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NEW JUSTICE THEORIES AND PRACTICE

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(The impetus for this article comes from my participation at the Oslo Conference on Conflict Management in June, 1980. The Conference, called by Professor Nils Christie, Dean of the Scandinavian Research Council for Criminology, and sponsored by The German-Marshall Fund of the United States, was a five-day meeting exploring the different concepts and practices relevant to societal needs and theories of criminal jurisprudence. The intent of the Conference was exploratory: upon what understanding or foundation could progressive thinkers in the field of justice begin to build a theory or approