared to be working all right with no definitive evaluations at hand. In 1979 the California Department of Finance estimated that there would be some increase in net costs to counties after adopting AB2. 30/ In the same year an estimate by the Center on the Administration of Criminal Justice, University of California at Davis, concluded without qualification that there would be a substantial financial advantage to state and local governments under the ten percent bail scheme. 31/ However, as in other such studies, this required a number of assumptions, one of which was that funds from one to two million bond forfeitures would be forthcoming from defendants.

Given the difficulties of sorting out the conflicting testimony submitted by the proponents and opponents of AB2, likewise the problem of balancing its possible gains and losses--particularly the possible effects of facilitating bail for persons charged with felonies--it is not surprising that its passage remained in doubt. The bill finally was reported out only because a major compromise was forced by the opponents of AB2 to remove felony cases from those eligible for the ten percent bail. As it was, the vote in the Committee was only five to four in favor.

The exclusion of felonies from AB2 was a significant victory for the bondsmen. It is the felony cases which provide the vast majority of revenues for bondsmen. Only a few agents specialize in misdemeanor cases, for two good reasons. First, after the enactment of field citation legislation and the growth of OR programs, bail bonding became an infrequent mechanism for release. Table 1 illustrates the

---

30/ Testimony before the Assembly Criminal Justice Committee on AB2, 1979.

31/ See note 30.

low rates of bail release from the Los Angeles County jail system in 1980. Second, misdemeanor cases are low bail offenses but are viewed as high-risk cases by bondsmen. Bondsmen claim they can only afford a 2 percent FTA rate and still remain in business. 32/ And it is known from recent research that persons charged with less serious property/economic charges (many of which are misdemeanor offenses) are more likely to fail to appear, compared to those charged with crimes against persons or drug crimes. 33/ One bondsman indicated that misdemeanor bonds help pay business-related overhead expenses but are not the primary source of profit for bail agents. 34/ Another informant went so far as to express his appreciation to the state for taking over what he saw as the nonprofit sector of the commercial bail industry. 35/

TABLE 1

PRETRIAL RELEASE OF MISDEMEANOR PRISONERS
1980
LOS ANGELES COUNTY

Method of Release	Monthly X	%
Released in Field	313	6.2
Cited	2227	44.2
Charges Dropped (849 PC)	779	15.5
Bail Bond	387	7.7
Not Released	1332	26.4
Total	5038	100.0

Source: Los Angeles County Sheriff's Department Statistical Summary Sheets

---

32/ Celes King and Marvin Byron, An Analysis of the Impact of AB2 (Berman Bail Reform) Effective January 1, 1981 (Los Angeles: Independent Bail Agents Association of California, 1981), p. 9.

33/ Mary A. Toborg, Pretrial Release: A National Evaluation of Practices and Outcomes, National Evaluation Program Phase II Summary Report (Washington, D.C.: National Institute of Justice, October 1981).

34/ See note 25.

35/ See note 25.

Further trouble for AB2 came in the Assembly, where the original vote was considerably less than that needed for passage. The bill was put on call for eight hours, during which 26 of the 72 assemblymen changed their votes one way or another. While the more intimate details of what transpired are lacking, it may be inferred that a variety of pressures were applied and political debts called in. This was fittingly symbolized by the assemblyman who cast the deciding vote with his arm suspended in a gaudy white sling to indicate that it "had been twisted." 36/ A less humorous reflection of the situation was the bitter complaint of the bondsmen's representative that political favors were promised by the Berman-Kline coalition while "all we had was persuasion." 37/

There was further rear guard resistance to the passage of AB2 in the Senate, where a number of delaying amendments were proposed. Ultimately the bondsmen, faced with probable defeat, withdrew their total opposition in return for a provision that the bill would be limited to five years' duration, during which no effort would be made to amend it to include felonies. Also a bondsmen representative was to be included on the Bail Reform Evaluation Committee overseeing the study of the effects of the bill.

Epilogue

The passage of AB2 was in a sense a high-water mark of the bail reform movement in California, perhaps, too, of the liberal civil rights influence on state politics. It was observed that by 1981, when the bill went into effect, the climate of public opinion on criminal justice had so changed and the bill's liberal supporters were so dispersed that it could not have passed. For example, the 1981 California poll on criminal justice issues found that 84 percent of the public believed that too many crimes were being committed by defendants released on bail; and only 40 percent agreed that too many defendants are in jail because they cannot afford bail. 38/ These findings plus increasing public support for tougher sentencing and preventive detention policies seems to have signaled the end of an era of liberal reform in California.

It may be wondered whether this shift toward conservative politics and the mode of passage of AB2 did not mark it as a kind of symbolic legislation in that it allowed liberal policymakers to claim a victory for their values while maintaining an equally salient position of groups opposed to defendant legislation. The test of this

---

36/ See note 25.

37/ See note 25.

38/ Field Institute, op. cit.

interpretation will hinge on the various ways AB2 is being used. Although it is premature to reach final judgment on AB2, a few preliminary observations can be made.

First, ten percent bail is being used infrequently but may be indirectly increasing the use of citation. Los Angeles data indicate that during the first ten months of 1981, AB2 was used infrequently relative to other forms of release (Table 2). When compared to 1980, the usage of field and station citations has increased over 7 percent, while the rate of those not released prior to trial has decreased by less than 4 percent. Other release rates have remained fairly stable. Los Angeles officials indicated they were anticipating the change to AB2 and due to uncertainty about the manner of its application, they began using citations more frequently. 39/ Tension generated by increased bookings and an overcrowded jail may have encouraged greater use of citations. While the small decreases in both rate and percentage of defendants not released may encourage reformers, the overall finding is that AB2 is not having a major impact on the system at this time.

TABLE 2

PRETRIAL RELEASE OF MISDEMEANOR PRISONERS
1980 AND 1981
LOS ANGELES COUNTY*

Method of Release	1980		1981	
	Monthly $\bar{X}$	%	Monthly $\bar{X}$	%
Released in Field	353	6.9	442	8.1
Cited	2227	43.8	2608	47.8
Charges Dropped	779	15.3	726	13.3
Bail/Bond	387	7.6	349	6.4
Ten Percent (AB2)	-	-	102	1.9
Not Released	1332	26.2	1227	22.5
Total	5077	100.0	5454	100.0

* Reflects first ten months of 1981 only.

39/ See note 25.

Source: Los Angeles County Sheriff's Department Statistical Summary Sheets

Further evidence for this conclusion is the manipulation of bail schedules to circumvent provisions of AB2. Several counties have increased 1981 bail schedules to force defendants to pay typical 1980 bail rates. For example, in one county the standard bail amount for prostitution was $500. That was subsequently increased to $5,000, meaning that under AB2 defendants will continue to pay the $500 premium. Some counties have reduced the bail amount to $149, below the $150 cutoff point, which makes the defendant ineligible for AB2.

Local jurisdictions are still in the process of determining if and how they will comply with the intent of AB2 reform. Their decisions will largely depend on its usefulness to their organizational interests. Although AB2 made nominal bail "a right of the misdemeanant defendant," this right will take on its meaning from the particular ways in which the various provisions of the bill are used, depending on exigencies and contingencies of the criminal justice process in local jurisdictions.

87692

DANGER, PUBLIC OPINION, AND JUDICIAL BEHAVIOR

by

MICHAEL P. KIRBY, Ph.D.
CYNTHIA GAIL McKNIGHT

In his Introduction to this volume, Floyd Feeney identified the central dilemma facing those concerned with pretrial services as "the conflict between public safety and fairness to individuals."

Legislatures and policy-makers have invested considerable time in the determination of how that conflict should be resolved in state and federal laws. To a large extent, it appears that the decisions made in these forums reflect the opinions and demands of the public, which is understandably focused on public safety. Less clear is the impact of public opinion on individual bail decisions made by judges interpreting the pretrial release laws on a daily basis.

This article examines the extent to which judges in Memphis, Tennessee, consider the potential dangerousness of the defendant in bail setting--despite a law that allows for the consideration of flight risk only. In addition, the article examines public opinion in the city of Memphis concerning the purpose of bail and the need to consider danger in bail setting. Because bail in rape cases had become a controversial public issue discussed in the Memphis newspapers and had recently been subject to statutory changes, the authors emphasized bail in rape cases in their case study of danger.

Dr. Michael P. Kirby is an associate professor of political science at Southwestern at Memphis. He was formerly Research Associate at the Pretrial Services Resource Center, has been involved in numerous criminal justice evaluations with an emphasis on pretrial services, and is the author of several publications on research methodology, issues and findings. Dr. Kirby received his masters degree in political science from Northern Illinois University and his doctorate from the University of Wisconsin at Milwaukee. Co-author Cynthia Gail McKnight is a senior-year student of political science at Southwestern at Memphis.

Introduction

The purpose of this paper is to examine the impact of public opinon concerning pretrial danger on bail decision making by judges. This paper is unique, not only because few studies have ever addressed the issue of public opinion and bail, but because it is derived from a political science perspective, which links public opinion with the behavior of decision makers. 1/

The research in Memphis on which this paper is based showed that many judges expressed the view that release decisions should be based upon "danger" criteria. Yet an examination of the Tennessee state law showed that judges are only authorized to make decisions based upon "flight" criteria. Thus, as a practical matter judicial bail decision making does not apparently emanate from the statutes, but from some other source. This paper demonstrates both that judges respond to "danger" criteria, and that the public feels the need for the consideration of danger in bail decisions.

Flight and Danger

This section will briefly describe issues related to dangerousness. The relationship between flight and dangerousness of pretrial defendants has been extensively illustrated in the literature.

The purpose of bail to assure the defendant's appearance in court has been well documented in Stack v. Boyle (342 US 1, 1951), a Supreme Court case which stressed the presumed innocence of criminal defendants. The court held that bail decisions ought to be based upon whether the defendant had a propensity to flee from prosecution. This case formed the basis for the 1966 Bail Reform Act, with its provisions to assure the appearance of pretrial defendants. Numerous state laws are based upon the Bail Reform Act. 2/

Danger considerations have found some authority in another case, Carlson v. Landon (342 U.S. 524, 1952). In this non-criminal

---

1/ An illustration in legislative studies is provided by John Walke et al., The Legislative System (New York: Wiley, 1962). An illustration in judicial studies is provided by J. Woodward Howard, "Role Perceptions and Behavior in Three US Courts of Appeal," Journal of Politics, Vol. 39, November 1977, pp. 916-938.

2/ For a discussion of presumption of innocence which justifies a flight perspective for bail, see Nancy Travis Wolfe, "The Guardian Angel: Presumption of Innocence," Pretrial Services Annual Journal, Vol. IV, 1981, pp. 53-69.

immigration case, the Supreme Court found there was no constitutional right to release before conviction and that "reasonable apprehension of hurt" (later to be used as the idea of dangerousness) was reason enough not to release (or at least to set onerous conditions of release). 3/

The legal guidelines on bail, at least as expressed by the Supreme Court, are quite confusing. Goldkamp refers to these two perspectives as ideologies. He finds that ambiguity in both the statutes and in the court cases "may foster interpretations supportive of both bail ideologies. Clearly, the danger ideology lurks potentially behind the scenes of all bail decisions making, unaffected by arguments concerning its legality, appropriateness, or definitions." 4/

What is the position of the Tennessee state law on the issue of flight and danger? It can be argued that Tennessee statutes and case law are generally flight based. The one case in this area decided by an appeals court held that the defendant was illegally detained by excessive bond. The court ruled it "unconstitutional to fix excessive bail to assure that a defendant would not gain his freedom." The court noted flight-based criteria when it said other conditions may be utilized to compel the defendant's appearance. 5/

Tennessee state statutes on bail, originally passed in 1978, are also essentially flight based. The statutes state that "any person charged with a bailable offense may be...ordered released pending trial," and that the purpose of bail setting by a judge is to "assure the appearance of the defendant." Bail is to be set "as low as the court determines it necessary to reasonably assure the appearance of the defendant." The laws require the judge to consider release on recognizance before other conditions, including monetary bail. Further, the criteria for release are similar to those of the Bail Reform Act. The Tennessee statutes do not generally provide for consideration of dangerousness, except in some special circumstances: bail may be denied after conviction pending appeal; it may be increased for felony defendants who are rearrested on a felony; and a statute passed in 1982 specifies criteria that may be used in setting bond for defendants charged with rape. 6/

3/ For various definitions of danger, see Performance Standards and Goals for Pretrial Release and Diversion: Release (Washington, D.C.: National Association of Pretrial Services Agencies, July 1978), p. 45.

4/ John S. Goldkamp, Two Classes of Accused (Cambridge: Ballinger Publishing Company, 1979), p. 220.

5/ Wallace v. State, 193 Tenn. 182, 184; 245 SW2d 192, 194; (1952).

6/ 1978 Tenn. Pub. Acts ch. 506, s. 1-18; Tennessee Code Annotated, s. 40-1201 to 1244.

Views of Memphis Judges

Our conclusion is that the statutes, except in limited circumstances, are flight based. Yet, the statutes do not define how judges actually set bail in Memphis. A recent study by Christie estimated that on the basis of statutory guidelines, at least two-thirds (if not more) of felony defendants ought to be released on recognizance. Yet, this study showed that 64 percent of the defendants had financial conditions of release set. The reason for such a high percentage of monetary bail is that judges in Memphis generally set higher bail where the charges are more serious. They are necessarily responding to dangerousness considerations, since there is no indication in Memphis that individuals with more serious charges are more apt to flee. 7/

Further, interviews and newspaper reports have indicated that judges consider dangerousness to be exceptionally important. In a 1974 study, Kirby interviewed judges in both the lower and upper courts. He found that "a number of judges admitted that 'society needed to be protected, especially from violent criminals.'" One judge stated that in setting high bond he is "incarcerating the dangerous defendant until his case is disposed." 8/ A 1981 study by Christie interviewed judges who reflected dangerousness criteria. Christie provided the judges with hypothetical cases and asked them to set bonds in particular cases. Though he found a range of responses, many judges set exceptionally high bonds. In one case of a hypothetical aggravated rape, a judge who set $15,000 bond "meant that he was trying to protect society." Another judge setting $75,000 bond intended "to hold the defendant in jail to keep him from repeating the crime or threatening the witness, who had been through a traumatic experience." In questioning judges about the state interest in bail decision making, Christie found one judge who said "the nature of the crime is the main consideration when setting bail. The protection of society is necessary." Three of the judges indicated that they were interested in whether a defendant "is going to commit another offense." Christie found that in determining dangerousness, the judges utilized dangerousness criteria which were not mentioned by the Tennessee law. 9/

7/ James S. Christie, "Release on Recognizance: An Empirical and Legal Analysis," unpublished Honors thesis, Southwestern at Memphis, Department of Political Science, May 15, 1981, Ch. IV.

8/ Michael Kirby, An Evaluation of Pretrial Release and Bail Bond in Memphis and Shelby County (Memphis: Policy Research Institute, Southwestern College, 1974), Ch. 2.

9/ Christie, op. cit., Ch. VI.

Not only did Christie find that judges talked about dangerousness as a "state interest" in bail decision making, but they used what Christie perceives to be dangerousness criteria. He argued that in setting forth criteria for making bail determinations, judges often used danger-related criteria not suggested by the Tennessee statutes. Furthermore, Christie argued that the nature of the charge and prior record were criteria perceived by many judges to be danger- rather than flight-based. Christie also found that judges appeared to be using flight-based criteria on the defendants charged with minor crimes and danger-based criteria on defendants with more violent crimes. 10/

A review of the local newspapers revealed statements by judges admitting they use danger criteria. There were also illustrations of cases where judges responded to public opinion. A 1974 article showed that Judge Ray Churchill set higher bond in gun and fear cases. For example, Churchill decided to increase bail after the slaying of a retired police inspector in a hold-up; the suspect in the case was out on bond. Churchill said, "I feel there is something wrong with a system that allows persons to continue getting out on bond and committing additional crimes." 11/ Judge Horace Pierotti stated that "my philosophy is that it should be as high as possible, especially in view of the increase in crime....Society has to be protected." Pierotti went on to say "the Constitution was written years ago. We live in the 20th century, and crime has increased considerably. True, bail is to guarantee appearance, but it also must protect the community." 12/ In another case a defendant charged with stabbing a woman was released on recognizance. After neighborhood complaints and newspaper editorials, a City Court Judge raised the bond of this defendant to $25,000. 13/ A recent article showed that one judge held special hearings "for defendants charged with serious offenses so that he could hear from the police, the victim, the defendant's attorney and the defendant himself." 14/ A recent Memphis case involved a defendant charged with several rapes, one of which involved considerable newspaper publicity. Judge Nancy Sorak was criticized widely for setting a low ($5,000) bond on this defendant. Judge Sorak said, "No judge likes to feel they are responsible for having a criminal on the street....It's terrible to think that perhaps the bond

---

10/ Ibid.

11/ Memphis Press Scimitar, November 11, 1974.

12/ Memphis Press Scimitar, December 13, 1979.

13/ Memphis Press Scimitar, March 19, 1979.

14/ Memphis Commercial Appeal, May 7, 1981.

should have been higher." After this public criticism of the low bond, Judge Sorak decided to change her bond-setting procedure. She "no longer sets bond over the phone in cases involving violent crimes." 15/

Public Opinion Literature

There is a lack of literature on the relationship between public opinion and bail. We were able to find two studies which addressed this issue in the context of dangerousness. A Field Institute study asked the following question in their 1981 survey in California on criminal justice: "Please tell me whether you agree or disagree--so many crimes today are committed by persons awaiting trial who have been freed on bail that the entire bail system should be reexamined and changed." A majority of the 1018 respondents indicated their agreement with this general approval of the use of danger-related criteria. Sixty-five percent of the sample agreed strongly with the statement, while 18 percent agreed somewhat. Only 12 percent of the sample disagreed to some degree with the statement. The study did not find any great variations on the basis of party affiliation, political ideology, age, sex, income, ethnicity, religion, and union membership. The only variation in all the tables seemed to be among those who were older than 60 years of age, who tended to agree more strongly with the statement. 16/

A second study, commissioned by the National Center for State Courts, was done by Yankelovich, Skelly, and White. The study asked whether it was a serious problem that occurs often "that courts...do not help decrease the amount of crime" and "courts...grant bail to those previously convicted of a serious crime." The percentage of response for the two questions was 43 percent and 37 percent. It was, however, difficult to tell from the description of the data whether this was an overwhelming public response to problems with bail. 17/

Methodology

The public opinion data on Memphians' views on bail laws was part of a larger study of criminal justice issues. The sample was generated using random digit dialing. A sample of 225 Memphis residents was surveyed in February 1982. Extensive information was also gathered

---

15/ Memphis Press Scimitar, January 4, 1982.

16/ Field Institute, Attitudes of Californians Toward Prisons and Jails, Punishment, and Some Other Aspects of the Criminal Justice System, August 1981.

17/ Yankelovich, Skelly, and White, The Public Image of Courts: Highlights of a National Survey of the General Public, Judges, Lawyers and Community Leaders (The National Center for State Courts, March 1978), pp. 19-22.

about the demographic characteristics of the population. The following discussion has not included all of the relevant tables and correlations because of space limitations.

Although the sample of 225 was randomly generated and is substantial, we recognize the statistical limitations posed by this sample size.

Appearance and Danger

This section will analyze the empirical data gathered in the survey of the Memphis population. Specifically, it first contrasts public opinion on appearance and danger and then inquires of Memphis citizens their views on setting bail generally and then specifically in violent crimes. In the following section, the article proposes a case study of rape as an example of the way Memphians view bail for allegedly dangerous defendants.

We asked two questions dealing with flight and danger. Specifically, we asked the respondents whether bail's primary use should be to assure that the defendant appears for trial. Twenty percent of the respondents agreed strongly with the statement, while 60 percent merely agreed. Twenty percent disagreed in some form with this statement.

We then asked the question, whether "bail's primary use should be to protect the public from a possibly dangerous person." We found that 31 percent of the respondents agreed strongly with this statement, while 54 percent agreed with this statement. Only 15 percent of the respondents disagreed in some form with this statement.

PURPOSE OF BAIL

Appearance vs. Dangerousness

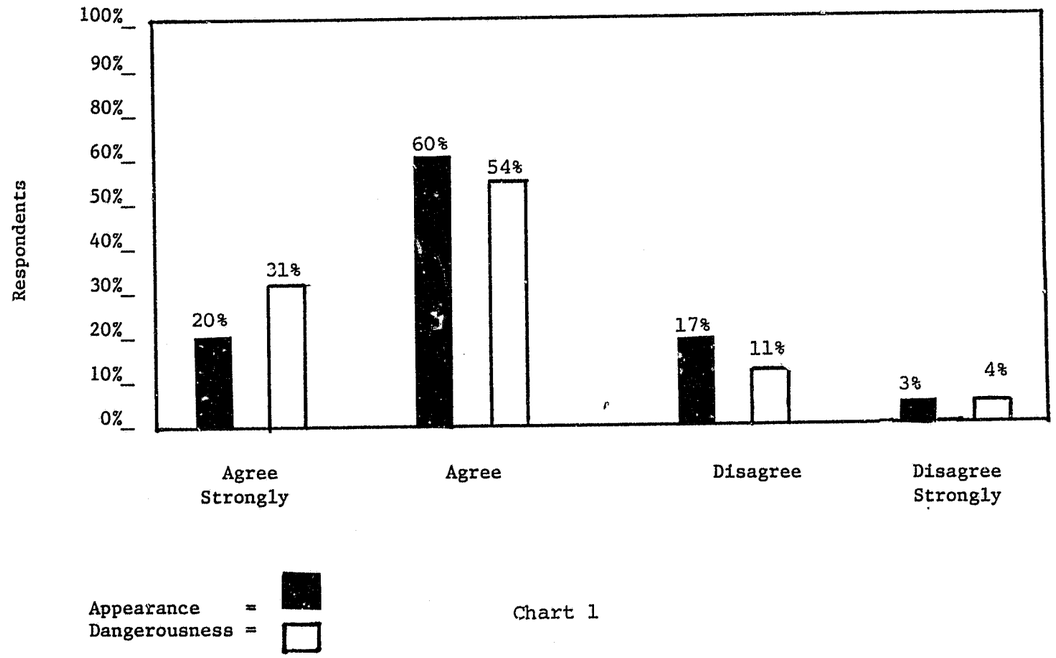


Chart 1

Several conclusions can be drawn from these findings. First, the distribution of responses is generally similar for these two questions. Responses were most strong in the "agree" category. Unfortunately, a subsequent question, in which the respondent was asked to choose whether appearance or safety were the more important criterion, was not asked. Second, there is greater intensity on the danger issue. That is, we found that in the "strongly agree" category, 31 percent responded to danger while 20 percent responded to appearance. For the "disagree" category, we found that 20 percent responded to flight, while only 15 percent responded to dangerousness. Though the magnitude is somewhat limited, one could argue from these data that danger is a slightly more important consideration in terms of public opinion. We might be able to hypothesize that if we had directly contrasted appearance and safety, we might have had a higher percentage of respondents responding to the latter.

Next we examined the issue of setting bail. The authors argue that those who think in terms of "danger" will be more apt to think negatively about setting bail in all cases. Two questions were used to try to reach this issue: first, respondents were asked whether they thought that federal law should require bail to be set in all cases. The Memphis population was divided on this issue. That is, 51 percent disagreed in some form with this question, while 49 percent agreed in some form with this question. The levels of intensity were similar for the various responses.

FEDERAL BAIL LAWS

Federal Law Should Require Bail Be Set in All Cases

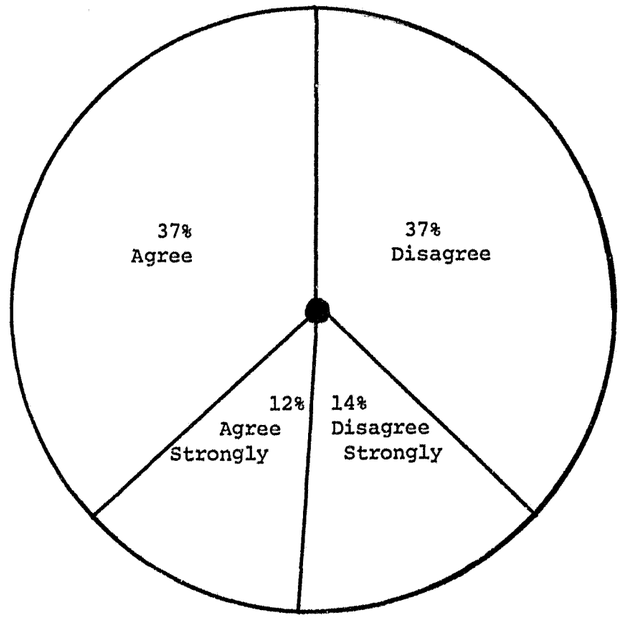


Chart 2

The analysis was then directed to danger concerns. Specifically, respondents were asked whether "a person charged with a violent crime should remain in jail before trial." The distribution of responses was substantially different from the previous question. That is, 52 percent of the respondents agreed strongly with this statement on dangerousness while 34 percent agreed with this statement. Only 14 percent of the respondents thought defendants in violent crimes should not remain in jail before trial.

PRESUMPTION OF INNOCENCE

Defendants in Violent Crimes Should
Remain in Jail Before Trial

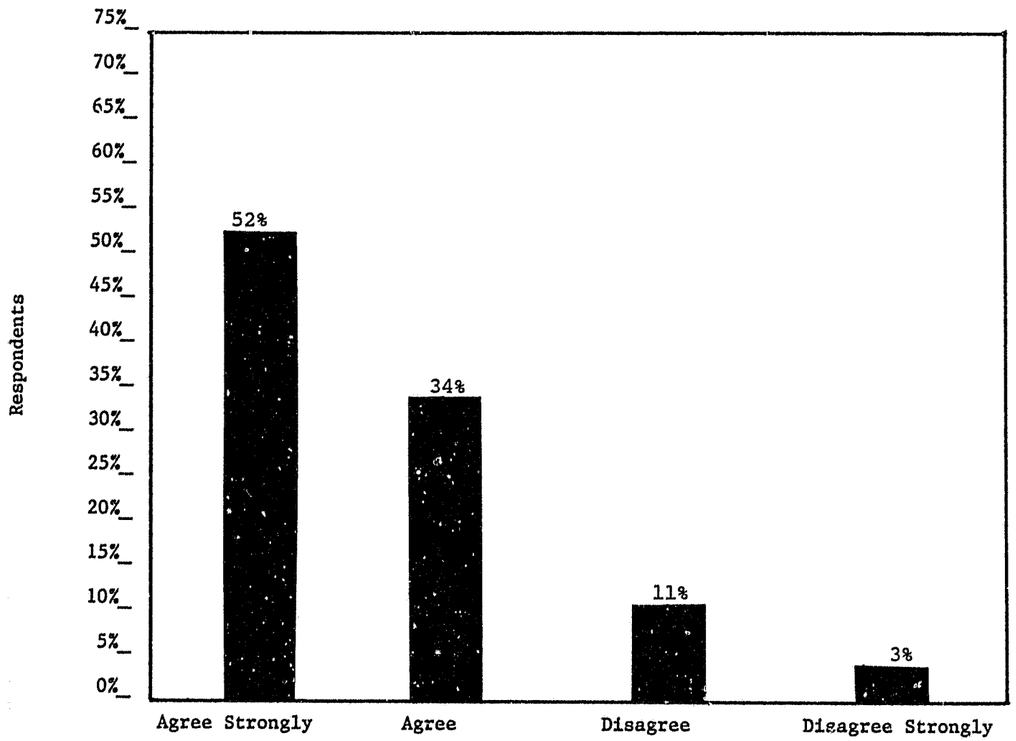


Chart 3

What are the implications of these figures for bail setting? First, when a question is asked in a general way about bail, the population tends to split itself about evenly on the setting of bail. However, when the analysis is shifted to violent crimes, the population also shifts in wanting to see the defendant detained. Therefore it could be argued that the Memphis population is highly attuned to danger.

Rape: An Example of Danger

This pessimistic view of accused defendants in violent crimes is especially evident in dealing with the crime of rape. People see rape differently from other types of crime. The data in this study strongly support that claim. Two questions were asked about rape.

The first question inquired whether bail should be available to persons accused of rape. Dangerousness considerations pervade the responses, with 44 percent disagreeing strongly that bail should even be available for persons accused of rape, while 31 percent disagreed, 16 percent agreed, and 9 percent agreed strongly. A full 75 percent of those surveyed were in favor of allowing no bail whatsoever for defendants accused of rape. The second question asked whether bail should be higher for those persons accused of rape. In that response, 42 percent agreed strongly that bail should be higher for rape, 29 percent agreed, 24 percent disagreed, and only 6 percent disagreed strongly. In essence, 71 percent agreed with higher bond while only 30 percent disagreed.

BAIL FOR DEFENDANT'S CHARGED WITH RAPE

Available v. Higher

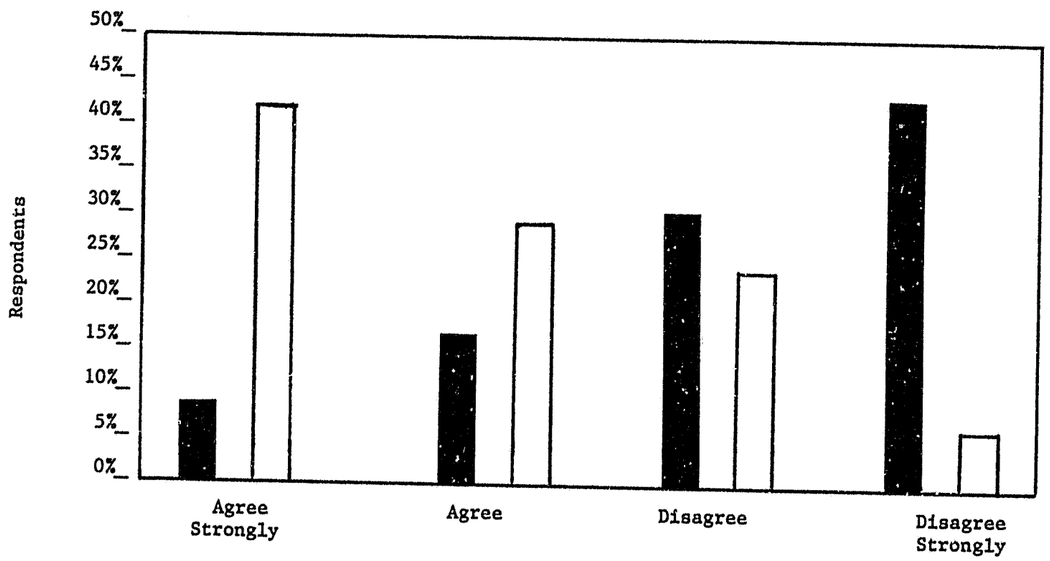


Chart 4

Bail Should Be Available =
Bail Should Be Higher =

There are several possible explanations for such harshness when dealing with rape. Our hypothesis is that rape is an emotional crime. Although armed robbery, assault, and other violent crimes are also traumatic for the victim, they do not carry the same connotations as rape. The victims of other crimes may not feel the same subsequent anger as with rape. It would seem, then, that persons who have been victims of serious crimes would be more in favor of stiffer bail laws for defendants accused of rape. Following that logic, most of those large percentages in favor of very restrictive bail laws for rape would probably be women.

Another explanation for the strong responses to these questions is the recent publicity about proposed legislation in Tennessee which would permit judges to consider the potential dangerousness of rape defendants. Because of the extensive newspaper reporting, it might be that the persons responding to the survey were more aware of this issue than they otherwise might have been. During the time this survey took place, at least five articles appeared in the morning newspaper. The Senate voted 32-0 in favor of this bill. Senator Curtis Person was quoted as saying, "Rape is a sick, violent act of aggression. Memphis has the horrible distinction of being the rape capital of this country." 18/ Person went on to say that proposals in the bill were not emotional, but were "sound constitutional proposals drafted after a great deal of research." Such research, he said, included such facts as: a reported rape occurs every ten minutes; age does not affect who will be a rape victim; and 75 percent of all rapes are committed by repeaters. He said that upon occasion the rapist who has been released on bail rides down to freedom on the same elevator as the victim. 19/ Certainly such emotional publicity could have influenced the respondents of this survey.

Implications

What are the implications of these data? First, along with many others, the authors have long argued that the primary purpose of bail is and should be to deter a defendant from fleeing prosecution. Philosophically, we believe in this tenet. Practically, the bail reform movement has been built on this tenet, especially with its emphasis on community ties as reflective of a lack of propensity to flee. Author Kirby has also written widely about the difficulty of dealing with the issue of danger. Danger is difficult to predict. Criteria such as prior record which are used to measure both danger and flight in some statutes do not reflect a meaningful distinction.

18/ Memphis Commercial Appeal, February 18, 1982.

19/ Ibid.

There does not appear to be any meaningful way to foresee the potential dangerousness of a defendant. Monahan, among others, has extensively written about the false positives. 20/ These occur when a judge or statistician attempts to predict who is dangerous: they are more apt to guess wrong than right about the defendant. Furthermore, an assessment of future dangerousness based upon the defendant's original crime (if it was a violent crime) is almost impossible.

However, one must understand that from these data at least, which at this point appear to be localized at one site, the public is especially concerned about dangerousness. In fact, it would appear that these data help us understand why judges use danger criteria in setting bail. State legislators in Tennessee and across the country seem to be moving toward mandating use of danger-based criteria. To this point, the public does not understand the practical problems in considering danger, for there has not been meaningful debate on the issues involved in these cases.

The implications of these data are incredible, considering how few public opinion studies have been done in this area. The data are consistent with those of the study done in California in 1981 which asked a sample of 1018 persons whether they agreed with a statement that the entire bail system should be re-examined and changed, showing a strong relationship in favor of consideration of dangerousness. 21/

What do these statistics imply? Very simply, the bail statutes are not in agreement with what the public considers the important purpose of bail. This suggests that if legislation were proposed to change

---

20/ (14) John Monahan, "Ethical Issues in the Prediction of Criminal Violence," for the Conference on Solutions to Ethical and Legal Dilemmas in Social Research, Washington, D.C.: February 25, 1978, p. 4. An excellent discussion of myth and reality on danger is provided by Bruce D. Beaudin et al., "A Proposal for the Reform of Pretrial Release and Detention Practices in the United States," in Pretrial Services Annual Journal, Vol. IV, 1981, pp. 68-100. One of the authors of this article, Michael Kirby, has written on this topic in The Effectiveness of the Point Scale (Washington, D.C.: Pretrial Services Resource Center, 1980); and "Pretrial Release Agencies in the 1980s," Southern Association of Criminal Justice Educators, October 1979. An excellent review of the literature is provided by Chris Eskridge, "Predicting and Protecting Against Failure in Pretrial Release: The State of the Art," in Pretrial Services Annual Journal, Vol. IV, 1981, pp. 34-51. The punishment basis of pretrial process is presented by Malcolm Feeley, The Process Is the Punishment: Handling Cases in a Lower Criminal Court (New York: Russell Sage Foundation), pp. 199-243. A point made by all of these studies is that concern with identifying dangerous defendants is not apt to produce very many positive results.

21/ Field Institute, op. cit.

those statutes, the public would probably be in favor of authorizing consideration of future dangerousness. This change seems to revise the entire framework of the bail system as we know it. The myth is that the purpose of bail is to ensure appearance. The reality: people want to keep potentially dangerous persons off the streets, and judges, using criteria not stated in the law, are meeting the demands of the public by basing some bail decisions on their beliefs concerning the potential dangerousness of the defendant.

Personal Characteristics

The authors next examined the relationship between the background characteristics of the respondents and the bail questions. The background characteristics included victimization, political ideology, income, education, age, race, and sex. Except as noted below, these variables did not show a relationship with the bail questions. The authors suggest that these variables are not explanatory because the issue of bail, especially in terms of statutory changes to reflect public safety considerations, is one that transcends a person's age, income, and education. Most citizens are concerned about crime regardless of their age or how much money they make or how many years they went to school.

The victimization question had an interesting relationship to two of the bail questions. Victimization was determined by a question asking if the person were the victim of a serious crime in the last five years. A startling result was found when victimization was tabulated with the response to the question concerning whether federal bail laws should require bail to be set in all cases. The hypothesis is that persons who had been former victims of crimes would not want bail to be set in all cases. The opposite result occurred. The gamma statistic showed an astounding 0.328 relationship. The data showed that 19 percent of those who had been former victims agreed strongly that bail should be set in all cases. Only 9 percent of those who had not been victims agreed strongly. Similarly, 48 percent of former victims agreed, while only 34 percent of those who were not victims agreed. The results of those who disagreed or disagreed strongly are similar. Former victims disagreed that bail should be set in all cases by 21 percent, and disagreed strongly by 13 percent; while persons who were not former victims disagreed by 42 percent and disagreed strongly by 15 percent.

Chart 5

FORMER VICTIMIZATION AND RIGHT TO BAIL

		Former Victim of a Violent Crime	
		Yes	No
Federal Law Should Require Bail Be Set In All Cases	Agree Strongly	19%	9%
	Agree	48%	34%
	Disagree	21%	42%
	Disagree Strongly	13%	15%
	Total =	101%	100%
	N =	48	163

Why would former victims want bail to be set in all cases in a greater percentage than persons who have not been the victim of a crime? One possible explanation is that the respondents who have been victims of crimes are more familiar with the system. If they have been victims of violent crimes, perhaps they know what goes on in preliminary hearings, trials, plea-bargaining, and other parts of the system. Most victims (or witnesses) will readily agree that the system involves a long, slow process. Perhaps they have a better view of what it means to be presumed innocent. If they have seen the tediousness of the criminal justice system, perhaps they are more willing to allow persons accused of crimes out on bail. Persons who have never seen first hand the criminal justice process may be more unaware of what the system is really like; they might be more willing to lock someone up before trial.

A contrary finding emerged when comparing victimization with the question concerning whether a person charged with a violent crime should remain in jail before trial.

The data showed victims were more apt to be in favor of pretrial detention. The survey showed that 38 percent of the respondents who were former victims of crimes agreed strongly that the primary purpose of bail was to prevent release of a dangerous person, while 54 percent of those who were not victims of crimes agreed to the question. Only 8 percent of former victims disagreed or disagreed strongly to some extent, while 17 percent of non-former victims disagreed with this statement. These data imply that persons who have been the victims of violent crimes are more in favor of utilizing danger-based criteria. However, those who were not victims of crimes are also significantly in favor of consideration of dangerousness.

Chart 6

FORMER VICTIMIZATION AND CONSIDERATION OF DANGEROUSNESS

		Former Victim of a Violent Crime	
		Yes	No
Danger: the Primary Purpose of Bail	Agree Strongly	38%	29%
	Agree	54%	54%
	Disagree	2%	14%
	Disagree Strongly	6%	3%
	Total =	100%	100%
	N =	50	162

Several other variables showed a relationship with the bail questions. Ideology had an effect on the question of whether a person charged with a violent crime should remain in jail. These data showed that 62 percent of those surveyed who said they were conservative agreed strongly that a person charged with a violent crime should remain in jail before trial. The statistics shifted as the person got more liberal: 45 percent of the moderates agreed strongly, while 37 percent of the liberals agreed strongly. These results suggest that political ideology has an impact on views of the presumption of innocence as it relates to the right to bail. As a person becomes more conservative, it appears that s/he becomes more in favor of pretrial detention for potentially dangerous persons.

Chart 7

POLITICAL IDEOLOGY AND PRETRIAL DETENTION OF DEFENDANTS IN VIOLENT CRIMES

		Political Ideology			
		Conservative	Moderate	Liberal	Other
A Person Charged with a Violent Crime Should Remain in Jail Before Trial.	Agree Strongly	62%	45%	37%	67%
	Agree	32%	36%	40%	0%
	Disagree	4%	16%	17%	34%
	Disagree Strongly	2%	3%	7%	0%
	Total =	100%	100%	101%	101%
	N =	84	80	30	6

The variable of race also showed a large correlation of .32 with the question of whether a person charged with a violent crime should remain in jail. For example, the responses showed that 57 percent of the whites agreed with this statement, while 41 percent of the blacks agreed with this statement.

Chart 8

RACE AND PRETRIAL DETENTION OF DEFENDANTS IN VIOLENT CRIMES

		RACE		
		White	Black	Other
A Person Charged in a Violent Crime Should be Held in Jail Before Trial.	Agree Strongly	57%	41%	40%
	Agree	34%	34%	40%
	Disagree	7%	19%	20%
	Disagree Strongly	1%	6%	0%
	Total =	99%	100%	100%
	N =	136	70	5

The authors had proposed that the respondents' sex would greatly affect their responses to the two questions about rape. Because of the nature of the crime of rape, it seemed that women would more likely be harsh on rape defendants. The variable of sex, however, showed no relationship.

There was some difference in responses, but no significant difference in response to the statement, "Bail should be available to defendants accused of rape." The survey showed that 12 percent of the women surveyed agreed strongly, while only 7 percent of the men agreed strongly. Another 19 percent of the men agreed, while only 13 percent of the women agreed. Of those who disagreed, 33 percent were men and 28 percent were women; while 41 percent of the men disagreed strongly, 47 percent of the women disagreed strongly.

In response to the statement, "Bail should be higher for those defendants accused of rape," 37 percent of the males agreed strongly, while 46 percent of the women agreed strongly. Of those agreeing, 29 percent were men and 19 percent were women. Disagreeing were 27 percent of the men and 19 percent of the women; while 7 percent of the men disagreed strongly, 6 percent of the women disagreed strongly.

Chart 9

SEX AND BAIL FOR DEFENDANTS CHARGED WITH RAPE

		Bail Should Be Available	
		Male	Female
Bail Should Be Available For Defendants Accused of Rape.	Agree Strongly	7%	12%
	Agree	19%	13%
	Disagree	33%	28%
	Disagree Strongly	41%	47%
	Total =	100%	100%
	N =	111	102

Chart 10

Bail Should Be Higher

		Sex	
		Male	Female
Bail Should Be Higher For Defendants Accused of Rape.	Agree Strongly	37%	46%
	Agree	29%	29%
	Disagree	27%	19%
	Disagree Strongly	7%	6%
	Total =	100%	100%
	N =	106	104

To reiterate, these figures on personal characteristics show that there are not individual variations in the population regarding consideration of danger in bail decisions. Even when one would expect an exceptionally large variation, as with sex and bail in rape cases, there was no relationship.

Summary and Conclusions

This study has attempted to examine the public's point of view and role in bail decisions. Issues such as the right to bail, the purpose of bail, presumption of innocence and the right not to be punished prior to an adjudication of guilt, and an example of rape defendants were described and evaluated. There are several main points which conclude this study.

First, the public is divided on whether bail should be set in all cases. Former victims of violent crimes are more in favor of bail for all defendants.

Second, the public views the purpose of bail as both prevention of flight and protection of the community from dangerous persons, with a stronger percentage of those who favor consideration of danger criteria having been victims of violent crimes. The public seems to place an emphasis on the use of bail to prevent dangerous behavior.

Third, the public appears unaware of or unconcerned about the "presumption of innocence" for a defendant charged with a violent crime. The majority of those who are in favor of pretrial detention of those accused of violent crimes are conservative.

Fourth, judges appear to take their cues from the public rather than from the flight-based statutes in bail-setting decisions. They do consider the potential dangerousness of defendants, even though there are no reliable criteria by which to determine who will commit crimes while out on bail.

Fifth, the public is strongly in favor of pretrial detention or higher bail for persons charged with rape. Surprisingly, this has no relationship to the respondent's sex or former victimization.

MURPHY v. HUNT: THE RIGHT TO COUNSEL AND EQUAL PROTECTION IN NEBRASKA

by

SHELDON PORTMAN

In 1978, Nebraska amended its constitution to require the denial of bail to defendants charged with forcible sex offenses when the proof is evident or the presumption of guilt is great (Article 1, Section 9, Nebraska Constitution). This amendment was upheld by Nebraska's highest court the next year in Parker v. Roth, 278 N.W. 2d 106. Subsequently, the provision was overturned by the United States Court of Appeals for the Eighth Circuit, which found it to be an unconstitutional restriction of the right to bail in Hunt v. Roth, 648 F.2d 1148 [vacated as moot, sub nom. Murphy v. Hunt, 50 U.S.L.W. 4264 (1982)]. The State of Nebraska appealed the Eighth Circuit's decision to the United States Supreme Court.

The following article is adapted from a brief filed amicus curiae with the Supreme Court by the National Legal Aid and Defenders Association (NLADA) and the National Association of Criminal Defense Attorneys (NACDA), requesting that the Eighth Circuit decision be affirmed by the Supreme Court. The brief raised two issues which were not addressed by the Eighth Circuit and which have not frequently been raised in debates concerning pretrial preventive detention or the right to bail generally: the extent to which constitutional rights embodied in the Sixth Amendment (the right to effective assistance of counsel) and the Fourteenth Amendment (the right to equal protection of the laws) are affected by denying bail to defendants charged with certain crimes.

Neither the issues raised in this article (or the brief on which it is based) nor any other constitutional issue involving the Eighth Amendment and the right to bail were decided by the Supreme Court. In Murphy v. Hunt, the high court ruled that the case was moot because the defendant who had brought the case had since been convicted of rape, sentenced to prison and was not eligible for release. Therefore, the challenged section of the Nebraska Constitution remains in force today.

The original of this article as a legal argument distinguishes it somewhat from the academic perspective which characterizes most Journal articles. Nonetheless, it presents an important viewpoint, and illustrates the complexity of the issues involved in considering the meaning of the "right to bail" as it develops in state and federal courts.

The author of the article (and the amicus curiae brief), Sheldon Portman, is the Public Defender of Santa Clara County, California. Mr. Portman is the past president of the California Public Defenders Association and is a current member of the ABA Standing Committee on Legal Aid and Indigent Defendants, the Board of Directors of the NLADA, and the California Council on Criminal Justice. He received his law degree from Case Western Reserve University.

Introduction

The National Legal Aid and Defender Association (NLADA) and the National Associaton of Criminal Defense Lawyers (NACDL) filed an amicus curiae brief with the Supreme Court in Murphy v. Hunt. 1/ The brief was limited to two primary issues--the effect of the Nebraska bail provision denying bail to persons charged with forcible sex offenses on Sixth Amendment rights, and its validity under the Equal Protection Clause of the Fourteenth Amendment. The arguments in the brief were confined to these two issues because of space limitations, and not because of any lesser concern for the other important constitutional issues raised by the case. In general, these organizations and their counsel supported the arguments of the Omaha public defender on behalf of Eugene Hunt (the original defendant) and the views of the United States Court of Appeals for the Eighth Circuit, which found the Nebraska measure in violation of the Eighth Amendment's bail clause. 2/ Nonetheless, only the arguments raised in the amicus brief are discussed in the following article.

I. The Nebraska Constitutional Provision Which Denies Bail to Persons Accused of Violent Sex Offenses Violates the Sixth Amendment 3/ by Depriving Such Persons Their Rights to Effective Assistance of Counsel, Self-representation, and "the Fullest Possible Defense."

A. The "Traditional Right of Freedom Before Conviction" is Directly and Significantly Related to the Rights Protected by the Sixth Amendment.

The important relationship between the right to bail and the rights encompassed by the Sixth Amendment was stressed long ago by the Supreme Court in Stack v. Boyle. 4/ In setting aside as "excessive" the bail settings for various Smith Act defendants, Chief Justice Vinson, writing for a unanimous Court, stated:

> "This traditional right to freedom before conviction permits the unhampered preparation of a defense, and serves to prevent the infliction of punishment prior to conviction....

1/ See Hunt v. Roth, 648 F.2d 1148 (8th Cir. 1981), vacated as moot sub nom. Murphy v Hunt, 50 U.S.L.W. 4264, 30 CrL 3075 (1982).

2/ Hunt v. Roth, supra, reversing Parker v. Roth, 202 Neb. 850, 278 N.W. 2d 106 (1979), cert. denied, 444 U.S. 920 (1980).

3/ The Sixth Amendment is made applicable to the states by the Due Process Clause of the Fourteenth Amendment.

4/ 342 U.S. 1 (1951).

> Unless this right to bail before trial is preserved, the presumption of innocence, secured only after centuries of struggle, would lose its meaning." 5/

In a concurring opinion, Justice Jackson, joined by Justice Frankfurter, further added:

> "The practice of admission to bail, as it has evolved in Anglo-American law, is not a device for keeping persons in jail upon mere accusation until it is found convenient to give them a trial. On the contrary, the spirit of the procedure is to enable them to stay out of jail until the trial has found them guilty. Without this conditional privilege, even those wrongfully accused are punished by a period of imprisonment while awaiting trial and are handicapped in consulting counsel, searching for evidence and witnesses, and preparing a defense." 6/

An arbitrary and unjustified revocation of bail during trial was also described by the Supreme Court as an "unjustified and...unwarranted burden upon defendant and his counsel in the conduct of the case." 7/

A fair trial is, of course, a fundamental requirement of due process. 8/ And the right to effective assistance of counsel is essential to a fair trial. 9/ Moreover, to ensure the attainment of that important goal, counsel is required at all "critical stages" of a criminal prosecution. 10/ Furthermore, the Sixth Amendment requires that counsel's assistance be "effective and substantial" and not merely pro forma. 11/ This includes adequate opportunity to investigate and to prepare for trial. 12/

5/ 342 U.S. at 4.

6/ 342 U.S. at 7-8; emphasis added.

7/ Bitter v. United States, 389 U.S. 15, 17 (1967).

8/ In re Murchison, 349 U.S. 133, 136 (1955).

9/ Gideon v. Wainwright, 372 U.S. 335, 344 (1963).

10/ E.g., Miranda v. Arizona, 384 U.S. 436 (1966) (in-custody interrogations); Gilbert v. California, 388 U.S. 263 (1967) (lineups); Coleman v. Alabama, 399 U.S. 1 (1970) (preliminary hearings).

11/ Powell v. Alabama, 287 U.S. 45, 53 (1932).

12/ Id., at 58; Avery v. Alabama, 308 U.S. 444, 446 (1940). See also, Wolfs v. Britton, 509 F.2d 304 (8th Cir., 1975) (counsel improperly appointed a mere day-and-a-half before trial); United States v. Venuto, 182 F.2d 519 (3rd Cir., 1950) (defendant improperly forbidden to confer with counsel during an 18-hour recess).

Chief Justice Burger has observed that "[both] the 'spirit and the logic' of the Sixth Amendment are that every person accused of crime shall receive the fullest possible defense...." 13/ That Amendment has been described by the Supreme Court as "constitutionaliz[ing] the right in an adversary trial to make a defense as we know it," and not merely that such defense "shall be made for the accused, [but that] it grants to the accused personally the right to make his defense." 14/

Does Nebraska's denial of bail to persons accused of violent sex offenses virtually eliminate their right of self-representation? Obviously, the Nebraska bail provision significantly affects not only the Sixth Amendment right of self-representation, but also the right to effective assistance of counsel. Surely, such denial of bail must be deemed, at a minimum, to significantly hamper what Chief Justice Burger described as the Sixth Amendment right of "every person accused of crime [to] receive the fullest possible defense." This right lies at the heart of the issue of the constitutionality of the Nebraska bail provision. If, indeed, "the traditional right to freedom before conviction permits the unhampered preparation of a defense"--as stated 30 years ago in Stack v. Boyle--then the Nebraska provision deny- ing such freedom to accused sex offenders violates the Sixth Amend- ment. Despite this clear language, the Attorney General of Nebraska asserted it was "fallacious" to contend that an accused "has a constitutional right to be free from custody after being charged with a crime in order to assist in the preparation of his defense." 15/ Utterly ignoring Faretta and the entire "spirit and logic" of the Sixth Amendment, the State also erroneously asserted that an accused is entitled to nothing more than the right "to consult with his attorney" and for his attorney to be "given adequate time and opportunity to prepare his defense," supporting this contention by arguing that a broadened view would render unconstitutional "all pretrial detentions, including those situations where a reasonable bail has been fixed which the accused is unable to meet." 16/

The short answer to this argument is that it simply begs the question of the validity of the State of Nebraska's complete denial of any bail at all for alleged violent sex offenders. Obviously, if an accused cannot provide "reasonable bail," then under the "traditional right to freedom before conviction" referred to in Stack v. Boyle an accused

---

13/ Faretta v. California; 422 U.S. 806, 840 (1974) (dissenting opinion).

14/ Id., at pp. 818-819; emphasis added.

15/ Brief filed in the Supreme Court by Appellant James M. Murphy, District Judge of the Fourth Judicial District of the State of Nebraska, Douglas County, Nebraska (State of Nebraska brief), p. 36.

16/ Ibid.

must be detained in deference to the State's interest of assuring the defendant's appearance. However, the State of Nebraska, in this case, urged a radical departure from that "traditional right," contending that irrespective of an accused's ability to give reasonable assurance of appearance, he may be imprisoned on the basis of the "heinous nature" of the offense. In another context, Justice Stevens has warned that if such a doctrine were ever adopted"...it would work a fundamental change in the character of our free society." 17/

B. The Denial of Bail Has Severe Adverse Effects on the Exercise of Sixth Amendment Rights.

The adverse practical effects of pretrial imprisonment on an accused's ability "to receive the fullest possible defense" include impairment of the ability of the accused to personally locate and confer with potential defense witnesses. 18/ It also significantly detracts from counsel's duty to investigate thoroughly the facts and law of the case. 19/ In the conduct of such investigation, the accused's assistance can be vital to location of defense witnesses, especially those in low-income, minority neighborhoods where residents are often suspicious and uncooperative. 20/

An accused's ability to exercise his Sixth Amendment rights is further affected by the adverse physical conditions of most jails, by restricted telephone and visiting privileges, and by limited opportunity to consult privately with counsel. Attorney-client consultations are severely hampered by the lack of private interview

---

17/ Bell v. Wolfish, 441 U.S. 520, 579 (1979) (dissenting opinion).

18/ Cf., Smith v. Hooey, 393 U.S. 374, 379-380 (1969).

19/ See ABA Standards Relating to the Defense Function (Approved Draft, 1971) Std. 4.1.

20/ See Amsterdam, Segal, and Miller, Trial Manual 3 for the Defense of Criminal Cases (1974), sec. 75 A, pp. 1-61; Calif. Continuing Education of the Bar, California Criminal Law Practice (1974), sec. 3.9, p. 113. An example of the value of a defendant's assistance in locating witnesses was portrayed in an article in the New Yorker magazine [Kahn, Annals of Law, New Yorker (Feb. 6, 1971), p. 76, reported in Katz, Litwin & Bamberger, Justice Is The Crime: Pretrial Delay in Felony Cases (1972) pp. 149-150.] The defendant (Thomas Goins) was arrested for possession of 600 glassine envelopes containing heroin which he had turned in to the police, claiming he had found the contraband on a New York City street. His employer helped him make bail and supplied him a competent attorney. Under the latter's direction, he located witnesses to the event, which had occurred the night before, resulting in the dismissal of the charges. Had Goins been unable to secure his quick release and to return to the scene, the witnesses who had seen him pick up the envelopes in the street would probably not have been located.

rooms in many jails, and the travel time and frequent delay experienced by lawyers in gaining entry and access to their clients in pretrial custody. These circumstances impair attorney-client communications and rapport, which are so vital to effective assistance of counsel. They also generate a cycle of hostility and distrust between attorneys and clients that is the very antithesis of the trust and confidence that are essential to effective representation. 21/ This was aptly described in a study of 1,660 felony defendants in pretrial custody in Cleveland, Ohio, reporting:

> "An accused in jail is of little value to his attorney during the preparation of his defense. Unlike [the bailed defendant], he cannot look for witnesses or personally contact anyone who might be able to assist in his trial defense, and his attorney must consequently assume complete investigatory responsibility. In many ways the jailed defendant is an absolute liability to his defense counsel, since the attorney must go to the jail every time he wants to see his client or consult with him on a particular fact.
>
> "Frequently, the defendant in jail is virtually forgotten by his attorney; rather than consult with his client every time a question comes up, the attorney must defer looking into the matter until it is convenient to visit the jail. The jails are filled with defendants who have been waiting for trial for several months and who complain bitterly that in all that time they have seen their attorneys only once or twice." 22/

The difficulties experienced by public defenders in conferring with incarcerated indigent clients may well explain the deep distrust and unfavorable opinions that typify the attitude of most defendants toward public defenders. 23/

The deleterious effects of pretrial imprisonment have been well documented in several studies over the past 20 years. 24/ Each of these studies was controlled for variable factors, such as prior record, the amount of bail set, seriousness of the charge, type of

---

21/ See ABA, op. cit., Std. 3.1, p. 201.

22/ Katz, op. cit., p. 150.

23/ See Casper, Criminal Courts: The Defendant's Perspective (1978) 33, 35-36.

24/ See Rankin, The Effect of Pretrial Detention 39 N.Y.U.L. Rev. 641, 642 (1964); The Unconstitutional Administration of Bail: Bellamy v. The Judges of New York City, 8 Crim.L.Bull. 459 (1972); Katz, op. cit., p. 151.

counsel, etc., and they all found a substantial disparity in case dispositions based upon whether or not the defendant was in pretrial custody. The New York City study, which was the most sophisticated, found that a first offender in pretrial detention was three times more likely to be convicted and was more than twice as likely to receive a prison sentence than a released defendant with more than ten prior arrests! 25/ When the factors of seriousness of the crime, prior criminal record, family ties, and employment status were controlled, detained defendants were 41 percent more likely to be convicted and sentenced to prison than those released. Pretrial status was found to be more than three times as important as either the seriousness of the crime charged or prior record in determining whether a defendant would be convicted and sentenced to prison. In fact, pretrial status was more important than all other factors combined. 26/

Professor Foote in evaluating Professor Rankin's study data concluded that among the major reasons for this disparity were loss of employment, affecting a defendant's ability to earn a fee to employ his own counsel (as well as ability to obtain probation and support his family), and poorer legal representation due to the adverse physical environment of the interview process and the remoteness of the jail. 27/

Similarly, Professor Katz and his colleagues cited the ability of the bailed defendant to "build a record," i.e., employment, family ties, exemplary conduct, during delayed disposition. 28/ Another commentator cited the pressure of miserable jail conditions and the delays in getting to trial causing in-custody defendants to waive their rights

---

25/ The Unconstitutional Administration of Bail, op. cit., at 460.

26/ Ibid., at 480-481.

27/ Foote, The Coming Constitutional Crisis in Bail: II, 113 U. Pa. L. Rev., 1125, 1147 (1965).

28/ Katz, op. cit., p. 152.

and plead guilty. 29/

The State of Nebraska in its bail provision has extended these adversities that afflict the Sixth Amendment rights of those unable to afford bail or who are otherwise unable to give assurance that they will appear in courts. The "traditional right to freedom from conviction [which] permits the unhampered preparation of a defense" is denied to those charged with the "heinous" offense of violent sexual assault--who, if innocent and the victims of incriminating circumstances, are most in need of the benefits of the Sixth Amendment, i.e., "the fullest possible defense."

29/ Thaler, Punishing The Innocent: The Need for Due Process and the Presumption of Innocence Prior to Trial, 1978 Wisc. L. Rev. No. 2, 441, 457-458. The insidious pressure of pretrial imprisonment on the innocent to give up their Sixth Amendment rights was poignantly illustrated in the dialogue between an attorney and his client, reported in Mills, "I Have Nothing To Do With Justice," Life (March 12, 1971) p. 62. After the defendant was told that if he were to plead guilty he would "walk today," he offered to plead guilty, yet insisted upon his innocence. But the attorney told him that his plea would not be accepted if he was not "guilty of something." Whereupon the defendant insisted that he "didn't do nothing," and his attorney replied:

> "'Then you'll have to stay in and go to trial.'
>
> "'When will that be?' 'In a couple of months. Maybe longer.'
>
> "Santiago has a grip on the bars. 'You mean if I'm guilty I get out today?'
>
> "'Yes.' ...
>
> "'But if I'm innocent, I got to stay in?'
>
> "'That's right.' ...
>
> "It's too much for Santiago. He lets go of the bars, takes a step back, shakes his head, turns around and comes quickly back to the bars."
>
> "'But, man' — ."

C. Defendants Accused of Heinous Sex Offenses Must Be Accorded the Fullest Possible Protection Under the Sixth Amendment.

The facts of Murphy v. Hunt present a remarkable irony in light of the historic recognition given by our Anglo-American law that "rape...is an accusation easily to be made and hard to be proved, and harder to be defended by the party accused, tho never so innocent." 30/ Lord Chief Justice Matthew Hale of the King's Bench, 1671-1676, was the source of that observation, which was based upon his long experience in presiding at trials of rape charges, and it became a standard cautionary instruction given to juries in such cases in this country as well as England over the next three centuries. 31/

California's experience with this instruction is especially relevant to the issue presented in this case. Until 1975 California courts were required to so advise juries in all sex offense prosecutions. At that time the California Supreme Court ruled that the instruction would no longer be "mandatory." 32/ In arriving at that conclusion, former Chief Justice Wright, the author of the court's opinion, engaged in an extensive historic analysis of the instruction. He concluded that the admonition to juries that a rape charge was easily made and hard to defend was no longer necessary because of the increased protection provided to criminal defendants accused of such offenses in modern trials by virtue of rights guaranteed under the Sixth Amendment! Thus, he observed:

> "...[F]undamental precepts of due process [presumption of innocence and proof beyond a reasonable doubt]...[and] [t]he rights of an accused to present witnesses in his defense and to compel their attendance, subsequently enshrined in the Sixth Amendment, [were] barely nascent in the 17th Century....Most importantly of all, in the context of a rape case, one accused of a felony in [Lord Chief Justice] Hale's day had no right whatsoever to the assistance of counsel..." 33/

30/ People v. Rincon-Pineda, 14 Cal.3d 864, 874, 123 Cal.Rptr. 119, 538 P.2d 247 (1975), quoting 1 Hale, History of the Pleas of the Crown (1st Am. ed. 1847), p. 635.

31/ Examples of recent decisions upholding the instruction include Beasley v. State, 258 Ark. 84, 522 S.W.2d 365 (1975); People v. Carr (Colo. App. 1975) 541 P.2d 104; Kennedy v. State (Wyo. 1975) 470 P.2d 372, cert. denied, 401 U.S. 939. See also, Anno. 92 ALR2d 866.

32/ People v. Rincon-Pineda, supra.

33/ Ibid., at 878.

In language fraught with vital significance to this case, Chief Justice Wright concluded:

> "...Considering that under the Anglo-Saxon adversarial system of justice 'when a prisoner is undefended his position is often pitiable, even if he has a good case' (1 Stephen, supra, at p. 442) [History of the Criminal Law of England (1883)], we recognize that there may well have been merit to Hale's assertion that a prosecution for rape was an ideal instrument of malice, since it forced an accused, on trial for his life, to stand alone before a jury inflamed by passion and to attempt to answer a carefully contrived story without benefit of counsel, witnesses, or even a presumption of innocence. But the spectre of wrongful conviction, whether for rape or for any other crime, has led our society to arm modern defendants with the potent accouterments of due process which render the additional constraint of Hale's caution superfluous and capricious." 34/

While it is not the purpose of the State of Nebraska, through its bail provision, to revert to the ancient practices sought to be avoided by means of the Sixth Amendment, it is clear that Nebraska has made one small, but significant, backward step in that direction. This requires a reminder of the classic admonition by Justice Bradley in Boyd v. United States, that:

> "...It may be that it is the obnoxious thing in its mildest and least repulsive form; but illegitmate and unconstitutional practices get their first footing in that way, namely: by silent approaches and slight deviations from legal modes of procedure.
>
> This can only be obviated by adhering to the rule that constitutional provisions for the security of person and property should be liberally construed." 35/

II. The Bail Clause (Article 1, Section 9) of the Nebraska Constitution Violates the Fourteenth Amendment to the United States Constitution by Depriving Persons Accused of Violent Sex Offenses of Equal Protection of the Law.

In determining whether a person denied a right which others have enjoyed has been deprived of the equal protection of the laws, the courts may apply a number of "tests." Under these tests, the courts

---

34/ Ibid.

35/ 116 U.S. 616, 635 (1885).

will review whether the statutory classification which results in the deprivation is permissible. Depending on the nature of the right, the court may require merely that the classification be "rationally related" to a valid state purpose; or where the right involved is fundamental, "strict scrutiny" of the classification is required. The State of Nebraska, in its appeal to the Supreme Court in Murphy v. Hunt, argued that the right to bail was not a fundamental right. Further, they did not attempt to justify Nebraska's discriminatory bail classification under the "strict scrutiny" standard, apparently conceding that the provision cannot pass constitutional muster under the test. However, the State's argument also failed to justify the classification under the lesser "rational relationship test."

A. Denial of the Right to Bail to Persons Accused of Violent Sex Offenses is Subject to the "Strict Scrutiny Test" of Equal Protection.

An analysis of what constitutes deprivation of "fundamental rights" for the purpose of the "strict scrutiny" equal protection test was presented in San Antonio Independent School District v. Rodrigues, which involved the validity of the Texas financing system for public school education. 36/ The issue whether "education" was "fundamental" was determined by "assessing whether...a right to education [was] explicitly or implicitly guaranteed by the Constitution." 37/ The majority opinion by Justice Powell cited as examples of rights "implicitly guaranteed" the right to vote 38/ and the right of procreation. 39/ The connection between these rights and any express constitutional provision is far more tenuous than that between the right to bail and the Eighth Amendment!

The Rodrigues Court also indicated, in its restatement of the "strict scrutiny test," that if such "fundamental freedoms" were merely "impinge[d] upon," the Court would be required to scrutinize the statutory classification to determine if it was "not merely rationally related to a valid public purpose but necessary to the achievement of a compelling state interest." 40/ Such "impingement," as distinguished from outright denial, was further emphasized by the Court in

---

36/ 411 U.S. 1 (1973).

37/ 411 U.S. at 33-34.

38/ Dunn v. Blumstein, 405 U.S. 330 (1972); Harper v. Virginia Board of Elections, 383 U.S. 663 (1964).

39/ Skinner v. Oklahoma, 316 U.S. 535 (1942); Roe v. Wade, 410 U.S. 113 (1973).

40/ 411 U.S. at 34, n. 73, quoting from Eisenstadt v. Baird, 405 U.S. 438, 447, n. 7 (1972).

distinguishing the facts of the other cases (such as those involving the right to vote and the right to procreation), in which it had applied "strict scrutiny,"--noting that those cases "involve[d] legislation which [had] 'deprived,' 'infringed,' or 'interfered' with the free exercise of some such fundamental personal right or liberty." 41/ In contrast to those cases, the Court found that the Texas education financing scheme was "affirmative and reformatory" and, therefore, not subject to that strict standard.

In the present case, there can be no doubt that the "free exercise" of a "fundamental personal right or liberty" has been "deprived," "infringed," or "interfered" with. This "traditional right to freedom before conviction," explicitly or implicitly guaranteed under the Eighth Amendment bail clause and under the Sixth Amendment right to "receive the fullest possible defense," requires application of the "strict scrutiny" test and compels the conclusion that the Nebraska provision violates the Equal Protection Clause.

B. Even if Denial of Bail Does Not Constitute Interference With a Fundamental Right, the Nebraska Bail Provision Would Be Invalid Under the "Rational Relationship Test."

The State in its appeal asserted that the "differing treatment of sexual offenders apart from other criminal offenders" under the Nebraska bail provision is "reasonable in that it is relevant to the legitimate state purpose of protecting society." 42/ However, the requirement of showing "at a minimum, that [the] statutory classification bear[s] some rational relationship to a legitimate state purpose" 43/ has not been met. Rather, the proponents of the provision simply assert that "[t]he people of the State of Nebraska have reasonably determined that the crime of first degree sexual assault is distinct from other crimes [justifying denial of bail] based on the undisputed fact that rape is of such a heinous nature as to pose a grave threat to society." 44/

This argument merely begs the question as to whether the discriminatory classification bear[s] some "rational relationship to a legitimate state purpose." Surely, it may be argued as an "undisputed fact" that other crimes are equally, if not more, heinous; under Nebraska law, such crimes carry even heavier penalties. Yet the

---

41/ 411 U.S. at 37-38.

42/ State of Nebraska brief at 26.

43/ Weber v. Aetna Casualty and Surety Company, 406 U.S. 164, 172 (1972).

44/ State of Nebraska brief at 31-32.

people of the State of Nebraska have not denied bail to those accused of such crimes--including, among others, shooting or stabbing with intent to kill, robbery, kidnapping, arson, and burglary with explosives. It is unclear how the crime of first-degree sexual assault is any more "heinous" than those crimes, so as to warrant the discriminatory classification that is at issue here. All that the State argued, essentially, is that the crime of first-degree sexual assault has been "reasonably determined" to be distinct and to warrant denial of bail simply because a majority of the people of the State voted in favor of an amendment to the constitution that provides for denial of bail in such cases.

The denial of bail has traditionally been limited to capital offenses. According to one view, that concept is "at least arguably consistent with one of the purposes of bail...to provide reasonable assurance the accused would appear for trial and sentencing if convicted...[and that]...it had been thought that most defendants facing a possible death penalty would likely flee regardless of what bail was set, [whereas] those facing only a possible prison sentence would not if bail were sufficiently high. United States v. Kennedy, 618 F.2d 557, 559 (9th Cir., 1980)." 45/ A similar justification for denial of bail in rape cases (i.e., likelihood of flight) has not been suggested in this case. In fact, the opposite conclusion might be suggested by the Supreme Court's decision striking down the death penalty for the crime of rape as cruel and unusual in Coker v. Georgia. 46/ At the time of the decision, of the 16 states that had authorized capital punishment for rape prior to the first main case striking down capital punishment in 1972, 47/ only three had reenacted the death penalty for that offense afterwards. 48/ And while the Court acknowledged that rape deserved "serious punishment," nevertheless:

> "...in terms of moral depravity and of the injury to the person and to the public, it does not compare with murder, which does involve the unjustified taking of human life. Although it may be accompanied by another crime, rape by definition does not include the death of or even the serious injury to another person. The murderer kills; the rapist, if no more than that, does not. Life is over for the victim of the murderer; for the rape victim, life may not be nearly so happy as it was, but it is not over and normally is not beyond repair." 49/

45/ Hunt v. Murphy, 648 F.2d 1148, 1160 (8th Cir., 1981).

46/ 433 U.S. 584 (1977).

47/ Furman v. Georgia, 408 U.S. 238 (1972).

48/ 433 U.S. at 593-594.

49/ 433 U.S. at 598.

Accordingly, the death penalty was held to be excessive for the rapist.

In light of Coker, it is clear that no analogy can be drawn, as seems implicit in the Nebraska amendment, that the crime of rape, like the crime of murder, justifies the denial of the fundamental right to bail, due to its "heinous nature." Coker's reference to the treatment of rape in other states is also instructive here, since Nebraska is the only state in the Union that has a law denying bail for the crime of rape.

Proper application of the "rational basis test" in this case must rest upon the principles enunciated in Baxstrom v. Herold. 50/ The facts of that decision are pertinent. New York statutes permitted continued confinement of convicted criminals who were mentally ill beyond their sentences without a jury trial, as afforded others, and based on mere administrative determinations. Not unlike Nebraska's argument, New York's attorney general argued that its classification was reasonable since such persons were not only insane but had proven criminal tendencies as shown by their past criminal records. And as in Nebraska, the state courts had accepted that argument.

In reversing that judgment, the Supreme Court first set forth its classic statement, "Equal protection does not require that all persons be dealt with identically, but it does require that a distinction made have some relevance to the purpose for which the classification is made." 51/ Applying this rule to the facts, the Court acknowledged that while a reasonable distinction for determining the type of custodial or medical care could be made on the basis of whether mentally ill persons were either insane or dangerously insane, that classification had "no relevance whatever in the context of the opportunity to show whether a person is mentally ill at all." 52/

Similarly, in Murphy the State of Nebraska contended that there is a rational basis for denial of bail to defendants charged with rape because of the "heinous nature" of that offense--just as New York State argued that it could classify the insane on the basis of whether they were "dangerously insane." But, as in Baxstrom, while the nature of the offense and the severity of its penalty may well determine conditions of release and the amount of bail to assure appearance in court, etc., a classification based on the "heinous nature" of the offense "has no relevance whatever in the context of the opportunity [to make bail] at all." 53/ And like Baxstrom, this classification

---

50/ 383 U.S. 107 (1966).

51/ 383 U.S. at 111.

52/ Ibid. (emphasis in original).

53/ Ibid.

must be deemed "capricious" in light of the fact that the "full benefit" of bail is afforded those charged with equally heinous offenses, such as shooting or stabbing with intent to kill. 54/ Like Baxstrom, "this distinction contradicts all semblance of rationality of the classification." 55/

Jackson v. Indiana 56/ is also instructive here. That decision invalidated an Indiana statute that declared unconstitutional a discriminatory classification of accused persons found presently insane and unable to stand trial. Unlike other alleged mentally ill persons, such defendants were deprived of substantial rights accorded to persons committed under the civil commitment procedures. In a unanimous opinion authored by Justice Blackmun, the Court sustained that contention under Baxstrom v. Herold. The fact of pending criminal charges was held not sufficient to justify such discrimination; and, in language pertinent to the present case, the Court noted, "[I]f criminal conviction and imposition of sentence are insufficient to justify less procedural and substantive protection against indefinite commitment than that generally available to all others, the mere filing of criminal charges surely cannot suffice." 57/

Like the above statutes, the Nebraska bail provision denies, at the very least, the important "procedural and substantive protection" of bail to a particular class of defendants--those charged with violent sexual offenses. The State justified this classification on the basis of the "heinous nature" of rape, yet it has utterly failed to show that "the distinction made ha[s] some relevance to the purpose for which the classification is made." 58/

The real question, as indicated by the Baxstrom-Jackson analysis, is whether or not the classification of alleged violent sex offenders--as distinguished from alleged attempted killers, kidnappers, robbers, etc.--has relevance "in the context of the opportunity" to post bail. The State provided no proof whatever of any basis for such discrimination, but merely asserted that the people of the state

---

54/ S28-410, Nebraska Statutes Reissue of 1975.

55/ Ibid., at 115.

56/ 406 U.S. 715 (1972).

57/ Ibid., at 724 (emphasis added).

58/ Baxstrom, supra.

"reasonably determined that the crime of first degree sexual assault is distinct from other crimes [and] that rape is of such a heinous nature as to pose a grave threat to society." 59/

An amicus curiae brief filed by "Laws at Work" (L.A.W.) with the Supreme Court in connection with Murphy v. Hunt essentially echoed this unsupported assertion, stating, "[A] key issue in the instant case is that of the dangerousness of accused rape offenders while awaiting trial." 60/ But after so stating, that brief merely provides data on the incidence of repeat offenses for convicted and accused rapists and other offenders--it does not address what is referred to earlier as the "key issue" of the "dangerousness of accused rape offenders while awaiting trial."

Even more significantly, the L.A.W. data entirely contradict any suggestion that rape offenders have a higher recidivision rate. According to their charts, the incidence of repeat offenses by rapists is no greater and is often less than repeat offenses by other offenders. 61/

Thus, any implication that the Nebraska statute's classification--as it relates to the denial of bail--is somehow rationally related to a higher incidence of repeat offenses by such accused persons is entirely negated.

C. The Latest Available Empirical Data Provides No Support for Either a "Necessary" or a "Rational" Relationship Between the Classification Herein and Denial of Bail.

The most recent empirical study of pretrial release practices in eight jurisdictions throughout the country provides important new data on

---

59/ State of Nebraska brief at 31-32.

60/ L.A.W. brief at 17 (emphasis in original).

61/ L.A.W. brief at 18. Under the chart labeled, "Table 2, Offender Arrest Record," the recidivist rate for offenders with previous arrest records for rape range from a low of 17.5 percent to a high of 27.8 percent, which is substantially below the recidivist rates for repeat offenders in the "other violent" category, which range from a low of 28.6 percent to a high of 40.6 percent! Similarly, the chart entitled, "Table 3, Accused With Previous Arrest Records," shows that the previous arrest rates for alleged rapists range from a low of 16 percent to a high of 26 percent, whereas arrest record rates for persons accused of "other violent offenses" range from a low of 22 percent to a high of 38 percent! Thus, the L.A.W. brief data show that those accused and convicted of other crimes have substantially higher recidivist rates.

court appearance performance and pretrial criminality. 62/ These data are inconsistent with common notions about those subjects and contradict any theory that the Nebraska bail classification is either "necessary" or even "rationally" justifiable as a measure to prevent crime or to assure appearances in court by persons accused of violent sex offenses.

There were 3,488 defendants included in the eight-site sample, 85 percent of whom secured release at some point before trial: 825 defendants were released on financial conditions; 2,129 were released on nonfinancial conditions; 510 persons were detained. 63/

In general, the study found that "the overwhelming majority, 84 percent, of all released defendants in the eight sites had no pretrial arrests." 64/ The overall pretrial arrest rate was 16 percent, with rates for individual jurisdictions ranging from 7.5 percent to 22.2 percent. 65/ Pretrial rearrest rates were broken down by specific charge. For the category "forcible rape," the sample contained 17 defendants who were released and 7 defendants who were detained. Of the released defendants, 14 were not rearrested, or 84 percent--precisely the same proportion as that of the general pretrial release population. 66/ And of the three defendants who were rearrested, only one was convicted of the pretrial rearrest charge. 67/

Higher rearrest and conviction rates were reported for all other serious crimes, except embezzlement. 68/ Among these higher rearrest rates were those who had been released on charges of "murder, manslaughter" (21.4 percent), "robbery" (16.9 percent), "aggravated assault" (16.7 percent), "burglary" (27.6 percent), "larceny, theft" (24.1 percent) "auto theft" (29.0 percent), "simple assault" (16.2 percent), "arson" (30.4 percent), "forgery, counterfeiting" (33.8

62/ The study was conducted by The Lazar Institute of Washington, D.C., and was reported in Pretrial Release: A National Evaluation of Practices and Outcomes: Summary and Policy Analysis (August 1981). It was funded by grants from the National Institute of Justice, U.S. Department of Justice.

63/ Ibid., p. 11, Table 4.

64/ Ibid., p. 20.

65/ Ibid.

66/ Ibid., p. 73, Table A-4.

67/ Ibid., p. 74, Table A-5.

68/ Ibid., p. 73.

percent), "fraud" (18.3 percent), "stolen property" (21.9 percent), and "malicious destruction" (18.4 percent). 69/

The data on failure-to-appear rates, however, showed that five of the seventeen released on forcible rape charges (28.9 percent) had failed to appear, which was the highest rate, with comparably high rates for "forgery" (20.8 percent) and "fraud" (20.9 percent), and "prostitution, vice" (27.9 percent). 70/ However, lest any great significance be given to this, the study also reported that, overall, 29 percent of the defendants in all categories who failed to appear had returned to court of their own volition within 30 days, and an additional 16 percent returned voluntarily afterwards. The others were either returned to court as a result of an arrest (about one-third) or were tried in absentia or forfeited bail (6 percent). Of all the defendants who failed to appear, 17 percent were still at large when the data were collected, leaving an overall "fugitive" rate of just 2 percent. 71/

With respect to the ability to predict court appearance outcomes, the study could not "identify a set of characteristics that could be used to predict with reasonable accuracy the defendants who would fail t· appear" and concluded that this reflected "the difficulty of trying to predict an event that is relatively rare and experienced by persons with diverse characteristics." 72/

Thus, it is clear from this most recent empirical study that it cannot be concluded that the Nebraska bail provision's classification of first-degree sexual offenders is either "necessarily" or "rationally" related to any purpose for which bail may be denied. It is simply irrational to deny to this category of accused persons "the traditional right to freedom [which] permits the unhampered preparation of a defense," when others, similarly situated and charged with offenses that are equally, if not more, heinous are accorded that fundamental right.

69/ Ibid.

70/ Ibid., p. 72, Table A-3.

71/ Ibid., p. 15.

72/ Ibid., p. 18. With regard to the ability to predict "dangerousness," empirical studies also show that such predictions are "grossly inaccurate," and that incorrect predictions occurred in more than half and up to 99 percent, in recent efforts. See Martin, "The Prediction of Dangerousness in Mental Health and Criminal Justice," Pretrial Services Annual Journal, Vol. IV, 1981, p. 14.

Conclusion

Both NLADA and NACDL are deeply concerned and troubled by the State of Nebraska's attempt to curtail the precious right of its citizens to bail and the ominous implications of such denial for the future of individual liberty in that state and in this country. In this regard, they share the views implicit in the remarks of Justice Story many years ago:

> "The provision [Eighth Amendment] would seem to be wholly unnecessary in a free government, since it is scarcely possible that any department of such a government should authorize or justify such atrocious conduct [denial of the right to bail]." 73/

73/ Story on Constitutional Law, 5th edition, Vol. 2, p. 650.

VOLUNTEERISM IN PRETRIAL RELEASE

by

BARBARA K. LINDAUER, Ph.D.
GLENN COOPER, M.J.A.

A recent study of practices in 119 pretrial release programs published by the Resource Center indicated that, despite a general growth in the annual budgets of release programs since the early 1970s, the funding increases do not appear to have been reflected in larger staffs. In fact, there may even have been a slight decrease in the numbers of staff in some larger programs, so that program resources appear to be stretched thinner now than in the previous decade, and the increased funding may only be serving to keep pace with inflation. The study suggests, therefore, the need for consideration of expanded use of volunteers and/or student interns, to assist in interviewing defendants, gathering data, and in-house research. Nonetheless, volunteers will not solve all the problems of diminished program resources--nor will volunteers necessarily be effectively utilized in the absence of a strong project core and a well-thought-out program for their use.

The authors of this article argue that heightened funding pressures at all levels will force the expanded use of volunteers in criminal justice programs and that the pretrial arena is particularly well suited for such expansion. Authors Lindauer and Cooper explore the history of volunteers in criminal justice and pretrial services and document examples of how budgetary constraints have placed limitations on operations in several pretrial services agencies. They further recount one agency's positive experience with the use of volunteers and outline the transition process to the use of volunteers instead of paid staff, implementation of a volunteer program, and other issues which arise in connection with the effective utilization of volunteers.

Barbara K. Lindauer is a research scientist at the Denver Research Institute (DRI). She received both her masters degree and a doctorate in psychology from Purdue University. Dr. Lindauer is currently co-director of a study on Central Intake Systems, a grant awarded to DRI by the National Institute of Justice.

Glenn Cooper is a research associate at the Denver Research Institute where he co-directed an evaluation of the Community Service Restitution Program. He has a masters degree in judicial administration from the University of Denver.

Since their inception, pretrial services agencies have justified their existence through provision of defendant services and by providing alternatives to incarceration. Given the recent emphasis on fiscal conservatism at the county funding level, many pretrial agency staff positions are being faced with severe cutbacks or elimination. An alternative to service reduction may be the incorporation of volunteers into the program. Historically, criminal justice systems in America have benefited from active citizen participation. In addition, use of volunteers complements the present Administration's emphasis on self-reliance. 1/ This article explores the relationship between volunteers and pretrial services and discusses a variety of factors which must be considered in the transition to the use of volunteers in lieu of paid professional staff.

Volunteerism as a Tradition in Criminal Justice

Within the context of criminal justice, volunteerism in America has a long and successful history. One hundred and fifty years ago, members of the Philadelphia Society for Alleviating the Misery of Public Prisons volunteered their time to supervise persons just released from prison. This volunteer effort served as the foundation for parole. 2/ In 1841, a concerned citizen named John Augustus introduced the practice of placing persons convicted of a crime under community rather than prison supervision. Trained volunteer citizens continued to assist in alleviating problems relating to offender counseling and supervision and to court sentencing alternatives. However, as the corrections field became more dependent upon professional staffing, the role of the volunteer private citizen along with the concept of volunteerism became less important. 3/ By the mid-1900s, professionals had assumed most of the positions previously held by volunteers. However, by the 1960s, use of volunteers in corrections had come full circle. Because of such factors as the increase in the crime rate after World War II and overcrowded prisons, professional staffs were unable to provide appropriate human services to the swelling prison populations. It became increasingly apparent that private citizens had a vested interest in the correctional process since many of those incarcerated would at some point return to the community. 4/

1/ Ronald Reagan, Remarks of the President to the National Alliance of Business, The Sheraton Hotel, Washington, D.C., October 5, 1981 (Washington, D.C.: The White House, Office of the Press Secretary, 1981).

2/ P. C. Kratcoski, "Volunteers in Corrections: Do They Make a Meaningful Contribution?," Federal Probation, Vol. 46, No. 2, 1982, pp. 30-35.

3/ Ibid.

4/ "Guidelines for Volunteer Services," in Corrections Volunteer Information Portfolio, B. R. Host, ed. (Boulder, Colo.: VOLUNTEER, The National Center for Citizen Involvement, September 1980).

Particular success has been achieved during the recent past with the use of volunteer counselors in juvenile justice programs. 5/ Such was the perceived impact of the renewed interest in volunteers on the justice system that the National Information Center on Volunteers in Courts was founded in the 1960s. Later, this organization and other groups that sought to provide information on and advocate the use of volunteers combined to form VOLUNTEER: The National Center for Citizen Involvement. 6/ In a message to the Sixth National Forum on Volunteers in Criminal Justice, President (then candidate) Carter stated, "I feel strongly that the criminal justice system in this nation must depend on the involvement of the people to assure maximum efforts in crime prevention, court assistance, and both juvenile and adult correctional programs. In a democratic society, freedom is dependent on fair and sure justice. What better assurance is there than having the People of the United States themselves involved in our justice process?" 7/

With continued emphasis on the use of volunteers in both courts and corrections, the need was apparent for continuing evaluation of the effectiveness of such programs. In an early (1975) evaluation effort for the National Science Foundation, Cook and Scioli concluded that previous evaluation efforts were minimal and that the success of any future research in the area of volunteerism in courts and corrections would depend on the development and use of a national set of effectiveness criteria for agency volunteers. Although this was seen as a necessary first step for an overall evaluation of volunteer programs and inventorying program results, their proposal has not been implemented to date.

Volunteers in Pretrial Release Agencies

In the late '60s and early '70s, considerable interest was shown throughout the criminal justice community in bail reform and the use of nonfinancial forms of release. With the advent and apparent success of the early Vera Institute and Manhattan Bail Projects many pretrial services agencies began operation throughout the country. These agencies, charged with screening pretrial defendants for release, verifying client information, and in some cases releasing arrestees on a promise to appear without posting bond, were frequently staffed with individual volunteers or sponsored by such programs as

---

5/ M. Ritchey, "The Partners Program," Voluntary Action Leadership, Fall 1979, pp. 32-34.

6/ P. L. Weston, Volunteers in Justice: Observations on a Movement (Denver, Colo.: National Association on Volunteers in Criminal Justice, 1977).

7/ Remarks by Jimmy Carter in Atlanta, Georgia, October 17, 1976.

VISTA. 8/ Although many projects were initiated as a result of the bail reform movement, today the proliferation of pretrial services projects is largely the result of the need to alleviate jail overcrowding, preserve human rights, decrease reliance on monetary forms of release, and avoid new jail construction costs. As judges, prosecutors, and other key actors in the system recognized the utility of pretrial release programs, and as federal, state, and local monies became available, these projects, much like those in corrections, became less reliant on volunteers and more dependent upon professional paid staff, using volunteers for ancillary rather than essential services.

But recent cutbacks across all criminal justice agencies at the federal, state, and county levels have caused reductions in pretrial staffing across the nation. A change in direction for many pretrial services programs has also been documented. According to a December 1981 letter from Madeleine Crohn, then Director of the Pretrial Services Resource Center, "Although many (programs) still attempt to provide services to defendants--and occasionally to victims--they do so with increasing difficulties. The service staff of those programs are the first ones laid off when budgets are cut. The service-providing agencies within the community are themselves being phased out. And the program sponsors (often prosecutors or probation departments) sometimes no longer see value in maintaining these services." Many pretrial services agencies have already experienced these funding cutbacks--to the extent of program elimination. Therefore, the traditional use of volunteers as program enhancements may change to replacement of paid staff. From our experience conducting research for the National Institute of Justice (NIJ) related to post-arrest/pretrial processes, we at the Denver Research Institute have seen budget cutbacks severely reduce research efforts and service delivery at some sites. The following are examples of impacts that have been observed:

- In Pima County (Tucson), Arizona, budget cutbacks have forced the elimination of data collection and information services based on client tracking information.

- In Salt Lake County, Utah, reduced funding has eliminated tracking and supervised release of misdemeanant warrant arrestees and eliminated almost all research efforts.

- In Denver County, Colorado, only screening and information verification functions remain in a program once also charged with supervision of clients after own recognizance release.

8/ P. Kennedy, "VISTA Volunteers Bring About Successful Bail Reform in Baltimore," American Bar Association Journal, Vol. 54, 1982, pp. 30-35; Pretrial Services Resource Center, Washington, D.C., personal communication; San Mateo Bar Association Newsletter, 1981.

- In Baltimore, Maryland, the loss of CETA funds forced the Pretrial Services Agency to reduce its staff from 117 to 68 and to substantially reduce its services.

- In Multnomah County, Oregon, pretrial services and community corrections were particularly hard hit when the corrections budget was reduced by $2 million.

- In Orleans Parish, Louisiana, the loss of federal funding for a pretrial services agency resulted in the termination of five out of seven staff positions.

- In Santa Clara County, California, extreme budget cuts as the result of Proposition 13 may cause the elimination of either the Own Recognizance or Supervised Release programs.

Because of the recent fiscal problems encountered by pretrial services agencies and their early dependence upon volunteers, they seem to be prime candidates to test the President's policies for increased use of nonpaid citizens. Not only are pretrial services agencies losing funds, they seem particularly well suited for a transition to use of volunteers in some staff positions because they have the least stereotyped requirements for criminal justice system employment and have traditionally operated on flexible scheduling policies. 9/ For example, in a review of staff qualifications (for interviewing defendants at booking and verifying interview information, including checking criminal history records), directors from all six of the sites included in a recent research study cited flexible educational background requirements and expressed particularly strong interest in personality characteristics such as warmth, responsibility, and the ability to communicate well. 10/ In terms of scheduling, the study found that many of the larger pretrial services agencies operate 24 hours a day, with employees working four- to eight-hour shifts. Smaller agencies, often working in conjunction with other criminal justice offices, operate only when the courts are not in session, allowing for evening, night, and weekend shifts. This type of scheduling creates ample opportunity for those with other job commitments to volunteer, and is also suitable for homemakers, students, retired persons, ex-offenders, and others. 11/

9/ These conclusions are based on research currently underway (pursuant to a grant from the National Institute of Justice to the Denver Research Institute) to analyze central intake systems.

10/ Ibid.

11/ Ibid.

The use of volunteers by existing pretrial services agencies indicates that the concept is feasible. The Court Volunteer Center (CVC) in Pima County (Tucson), Arizona, began a volunteer program in 1972 and presently maintains a staff augmented by approximately 60 volunteers. They are actively recruited through the Volunteer Action Center, a United Way agency; through advertisements posted in local college and university newspapers; through talks to classes and instructors at these post-secondary institutions; through different community organizations; and by word of mouth. Senior citizens are also active in volunteering through RSVP (Retired Senior Volunteer Program), which reimburses volunteers for lunch and transportation expenses.

Once recruited, volunteers undergo four extensive three-hour training sessions, designed to familiarize them with the functions and organizational structure of CVC, court procedures, pretrial release processing, jail programs, and the appropriate forms and procedures for processing defendants through the criminal justice system. Once their training sessions are completed, volunteers conduct both misdemeanor and felony release interviews at the jail. All misdemeanants are processed through a prebooking facility located outside of the main jail in a trailer where interviewers using a point scale determine release eligibility. Inside the jail another office is maintained, primarily through the use of volunteers, where all felony defendants and those misdemeanants booked into the jail are interviewed. The jail office is staffed 24 hours a day, seven days a week, in 42 four-hour volunteer shifts. Some volunteers work two shifts.

Volunteers also serve in the CVC office and in the past have helped to maintain an accurate manual defendant tracking system through working with city court records. 12/ They attend court sessions to check on the agreement rate betwen CVC release recommendations and court decisions regarding defendant release. CVC volunteers staff two information desks located at the Superior and County Court Offices, to direct people to the appropriate offices and courtrooms.

Volunteers directed by the volunteer coordinator are always under the direction of a staff supervisor who schedules shifts and "trouble-shoots" any scheduling conflicts. The volunteers themselves, retired people, ex-offenders, students, people easing back into the job market, those getting credit for internships or field placements, and the curious or those who need to fill up some free time, must be committed to serving at least four hours per week for a minimum of six

---

12/ Unfortunately, the paid staff position responsible for research, supervision of volunteers, and data collection was eliminated, so this effort was significantly reduced. But prior to this reduction, volunteers made possible the extensiveness of previous monitoring.

months. Some choose to spend even more time, sometimes as much as 35 to 40 hours per week. It is estimated that volunteer hours are equivalent to eight full-time equivalent positions. 13/

The value of volunteers goes beyond economic considerations for CVC, according to Pat Frank, volunteer coordinator at CVC. Frank points out that volunteers have exerted a positive influence throughout the criminal justice system and community. 14/ Keeping the agency known to the public, increasing professional staff motivation and level of expertise, keeping the criminal justice system open to routine public scrutiny, educating the public about criminal justice functioning, maintaining a humane element in corrections, and developing a pool of potential job candidates are all attributed to the use of volunteers. 15/

Whereas Pima County's Court Volunteer Center was selected as an illustrative example of volunteer usage in pretrial release, the concept has been utilized elsewhere. A survey of the 283 pretrial services agencies contained in the 1979/80 Pretrial Services Resource Center Directory indicates that 77, or 27 percent, of the agencies use volunteers in some capacity.

Transition to Volunteers

Incorporating a volunteer program into an existing criminal justice system is not without its drawbacks. Schwartz, Jensen, and Mahoney report that as many as 25 percent of all volunteer criminal justice programs fail. 16/ Therefore, the move to staff a pretrial services agency in full or in part by volunteers requires careful consideration. The following discussion centers on those factors which would facilitate a successful transition.

13/ No dollar amount is given because a review of the literature on volunteerism in criminal justice turns up no specific numbers. Also, in contacts with a number of programs that employ volunteers, it was learned that no agency has calculated savings attributed to the use of volunteers in an exact fashion. Rather, savings were approximated using an average hourly wage and multiplying that figure by the number of hours donated by volunteers, leading to questionable high figures.

14/ Personal communication, 1982.

15/ See note 14.

16/ I. M. Schwartz, D. R. Jensen, and M. J. Mahoney, "Integrating the Volunteer Program in the Agency Structure," in Host, op. cit.

Initially, a pretrial services agency must consider potential sources of volunteers and make a preliminary determination if sufficient human and fiscal resources are available to initiate a volunteer program. An initial feasibility study should ascertain the presence of large agencies noted for volunteer services (United Way, Salvation Army, Volunteers of America, etc.), special-interest community service groups (Kiwanis, Jaycees, VFW, Elks, etc.), college or university student populations, elderly, underemployed or unemployed workers, and groups or individuals already involved with assisting criminal justice agencies. (For example, the Service League in Redwood City, California, has been active in assisting defendants with meeting personal needs while incarcerated; such an organization's functions might be expanded to include volunteer activities in pretrial services.) Based on this information, a decision can then be made whether sufficient local resources exist to provide an ongoing complement of volunteer workers.

Secondly, careful consideration must be given to the selection and training of the volunteer force. Concern by those reluctant to incorporate volunteers has focused on unprofessionalism, underlying motives of volunteers, potential for illegal or unethical actions, and threats to public relations. 17/ However, in reviewing all the evaluations of criminal justice volunteers to date, Sigler and Leenhouts (1982) conclude that no studies have demonstrated that clients serviced by volunteers are less successful than other clients. 18/ It remains, then, for the prospective volunteer agency to develop guidelines for screening applicants for volunteer work. Ideas for screening interviews or application procedures can be modeled after existing procedures from other agencies which depend on volunteers, through contacts with other criminal justice systems which rely on volunteers, or from such agencies as the National Information Center on Volunteerism or the Pretrial Services Resource Center, both of which can provide technical assistance in areas related to volunteers and on staffing pretrial services agencies.

Once potential volunteers have been identified, they must become acquainted with the agency itself and the tasks they will be required to perform. Training decisions include selecting the most effective instructional media and an instructor, deciding if instruction or on-the-job training is most appropriate, and scheduling training sessions. Agency expectations of the volunteers should be clarified. For example, Pima County holds training sessions that are broken down into four broad topic areas--Court Systems, Crisis Intervention, Perspectives on the Criminal Justice System, and Training in Program Specific Areas. Guest lecturers are included to familiarize

---

17/ Kratcoski, op. cit.

18/ R. T. Sigler and K. J. Leenhouts, "Volunteers in Criminal Justice: How Effective?" Federal Probation, Vol. 46, No. 2, 1982, pp. 25-29.

volunteers with the roles of relevant criminal justice agencies. All sessions are mandatory and expectations regarding length of volunteer service are clearly specified. A critical factor in the retention of volunteers in criminal justice programs is the successful matching of volunteers' talents with agency needs, effective training programs, and the development of precise job descriptions to reduce chances of conflict between paid and volunteer staff members. 19/

After completion of training, program administrators must concern themselves with the continued motivation, incentive, and support of volunteers. Since volunteers do not receive monetary considerations for their performance, they must receive other kinds of recognition for their efforts. In the Corrections Volunteer Information Portfolio eight items are listed as relating to volunteer motivation and incentive. 20/ They include volunteers' having an agency identification card or pin, certificates and/or recognitions at an annual awards meeting, recognition of staff leadership for its role in volunteer programs, location of a volunteer office or desk within the agency, ability of proven volunteers to move up within the agency, presence of an ex-volunteer on paid staff, presence of at least two-thirds of trained volunteers on duty at the end of one year, and the presence of at least one-third of the new volunteers who were referred by present volunteers.

Additional considerations in the use of volunteers are those of liability and insurance coverage. Information can be obtained through consultation with a professional insurance agent or through a local or state volunteer board or resource center. In their survey, NIC-NICOV found several insurance companies which provided volunteer coverage at a group rate or based on a low or year cost model when volunteers could be classified as employees-without-pay. 21/

Since they are unpaid staff, volunteers usually cannot fit into a program's normal organizational structure in the same way as salaried personnel. Several organizational models have been created which provide management choices for supervising the work of volunteers. These models include a separate volunteer unit headed by a volunteer program administrator, a separate unit headed by an assistant director for volunteer services, and a special unit working directly under the agency director. 22/

19/ Kratcoski, op. cit.

20/ National Institute of Corrections and National Information Center on Volunteerism, Corrections Volunteer Information Portfolio (Boulder, Colo.: National Information Center on Volunteerism, April 1979).

21/ Ibid.

22/ These and other volunteer organizational designs are elaborated upon in Schwartz et al., op. cit.

In order to establish the effectiveness of any innovative program or change in staffing a system must be designed to evaluate and monitor agency performance. In this case, an evaluation plan to measure volunteer as compared to paid staff pretrial services performance must be created. 23/ First, policies and procedures should be tailored to incorporate a volunteer staff. Second, the goals of and objectives for the use of volunteers in pretrial services should be defined in operational terms. Third, performance measures for various tasks assigned to volunteers should be devised to assess levels of volunteer output (e.g., number of screening interviews completed, number of follow-up contacts made) as compared to pre-established or paid staff levels of achievement for each job. Finally, feedback loops should be developed between volunteers and agency management and between "consumers" of agency services (defendants, courts, corrections) and program administrators to provide informal, subjective measures of job performance and service satisfaction levels.

Conclusions

The above discussion was designed to stimulate interest in the use of volunteers by pretrial services agencies which are currently facing or in the future will face a reduction in professional staff and subsequent cutbacks in services. Because the design, implementation, maintenance, and evaluation of a volunteer program is a complex process, a list of relevant resources has been appended to this article. It is hoped that the lack of adequate evaluation data and the presence of few model programs will not discourage the adoption of volunteer programs by pretrial services agencies, especially given the existence of approximately 2,000 volunteer programs involving a quarter of a million people in criminal and juvenile justice at last count. 24/ Evidence cited has suggested that a well-planned utilization of volunteers can not only result in a significant cost savings to pretrial programs but can also provide beneficial nonfinancial advantages to the agency itself, the criminal justice system, and to the community.

23/ T. J. Cook and F. P. Scioli, The Effectiveness of Volunteer Programs in Courts and Corrections: An Evaluation of Policy Related Research (Chicago: University of Illinois, Department of Political Science, 1975).

24/ Kratcoski, op. cit.

APPENDIX

Resources: Volunteers in Pretrial Release

Court Volunteer Center
Pima County Superior Court
45 West Pennington
Tucson, AZ 85701

National Institute of Corrections
Information Center
1790 30th Street
Suite 130
Boulder, CO 80301

Pretrial Services Resource
Center
918 F Street, N.W.
Suite 500
Washington, DC 20004

VOLUNTEER: The National Center for
Citizen Involvement
P.O. Box 4179
Boulder, CO 80306

National Association on Volunteers
in Criminal Justice
P.O. Box 6365
University, AL 35486

59694

NASADAD: TECHNICAL ASSISTANCE TO SUPPORT TASC DRUG/ALCOHOL REHABILITATION PROGRAMS

by

ROBERT B. STITES, Esq.
MILTON CLOUD, M. Div.

Over the last ten years, federal response to the need of communities to provide alternatives for drug and/or alcohol abusers and addicts in the criminal justice system has in part centered around the development of the Treatment Alternatives to Street Crime (TASC) programs. The 1980/1982 Directory of Pretrial Services published by the Pretrial Services Resource Center lists TASC programs in nearly 50 cities nationwide. Despite the demise of LEAA, the federal government still funds several statewide TASC systems, and a number of programs have found alternative (local) funding sources.

The majority of TASC programs accept pretrial defendants for substance abuse treatment. Participation in a TASC program may be a condition of pretrial release or diversion of a defendant. TASC programs often fulfill the functions of pretrial agencies or serve existing agencies by providing ancillary treatment and resources. For this reason, their development is important to pretrial practitioners. Also of interest is the history and role of the National Association of State Alcohol and Drug Abuse Directors (NASADAD) in providing technical assistance to TASC programs. These issues are the subject of the following article, based on NASADAD's final report to LEAA early this year.

Not only is the experience of NASADAD valuable in terms of the knowledge accumulated about providing services to a large proportion of clients often served by pretrial agencies, but it is also of interest in terms of the provision of technical assistance generally. Of particular value are insights about the development and implementation of "alternative" programs in a community, and the difficulties which arise in securing political and economic support from the community.

Robert B. Stites was project director for NASADAD's LEAA-funded technical assistance project. Prior to his position with NASADAD, he was director of New Jersey's state drug abuse authority. Mr. Stites is a graduate of Rutgers Law School, and is currently practicing law in New Jersey.

Milton Cloud was project manager of the technical assistance project described in the article. Prior to that position, he was employed by the Cincinnati Health Department as TASC director. Currently, Mr. Cloud is project manager for Project Connection, funded to provide technical assistance to drug abuse and treatment programs in the criminal justice system. He has a Master of Divinity degree from Methodist Theological School.

I. BACKGROUND

TASC Origin

The Treatment Alternatives to Street Crime (TASC) program has enjoyed a long run for a limited federal assistance program. It has been "limited" not only in the sense of the relatively small amount of money available in a given year, but also in that local programs were eligible to receive federal funds for only two to three years each. Undoubtedly, the continued acceptance of TASC was due primarily to the need perceived by many communities to find alternative processes to cope with drug and/or alcohol abusers and addicts in the criminal justice system. In no small measure, however, TASC acceptance can be attributed to the willingness of the Law Enforcement Assistance Administration (LEAA) to aid communities in adapting TASC to local needs and values.

TASC began as one of the innovative programs developed by the White House Special Action Office for Drug Abuse Prevention (SAODAP) to counter increasing drug addiction and abuse and to deal with its releationship to the increase in crime. After initiating a single pilot project in Wilmington, Delaware, SAODAP and LEAA cooperated in offering support to establish and operate TASC programs in those cities included in LEAA's High Impact Crime mini-block grant program. A third federal agency, the Division of Narcotic Addiction and Drug Abuse (DNADA) of the National Institute of Mental Health, joined the effort and awarded grants to additional jurisdictions to begin TASC programs.

In less than two years, from the award of the pilot project grant in early 1972 to the end of 1973, TASC projects became operational in 13 local jurisdictions within 11 states, and several other grants were awarded to sites that would be operational in a few months. The local TASC projects established mechanisms for screening, intervention (identification), referral to treatment, and monitoring treatment progress of drug addicts or abusers charged with criminal offenses. In many cities TASC also either provided drug abuse treatment or purchased treatment services from community programs. Late in 1973 the three federal agencies involved agreed that LEAA would thereafter be responsible for developing, funding, and overseeing the screening, intervention, referral, and monitoring functions, while DNADA and its successor, the National Institute on Drug Abuse (NIDA), would take the lead in providing federal assistance to treatment providers.

The popularity of TASC continued with the addition of 19 more operating projects in 1974 and 1975, while three former projects were discontinued. The 29 operational sites represented 24 states; three other grant awards in an additional three states were also made in 1975 but had not yet started operations. With a majority of the states having thus been exposed to TASC, LEAA set out to expand TASC demonstration by encouraging the start of local projects in a major city or county of the states not yet represented. In 1977 TASC was opened to competition by all comers seeking the TASC "model."

TASC Expansion

The TASC "model" continued to evolve. The original design for heroin-addicted criminal offenders was modified to include those dependent upon or abusing other drugs, and later, alcoholics and alcohol abusers. Diversion as the sole or principal procedural remedy was supplemented by intervention conditioned upon treatment, and by probation or parole with similar conditions. TASC functions changed with experience: 24-hour screening capability was found unnecessary in most jurisdictions and was replaced by one or two shifts or by just a few hours per day in smaller jurisdictions; mass urinalysis as a screening tool was discarded by most projects in favor of limited, confirmatory tests; broader client eligibility created a need for a greater range of treatment and support services available to TASC clients; and continued budget pressures forced project directors to seek and implement more efficient methods of operation.

TASC Incentive Programs

Territorially, the early TASC projects each served a major city or an urban county. Later, TASC projects were developed in smaller cities or counties or in multi-county regions. One such project, serving a 17-county judicial district with the state capital as its core city, expanded in its second year of operation to become a statewide TASC project, establishing branch offices in the community corrections agencies in the other seven judicial districts. Another state applied for and received a statewide project grant, implementing TASC through the state probation network.

In view of the successful implementation of the two statewide TASC programs, and anticipating statutory changes that would emphasize replication of successful programs, LEAA initiated an Incentive Program in 1978 which included TASC as one of the programs eligible for incentive grant support. TASC incentives encouraged statewide TASC programs, providing grant funding support for a state coordinating office and local TASC projects. The intent of the Incentives Program was to encourage--provide incentives to--states and local governments to replicate successful LEAA programs. The major incentives were long-term grants, permitting the grantees to use federal funds (including LEAA block grant funds) for a substantial

portion of the state/local share. In the case of TASC, additional objectives were to encourage states or large substate units of government to assume a major role in developing, coordinating, and managing local TASC projects. Three states were awarded statewide TASC incentive grants in the 1979 grant cycle and four more such awards were made in 1980 (renamed National Priority grants to coincide with statutory terminology). The seven states have activated 55 new local TASC projects to complement the 13 previously existing local TASC projects in those states. As of 1982, the tenth anniversary year of the first TASC project begun, 99 local TASC projects remained in operation nationally out of the 130 projects that had been developed (plus the seven state TASC coordinating offices).

In retrospect, statewide TASC development was a logical conclusion to the earlier stages of TASC demonstration. Major cities with sufficient interest in TASC had received grants and shared the TASC experience; other cities and counties also had opportunities to test TASC's effectiveness through assorted mutations; and Iowa and Connecticut had shown that TASC units smaller than most (or all) self-contained TASC projects could function effectively, even in low population jurisdictions, with support from a statewide TASC management component. But reproducing the federal TASC activity required finding or developing skills at the state level that the federal program office had not previously been concerned with: local program development by state managers in remote locations, plan reviews and grant or contract awards, grant/contract monitoring, and fiscal management.

Throughout the history of TASC, LEAA encouraged local planning of TASC projects to meet locally identified needs. Within limits, flexibility in design, standards, and operation has been sought, rather than imposing a rigid model upon dissimilar jurisdictions. In order to aid local communities in trying new approaches while benefiting from the experience of other communities, LEAA has supplemented its in-house technical assistance capability through a contract, first with Social Consult, Inc., to mid-1974 and, after a lapse of about one year, through contracts with the National Association of State Alcohol and Drug Abuse Directors, Inc. (NASADAD), since July 1975. This report will discuss some of the impacts of NASADAD's fulfillment of the contracts on the TASC program.

II. TECHNICAL ASSISTANCE

When NASADAD received its first technical assistance contract in the summer of 1975. TASC projects were in operation at 24 sites, one of whose costs has just been assumed by state and local funding sources. In addition, grants had just been or were about to be awarded to eight more jurisdictions. The subgrantee or operating agency in the vast majority of projects was from the treatment sector: a drug treatment provider or coordinating agency, a mental health or public health department; a scant half-dozen projects were in probation departments, and a few were in other criminal justice agencies.

Those who had been closely associated with TASC, at the local sites as well as at the federal program level, were convinced that TASC "works." Their opinions were supported by a 1974 evaluation of five TASC projects which concludued that TASC was dealing with a substantial proportion of repeat offenders with long histories of addiction, introducing the subjects to treatment (a majority had no prior treatment experience), and reducing their criminal recidivism. LEAA set out to expand the TASC program to additional jurisdictions in order to test the model in differing environments and, if successful, to demonstrate more broadly the program's effectiveness.

Continuing the earlier method of site selection, the LEAA program office chose target cities or counties for their demonstration potential. A new factor was added to the selection process in 1975, however, with information from the new TASC technical assistance contractor, NASADAD (then named the National Association of State Drug Abuse Program Coordinators - NASDAPC). NASADAD had a communication network on the drug abuse treatment side through its member state agencies that complemented the LEAA State Planning Agency criminal justice communications. In addition, NASADAD staff had first-hand knowledge of criminal justice drug abuse treatment activities in many communities, having just sponsored a series of justice-treatment interface planning workshops for the Drug Enforcement Administration (DEA) Operation Alternatives.

LEAA Objectives

Expanding the TASC demonstration was intended to accomplish several LEAA objectives, the most obvious being wider geographic distribution, not only in the number of states with TASC projects but also a greater distribution among the regions of the nation. Another objective was to gain TASC experience in jurisdictions of varying size, political climate, and socioeconomic environment. A third objective was to have TASC implemented by a variety of sponsoring agencies or organizations, and a fourth was to continue expanding TASC services to a broader clientele.

Objective 1: Geographic Distribution

The 1975-76 expansion of TASC concentrated on the first of these objectives, with more emphasis on the others coming when that demonstration phase was completed. Identifying 12 states that had not had TASC projects but did have at least one jurisdiction that was likely to meet the selection criteria, LEAA's TASC program office attempted to select a target site within each state. The criteria were a minimum population of 200,000 in the jurisdiction (city, county, or judicial district), a substantial drug-related crime problem, and an adequate treatment availability. Seven target sites were selected quickly; the remainder, several months later.

Objective 2: Size and Climate

LEAA began to accomplish its second objective before the geographic expansion cycle was completed. LEAA began to respond to requests from other local jurisdictions in states with local TASC programs by deciding to award all new TASC grants in future cycles on a competitive basis. This open competition allowed for TASC proposals from jurisdictions of different sizes and environments. Through 1975 only one of 35 TASC projects had been established in a jurisdiction smaller than 250,000 population--the original pilot project which had been terminated primarily because of cost inefficiency. The minimum population criterion of 200,000 had been maintained during the 1975-76 geographic expansion cycle, except for one project where the applicant reduced costs enough to convince LEAA that it could be efficient (in cost per client) in a population base somewhat under 200,000. The staffing pattern and budget for that project became a model for several small jurisdictions that successfully competed for funds in later cycles.

In a decade of TASC development and demonstration, TASC's exposure has been extensive. TASC projects have been in operation in 37 states and Puerto Rico, with statewide coverage (major jurisdictions) in nine of them. Some 130 local TASC projects have been initiated, with more likely to be activated by some of the statewide TASC projects.

Objective 3: Sponsoring Agencies

Grants were awarded to a variety of sponsoring or operating agencies for local TASC projects. However, they continued to be largely from the substance abuse or health field, especially since their numbers were reinforced by the bulk of new TASC projects developed by the Florida, Michigan, and Pennsylvania statewide TASC projects. But TASC projects have also been operated by courts, probation departments, prosecutors, sheriffs, departments of corrections, pretrial agencies, public safety departments, criminal justice planners or coordinators, mayors' offices, civic organizations, and free-standing corporations. Statewide TASC projects have been operated by state departments of correction (2), a probation department, alcohol and drug abuse authorities (2), a criminal justice planning agency, a court administration office, and by independent nonprofit corporations (2).

Objective 4: Broader Clientele

Finally, the type and number of eligible clients were expanded by evolution. Initially, drug addiction had been the target; then drug abuse that fell short of physical dependence was included within eligibility criteria. Abuse of or even dependence on the legal drug alcohol was not treatable through TASC referral, however, unless it was secondary to abuse of other psychoactive drugs. This anomaly was addressed by a task force of TASC project directors assembled by LEAA.

CONTINUED

1 OF 2

The task force developed and recommended eligibility criteria for alcohol patients, and procedures--acceptable to LEAA--for obtaining grant adjustments to permit acceptance of those clients. Thereafter individual projects broadened their client eligibility to accept mental health patients or family violence offenders, to earn program support through client fees, and to serve the criminal justice system by operating restitution programs and (non-substance abuse) diversion programs.

There have been several ways in which local projects have made TASC services available to larger client populations, most often through extending eligibility to include offenders whose sole drug or primary drug of abuse was alcohol, in addition to the project's original eligibility for opiate and polydrug abusers. In some communities this task involved merely redefining eligibility acceptable to criminal justice officials; in others it required establishing linkage with a second and separate treatment network, revising monitoring methods, or revising record systems. Some projects enlarged the stage of criminal justice processing at which offenders would be acceptable to TASC, established working arrangements with probation or parole, or negotiated diversion (deferred prosecution) criteria and procedures with judges or prosecutors. Some TASC projects expanded geographically by means of satellite offices, "circuit rider" coverage, or passive referral mechanisms.

Role of Technical Assistance

In order to assist LEAA in accomplishing its objectives, technical assistance was designed to intersect at three distinct stages of project development and operations. NASADAD introduced TASC to many local communities and, as part of planning assistance, gave guidance in developing a viable plan and meeting LEAA requirements. If an applicant were successful in receiving a grant award, NASADAD assisted the project in starting operations by training staff, helping to develop written procedures, and helping to identify data elements to be collected. Once projects were operational, NASADAD provided assistance with expansion, improved operations, and problem resolution.

Task 1: Planning Assistance

The role of technical assistance had begun by helping LEAA in site selection. LEAA also used NASADAD to conduct a meeting to introduce local criminal justice, drug abuse treatment, and general government officials to the TASC concept and model and to initiate a planning process. To the extent desired by local planners and decision makers, further assistance was made available in developing a viable plan. While deferring decisions to the local planners and officials, NASADAD staff encouraged broad participation in the development process and sought a variety of sponsoring agencies. NASADAD also gave guidance to the planners on LEAA requirements and on successful approaches used

by other TASC projects. If an applicant were successful in receiving a grant award for TASC, NASADAD also provided assistance in activating and operating the program.

Patterns of assistance to the sites varied with the needs and the level of interest in each community, but most began in the same manner. Following written and telephone communications among LEAA, NASADAD, and a local lead agency or individual, an introductory meeting was convened by local officials. Typically, this meeting was followed by a smaller working session of the individuals who carried the planning load.

In the course of performing the technical assistance contracts, NASADAD conducted pre-planning introductory sessions not only in the 12 target sites chosen in 1975-76, but in more than 30 other jurisdictions as well. TASC projects were subsequently established in about two-thirds of those jurisdictions, and some conclusions may be drawn from the successful grant applicants as well as the unsuccessful applicants and nonapplicants. NASADAD and LEAA approached planning assistance with the philosophy of helping the technical assistance "clients" to help themselves, rather than with the intent to do the clients' tasks for them. This philosophy was reinforced by the capacity of the more self-reliant groups to understand, plan, and implement TASC.

A contributing factor to assembling a planning group able to carry the burden was the authority of the "sponsor" of the initial meeting. In some jurisdictions the key figure able to get the attention and attendance of ranking officials was the presiding judge; in others the district attorney, or the sheriff; in still others, the mayor or county executive. Seldom was a treatment or health director or a criminal justice planner sufficiently influential to assure attendance of the desired individuals, but in some jurisdictions they were the persons needed to initiate the TASC process. A related factor affecting the success of a plan and implementation was gaining the acceptance of other key officials early in the planning process and maintaining it through frequent communications. Another important factor was an early decision on which agency or organization would have responsibility for operating the TASC project; this did not need to be the same as the lead planning agency but did need to have a major role in planning.

At the same time that TASC was expanded to new territory, efforts were made to demonstrate the effectiveness of the TASC concept with a different clientele. TASC had originally been designed as a pretrial program that had rather quickly been enlarged to include post-trial offenders (probationers or deferred sentence cases). However, many of the later TASC projects were so predominantly probation-oriented that it became necessary to reverse the approach and provide technical assistance to establish pretrial referral as a meaningful option.

Task 2: Activation Assistance

One area in which there was room for improvement by nearly all new TASC sub-grantees was in activation of the project. Some of the early grants were awarded on the basis of incomplete plans that required additions and revisions before the sub-grantee could begin implementing the plan. Even after TASC grants had become regularized under the LEAA award process, the state of TASC knowledge and communication among local projects was such that few sub-grantees benefited from the mistakes or accomplishments of others. Both the time consumed to activate the projects and the difficulties engendered by early mistakes were costly to efficient operation.

Some of the activation delays and errors were alleviated by better planning processes initiated by NASADAD and by information provided by technical assistance staff during planning, imparting knowledge gained from the experience of other TASC projects. Coupled with more thorough planning was post-award advice to many sub-grantees regarding background and skills needed by TASC staff, content and format of TASC record systems, and communications with criminal justice and treatment agencies. Much of the post-award activation assistance was performed off-site by means of telephone and mail communication; only where necessary was on-site assistance also provided. Most projects were also site-visited shortly after they began processing clients, in order to walk through local procedures and recommend any modifications that would be helpful.

Staff training was as integral element of activation assistance but would be a heavy drain on contract resources if NASADAD attempted to provide all of the required training. The LEAA program manager and NASADAD agreed that the technical assistance staff would geneally confine its training activities to national conferences and regional training events. Routine training of local TASC staff would use other existing training sources, such as NIDA's National Drug Abuse Training System and state criminal justice or substance abuse training facilities, with NASADAD assisting the projects in gaining access to those resources and providing direct training only when no other source was available. This approach proved less than satisfactory, however, as the available training was too often irrelevant to TASC or took a parochial view of TASC rather than drawing on experience from the national program.

At about the time that the inadequacy of external training was realized and consideration given to increased training on a regional basis, Cincinnati TASC, with encouragement from its regional LEAA office, proposed a National TASC Training Center in conjunction with its continuing operation. NASADAD was asked by LEAA and the Cincinnati TASC director to assist in developing the training content and to work with the Cincinnati staff in the training of staff of new projects. Participation by NASADAD allowed more efficient use of

Cincinnati staff, broader national perspective in the training, and greater continuity with the technical assistance that preceded and followed training. Beginning in June 1977, the National TASC Training Center (NTTC) provided training to the staffs of 29 local TASC projects, the TASC Coordinating Office (TCO) staffs of seven statewide TASCs, and some local project staff in six of the latter states.

While the provision of consistent, TASC-oriented training probably had little effect on reduction of implementation delays, it did help to eliminate some of the usual early operation problems. In some cases, however, a new set of problems arose. Although the training stressed that no two TASCs were exactly alike and examples were drawn from a number of projects, what the trainees saw in operation, often their first exposure to a TASC-in-being, was Cincinnati TASC. This unduly influenced some TASC personnel to pattern their own project operation after Cincinnati TASC, whether or not their operating environment bore any resemblance to that project's.

The early on-site review of project operations thus continued to be an essential part of the activation assistance provided by NASADAD. Because many of the problem areas (e.g., record keeping, intake procedures, reporting requirements, etc.) could be addressed in the course of training, the optimum time for a routine review was found to be after the project had two or three months of client processing experience. By that time the TASC staff usually had a clearer picture of the personalities and procedures of the criminal justice and treatment agencies in the jurisdiction, but it was not too late to recommend appropriate changes in TASC operation.

Task 3: Operational Assistance

Emphasis was placed on getting new TASC projects "up and running" as smoothly as possible based on the rationale that a good start would reduce the incidence of later operating problems. To a great extent the rationale proved to be valid, but that did not eliminate a need for further operational assistance. The approach was to use technical assistance to help good TASC projects become even better, as well as to correct problems.

Although the number of TASC projects was important to LEAA managers, the quality of those projects was of greater importance to them and to the communities served by the projects. Therefore, the major thrust of NASADAD technical assistance was directed toward more effective and more efficient operation of individual TASC projects.

LEAA's TASC program manager asked NASADAD to provide "pro-active" technical assistance by scheduling routine visits to all active TASC projects in concert with LEAA. The purpose of these visits was to identify potential problems and advise local management on corrective measures, give advice on improvements that might be made or alternate methods that could be used, and learn innovative procedures that could

be shared with other local TASC projects. This method of delivery differed from reactive technical assistance in that it did not require a specific request or a problem report to trigger assistance. Some of the advantages of this active approach were that matters could be dealt with at an early stage before becoming full-blown problems, usually at less cost in financial and other resources; travel cost could often be reduced by scheduling two or more sites on a single trip; local project directors did not need to admit "deficiencies" before getting help; indeed, there need not be any "deficiencies" as a prerequisite to making improvements.

Local projects were assisted in resolving problems in performing the basic TASC functions of identification, referral, and monitoring. TASC projects were aided in improving program accountability in several ways. Better collection of client intake data and treatment progress information was fostered through changes in forms and procedures. Use of that information was improved through changes in record keeping and abstraction of statistical summaries. Consistent and more usable progress reports to the criminal justice system were attained by better defining the needs of relevant officials and reformatting the reports.

Individual project management was improved by assisting in initiating a management-by-objectives system, by redefining the responsibilities of staff positions, and by developing better controls on staff activities. Cost savings were effected by building cooperative relationships with other agencies in the community and by elimination of duplicative or unnecessary activities.

Problems involving the confidentiality of client records arose with regularity, requiring all of NASADAD's technical assistance staff to develop a degree of expertise. The content of federal statutes and regulations governing the confidentiality of alcohol and drug abuse patient records, and the applicability of the federal laws to specific situations, were an endless mystery to most TASC personnel. Thus, procedures to safeguard client record confidentiality were reviewed by NASADAD staff as part of most site visits. Frequently, when issues occurred outside the routine project procedures, the local project sought and received advice by telephone or mail from NASADAD.

III. PROGRAM CONTINUITY AND TECHNICAL ASSISTANCE

Except to meet federal agency goals and to justify the existence of the program or the agency, it matters little how many state and local examples of a program are established or how well they operate as federal grant supported projects. When the purpose of the agency is to introduce and demonstrate innovative programs to state and local governments, a truer test of accomplishing that purpose is the degree of acceptance of the program by states and municipalities after the grant support expires. NASADAD's technical assistance was to aid the continuation of state/local TASC projects that had been effective while receiving federal support.

Several terms have been applied to the fact of continuation. In the early years of TASC, the term "institutionalization" was used most frequently to denote becoming an institution within local government. That term has a very different connotation in the fields of corrections and behavioral disorders, however, and so was always troublesome in the TASC program. "Institutionalization" was therefore supplanted in the TASC lexicon by "cost assumption": the use of state/local revenues or federal funds in the discretionary control of state or local government to assume the costs of the program. More recently the term "service assumption" has been used to describe either the continuation of TASC per se or the continuation of TASC services through another agency or agencies (e.g., pretrial services, probation, or a treatment program) without continuing an identifiable TASC entity. The term used here, continuity, is intended to cover all of these definitions, although our information on service assumption without the TASC name is incomplete.

Reference has been made to the 99 local TASC projects now in operation. Of that number, 54 were established under grants that are still active; that is, the six active Incentive and National Priority TASC grants. The other 45 projects now operating were among the 77 started under LEAA grants that have expired (technically, 44 of 76 former LEAA supported projects continue; the other was begun with local and state discretionary funds and never received LEAA money). That leaves 32 local projects that have been discontinued, and a 58 percent success rate for continuation. The current measure of success is better than many federal programs, but even so it is deceptively low. More than half (17) of the discontinued projects were continued for at least one year with state/local dollars, which would make an assumption rate of 80 percent if measured at the point of LEAA grant expiration. The 17 temporarily continued projects generally fell victim to state/local budget crises with a major part of the available revenues required for legally mandated or high priority services.

TASC's acceptance in a given community, and hence its chances of continuation, depends upon how well it meets positive expectations. More particularly the chances for future funding depend upon how well it meets the expectations of potential funding sources or of those in a position to influence the funding sources. NASADAD's technical assistance with respect to project continuity was generally focused upon assisting local projects in identifying and qualifying for potential funding support, determining where and by whom funding decisions were made and what information was used to make those decisions, and gathering credible information to influence decisions favorable to TASC--in short, finding the market, learning what is being bought, and selling what the market is buying.

In many cases the future funding source appeared obvious: the sponsoring or "parent" agency of TASC. Frequently, however, obtaining funds from the obvious source required competing with more established programs supported by the same source. For example, if TASC were part of a treatment "umbrella" agency, it would be competing for funds with other units that provide direct treatment services. TASC in those or similar circumstances was aided in documenting the benefits it offered to the "parent" and to the sister units in order to reduce the sense of competition, while arming itself to compete more effectively.

Local TASC projects were also assisted with suggestions of alternate funding sources and service additions or modifications that could appeal to such sources. Perhaps the most consistent advice given to local TASCs was to consider potential funding sources at the outset of TASC planning and development, designing local TASC activities, and defining TASC planning and objectives to encourage interest from likely supporters. Unfortunately, this advice was also the most consistently ignored; most projects gave little apparent thought to continuation until after operation was underway and some delayed the issue until their second and final grants were awarded by LEAA. Because of such delays, projects often limited their options of sources and their ability to be responsive to a source's requirements.

LEAA's requirement that applicants budget funds for an independent project evaluation in their grant proposals helped many project administrators prepare for continuity issues in spite of themselves. From a national perspective, the evaluations were of little value because they lacked common data, methods, analysis, even uniform definitions. Many were useful, from a local perspective, in documenting TASC effectiveness to the satisfaction of local decision makers. Projects were assisted in developing evaluation plans that met local needs and LEAA's minimal requirements, and some were also assisted in preparing requests for proposals (RFP) conforming to their local requirements.

More than any other aspect of TASC, a project's continuity depended upon TASC's effectiveness in the local environment and the ability of TASC personnel and sponsors to understand the force fields in that environment. Some local projects were not continued because they were ineffective or because the personnel failed to understand the environment. Undoubtedly, some were continued despite ineffective operation because there was an ability to "read" the decision makers. Technical assistance could not assure a receptive audience for TASC in any jurisdiction, nor could it provide the mixture of innate ability, ingenuity, and personality that would cause a TASC project's staff to jell into an effective team. As performed by NASADAD, it did provide the knowledge, skills, and expertise to those projects willing and able to use the assistance to make themselves successful TASC projects.

IV. RECOMMENDATIONS

TASC may be in its terminal stages as a federal government activity. The past record of TASC programs' continuity after expiration of federal grants indicates, however, that programs embodying the TASC concept are likely to remain active for some time to come. Although it may be difficult, federal money can be replaced from other sources; but other elements of federal support may be even more difficult to supplant. LEAA has given the TASC program an aura of legitimacy simply by its identity as a continuing federal effort. More concretely, support has been provided by means of national evaluations, training, technical assistance, and serving as a communication link among "old" TASC programs as well as active grantees. All of these have helped to define TASC as a national program while supporting local projects.

Even if TASC is continued as a federal program, reductions in budget and personnel allocations will lower the capacity to provide support similar to that given in the past. A greater burden will, therefore, fall upon local TASC programs and, in a few states, statewide TASC coordinating offices (TCOs) to maintain the vitality of TASC.

There are, of course, informal contacts among some local TASCs, particularly programs within close geographic proximity or within a statewide program. The danger is that the inbreeding of TASC programs that already have much in common will cause them to become more alike, narrowing the potential for serving their unique communities. In contrast, if there is an opportunity for cross-fertilization of ideas among programs in a broader geographic area, each local TASC can continue to expand the service possibilities.

With as much continued federal assistance as feasible, local TASC programs and statewide TCOs should be encouraged to seek support from each other and from appropriate outside resources. A conscious effort by the programs to forge links from the bottom up would strengthen the participating programs and provide the additional benefit of a national TASC identity. At least five support elements previously furnished from the national level could be derived in this manner: communication, technology sharing, problem solving, external review, and training.

Several modes of communication have been fostered, frequently routed through Washington instead of directly between or among TASC programs: face-to-face discussion, telephone, and written communication. Future face-to-face contact might be engendered through national or regional TASC conferences sponsored by a group of programs, state TASC events

to which "outside" TASCs are invited, or planned TASC gatherings that "piggy-back" on other national or regional conferences. Frequent telephone contact between programs just to discuss current operations could be initiated. Written correspondence among programs could be enhanced by periodic exchange of statistical summaries, summary reports, or bulletins prepared for local or state distribution.

The sharing of TASC technology--standards, techniques, and documentation used in TASC--is more difficult without a third-party "clearinghouse." The problem is that local programs often do not realize whether or not they are doing something innovative and, therefore, either fail to make new ideas known or broadcast what amounts to reinvention of the wheel. Nevertheless, programs can share technology by methods such as exchanging procedures manuals, opertional directives, or forms. Keeping communication channels open will also assist TASC programs in knowing who is doing what, enabling those interested to seek more information.

The first step to problem solving is identifying the problem or acknowledging that a problem exists that may not have been defined. Without federal monitoring or technical assistance support, program managers will have to be more attentive to problem identification and prompt internal action or enlistment of outside aid to solve problems in early stages. Each program should compile a roster of individuals and organizations available to provide services or to make referrals of assistance resources, noting special skills or areas of expertise. The roster may begin with personnel from other TASC programs but should also include third-party resources.

The most competent and attentive management is sometimes too close to an activity to recognize a problem or a potential problem as readily as an objective observer could. A program seeking to be more than just adequate should plan an external review at least once a year by someone familiar with the program but without direct interest in its performance. This service could be performed by managers of other TASCs or by some of the problem-solving resources.

Statewide TASC management has generally assumed responsibility for training of new local programs within the state system, in most cases also utilizing assistance made available to them (without cost) from the National TASC Training Center and NASADAD. It should be a short step for the state TCOs to provide training for replacement staff and to develop in-service training for existing personnel, in both cases using outside resources from other TASCs or third parties. It may not be economically feasible for local TASC programs that are not part of statewide systems to provide in-house training. These programs might arrange to participate in training activities of nearby statewide programs, purchase training services from a state TCO, develop regional plans with other nearby TASCs, or make use of related non-TASC training resources.

Services and activities such as the foregoing are essentially provided to individual local or state programs and thus can be generated from within the program. They are not without cost but are relatively inexpensive and can be made even more so by reciprocal support among TASC programs. An obstacle that could be greater than cost is the procurement process that the program may be required to follow. Each program that is part of a larger organization or receiving public funds should inquire into the process for procuring the support services previously received without cost. Amounts needed to purchase anticipated services should be budgeted and procurement requirements met in advance to enable use of services when needed.

Finally, if ten years' experience in TASC has value to society and to the American taxpayer, it must be expected that the concept will be kept alive after federal funds no longer sustain the existing programs. While it seems unlikely that the present climate for government spending--federal, state, or local--will spawn new TASC programs, the problems TASC confronts are still problems in society. It should be anticipated that the TASC approach will be considered again and implemented again, with or without federal funds.

DWI DIVERSION IN MONROE COUNTY

I.

THE ROLE OF PRETRIAL DIVERSION

by

ANDREA M. VALERIO, M.A.
KATHLEEN KANE, M.S. Ed.
FLORIE S. SAIGER, M.S. Ed.

II.

CREATIVE INTERVENTIONS IN AN ALCOHOL AWARENESS PROGRAM

by

GEORGE M. APPLETON, Ph.D.
JOEL KATZ, M.S. Ed.

Increased public awareness and concern about drinking and driving has led a number of jurisdictions to look for new approaches to prevention and treatment of drunk drivers. One approach calls for increased and/or mandatory penalties for persons convicted of the charge of Driving While Intoxicated (DWI). At the same time, some jurisdictions have viewed offenses associated with alcohol as appropriate targets for diversion programs. Some form of counseling and treatment--either directly by diversion program staff or through referral to an outside treatment program--has attracted considerable interest.

But as different treatment programs emerge (and seek funding), questions have arisen concerning the propriety of diverting DWI cases and which (if any) of the treatment programs are likely to have a positive impact on the divertee.

The two articles which follow address both aspects of DWI diversion. The first describes a diversion program in Rochester, New York, in which defendants charged with their first felony DWI charge may be diverted and referred for treatment to a non-traditional alcohol awareness program. This program, Creative Interventions, is the subject of the second article, in which the authors discuss some of the issues facing (and dividing) the field in identifying positive treatment models. The theory behind the Creative Interventions model, along with how it operates in practice, is described in detail.

The articles will be of interest to the diversion field on several levels: in assessing the feasibility of including DWI cases in diversion programs; in choosing among available treatment options for diversion clients; and in assisting diversion staff who counsel clients with alcohol-related problems and charges.

The authors of the first paper are diversion counselors at the Monroe County Bar Association Pretrial Services Corporation in Rochester, New York. Andrea M. Valerio earned her master of science degree in community psychology at Temple University. Kathleen Kane and Florie S. Saiger hold masters degrees in educational counseling from the State University of New York (SUNY) at Brockport.

The authors of the second paper, George H. Appleton and Joel Katz, are co-directors of Creative Interventions. Dr. Appleton, who received his undergraduate degree from Harvard College, holds masters degrees in Social Studies education and counseling psychology from the State University of New York (SUNY) at Buffalo. He earned his doctorate from the Department of Counseling Psychology at SUNY at Buffalo. Dr. Appleton is currently an associate professor of counselor education at SUNY at Brockport. Mr. Katz, a graduate of the University of Rochester, earned his masters degree in counselor education at SUNY Brockport.

I.

THE ROLE OF PRETRIAL DIVERSION IN EFFECTING CLIENT CHANGE IN A NON-TRADITIONAL ALCOHOL TREATMENT PROGRAM

by

Andrea M. Valerio, Kathleen Kane, and Florie S. Saiger

Introduction

This paper describes factors that seem to be significant in affecting the outcome of treatment for clients charged with Driving While Intoxicated (DWI) felony offenses. The clients are enrolled in the Monroe County Pre-Trial Diversion DWI felony program located in Rochester, New York, and are referred to community treatment programs by the Diversion counselors. The counseling staff is composed of mental health professionals who utilize therapeutic interventions throughout their relationships with their clients.

This paper will specifically examine factors affecting client progress in a particular non-traditional alcohol treatment program in Rochester, called Creative Interventions. (This program is described in detail in Part Two, in an article by George Appleton and Joel Katz.) The clients have all been referred by Pre-Trial Diversion counselors who select appropriate clients for treatment, monitor their progress, and make evaluative reports to the courts throughout the six- to seven-month program duration. We will explain the role of Pre-Trial Diversion in helping to bring about effective client change while describing other factors that seem to interplay therapeutically for clients in the Creative Interventions Program. This perspective is written from the viewpoint of the authors based on their clinical impressions as counselors for the Monroe County Pre-Trial Diverison Program.

Program Objectives and Philosophy

The objectives of the Pre-Trial Diversion Program are: 1) to provide the clients with an opportunity to change their behavior by actively participating in treatment; 2) to reward the clients' successful completion of Diversion by allowing them to plead guilty to a reduced charge of DWI as a misdemeanor, thereby avoiding a felony conviction; and 3) to interrupt the clients' pattern of arrests by attempting to prevent their future involvements with the law.

The clients have been charged with their first DWI felony in New York State. This means that they have at least one prior drinking conviction, a DWI misdemeanor. Many have been convicted of Driving While Ability Impaired as well. The majority have been through a New York State Drinking Driver seven-week educational course as a result of their DWI misdemeanor conviction.

The clients sign a contract with Pre-Trial Diversion agreeing to the adjournment of their court charges for the period of time necessary to complete treatment, usually six to seven months. This contract is composed jointly by the client and counselor outlining the client's commitment to treatment. Since no one approach is for everyone, a variety of treatment modalities are utilized. This paper focuses only on those clients we refer to Creative Interventions.

No attempt is made at labeling the clients "alcoholics." Clients are encouraged to take the responsibility of defining the areas of their lives which they feel are problematic for them and devising ways they can more effectively manage them. This includes, but is not limited to, drinking. Sobriety is never a requirement, nor is it even an issue. Clients are encouraged to learn limit-setting skills that are appropriate for their own value systems.

Naturally, shifting the responsibility to the clients for producing their life changes creates stress. The Diversion counselors use this anxiety as a way of developing motivation for change. It is a productive part of the therapeutic process. The relationship between the Diversion counselor and the client is used as a tool to motivate, monitor, and then evaluate the client. In other words, the Diversion counselors take on the role of catalysts for change. This will become clearer as the functions of the counselor-client relationship are explained.

Stages of the Diversion Counselor-Client Relationship

A. Screening

First-time DWI felony offenders are referred to Pre-Trial Diversion by the District Attorney's office after defendants involved in serious personal injury accidents or those with extensive criminal or motor vehicle records have been screened out. Another layer of screening occurs during the one- to three-session intake process with the Pre-Trial Diversion counselor to determine program eligibility. Clients with long-term mental health needs and those who completely lack motivation are not accepted. The selection process is geared toward accepting clients who have the ability and readiness to be open to short-term treatment interventions. It is important to remain aware that this non-random selection process may have an effect on conclusions we draw from our clinical observations.

During the intake sessions, the client's needs and drinking patterns are assessed. Issues are developed together with the client, and the ones that the client wishes to work on in treatment are targeted, if possible at this time. The selection process for referral to Creative Interventions (and for all other programs) is experimental and subjective.

The client is given a list of expectations or criteria for successful program completion and signs a contract with the Diversion counselor if both agree on the terms of the treatment plan. This activity is also part of the therapeutic process; the way in which a client approaches this task is illustrative of his motivation for treatment, his style of interaction (i.e., manipulative, demanding, passive, etc.), and his issues for treatment.

B. Monitoring Process

Clients are required to maintain regular, usually weekly, contact with the Diversion counselor. During these interactions, clients discuss their reactions, perceptions, and feelings about the treatment program. These contacts help the clients work through their resistance to treatment and help develop their motivation to change. It provides an opportunity for the clients to demonstrate behaviorally the changes they have made as a result of the treatment process, while still being a part of the treatment process. It is another layer of accountability, separate from the group, where the clients continue to develop and integrate their newly acquired behavioral skills. In the case of clients who are not making productive change, it is an opportunity to observe their patterns of "staying stuck."

Either way, it's grist for the mill. Clients don't just report their changes; they are verified by their actually doing them. How they make contact with the Diversion counselor demonstrates whether they're being responsible, being assertive, and taking care of themselves.

An important component in this process is feedback. We continually let the clients know how we experience their behavior and what their status is in Pre-Trial Diversion. We pay particular attention to comparing the information we get from the Creative Interventions group leaders with the information we get from the clients. If the perceptions from both sources don't match, that is an indication to the Diversion counselor that something needs to be addressed. By pushing clients to address issues in their treatment group, we help stir up frustration and stress. We believe this creates motivation and growth.

C. Evaluation

Reports are made periodically to the courts describing the client's progress. When the client completes his treatment program, the Diversion counselor must determine if he has "favorably" or

"unfavorably" complied with the expectations of his Diversion program. If he successfully finishes his program, he is convicted of a DWI misdemeanor rather than a felony. If unsuccessful, the client may be indicted by the grand jury on his original charge of a DWI felony and returns to the traditional court process for disposition of his case.

The criteria used to determine the client's final Diversion status include the demonstration of behavioral change. How a client expresses feelings, how he shows responsibility, and how he communicates are viewed as indicators of meaningful change. (Please see the Appendix for complete listing of program criteria.) The final decision is based on input from the client, with a stress placed on behavioral demonstration rather than verbal report, and on the treatment program facilitators' evaluations of the client's growth.

Other Factors Affecting Clients' Progress

In addition to the ongoing relationship with his/her Pre-Trial Diversion counselor and the direct treatment process of the Creative Interventions program, there are other influences at work on the client. The interplay of all of these variables seems to have a powerful impact on the client's behavior. It appears that the combination of these factors is crucial to bringing about meaningful change, but this has not been tested experimentally. This conclusion is drawn from clients' self-reports, observations of their responses to stressful situations, and from trying approaches differently with some clients at different times. The two other significant variables seem to be the client's lack of a driver's license and his fear of a felony conviction:

1. Lack of Driver's License

Clients are required to voluntarily surrender their driver's licenses for a one-year period beginning when they sign the Pre-Trial Diversion contract. This loss of personal freedom and mobility necessitates that the clients structure their lives on a "physical" level. They need to develop the skills of mapping out the logistics of their commuting needs, and thus they are faced with the inconvenience of restructuring their lives. The issue underlying this inconvenience appears to be their inability to ask other people for help. They are now in a position where they must rely on others and assertively make requests. At this time, the client often responds to this loss of driving privileges by grieving. This lack of a license forces the client to assess his situation and make pro-active decisions.

2. Fear of a Felony Conviction

Most clients choose to enroll in Pre-Trial Diversion not because they are really motivated for treatment, but because they want to avoid a

felony criminal record. This is realistic, and it is a good starting place. The dramatic influence of fearing a felony conviction seems to come largely from the client's need not to be labeled a "criminal" or "bad." Avoiding the felony is a way of protecting the self-concept from the judgments of others.

A felony conviction is a label that lasts a lifetime. It requires a mandatory jail sentence, as well as the loss of other personal freedoms: the right to vote, to have a passport, to register guns, to hold public office, to get licensed in certain careers, and to hold certain jobs. Many clients fear, and rightly so, that they will lose their jobs if convicted of a felony. The risk is very real and keenly felt; losing financial security is a powerful motivator.

Conclusion

In this paper we have attempted to describe how one Diversion program staffed by mental health professionals utilizes therapeutic and legal means to effect change in clients charged with DWI felony offenses. The combined impact of maintaining a relationship with the Diversion counselor, participating in treatment with Creative Interventions, facing a felony charge, and coping with the lack of a driver's license seems to fuel the client's motivation and sparks his behavior change. Diversion provides clout to the client's treatment experience. Clients are working toward the incentive of a "favorable" evaluation report to the court. This "carrot at the end of a stick" approach can be a powerful incentive for positive change. This clout is only one of the tools the program utilizes in its overall role as catalyst for change. By encouraging the clients to deal with the issues that emerge, by pushing them to make their own responsible choices for their decisions, and by providing the linkage for all the other factors at work, input and structure are constantly provided.

APPENDIX

Pre-Trial Diversion DWI Felony Program

Successful Program Completion Requirements

Successful completion of Pre-Trial Diversion is based on the client's demonstration of significant attitude and behavior change, not attendance. Clients must actively participate in treatment in order to learn and implement new behaviors.

Because of the individualized nature of the treatment plan and the uniqueness of each client's potential for change, final evaluations are determined on a case-by-case basis. There are, however, certain basic criteria that are taken into account for each client:

1. Responsibility - At all times the responsibility for change rests with the client. He/She will be encouraged to learn to be responsible for his/her actions and their consequences.

2. Insight Development - The client is expected to develop awareness of his/her particular dysfunctional patterns of behavior and make more constructive changes.

3. Feelings - The client is encouraged to get in touch with the feelings that produce his/her dysfunctional behavior.

4. Communication Skills - Effective interpersonal communication skills should be demonstrated by the client. A stress is placed on learning to be specific, direct, and open, and on developing active listening skills.

5. Identification of Needs Met by Alcohol - The client is expected to learn more about himself or herself, and specifically what needs are met for him/her by drinking.

6. Experimentation with New Behaviors - The client should be able to identify other behaviors that can meet the same needs as drinking. He/She should experiment with these new behaviors and be willing to take risks to develop these new skills.

7. Restructuring Lifestyle - The client is expected to change his/her lifestyle so as to interrupt the established pattern of DWI arrests and prevent the likelihood of future arrests for drinking-related offenses.

May 1982

II. CREATIVE INTERVENTIONS IN AN ALCOHOL AWARENESS PROGRAM

by

George M. Appleton and Joel Katz

Introduction

In this paper the authors wish to examine briefly some of the assumptions associated with alcohol awareness programs, specifically those directed toward the treatment of individuals charged with driving while intoxicated (DWI). The implications of recent research on the design of such programs warrant new approaches. Some of this research is discussed in the following section.

An existing program which incorporates some of these new approaches has proven dramatically that a new model based on individual responsibility can be more successful than traditional approaches to treatment. This new program is described later in this paper, in which we explore the assumptions basic to the program and the process through which the group members move.

Part I

Review of Current Thinking

Much emphasis is being placed today on relieving problems caused by the drunken driver. As a result, stringent application of penalties for conviction of driving while intoxicated as well as broader definitions of the state of intoxification have been promoted. In addition, the penalties themselves are becoming harsher. In New York State, for example, new laws compel the courts to impose mandatory fines for a DWI conviction, and mandatory prison sentences have been proposed for related crimes. The imposition of legal deterrents (the mandatory application of fines and prison sentences), however, does not seem to be effective. In Sweden it was proven that the imposition of stiffer penalties and mandatory jail sentences (punishment and the fear of punishment) did not act as a deterrent to further drinking and driving. 1/ That punitive actions fail to inhibit recidivism is further supported by other studies. 2/

1/ H. Laurence Ross, "Does Threat of Jail Deter Scandinavia's Drinking Drivers?" Traffic Safety, Vol. 75, No. 1, January 1975, pp. 10-13.

2/ Robert E. Booth and Ralph A. Grosswiler, "Correlates and Predictors of Recidivism Among Drinking Drivers," International Journal of the Addictions, Vol. 13, No. 1, January 1978, pp. 79-88.

Concurrent with the emphasis on apprehending and punishing the offender driver is an increase in attention on programs designed to discourage the drunken driver from operating a motor vehicle on the road. The directions taken by many programs, however, are limited by financial and social considerations. (For example, individuals who have been consuming alcohol and have, as a result, a higher content of alcohol in their blood than permitted by law cannot be forced to take a breathalizer test until they have driven; normally, they cannot be forbidden to drive until such test has been made.) Social customs and institutions, furthermore, generally do not exercise a restraining influence on the drinking driver. 3/

As a result, a variety of programs designed to increase the awareness of individuals already convicted on alcohol-related charges to the dangers of alcohol are being tried today. Many of these programs, educational in nature, do not seem to be successful. There is, in fact, considerable evidence that Alcohol Safety Action Projects and programs with similar objectives (the education of persons convicted of driving while intoxicated) do not work. 4/

Indications that education alone is not enough can be found throughout current literature. Research has demonstrated that educational programs may have a detrimental effect on certain types of referrals (e.g., severe problem drinkers). 5/ Individuals who are reluctant to assume responsibility for their actions may be prone to believe that, after completing the requirements of an educationally-oriented rehabilitation program, their problems with drinking and driving will disappear. This is not surprising, since the assumption is evidently basic to the design of the program and is espoused by the leaders.

3/ Richard D. Yoder, "Prearrest Behavior of Persons Convicted of Driving While Intoxicated," Journal of Studies on Alcohol, Vol. 36, No. 11, November 1975, pp. 1573-1577.

4/ Bert Hayslip, David Kapasainski, Alex Darbes, and Robert Zeh, "Evaluation of Driving While Intoxicated Programs; Some Methodological Considerations," Journal of Studies of Alcohol, Vol. 37, No. 11, 1976, pp. 1742-47.

5/ Paul Zador, "Statistical Evaluation of the Effectiveness of Alcohol Safety Projects," Accident Analysis and Prevention, Vol. 8, No. 1, February 1976, pp. 51-66; Paul Levy, Robert Voas, Penelope Johnson, and Terry M. Klein, "An Evaluation of the Department of Transportation's Alcohol Safety Action Projects," Journal of Safety Research, Vol. 10, No. 4, Winter 1978, pp. 162-176; Pascal Scoles and Eric W. Fine, "Short Term Effects of an Educational Program for Drinking Drivers," Journal of Studies on Alcohol, Vol. 38, No. 3, March 1977, pp. 633-637.

In an article entitled "Emerging Directions in Alcohol Treatment--A New Hope for the Problem-Drinker Offender," 6/ the authors point out that the difference between alcoholics and alcohol abusers is largely ignored by the majority of alcohol treatment programs. This is interesting in light of the fact that the majority of drunken driver offenders are alcohol abusers, not alcoholic persons. They continue to point out that what treatment has been available has been directed toward the alcoholic person. Characteristically, emphasis is placed on the recognition of the fact that the person convicted of driving while intoxicated has a problem with alcohol and should consider himself/herself an alcoholic. Based upon this traditional approach, many of the programs subscribe to a medical model. The offenders are regarded as people who have a disease, a basic intolerance for alcohol which, after the substance has been consumed, renders them incapable of self-control. 7/

The fact that traditional approaches continue to be prevalent, according to Goodrick, reflects deeply held beliefs and attitudes by those working in alcohol dependence treatment programs rather than any substantial evidence that the approach is effective. 8/ It was noted that many of these alcohol workers are themselves members of Alcoholics Anonymous. This reinforces the ideas basic to the disease model of alcoholism and their use in programs associated with alcohol treatment programs. These ideas may be counter-productive in providing therapeutic assistance to individuals who have drinking problems. Basically, they allow the individual to deny responsibility for his/her behavior and, in effect, provide an excuse for irresponsible behavior. 9/

An important statement made by Sobell and Sobell (and one which seems to have been largely ignored by many of the current alcohol workers) is that out of more than 125 reports published in journals associated with problems related to the use of alcohol, none has presented

---

6/ David D. Goodrick, Gerald Vigdal, and Dennis Sutton, "Emerging Directions in Alcohol Treatment--A New Hope For the Problem-Drinker Offender," Offender Rehabilitation, Vol. I, pp. 57-66.

7/ Ibid.

8/ Ibid.

9/ M. B. Sobell and L. C. Sobell, "The Need for Realism, Relevance and Operational Assumptions in the Study of Substance Dependence," in Biological and Behavioral Approaches to Drug Dependence, H. D. Cappell and A. E. LeBlanc, eds. (Toronto: Addiction Research Foundation, 1975).

scientific evidence that the disease model of alcoholism is valid. 10/ Indeed, exclusive allegiance to the theory has had several adverse consequences (including the de-emphasis of research on alternative viewpoints, the legitimization of one questionable viewpoint, and the political support of one questionable view. This statement, made in 1973 by Sobell and Sobell is, in the authors' opinion, still true.

Some alcoholic persons have learned to drink responsibly, a fact which is not recognized by the more traditional approaches. The newer approaches in alcohol treatment are directed toward the examination and elimination of many of the assumptions previously held to be true. They stress the introduction of a model which incorporates individual responsibility for all behavior as a cornerstone of the therapeutic process. 11/

The population from which the clients are drawn is, characteristically, experiencing considerable stress. The group membership is mandated by the judicial system. The stress is manifested in resistance and hostility. In traditionally oriented approaches, this resistance and hostility may never be dealt with adequately, particularly in programs which emphasize a didactic approach to the problem. This approach may result in temporary and inauthentic adoption of the value system of the teacher-leader and may explain the failure of many programs.

Another limitation with many existing programs is associated with time constraints which do not take into consideration the effectiveness of the information provided on the program enrollees or the differences in the rates of learning and the effect of such learning on behavior. These limitations may help to account for a lack of effectiveness in current program performance as measured by rearrests. Clearly what is needed is an individualized approach by which the length of the program corresponds to the length of time each individual in the program needs in order to demonstrate that specified learning has taken place. This requires that the program planners have clear ideas as to how the program participants demonstrate the changes which have taken place for them while participating in the experience. The need to spell out competencies and define them operationally is paramount and must be met on a regular basis. Inasmuch as almost all of the competencies are interpersonal situations, a condition which is permitted in a group counseling setting (which, rather than being structured, remains flexible) allows the participants to learn to become more effective in handling interpersonal problems in living. With the acquisition of knowledge and interpersonal skills, and the

---

10/ Ibid.

11/ Ibid., pp. 135-136; Richard Zylman, "DWI Enforcement Programs: Why Are They Not More Effective?" Accident Analysis and Prevention, Vol. 7, No. 3, September 1975, pp. 179-190.

realization that each person is ultimately responsible for all his or her own decisions, each person is more able to meet individual needs in satisfactory ways.

The authors would like to suggest here that treatment programs should serve another function as important as that of preventing those under the influence of alcohol from driving: the identification of drivers who are prone to behave in irresponsible ways in spite of the influences of education and increased awareness prompted by program experiences. The accurate identification of such individuals is difficult in programs which have as the objective education of participants as to the effects of alcohol on drivers and the dangers implicit in driving after drinking. What is needed is an approach which allows for accurate clinical assessment of the degree to which group members behave responsibly and make responsible decisions about when and how to drink. Recommendations for reissuance of driver's licenses should not be made until the individual clearly demonstrates responsible behavior, particularly under stressful conditions. Such individuals are less apt to allow the occurence of a situation in which they might drive while intoxicated.

Part II

Creative Interventions Program

The program described here has been in effect for three years. Its success is illustrated by the fact that since its inception, no individual who has successfully completed the program has been rearrested on charges related to driving while intoxicated. Between March 1, 1980, and December 30, 1980, 125 individuals were enrolled in the group experience. The average amount of time spent in the group was about 30 weeks. Approximately 15 percent of the group members were unwilling to make the required changes in behavior and as a result, left the groups. Recommendations for the reissuance of licenses were not made in these cases.

The Creative Interventions Program (CIP) is based on the assumption that most individuals with alcohol-related problems have not acquired or have lost the interpersonal skills and knowledge that enables them to recognize and meet basic needs associated with or met through social interaction. As a result, the problems in living which they encounter cannot be solved through interpersonal means and are largely avoided by those experiencing difficulty. These individuals are inclined to avoid the awareness and expression of intense feelings which result from contact with others. Such people tend, furthermore, to react to their environment rather than act upon it. As a result, it is difficult for these individuals to be assertive and meet their needs actively. The consumption of alcohol serves several purposes associated with reducing anxiety in interpersonal situations and reducing the individual's ability to recognize his or her responsibility for failure to meet those needs. It is the

irresponsible consumption of alcohol with which this program is concerned.

The experiential approach characteristic of our program is one in which clients who are under considerable stress (aggravated by possible felony charges and the certain loss of their driver's license) meet for group therapy. In this group all of the social behaviors, effective and ineffective, are evident and all behaviors are subject to discussion by the group. Perhaps for the first time, the group members regularly become aware of how their behaviors affect others and can learn how to exchange less adaptive behaviors for those which are helpful in meeting needs and might be classified as responsible.

There is an assumption made here--one which may be difficult to grasp but which is very basic to all experiential group counseling situations; that is, individuals in the group will demonstrate the same interpersonal behavior in the group counseling situation that they demonstrate in their lives outside of the group. The same needs are present: similar stresses exist in the group situation as exist outside of the group, and group participants' interpersonal reactions, effective and ineffective, are demonstrated in response to the stresses which occur in the group. It is these characteristic responses with which the groups must work. The process of communication, epitomized by the feedback process, is used to enable group members to behave, to become aware of the behavior of others (verbal and non-verbal), to evaluate the effectiveness of the behaviors, and to encourage group members to try new behaviors. The focus is on what is said, what is done, and how the individuals react to what is said and done. Excuses for behaviors which are not productive are not accepted. The lives of the group members outside of the group situations, although not unimportant, become important only as they relate to behaviors experienced in the present. (This is an important connection; the ability to generalize from the group situation to one's life problems outside of the group is necessary for change to occur.) For example:

> Mr. Smith has made several attempts to say something during a heated exchange involving several group members. He is interrupted and ignored and finally gives a sigh, leans back in his chair with his arms folded, and mutters something under his breath. A more experienced group member recognizes that something important is happening and authoritatively stops the discussion. The group member then gives Mr. Smith feedback about how little impact Mr. Smith has on him when he seems frustrated like that, and he goes on to describe how Mr. Smith withdraws. One of the group leaders points out that Mr. Smith has stated that the times that he stops at a bar after work and loses control of his drinking are times when he is experiencing the same type of frustration.

> Mr. Smith is then encouraged to try to make some active statements to the group about how he felt when he was interrupted. Mr. Smith continues to experiment with active ways to deal with the group when he feels frustrated over the following weeks. His role and image in the group begin to change, and he reports positive changes in his life at work and at home.

Part of Mr. Smith's behavior pattern that led to his arrest was his inadequate way of taking care of himself when he was frustrated. Rather than finding an active and responsible way to change things that frustrated him, Mr. Smith would find some rationale or justification for why he couldn't or shouldn't do anything.

The group itself acts as a therapeutic agent of change with each and all of the members. Resistance and hostility are encouraged in all group members. In that resistance, however, lies an important source of strength. The free expression of the hostility, accepted and encouraged by the group leaders, allows clients under stress to make constructive use of the energy they have bottled up in passive withdrawal and inappropriately expressed hostility. The anger becomes redirected at the source of the difficulties (the self), and the client is able to use the energy in useful ways, ways which put the client in control of his or her life. This is an important aspect of the group process. Resistance is part of the reality of the situation. It must be recognized and used in constructive ways to help the group members to become better able to take care of themselves. Through the feedback process, group members are encouraged to react to each other and share with the entire group the effects of the behavior of other participants on each individual. The feedback may be supportive or unsupportive of specific behaviors demonstrated witin the group experience. The non-evaluative aspect of feedback must be stressed here. Those who give the feedback report on their reactions to specific behaviors. The behaviors in themselves are not "good" or "bad," and the decision as to whether they are appropriate is always left up to the receiver of the feedback. Only that person can judge whether the behavior has helped him or her meet specific goals. In a sense, the group may be regarded as a community in which interpersonal behaviors may be performed and evaluated by the performer as to the degree to which they help him or her meet needs. The behavior may be practiced or eliminated in subsequent situations. Clearly, operant conditioning is taking place.

There are behaviors, encouraged by the group leaders, which are fundamental to the process of change. At their first group meeting, members receive a list of 11 behavioral competencies--behaviors they are expected to demonstrate on a regular basis throughout their attendance in the group (see Appendix 1). The behaviors are related to appropriate ways by which an individual can meet emerging needs.

At the same time, the behaviors are interrelated and, although treated discretely, each competency supports and promotes others. Taken as a whole, they function to help the passive individual become active in meeting his or her needs. These behaviors also serve as a basis for feedback and enable group members to evaluate their progress in the group. The competencies must be practiced on a regular basis by each participant in order to meet the requirements necessary to successfully complete the program.

It should be noted here that whether group members "fake" responses is irrelevant. It is expected that the production of new responses may require the exaggeration of affect, or experimentation with affective responses including verbal and non-verbal over-reaction. New and different responses are foreign and are, in effect, being "tried on for fit." Clearly, those which are effective will have meaning and will be incorporated into the behavioral repertoire of the client. Only with the repetition of such responses can they be included permanently.

Interpersonal stress, similar to the stress encountered in life outside the group, inevitably occurs. Frequent evaluations by other group members, ambiguity which characterizes the group meetings while expectations are slowly clarified, as well as the stress associated with being arrested for driving under the influence of alcohol, all contribute to the distress of group members. At times, a high degree of stress is an important element. By working with it, and through it, group members are able to become aware of the effect of stress on individual behaviors. They are able to get feedback on their reactions in a stressful situation and learn how to change their behaviors until they become pro-active and productive.

The process through which the group as a whole and the individuals within the group pass is one which involves change. The change is the result of active participation in the group, and the learning takes place as a result of the group experiences. In an experiental group, the type of learning differs from that which occurs under a didactic approach. It is more value oriented, more active, and, in the authors' opinion, more meaningful. The learning is demonstrated both verbally and non-verbally. Behaviors which demonstrate increased participation in the group decision-making processes (as displayed by posture, expression of involvement in interventions, display of creative thought and awareness of the implications of behavior, relevant self-disclosure, etc.) are readily observable. The entire group experience is relevant. Group members are responsible for asking for and setting up their own evaluations. The ways in which they take responsibility for this process are related to the ways in which they take responsibility in life outside of the group. All of this provides data for the leaders and group members on the degree to which each participant behaves responsibly. Basing evaluations on the

totality of demonstrated behavior reduces the opportunity for a member to display inauthentic behaviors solely for the purpose of "getting through" the program.

Basic to the change is the acceptance of responsibility by each individual for the decisions each has made and which have resulted in present conditions. The degree to which the group member is satisfied with present conditions is related to the degree to which the individual is motivated to make changes in life. The acceptance of personal responsibility for life-related decisions necessitates a change in values. Where a group member previously saw problems as events "out there," he or she is now able to examine responses and make choices as to which response he/she wishes to make. The responsibility for the problems as well as the solutions now is seen as belonging to the individual.

The experience itself has a "freeing" quality. Group members generally express optimism. They become less rigid, more accepting of themselves and others, able to deal with others in more facilitative ways. Their relationships with other members as well as the leaders become less demanding and more open. The most important characteristic of the newly demonstrated behaviors, however, is that each of the members accepts responsibility for his/her behavior and the consequences of his/her decisions.

Program Specifics

In this section, the authors will describe and comment on specific aspects of the program. These aspects are associated with selection of group members, characteristic leader approaches, evaluation of group member behaviors, and the procedure for termination of the experience.

Leader Approaches

The group leaders, who usually work in pairs, maintain focus on the present behaviors in the group. At the same time, they encourage the use of facilitative feedback in the group interactions. Such feedback is a simple, concise statement of how one reacts to the behavior of others. It is generally nonevaluative and provided as information on the effect of the behavior of others rather than an attempt to change behavior.

Leaders discourage advice-giving, which is seen as a method of imposing the will of one group member upon another. They also discourage asking questions, which may avoid responsibility by the questioner for pertinent statements which underlie the questions. The importance of demonstrating responsibility for statements and behavior is vital.

At times the group leaders suggest experiments which might be practiced by the group member to increase opportunities for the feedback process to take place and individual awareness to be increased. Role playing, psychodrama, "empty chair" techniques, and other games may be suggested. Many of these are allied to games practiced in Gestalt psychology. "Homework" assignments may be suggested. Such assignments are presented in the form of specific behaviors which the group member can practice in social situations outside of the group environment. The results incurred by the behavior may then be evaluated by the members. The focus of this procedure might be on the degree to which the new behavior helps the individual to meet his or her needs satisfactorily. Subsequently, they may share some of the results with the group.

The leaders, who conduct themselves as members and whose behaviors at times may not be distinguished from those of the mandated members, model the behaviors which will be practiced by group members, helping them to take risks, develop new behaviors, and behave in facilitative ways with other group members. It is important that the leaders be aware of group atmosphere, particularly of the element of stress. By remaining ambiguous at times, the leader may increase the level of stress and at the same time force the group members to become responsible for what happens in the group, thus permitting the group members to experience themselves in situations with varying degrees of stress. At such times, the leader may give feedback. The focus of the feedback might be, for example, on how a certain member reacts to nonsupportive statements made by others. Feedback given by the leader should, if possible, focus on actions which might be related to irresponsible behavior on the part of a group member, or behavior which does not seem to help the member to meet his or her goals.

Evaluation of Group Members

Group members are evaluated primarily in terms of the behavioral competencies, a list of which is presented to each new group member (see Appendix 1). These competencies are associated with processes which are designed to help the members to become pro-active and in control of tasks they encounter in life.

By design, the competencies focus on observable behaviors. Words implying the use of value judgments are not included. The behaviors are defined in clear terms and the use of psychology jargon is avoided. They should be practiced regularly throughout the experience by all members of the group. The practice of these behaviors (or the failure to practice them at appropriate times) is a source for feedback to each member by the rest of the group.

Procedure for Termination

Termination procedures are designed to increase the opportunities for feedback, enable the member requesting termination to identify specific areas which need more work on his or her part, and may be seen as an appropriate finishing experience (see Appendix 2). Although evaluations such as these may take up a great deal of the group's time, it is important to note that all group members participate in the experience and, while giving feedback, may themselves practice the behaviors suggested by the competencies and supported by the objectives of the group.

Appendix 1.

Creative Interventions

This competency list is designed to serve as a basis for evaluation and as a structure for participation in group meetings. In order to meet the requirements of this program it is necessary for members to demonstrate the behaviors in these competencies on a regular basis in the group.

1. Giving Feedback - Making a statement about how a group member's present behavior affects you. This involves paying attention to non-verbal behavior in others (tone of voice, silence, posture, gestures, etc.).

2. Being Responsible - Seeing yourself as causing your own feelings and as having a choice in the way you behave.

3. Demonstrating to others that you can understand their feelings, understand the way they see a situation, and hear them accurately.

4. Self Disclosing - Demonstrating the ability to communicate your thoughts and feelings in the immediate present to others.

5. Making connections and seeing similarities between your thoughts, feelings, and behavior in the group, and your thoughts, feelings, and behavior outside the group.

6. Congruency - Having your words and non-verbal behavior communicating the same thing to others.

7. Identifying specific needs which you meet by drinking or in the environment associated with drinking.

8. Demonstrating behaviors in the group which meet those needs aside from drinking.

9. Experimenting with new behaviors. Example: If you typically speak loudly, try experimenting with whispering.

10. Finding ways of helping group members who do not meet the competencies.

11. Demonstrating basic assertiveness skills to actively and directly make changes in the group.

Appendix 2

PROCEDURE OF TERMINATION

It is each member's responsibility to request an evaluation at the tenth (10th) week and again before the twentieth (20th) week. Each member's behavior will be evaluated by the group and the leaders. The evaluation will be based on the extent to which the group and leaders see that member as having met the specific competencies. All competencies must be met before a favorable recommendation will be written.

If the evaluation determines that a member has not met all competencies, the member has an option of continuing on in the group. In this case it is required that the member pay for five (5) sessions in advance and request a group evaluation at the end of that time. It is possible that more than one extension may be necessary to meet the competencies.

Consensus must be reached in each evaluation, that is, all members and leaders must agree to support the group decision.

BIBLIOGRAPHY

Booth, Robert E. and Grosswiler, Ralph A. "Correlates and Predictors of Recidivism Among Drinking Drivers," International Journal of the Addictions, Vol. 13, No. 1 (January 1978), pp. 79-88.

Glasser, William. Reality Therapy: A New Approach to Psychiatry. New York: Harper & Row, 1965.

Goodrick, David D., Vigdal, Gerald, and Sutton, Dennis. "Emerging Directions in Alcohol Treatment--A New Hope for the Problem Drinker," Offender Rehabilitation, I, pp. 57-66.

Hayslip, Bert, Kapasinski, David, Darbes, Alex, and Zeh, Robert. "Evaluation of Driving While Intoxicated Programs; Some Methodological Considerations," Journal of Studies on Alcohol, XXXVII, 2, 1976, pp. 1742-47.

Levy, Paul, Voas, Robert, Johnson, Penelope, and Klein, Terry M. "An Evaluation of the Department of Transportation's Alcohol Safety Action Projects," Journal of Safety Research, Vol. 10, No. 4 (Winter 1978), pp. 162-176.

Ross, H. Laurence. "Does Threat of Jail Deter Scandinavia's Drinking Drivers?" Traffic Safety, Vol. 75, No. 1 (January 1975), pp. 10-13.

Sobell, M. B. and Sobell, L. C. "The Need for Realism, Relevance and Operational Assumptions in the Study of Substance Dependence," Biological and Behavioral Approaches to Drug Dependence. Edited by H. D. Cappell and A. E. LeBlanc. Toronto: Addiction Research Foundation, 1975.

Scoles, Pascal and Fine, Eric W. "Short Term Effects of an Educational Program for Drinking Drivers," Journal of Studies on Alcohol, Vol. 38, No. 3 (March 1977), pp. 633-637.

Yoder, Richard D. "Prearrest Behavior of Persons Convicted of Driving While Intoxicated," Journal of Studies on Alcohol, Vol. 36, No. 11 (November 1975), pp. 1573-1577.

Zador, Paul. "Statistical Evaluation of the Effectiveness of Alcohol Safety Projects," Accidents Analysis and Prevention, Vol. 8, No. 1 (February 1976), pp. 51-66.

Zylman, Richard. "DWI Enforcement Programs: Why Are They Not More Effective?" Accident Analysis and Prevention, Vol. 7, No. 3 (September 1975), pp. 179-90.

89697

DISPUTE MEDIATION:

EVALUATING THE COURT-SPONSORED MODEL

by

PAUL J. WEBER, Ph.D.
PHILIP G. LAEMMLE, Ph.D.
RAY WEIS, M.S.W.
JAN KEMPF

The Commonwealth of Kentucky has long been in the forefront of progressive efforts in pretrial justice. In 1976 Kentucky became the first state to outlaw bail bonding for profit. Soon after, a statewide system of pretrial release was implemented in Kentucky; and over the next few years, programs offering diversion and mediation were added with projects organized in urban jurisdictions throughout Kentucky.

One such urban locale where an alternative dispositional program was started is Jefferson County, which includes the metropolis of Louisville. It is in Louisville that the Dispute Mediation Program of Jefferson County was established, the program whose evaluation serves as the focus of this paper. The paper highlights the evaluation results and includes a lengthy process discussion; an assessment of program impact in terms of client satisfaction with and longevity of resolutions; a cost analysis on a per-case basis; and a case analysis, examining the link between the referral source, the charge, and the relationship of disputants' impact on success. Readers will find particularly interesting the increased efficiency of the court criminal summons and arrest warrant processing system, attributed by the authors to mediation intake staff fulfilling this function. Note also the benefits associated with housing the program in the Hall of Justice.

Paul J. Weber and Philip G. Laemmle are associate professors of political science at the University of Louisville. Dr. Weber received his doctorate in political science from the University of Chicago. Dr. Laemmle received a doctorate in political science from Indiana University. Together, they are currently working on an experimental data-management project with the Pretrial Services Agency in Louisville. Ray Weis is Director of the Pretrial Services Agency for the 30th Judicial Circuit. Jan Kempf is Coordinator of Court Services at the same agency. Mr. Weis received his masters degree in social work from the University of Louisville. Ms. Kempf received her bachelor of science degree from the University of Louisville, where she is currently working towards a master of business administration degree.

In the 1980 Annual Journal of the Pretrial Services Resource Center, Dr. David I. Sheppard published the results of an evaluation of three Dispute Mediation Programs, each set up on a different organizational model. 1/ The Atlanta Center was sponsored by a non-profit organization created for the purpose. The Kansas City Center was sponsored by the local Community Services Department. The Los Angeles Center was sponsored by the Los Angeles County Bar Association. All the Centers were funded by LEAA grants.

There is another model which has not yet been adequately evaluated: the court-sponsored model. It is the purpose of this paper to examine the Dispute Mediation Program of Jefferson County (Louisville), Kentucky, which has also been funded by an LEAA grant, but is affiliated directly with the court itself rather than a non-profit or social service agency.

Evaluations of programs are generally concerned with the following areas: content, process, structure, outcomes, and impact. Because of the lack of available data prior to the establishment of the Dispute Mediation Program, our evaluation is forced to follow a "post-test only" format. Within our evaluation we shall assess three of the above areas--process, outcomes, and impact.

Process evaluation focuses on assessments of the workload management of an agency and/or program. In this evaluation we are looking at the following indicators of workload management.

1. Total cases reviewed and number of cases diverted from the judicial system.
2. Cases handled under expedited warrant review.
3. Staff time involved in processing cases.
4. Case-staff ratio.
5. Cost per case.

Outcome measures focus upon the results of programmatic or agency activity. In this evaluation we shall focus on data related to case disposition as a result of the Dispute Mediation Program.

Impact measures are the most elusive, and in many regards, the most important of all evaluative measures. Impact measures deal with not only the systemic effect of the program/agency, but the perceived effect of the program by the clientele. There is often a conflict

---

1/ David I. Sheppard, "National Evaluation of the Neighborhood Justice Centers Field Test," Pretrial Services Annual Journal, Vol. III, 1980, p. 192.

between "excellent" performance on process indicators and impact indicators, because "citizen satisfaction" tends to be labor intensive, while "efficiency" requirements tend to minimize labor. We have included two measures of citizen satisfaction in this evaluation as an attempt to evaluate impact. The first is to examine the results of the 30-day follow-up. The second is to examine the results of a survey of program participants. Before proceeding to the evaluation, it may be useful to provide a description of the program.

Program Description

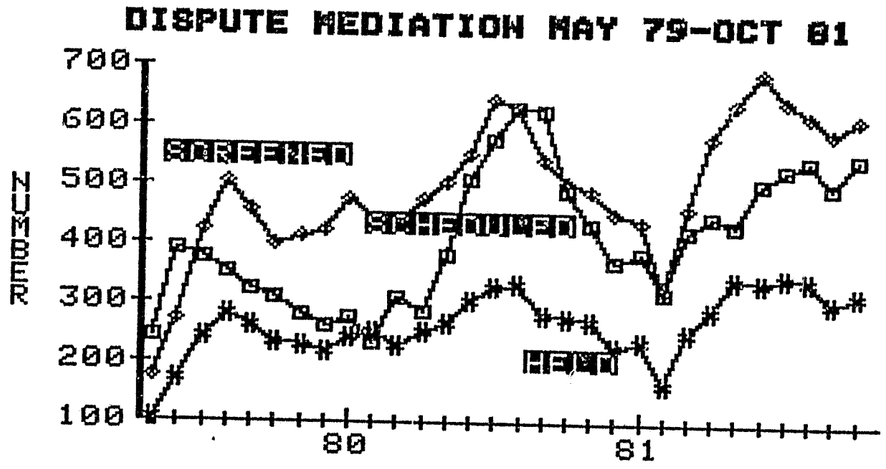
The Jefferson County Dispute Mediation Program was initiated on May 7, 1979, as an experimental project to provide an alternative to the formal warrant process in the resolution of interpersonal disputes. Mediation is an option available to the complainant in most misdemeanor cases, e.g., assault third degree, criminal mischief, harassment, terroristic threatening, menacing, and theft by unlawful taking. Depending upon particular circumstances or at the discretion of the court, other charges may be considered for mediation. Unlike some other programs, the one in Jefferson County does not mediate civil disputes.

Modeled after the Neighborhood Justice Center concept and the Night Prosecutor's Program in other localities, implementation of the program follows a national trend toward more personalization of human needs within the criminal justice system. Jefferson County has a population served by the Jefferson County District Court of approximately 930,000.

In Jefferson County the Pretrial Services Agency of the Administrative Office of the Courts has administrative responsibility for the program, while judicial responsibility is vested in the District Court bench. By rule of the District Court, information regarding the hearings, records of proceedings, and personnel employed to execute the program are exempt from subpoena.

The main goal of the program is to assist the operation of the District Court in processing a large number of potential cases while providing more personalized services to those individuals wishing to utilize the court. In order to achieve these goals the program provides two distinct functions: intake, the interviewing and screening of citizen complaints; and mediation, an attempt at conflict resolution. Figure 1 provides a month-by-month record of the two functions.

FIGURE 1



TOTAL SCREENED AND REFERRED
TOTAL HEARINGS SCHEDULED
TOTAL HEARINGS HELD

At initial intake the emphasis is on the screening of frivolous and/or invalid complaints, the referral of complainants to other service agencies where appropriate, and the assimilation of sufficient and pertinent information to assist the reviewing judge to determine charges. Current program data indicate that at this stage 28.3 percent are screened and referred elsewhere while 24 percent of those remaining eligible elect mediation. The initial "over-the-counter" interview provides a function in the community difficult to quantify. In many cases it is the sole "point of access" into the political as well as the criminal justice system for people who have little knowledge of the system and few resources. The physical location of the program in the Hall of Justice, we believe, adds an element that may be lacking in Neighborhood Justice Centers: the aura of law and order, of legitimacy and seriousness associated with traditional court proceedings. While they still have the advantage of a more personal

information service, clients are spared the impression that they are being given a cheap substitute proceeding reserved for "frivolous" cases. The location gives both the complainant and the respondent the realization that the charge is being taken seriously. We believe this adds to the respondents' willingness to settle the problem. A second advantage of the physical location is that it assures that sufficient numbers of cases are processed to make the system efficient. Indeed, few people come to the Hall of Justice with the idea of mediation in mind. Tying the intake function to the traditional warrant desk has meant that many people who originally had come to seek warrants chose mediation when they discovered this option. If they decide not to attempt mediation, they are already in the location where alternatives are available.

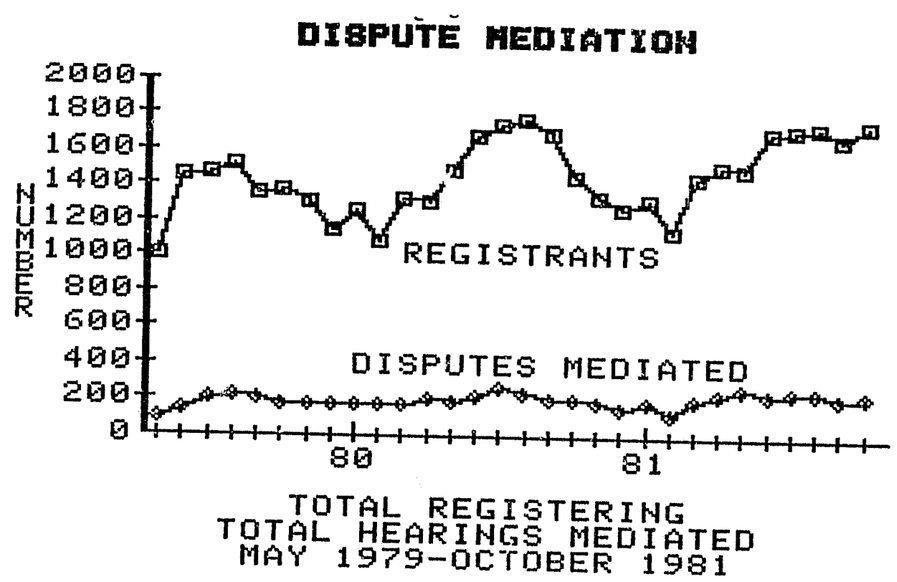
Additionally, the Intake staff is instrumental in processing for the court all criminal summons and arrest warrants. As an extension of this involvement and in keeping with program goals of assisting the court to better manage its flow while personalizing its services, Intake provides a vital link in the process of review of unserved warrants. With the support and encouragement of the local judiciary, a process was established to review all warrants which were unserved within 60 days of their issuance. In all cases except bad checks, Intake staff contacts the complainants, appraises them of the difficulty in service, and attempts to seek additional information to expedite resolution. All complaints are then reviewed by the judiciary and reissued for service, filed as valid, or docketed for dismissal. 2/ While the first two options assist in controlling the flow of paperwork, the latter eliminates the physical arrest of a defendant and all the subsequent departmental involvements (e.g., police departments, corrections, pretrial).

Cases are channeled into the second function of the program, mediation, from three sources. The majority of cases result from individuals selecting mediation after discussion with an Intake Officer. When an individual elects to utilize the program, an informal hearing is scheduled for approximately one week from the date the complaint is filed. The respondent is notified by mail of the time and date of the scheduled hearing, the complaining party, and the nature of the complaint. A number of cases are referred to the program by the individual judges after review of sworn affidavits. Individuals whose complaints are referred in this manner are notified by letter of the judge's request that they attempt mediation and the date and time of the hearing. The third channel of entry is referral from the bench in Warrant Court. Involved parties are notified in court of the referral to the program. All such cases are assigned a court continuance date as well as a mediation hearing date.

2/ To date (December 1981), of the 5,609 returns, 1,290 (23 percent) were docketed and disposed.

At the time of the mediation hearing, the two (or more) parties involved in the conflict meet with an impartial Hearing Officer and work toward developing a mutually acceptable resolution to their difficulty. The Hearing Officer directs and controls the hearing and establishes some basic rules of conduct at its onset. The Hearing Officer does not act as a judge in determining guilt or innocence, nor does s/he impose or attempt to impose a resolution upon the individuals. Rather, the prime function of the Hearing Officer is to facilitate the flow of communication between disputants so that a resolution may be more readily achieved. The climate of the hearing is one of informality in which both parties are encouraged to speak freely, giving their interpretations of the conflict, what resolution they would like to see achieved, and what they would find acceptable. Attorneys are welcome to attend hearings with their clients; however, the sessions are informal rather than adversarial in nature. Figure 2 illustrates the mediation process. It can also be used to show the striking differences in complaints according to the various seasons of the year.

FIGURE 2



Should a respondent fail to appear at the appointed time or should the parties be unable to resolve their differences, the Hearing Officer assists them, if they desire, in filing a formal complaint. In situations where an individual had initially filed an affidavit which was subsequently referred by a judge to the program, the judge is advised of the unsuccessful mediation and the affidavit is again reviewed. Unsuccessful bench referrals are directed to return to court on the scheduled continuance date. Successful disputants need not reappear on the continuance date. In all such cases, the Hearing Officer provides the judge with a report of the hearing.

In all cases in which an agreement is reached, a 30-day follow-up is completed by the Hearing Officer, to assure that the terms of the agreement are being upheld. If at the time of the follow-up, the agreement is not being adhered to, the Hearing Officer advises both parties of all available options.

Case Disposition

Figures 3, 4, and 5 show the flow of cases through the system from intake to final disposition for the first 30 months of the program's existence.

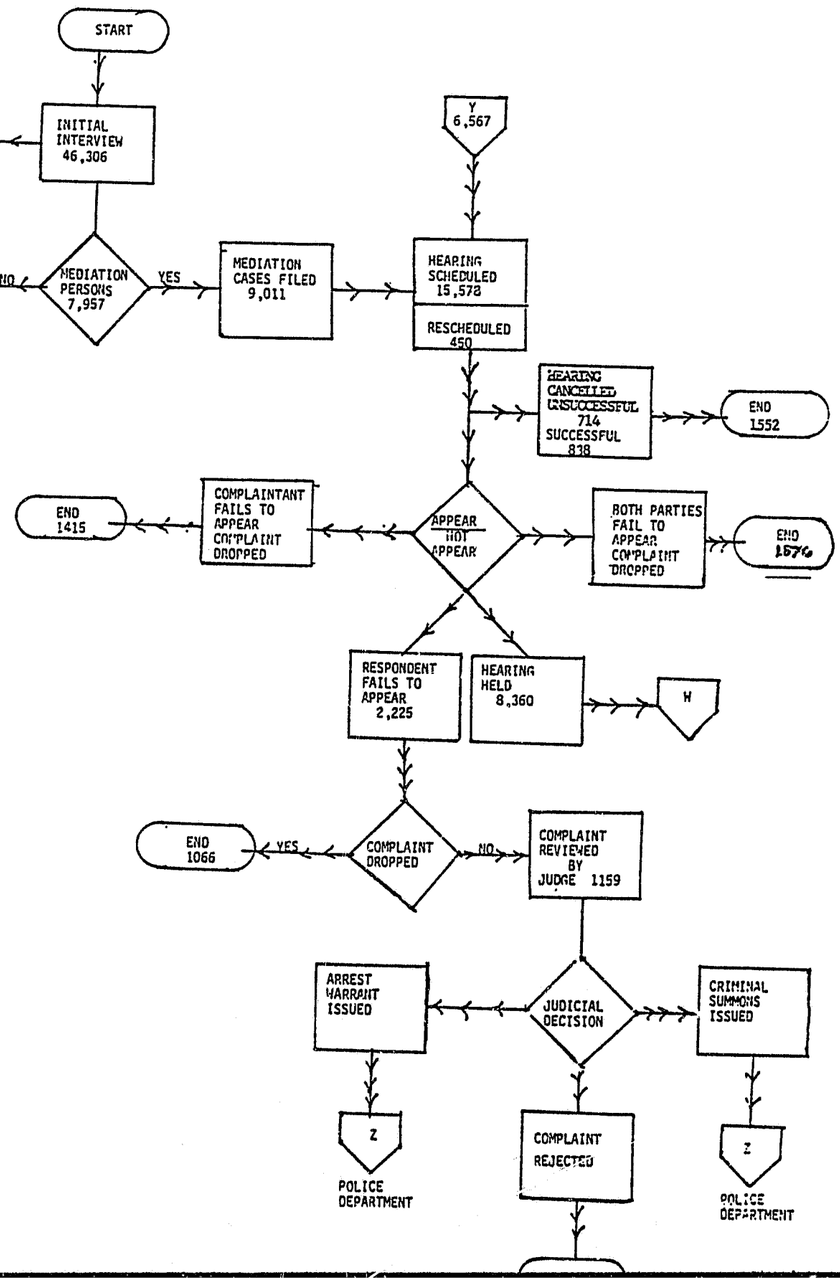
The Dispute Mediation intake desk is open for 102 hours each week. For the period under study the staff averaged 3.5 interviews each hour. Twenty-eight percent (13,143) of those interviewed were screened as frivolous or referred to more appropriate agencies. Fifty-four percent (25,206) initially chose to file a formal complaint, but of these some 22 percent (5,502) returned to mediation on the order of a District Court Judge. Seventeen percent (7,957) of the initial complainants chose mediation. What this has meant is that by providing screening and referral as well as mediation service prior to judicial review, 45 percent of all incoming complaints were diverted from formal court processes. If one includes those diverted later by judges, 56 percent of all complainants have been diverted from the formal system. This has been accomplished with a full-time staff of five intake workers.

Turning to the mediation component of the process we find that of the 15,578 cases scheduled for hearings during the period under review, 53 percent (8,360) were actually held. Of these, 74 percent (6,210) were resolved to the satisfaction of both parties. An additional 1,552 cases were cancelled. Of this figure 54 percent (838) contacted a mediation officer prior to the hearing date to report the conflict settled after the respondent received notice of the mediation hearing. Thus, when combining those cases that were successfully mediated with those cases which were successfully resolved once notice of the mediation hearing was received, a total of 7,048 individuals reached satisfaction without formal court intervention.

DISPUTE MEDIATION SERVICES

THIRTIETH DISTRICT

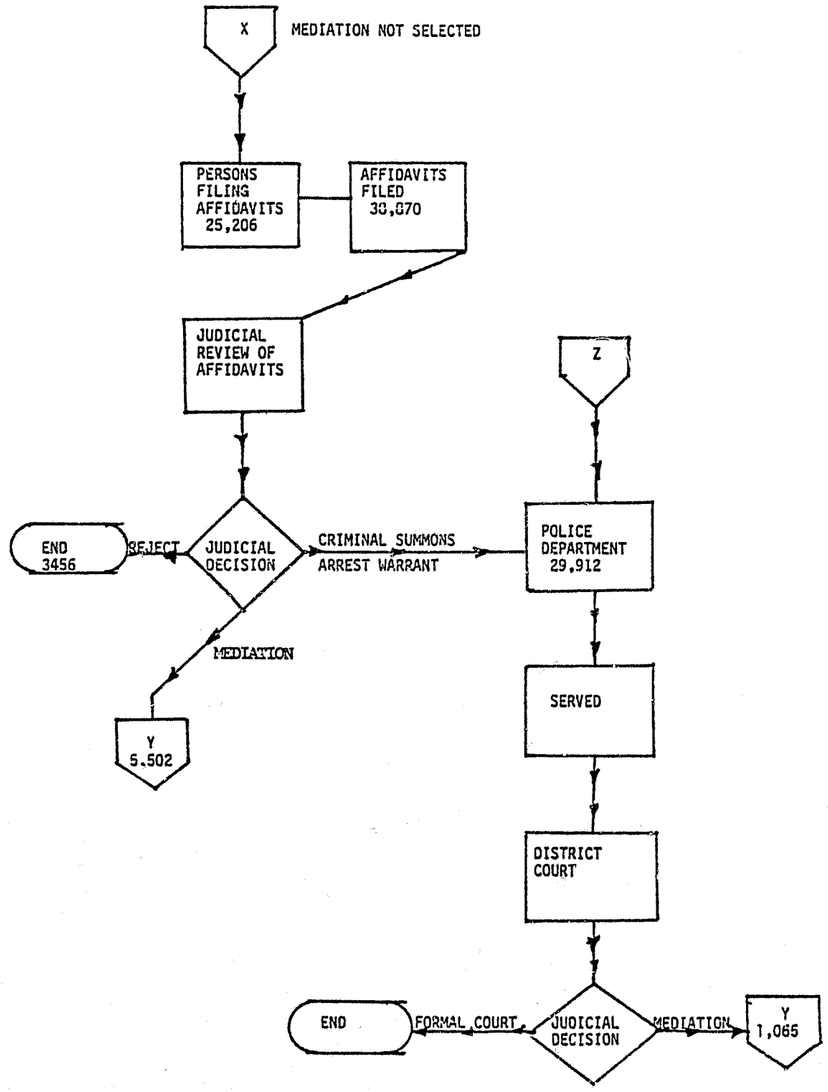
INTAKE PROCESS
JUNE 1979-DECEMBER 1981



DISPUTE MEDIATION SERVICES

THIRTIETH DISTRICT

JUDICIAL REVIEW JUNE 1979-DECEMBER 1981

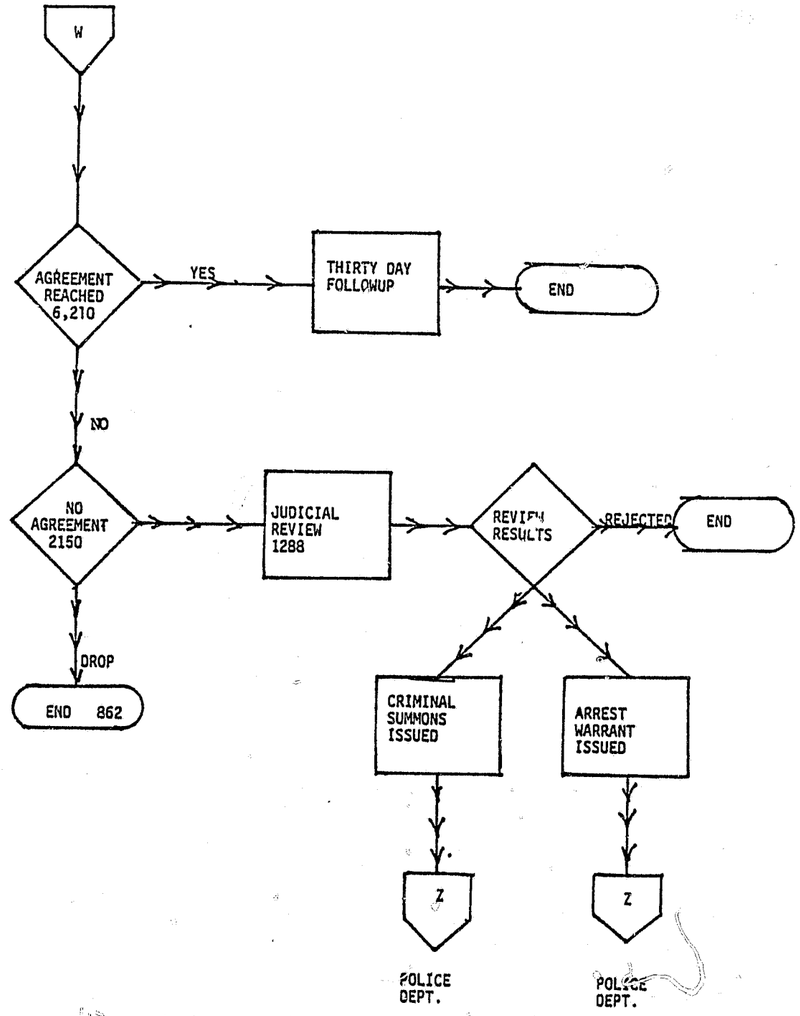


DISPUTE MEDIATION SERVICES

THIRTIETH DISTRICT

POST MEDIATION HEARING PROCESS

JUNE 1979-DECEMBER 1981



Of the remaining 5,258 cases for which a hearing was not held, 27 percent (1,415) were dropped due to failure of the complaining party to appear. An additional 30 percent (1,576) were dropped because both parties failed to appear. Of the 2,225 (42 percent) where the respondent failed to appear, 1,066 (47 percent) were also dropped when the complainant decided not to pursue the matter further. Thus 4,057 (25 percent) of the 15,778 cases scheduled for mediation were dropped. These cases, had they been processed in the formal court system, would have unnecessarily cluttered the dockets.

Granted that the flow chart may appear complex and the total number of cases processed appear large, it is significant that from the standpoint of the individual complainant the process is vastly simpler, quicker, and less expensive than a formal court procedure. Not only is the entire process carried on in the Hall of Justice with, in the case of successful mediation or cancellation, a maximum of two appearances, but the time taken to resolve the normal conflict is seven to ten days, as opposed to the 60 to 90 days required in the formal court process.

Mediations are normally termed "successful" if both parties reach a mutually agreeable solution at the session. One important monitoring procedure utilized by the Dispute Mediation Program is a call to the complainant 30 days after the mediation to determine whether the agreement has held up. Of the 6,210 cases in which initial agreement was reached during mediation, 3,296 were able to be reached. All reported that the agreement had held up and there were no continuing problems. An independent review of subsequent court records revealed that 117 or 1.9 percent of all mediations did fail and result in warrants being issued.

In August 1981 the Dispute Mediation staff initiated a comparative study of complainants over a three-month period (June-August 1980) who had selected mediation and complainants who, during the same three months, had elected to file a formal complaint. The study was designed to evaluate complainant satisfaction a full year after the mediation or court proceeding had taken place. While the contact rate was disappointing (558 of the 664 persons called were not able to be interviewed), the 106 persons interviewed provided an interesting contrast. Of the 53 who had chosen mediation, 48 (90.5 percent) reported that the mediation had been successful and that they had no continuing problems with the respondent. Five reported continuing problems. By contrast, of the 53 who had chosen a formal court proceeding, 38 (71.7 percent) reported no problems while 15 (28.3 percent) reported continuing problems. 3/ While the numbers are very small, the difference in satisfaction rates between the two groups

---

3/ The number is slightly misleading. According to the interviewer, a significant number of people reported no further problems with the defendant, but indicated dissatisfaction with attributes of the court process (e.g., never notified, case dismissed, multiple appearances).

does seem to indicate that mediated agreements are likely to be more stable and more satisfying than solutions imposed in a formal court proceeding.

Finding an accurate measurement of cost-effectiveness has proven somewhat difficult. The original LEAA grant was for the entire State of Kentucky and it was not possible to find a formula allocating precise costs for the 30th District. Nor was it possible to find a proper overhead figure for fixed costs such as rent and capital expenditures. For the purposes of this paper, we are assuming that if the Dispute Mediation Program were not operating, some other element of the court system would need to pick up much of its intake and record-keeping functions and that the overhead would remain the same. Therefore, in looking at cost-effectiveness, we are considering only personnel costs for the 30 months. The average monthly payroll, including fringe benefits, was $11,366.67 or $341,000 for the entire period. If computed by the total number of cases processed from the initial interview stage (46,306), the cost per case was $7.36. If computed by the number of those diverted from the District Court system (2,539), the cost per case was $13.41. 4/ If one figures costs only on the basis of hearings scheduled (15,578), the cost per case was $21.89.

Staff size remained constant over the 30-month period under study. It included five intake staff, six hearing officers working part-time (20 hours per week), one program clerk, the Pretrial Service Agency director, who devoted 10 percent of his time to the program, and a Coordinator of Court Services, who devoted 30 percent of her time to the program. The full-time equivalency was 9.4 individuals. Since the average number of cases processed per month was 1,544, the monthly case/staff ratio was 1:164. The monthly case/staff ratio for hearing officers actually mediating cases was 1:93, or slightly more than one case mediated for each hour spent.

On the bases of the indicators suggested earlier, it seems apparent that the Dispute Mediation Program performs successfully on all the evaluative measures. On the process evaluation measures, the total cases reviewed is high and efficient use of personnel time seems apparent. The cases diverted from the system would seem to be extremely beneficial, though cost estimate data on the benefits of this diversion are not available in any reliable form. On the outcome measures, the large number of cases which are handled within the system (54 percent) and the relatively small percentage of mediations which eventually reach the judicial system (1159/11,578) would

---

4/ These figures do not include the salaries of the Director of the Pretrial Service Agency who administers the overall program or the Coordinator of Court Services. The former spends 10 percent of his time on the program, the latter 30 percent. If their salaries are included in the program, the costs per case are approximately $7.62 per case for all cases and $13.61 per case for all cases successfully diverted from District Court.

indicate the Dispute Mediation Program is successful in reaching unit goals of non-judicial mediation. On the impact evaluation measures, the satisfaction indicated by clients through the survey is impressive, though the data are only suggestive. The 30-day follow up data indicated that only 1.9 percent of the mediations failed. The principal conclusion of this evaluation is that the Dispute Mediation Program has been effective in achieving its goals.

Case Analysis

For a closer analysis of the source and type of cases in which complainants chose mediation, we examined the records of four months. 5/ During these months 882 cases were referred to mediation from the three sources which were tracked for analysis. Table 1 shows the distribution by success rate. 6/

Table 1

Success by Referral Source

Number Row % Col % %Total %	Staff Referral	Judge Referral	Bench Referral	
	384	194	26	604
Successful	63.6%	32.1	4.3	72%
Mediation	76.6	63.4	81.2	
	45.8	23.1	3.1	
Unsuccessful	82	39	6	12.7
Changes	64.6	30.7	4.7	15.1%
Dropped	16.4	12.7	18.8	
	9.8	4.6	.7	
Unsuccessful	35	73	0	108
Pursued in	32.4	67.6	0	12.9%
District	7.0	23.9	0	
Court	4.2	8.7	0	
	501	306	32	N=839
	59.7%	36.5%	3.8	

5/ Needless to say, we would have preferred to analyze all the cases during the time under review. Unfortunately the program still relies on a manual filing system and staff resources were not available to pull the 9,198 cards.

6/ "Successful" includes cases in which agreement was reached after mediation was scheduled but before it was held. The difference in the numbers between Table 1 and Table 2 (839/882) is due to lack of complete data for each case in Table 1.

The table shows few surprises: 59.7 percent of all cases were referred by the staff, which reinforces our earlier observation concerning the importance of locating the program intake service in the Hall of Justice; 72 percent of the cases were mediated successfully. (Although it is not evident from the table, the figure is 70.7 percent if those resolved prior to the hearing are eliminated.) In 15.1 percent of the cases mediation was not successful but com- plainants were not willing to proceed further, and in 12.9 percent the complainant pursued the matter in District Court.

One significant difference is the success rate of judicial referrals in relationship to staff referrals. The former are unsuccessful 46.6 percent of the time, and the latter 23.4 percent. One probable explanation is that those referred by a judge are not necessarily there voluntarily and cannot be expected to have the same motivation as those who agreed to mediation of their own accord. It would be interesting to know the relation between voluntary and involuntary referral by the judges; unfortunately, no records were kept on that point.

The distribution of charge-types in Table 2 reflects the kinds of problems citizens encounter and their relative frequencies.

Table 2

Charge Type	Absolute Frequency	Category Percentage	Cumulative Percentage
Terroristic Threatening	244	27.7	27.7
Assault 3rd	226	25.6	53.3
Harassment	147	16.7	70
Criminal Mischief 3rd	111	12.6	82.6
Theft by Unlawful Taking	91	10.3	92.9
Criminal Trepass 3rd	34	3.9	96.8
Theft by Deception	17	1.9	98.7
Wanton Endangerment	12	14.3	100

It is noteworthy that 53.3 percent of all requests for mediation come from people who feel personally threatened (if harassment, which is usually by phone, is added, the figure jumps to 70 percent). Certain types of charges were tested to see whether they were less amenable to mediation than others. There are some tendencies, but they are not statistically very significant. In terroristic threatening, assault and harassment cases, unsuccessful mediation and subsequent referral to District Court occurred in 7.3 percent of the cases, whereas in theft by unlawful taking or deception, failure and referral came in 14.8 percent of the cases. Perhaps the most useful conclusion that can be drawn is that when mediators are trained, more time should be devoted to techniques for dealing with personal threat type cases rather than with theft and trespass issues.

We were also interested in exploring the relationships between complainants and respondents, our hypothesis being that the closer the relationship, the greater the chance of keeping the case out of District Court. To test this we collapsed the "successful" and "unsuccessful-dropped" categories since both did in fact remove the case from the court system.

Table 3
Removal from Court System by Relationship†

Number Row % Col % Total %	Family	Neighbor	X-intimate	Friend	Unknown	Relative	Business	Other	
	187	155	120	90	74	57	39	29	751
Successful	24.9	20.6	16.0	12.0	9.9	7.6	5.2	3.9	89.6
and	94.0	90.6	90.2	85.1	85.2	85.1	88.6	82.9	
Unsuc-drop	22.3	18.5	14.3	10.7	8.8	6.8	4.7	3.5	
	12	16	13	12	13	10	5	6	87
Unsuccessful	13.8	18.4	14.9	13.8	14.9	11.5	5.7	6.9	10.4
to District	6.0	9.4	9.8	14.9	14.8	14.9	11.4	17.1	
Court	1.4	1.9	1.5	1.4	1.5	1.2	0.6	0.7	
	199	171	133	102	87	67	44	35	838

†X-Intimate includes former spouse and former boy/girl friend.
Relative includes aunts, uncles, cousins and in-laws not in immediate family.
Other includes such persons as bill collectors, pastors and landlords.
Unknown reflects either a failure of the intake staff or mediator to report the relationship or that the complainant did not know the respondent.

The tendency does weakly support the hypothesis. Family and relatives are least likely to pursue a case into District Court; business and unknowns are most likely. Neighbors and ex-intimates are in the middle.

Conclusions

At the beginning of the paper we proposed to explore the efficiency and effectiveness of a court-sponsored model of a Dispute Mediation Program. One conclusion is that the model has been quite efficient. The time taken to process cases ranges from seven to ten days versus 60 to 90 days in District Court. The cost per case, calculated on the basis of any initial contact which is sufficiently extensive to open a file, is approximately $7.31. Calculated on the basis of non-frivolous and non-referred cases diverted from the formal court system, the cost is $13.41. The overall monthly staff-case ratio is 1:164. For mediation staff the ratio is 1:93.

We also believe the court-sponsored model has been effective. Location in the Hall of Justice has assured a steady stream of cases, while allowing the intake staff to perform a gatekeeper function for the courts. Between a third and a fourth of all potential cases are screened and referred to other agencies or rejected; 17 percent of all complainants choose dispute mediation instead of filing a formal complaint. This means that 45 percent of all potential cases are diverted from the formal judicial process (56 percent if we include those later referred by judges). No figures more graphically illustrate this impact than the fact that two warrant courts have been able to move into smaller quarters.

Client satisfaction with the mediation process has likewise been high. Of the cases actually mediated (or cancelled because of a reconciliation after the hearing notice was received), 76.6 percent were viewed as successful by both complainant and respondent. A routine check 30 days later indicated that all were still satisfied. Finally, a study of one three-month set of cases conducted a full year after the mediation showed a 90 percent satisfaction rate compared to a satisfaction rate of 71 percent for people who had chosen a formal court proceeding during the same three-month period.

The analysis of a sample month showed several important facts, first being the importance of intake staff referrals in providing the quantity of cases which made the program cost-effective. Judicial referrals are slightly less likely to be successful than staff referrals but certainly not so much as to suggest a change in this referral pattern.

Roughly two-thirds of all requests for mediation came from people feeling personally threatened as opposed to those having their property threatened. The former are slightly more likely to engage in successful mediation.

Finally, there is a rather clear hierarchy in complainant-respondent relationship. Mediated disputes are most likely to be between neighbors, followed by family and ex-intimates, and least likely to be between complainants and business, relatives, and others. At the same time, family and relatives are least likely to pursue an issue into District Court, while business is most likely.

89698

SUBPROCESSES OF NEGOTIATION:

THE CASE OF COMMUNITY MEDIATION

by

JOSEPH PALENSKI, Ph.D.
NOREEN M. SUGRUE

The preceding article provided an introduction to dispute resolution and assessed the performance of one program in a statewide system of alternative conflict resolution. The following article "breaks the skin" of the actual mediation session to analyze the negotiation context and "subprocesses of negotiation" by which mediation results in successful resolution. The authors examine the structure, format, and dynamics of the mediation session and mediators' styles for directing negotiation, maximizing involvement, and avoiding or extricating the session from the pitfalls often inherent in the mediation process. Finally, the authors address the two major categories of negotiation subprocesses, identified as "defusing" and "repairing," and define strategies for effecting both.

Dr. Joseph Palenski is presently an assistant professor of sociology and criminal justice at Seton Hall University. He received his masters degree from the City University of New York (Hunter College), and his doctorate in sociology from New York University. Co-author Noreen M. Sugrue is currently teaching in the Sociology Department at Northern Illinois University.

The research and data for this article were made possible through a grant to the Evaluation Group, Inc. (EGI), Glendale, New York, by the New York State Division of Criminal Justice Services; Suffolk County, New York, Office of Crime Control Planning; and the Law Enforcement Assistance Administration. The authors wish especially to thank Ernie Odom, project director of the Suffolk County Community Mediation Center, for his insight and assistance.

Introduction

Mediation programs and Neighborhood Justice Centers, which serve as an alternative to courts as a means of resolving conflicts, have flourished in the last ten years. 1/ Such centers are a response to overcrowded court dockets, and offer citizens an expedient, low-cost, and personalized arena for conflict resolution. Resolution is achieved through mediation and negotiation, rather than adversarial court procedures.

The Centers utilize mediation as a form of negotiation. Mediation techniques require that actors in conflict depend upon a third party to arrive at a solution. A number of third-party techniques are used in conflict resolution, including conciliation, mediation, arbitration, fact-finding, and administrative procedures. 2/ Over and against other third-party techniques, mediation requires that the mediator actively participate, reflect on the conflict at hand, and be involved in shaping personal agreements and resolutions. In their analysis of Neighborhood Justice Centers, McGillis and Mullen describe mediation in the following manner.

> Mediation involves the active participation of the third party in the processing of a dispute. This participation can range from minor involvement to highly structured interaction with the disputants. 3/

They further suggest mediation settings to be opportunities for disputing parties to express emotions, consider options, and talk. 4/

This paper focuses upon individuals in conflict and the negotiation context where resolution is sought. The organization in which negotiation contexts were examined is a county-run community mediation center. Central to our discussion of mediation is what has been termed the "subprocesses of negotiation". 5/ Subprocesses have an organic relationship to the negotiation process and attempt to more specifically identify the forms of negotiation as they occur. Strauss

---

1/ Paul Wahrhaftig, "Dispute Resolution Retrospective," Crime & Delinquency, Vol. 27, No. 1, January 1981.

2/ Daniel McGillis and Joan Mullen, Neighborhood Justice Centers: An Analysis of Potential Models (Washington, D.C.: Office of Testing and Evaluation, LEAA, October 1977).

3/ Ibid., p. 11.

4/ McGillis and Mullen, op. cit.

5/ Anselm Strauss, Negotiation: Varieties, Contexts, Processes and Social Order (San Francisco: Jossey Bros., 1978), pp. 8-9.

has described subprocesses as the tradeoff, concessions, and compromises that actors make in order to "get things done." 6/ Subprocesses are necessary to the negotiation process, for they link together the structure of negotiation, the actors, and the outcomes. In short, they are the "stuff" of negotiation.

Negotiation as a concept often is used in very general terms. 7/ Strauss' sensitivity to the subprocesses of negotiation is an attempt to provide a conceptual framework for understanding negotiation processes in greater analytical clarity and substantive detail. As one form of negotiation, mediation can be treated as a form of group negotiation in which subprocesses are explicit; as such, they become very amenable to empirical scrutiny. This feature makes mediation an ideal setting for the study of subprocesses. Therefore, it is the purpose of this article to identify and examine those subprocesses as functioning elements of the negotiation process.

The Structure of Mediation Sessions

Strauss has noted that a negotiation context "refers specifically to the structural properties entering directly as conditions into the course of the negotiation itself." 8/ In this paper we examine the context of mediation within a Neighborhood Justice Center. The mediator is seen as a negotiator; however, negotiation and mediation are not synonymous terms. Rather, mediation is a form of negotiation and the very process of negotiating is critical to sustaining the mediation process.

The overall flow of the mediation session, the sources of control exercised within the session, and the form of the resolution are all critically influenced by the mediator. The mediator's ability to nurture and apply the techniques of negotiation is critical to the continuation of mediation. In order to understand the mediation process, as well as the role of the mediator, data was collected over a six-month period at the Suffolk County Community Mediation Justice Center Program. This program is a neighborhood justice dispute resolution program located 70 miles outside of New York City. Participation is voluntary, and its success is dependent upon the ability of the disputing parties and the mediators to work together in order to arrive at a fair and equitable resolution. The data were collected through interviews with mediators and disputants and by observing and recording actual mediation sessions.

6/ Strauss, op. cit.

7/ Robert Lauer and Warren Handel, Social Psychology: The Theory and Application of Symbolic Interaction (Boston: Houghton and Mifflin, 1977).

8/ Strauss, op. cit., pp. 237-238.

Most cases are referred to the program by the police or the court, and usually involve domestic violence and arguments, noise complaints, landlord and tenant disagreements and third-party/love affair quarrels. Both police and D.A. see a mediation session as the "more constructive" route to peace when compared to court.

Involved in a mediation session are the complainant (offended), respondent (offending party), and two mediators employed by the center. The program uses two mediators as a matter of policy to ensure that both the complaining and responding parties receive adequate attention.

The center's staff prepares an outline for each session which identifies the complainant, the respondent, and the specific charges. The outline is given to the mediators; it helps set the parameters of the session, as well as ensure that all charges are acknowledged, attended to, and, should resolution occur, withdrawn.

The session begins with an introduction by the mediators. The content of the opening monologue is standardized; however, delivery, style, emphasis, and tone vary dramatically. The purpose of the introduction is to relax the respondent and the complainant, and to dispel fears that they are somehow being judged. "We are not here to judge you" is deliberately stated so as to underscore the non-judgmental and negotiative nature of the session. Additionally, the introduction describes the process of mediation, the goals of the center, and the ground rules for behavior which are to be adhered to by participants. These rules enable the mediator to control the behaviors of the respondent and the complainant during the session. They prohibit interruptions and set limits on language, screaming, and general demeanor. Complainants and respondents also are reminded that mediation is voluntary, confidential, and that should mediation fail, there are alternatives available to resolve the conflict. All participants may take notes during the mediation process. Mediators explain that oftentimes they will take notes, which enables them to have an immediate and accurate reference of who said what.

The introduction concludes with the mediators explaining that the session is divided into caucuses that are public and private. During the public caucus each party states his or her side of the story to the mediators in the presence of the other parties. Clients report that this gives them a feeling of participation.

> I would have to say you do get to talk. I didn't think so, but you get to tell your side.
>
> Respondent #9

> I knew what this would be like because I checked it out before I came down. I found out my friends reached a solution here so I said why not?
>
> Respondent #4

This feeling of participation is often reported to be non-existent when disputes are handled in court. 9/ During public caucuses, the participants discuss the issues surrounding the dispute. Moreover, the public caucus draws out anger, fear, suspicion, and other emotions that characterize human conflict.

> Court! (pause and laugh) Look, if the case flies (is heard), what is a judge going to tell you? Go home? Try to get along? Anyway, the reason she (the complainant) took me to court was she don't dig my style. I pay my rent so I figure my guests are my business.
>
> Respondent #9

> Look, if you have been to court, you know it is not easy to talk. The people, the noise. I'll tell you it wasn't like I figured it would be...you know, the judge listening, concerned and all. Hey, I think he was looking mad at both of us for even being there.
>
> Respondent #1

After respondent and complainant each has had his or her say, the mediators meet alone to discuss strategies for the upcoming private caucuses.

During the private caucus the parties in conflict meet one at a time with the mediators. Issues not brought out in the public caucus which are relevant to the dispute as well as possible solutions to the conflict are explained. At the private caucus each person is allowed to express feelings and thoughts without the other person's knowledge; we label this occurrence as "confidential expression." The mediators are made aware of feelings that each party has which they can take into account when negotiating a resolution, yet these feelings need never be made public. During this caucus the parties in conflict are asked to offer an equitable solution to the problem. The mediator listens to these offers and then disputes the proposed solutions by playing "devil's advocate." These private sessions maximize the participation of both the respondent and the complainant, and both parties in conflict are required to actively participate in identifying the source of conflict and in constructing a solution.

9/ W. S. F. Felstiner and Lynne A. Williams, "Mediation as an Alternative to Criminal Prosecution: Ideology and Limitations," Law & Human Behavior, Vol. 2, No. 3, 1978.

> Look, I never liked my in-laws but that session showed me something! (emphasis in tone...smile ceases) It showed me that the feeling, hurt and all, is deep. Deep enough for me to hurt one of them. I'm glad I'm not back in the house, because I'm not a guy who takes much shit. A couple of bats 'n balls (drinks) and who knows, maybe I'd do something I would be sorry. This way I'm out of the house for now. (pause) Maybe something will get worked out later.
>
> Respondent #12

> The one good thing I noticed is they asked me what I wanted from this. I told them, and then we worked it (the case) through.
>
> Respondent #7

After the mediators have met with each party, they again meet alone before resuming with another public caucus.

The second public caucus denotes the last stage of the mediation process. During this stage the mediators present a tentative agreement to both parties. This tentative agreement is the focus of discussion during this session. When both parties and the mediators agree upon the solution, the resolution agreement is formalized. At this point, the conflict is resolved and the mediation process is over. However, if no agreement is reached, the case can be referred back to court, the matter can be dropped with neither party satisfied, or another mediation session can be scheduled.

The Elements of Problematics in Mediation Encounters

The role of the mediators is pivotal to the mediation processs. The actions and styles that a mediator brings to a session are fundamental in how the respondent and complainant view each other and themselves within the conflict situation as well as within the proposed resolution.

> Once we reach that tentative agreement, I know the private caucus was productive. Sometimes you get a stall or snag; so I try to let them both know they have agreed to some solution...at least privately!
>
> Mediator #1

> Everybody tells you, don't start with the "problem," and I agree. I was in business for years. I approach these people like I did my clients. Sure there is a problem, but let's let them see this is a good service that can help. The problems...you'll hear about them later.

Mediator #3

Mediation that fails can mark the onset of further and more complicated conflicts. After all, seeking the aid of a third party (e.g., a court, a mediator, an arbitrator) makes the conflict public and often escalates the problem. If mediation is successful, then all the parties are winners; if it is unsuccessful, everyone loses. In a court setting it is a negative situation; in mediation, success is a gain for all and failure is a loss for all.

> You see, you don't have a loser in a mediation resolution. If both parties contribute, where is the loser? In court...somebody's got to lose...one loser and one winner. That's the system! Funny thing though, most winners still ain't satisfied.

Mediator #6

Because the mediator is the key figure in resolving the conflict, how she is trained and how she performs her role are very important to the process. The mediator can erase, gloss over, or accent the problematics of the mediation process. The training of mediators involves the explicit definition of their role, but their role performances are negotiated during each session. Avoiding failure is the organizing theme for a mediator's training. The goal of the center, hence the goal of every mediation session and every mediator, is successful conflict resolution; the complainant and the respondent are to leave the Center with an agreement detailing the resolution to a problem. Furthermore, the mediators are to resolve conflict by helping the parties, not by judging them. The mediator directs the respondent's and complainant's actions so that resolution is attained. The parties in conflict must actively participate in designing the resolution with the mediator helping in any and all ways. In training, it is explicitly stressed that mediators cannot use drama, threats, intimidation, force, or distance in order to acquire a resolution. The resolution must be negotiated between the respondent and the complainant in a setting where they are secure in their feeling of voluntary cooperation. The use of tactics which in any way threaten the spirit of compromise and voluntarism violates the very purpose of mediation. Furthermore, the use of any such tactics often gives the Center the appearance of courts, something that the program as well as its participants want to avoid.

> Authority? Yes, in the training we talked about authority. We want people to see us as help first and authority second. For good reasons, I guess I try to refrain from showing any authority.

Mediator #6

> Yes, I've lost my temper in sessions. In fact one time I threatened them both with going back to court, something I'll do even though it's not part of our training.

Mediator #1

Mediators often are perceived as a threat or as judgmental. This can and does occur no matter how closely a mediator adheres to the helping role. This perception of threat or judgment can be explained in large part by the emotional dimension to conflict as well as by the guilt and embarrassment produced by public acknowledgement of the conflict. In addition, actors attach a self-justification to their past, present, and future behaviors.

With the conflict escalated to the point of requiring mediation, actors must bring such self-justification in line with the definitions agreed upon in mediation. The definition of behaviors which are settled upon within mediation are not necessarily those a person held prior to the mediation session. Accenting these problems is the fact that most persons who become involved in mediation are unaware of the events that are likely to unfold. As one mediator points out:

> Most persons caught up in these sorts of fights, arguments, and problems are worried about themselves. While we want them to understand we aren't the court, they don't hear us! All they know is they are being accused of something and they are pissed! Most times, they don't even hear. Being accused is the problem, and they think they are right. Many of them see us just like a court, a judge, about to make judgments about them. They see an office and people making decisions about them. From their "side of the fence" all of this is aimed at them--and you can call it what you want!

Mediator #1

Most mediators are aware that complainants and respondants are nervous, unsure of what will happen, and anxious about the situation. Mediators must develop a repertoire of techniques that can be used to relax complainants and respondents as well as ease their fears.

Training sessions can suggest how one might calm another person. However, they cannot equip the mediator with the skill. The ability to put the parties in conflict at ease is something that must be acquired and can be handled only on a situational basis. Putting the complainant and respondent at ease is necessary if successful mediation is to occur, since compromises and agreements cannot be handled in a setting of fear, anxiety, and nervousness. The following are examples of various techniques employed by mediators in order to put the clients at ease:

> I use coffee with my people, I offer coffee and never use the word "problem." If I say the word "problem," and talk problems, I only reinforce what they suspect already. I don't want to expand on the problem. I would much rather get people thinking about solutions. Now how you get people to think solution depends on what the case is and how people are acting. You see, when the "guy down the block" thinks he is right...he is, at least in his own mind. So why should he think solutions? Solution for what?
>
> Mediator #6

> I sometimes talk about my last case, and make up something.
>
> Mediator #7

> I often talk about myself. You know, talk light; if the guy has a golf hat on, I'll say, "Is this dispute over a golf course?"
>
> Mediator #5

> Comfort. I ask them are they comfortable; too warm, cold room, temperature items.
>
> Mediator #4

There are four elements or dimensions in mediation which may make a session problematic in reaching compromises and agreement.

The first element is that mediation is voluntary; it is a setting where neither the complainant nor the respondent is obligated to participate. At any moment the process can be halted. When participants feel threatened, are unwilling to compromise, or when information that one does not wish to face is made public, they can withdraw from mediation. The mediators, as well as the complainants and respondents, are cognizant of this independence all during the session. What the mediator must do is nurture the participation of

the parties in conflict, confront all pertinent issues, and agree upon a resolution--while not going to a point where one or both parties will walk out. Defining, confronting, and resolving the conflict, yet not having the disputants stop the process, places severe limitations upon the mediators. The following examples discuss these limitations and how they are handled in mediation.

> You know, I'm not certain how I did get a resolution on some of these cases! Some people really arrive here with some serious problems, problems they're not even in touch with.
>
> Mediator #10

> I had one case where the wife admitted to both of us (the mediators) that she was bringing the petition in order to get her husband. To some extent she was correct. She did right. There turned out to be plenty of marriage problems there.
>
> Mediator #10

The second element is the threatening or embarrassing character of mediation sessions. Vivid and emotional charges concerning each party are commonplace in mediation sessions. Such charges typically include description of past deeds which are threatening or embarrassing: threatening because they are for the first time being scrutinized by some third party; embarrassing since detail about some previously personal or private behavior is now public. As persons are attempting to tell their "best side" of the story, the worst of all behaviors will be used to justify this position in the story. As both parties in conflict begin to see themselves in this reconstituted light, threat and embarrassment typically become feelings which permeate the session.

The third element which lends itself to making mediation problematic is the volatile nature of the sessions. Although there are ground rules for behaviors, the sessions often contain periods of verbal attacks, threats of physical attack, and intimidation. Although the mediator can refuse to proceed with the session when these occur, doing so would result in a failure to resolve the conflict. On the other hand, the mediator cannot allow such occurrences to proceed unchecked. In addition, when one party is feeling harrassed or intimidated by another, he or she can quickly stop the session. The mediator must allow the expression of feelings, yet control the form such expression takes. When the expression of feelings gets out of control, the mediators must help the conflicting parties get back to the issues at hand and continue with the mediation process. Furthermore, they must not allow such outbursts to hinder successful conflict resolutions; while retaining control over the situation, they must have the respondent and the complainant define them as helpers.

When I can, I will appeal to a health problem as a reason for more civil discussion. Often people will tell you this episode has put them under a doctor's care. I'll use phrases like, "Look, as a helper to both of you, I don't want this encounter to further upset your health; please relax. Remember, your health is at stake here!"

Mediator #8

Bullshit and smiling turns to crying. Crying to yelling, lying, whatever. There are a lot of feelings crossing the desk.

Mediator #7

The fourth element that may cause problems within a session is unpredictablity. A wide range of cases passes through the Center, each case having unique qualities which make it impossible to predict how long successful mediation will take or even if mediation can work. The element of unpredictability is present as a contextual feature until the complainant and respondent leave the session with an agreement.

You don't have an agreement until both parties sign. One time I had a guy try to "jam" new provisions into the agreement at the last minute.

Mediator #2

For some people it's a game! Like people with marriage problems. Seems like they know what each other is going to do and say in the session--but you as the mediator don't. It's crazy. The whole session can collapse in an instant.

Mediator #3

Remember...some of these problems have been developing for years. We're coming in on the last act!

Mediator #1

It also should be noted that this unpredictablity may remain with the disputing parties long after they leave the center. However, the mediator cannot spend too much time worrying about that. If the parties engage in continuing conflict, another mediation session is required.

Mediation sessions are characterized by these factors, which make it impossible for mediators to plan, predict, anticipate, or control the behaviors and utterances of the participants. In order for the mediation process to continue and be successful, mediators must adopt appropriate coping strategies. Strategies often take the form of tradeoffs, deals, and accommodations toward participants. These strategies are the very subprocesses which allow mediation to evolve and culminate in success.

Mediation Subprocesses

In their training, mediators are taught that they must try to achieve a resolution to conflict, and that such resolution involves keeping both the respondent and the complainant participating in the session. Mediators must be cognizant and responsive to each party, the issues at hand, and all potential solutions. Therefore, it is critical that mediators utilize various tactics and strategies which keep mediation a going concern. These strategies and tactics, which are not part of the training, are the necessary subprocesses of mediation.

There are two distinct categories of subprocesses. The first, "defusing a potential crisis," requires the mediator to define the ongoing situation as one leading to a crisis or breakdown in mediation. The mediator heads off the potential crisis by redirecting or redefining the interaction. In the second category, "repairing a crisis," the mediator must respond to a crisis in the mediation process by realigning the participants' actions in a way that contributes to resolution. When the process requires such repair, control over the situation has fallen into the hands of either the respondent or the complainant. It is then the mediator's responsibility to regain a measure of control over the interaction.

Defusing

When the mediator defines a situation as problematic, he must intervene in order to maintain the mediation process. The form of intervention varies with the problems being mediated, the general direction of the session up to that point, the potential he sees for the session, and the interactants themselves. However, when a mediator intervenes, he does so by altercasting). 10/ Altercasting becomes a general approach for keeping the session focused on the problem. We identified four such strategic approaches that are used to defuse potential crises.

First, a mediator can present himself as an "equal." He abandons the authority and power of the mediator role, and encourages the complainant and the respondent to talk and confide in him as they

---

10/ Eugene Weinstein and Paul Deutschberger, "Some Dimensions of Alter-casting," Sociometry, Vol. 26, 1963, pp. 445-446.

would a friend. He relaxes the session rules and attempts to create the ambience of a "rap session" with his buddies.

Second, a mediator can "play dumb." 11/ The mediator foregoes swift and efficient review of the facts, and instead gets the parties to participate by having them deliberately and in great detail review their position and their recollection of events. Since this is done in public, each party is made aware of how the other perceives the problem.

Third, the mediator can fully embrace the authority of the position of mediator. "Authority embracement" involves the use of the authority and power of the mediator role to require strict adherence to all rules and, if necessary, the use of coercion to keep the mediation in process. In this embracement, the mediator takes seriously the directive to achieve an orderly and expedient resolution.

Fourth, the mediator may take on the role of "facilitator." In this role the mediator explicitly explores tradeoffs, bargains, and concessions which will enable a resolution. The mediator emphasizes the give-and-take of the situation in which all participants must engage if a solution is to be reached.

The first two strategies involve the mediator distancing himself from the mediator role, and sessions are conducted on an informal basis. The third strategy represents the polar opposite of the first two. Authority embracement appeals to the structural features of the mediator role and the mediator uses these features to structure and conduct the sessions. The fourth strategy contains features of the other three, insofar as the mediator vacillates between role distance and role embracement. His identity as facilitator enables him to utilize whatever tactics he feels are necessary in order to achieve a resolution. This identity gives him the latitude to be aligned with the interactions between respondent and complainant and to do whatever he defines as necessary to ensure that mediation continues.

Repairing Crises

The repairing of subprocesses is a reaction to a crisis or an abrupt or unexpected event in mediation. Whereas defusing is preventive in nature, repairing subprocesses are those used to salvage mediation. The original basis for controversy in these situations becomes secondary to the crisis itself. An asymmetrical relationship results when one of the participants introduces unexpected issues and lines of action; that is, one participant gains control over the definition of the session's focus, tone, and momentum, and the negotiated nature of the situation is interrupted. The mediator, wanting to keep the session progressing, has to alleviate the asymmetry. The two most

---

11/ Howard Becker, "Social Class Variations in Teacher-Pupil Relations," Journal of Educational Psychology, Vol. 1, No. 25, 1952, pp. 451-465.

common strategies for repairing such situational breakdowns are compensating the party who has not gained control of the session and threatening one or both parties.

Depending upon the details of the situation, the mediator can use a number of tactical moves in the compensation strategy. For example, if the respondent is screaming, cursing, and threatening physical abuse, the mediator can tell him to stop speaking and turn the floor over to the complainant. He communicates his displeasure to the person who is violating the norms of mediation as well as his unwillingness to allow that to happen again. Additionally, he attempts to convince the violated party that, as mediator, he will reward him for forgiving the outburst and remaining in the session. However, the mediator must also communicate to both parties that he is still unbiased and that it is they who must negotiate a resolution.

The second strategy a mediator can use to repair a session is threat. What this involves is inducing both parties to remain in the session until a resolution is reached or else be sent to court. The cost, time, and negative conditions of court are something to avoid; after all, both disputants voluntarily entered mediation to avoid court. The threat is often used as a follow-up to compensation. When some form of compensation has been offered and rejected, the use of threat may become the only way to keep mediation going. Although threatening can be and is used as a follow-up to other techniques, it also is used as a tactic of first resort.

The techniques used to repair sessions are dependent upon the style of each mediator, the severity of the session's damage, the type of complaint being mediated, and how the parties in conflict respond to the mediator's suggestions. Mediators need to be cognizant that an escalation of tactics to ensure progress in the session and an escalation of the problem feed into each other. 12/ The mediators need to keep the session focused on the problems, the respondent and complainant actively engaged in conflict resolution, and ensure a de-escalation rather than an escalation of the problems.

The formal training of mediators equips them to cope with "typical" sessions and participants. However, when deviations occur, mediators must employ a variety of subprocesses to enable the session to continue. When problems surface that the mediator defines as contributing to session breakdown, he must respond strategically in order to keep things going. There are few guidelines for specific instances of collapse, since they often emerge unannounced, and thus there are few directives for the use of specific strategies. When a situation erupts and communication breaks down, the mediator must do whatever is necessary to regain control of the session's activities.

12/ Frances Fox Pivin and Richard Cloward, Poor People's Movements: Why They Succeed, How They Fail (New York: Pantheon Books, 1977).

If the subprocesses of defusing and repairing mediation were not used by mediators, few, if any, sessions would result in conflict resolution.

> If one of these conflicting parties begins to see that I (the mediator) am losing ground, the whole session might die. I, by that time, figure I better get things back under control and remind people that if the session fails to resolve the problem, we might go back to court.
>
> Mediator #1

Discussion/Conclusion

In examining the above application of what has been termed here "repairing" and "defusing" subprocesses, important implications would appear to exist for how such subprocesses make possible the resolution of conflicts. First, the use of subprocess by mediators prevents the possible foreclosure of any element which might aid in the resolution of conflict. Participants in sessions may become loud, abusive, resistent, withdrawn, untruthful, indifferent, etc.; yet the mediator may choose to ignore such behavior as a tradeoff for a more important development inside the session. The person who expresses emotion by yelling ultimately draws the attention of the other parties to the conflict. Such an attention-getting device, while initially threatening, may serve to set the entire experience "in perspective" and prevent a withdrawal and an end to negotiation.

Second, the existence of subprocesses limits the degree to which personal ends may be pursued or manipulated in the session. Both Strauss and Goffman have commented on how inclusion into some social circle limits the ability of actors to accomplish ends. 13/ Because the session represents such a social circle, actors cannot end conflict in a unilateral way. Short of withdrawing from the session, an acknowledgement of "others' problems" and possible "joint solutions" becomes the norm rather than the exception. Subprocesses make this both possible and agreeable to actors who would otherwise reject the idea of settling disputes in a mutually acceptable fashion. The mediation concept stresses the theme of independence; actors are free to leave the session at will. For mediators, it becomes critical to make actors feel a willingness to continue to work toward acceptable solutions. Using the sorts of tradeoffs described above, actors find themselves with acceptable options and a commitment to the mediation situation based upon the non-threatening means directed toward them and their adversaries.

13/ Strauss, op. cit., and Erving Goffman, "On the Characteristics of Total Institutions," Asylums (Garden City, New Jersey: Doubleday, 1961).

Third, and finally, it appears that while we may wish to think of subprocesses as analytically distinct from the structured context of the negotiation, they are not. In fact, it would seem from the above-outlined observations that subprocesses are explicit to all forms of negotiation, both in understanding the structure of a negotiation and the more fluid processural events which emerge within them. Viewed here, subprocesses serve to "reconstitute" 14/ and reaffirm for all participants that negotiation is actually taking place; that agreements which allow one to "save face" are a concrete part of the mediation session one finds himself/herself in; that one actor is not going to be overrun by other actors using the sorts of power advantages and skills which permeate all circles. The importance of understanding the presence of subprocesses is that they allow actors to simultaneously experience both a degree of freedom and constraint. They do so since one's own act never stands by itself, but in relationship to all subsequent behaviors. Thus, actors can view themselves free to act, judge, or withdraw, only to find themselves further constrained by subsequent counter-responses by others around them. Mediators within mediation sessions can use the actors' understanding about themselves to work toward solutions which are interpreted as being mutually agreed upon, via negotiation and not coercion, deception, or a changing of the structural rules.

14/ Strauss, op. cit.

END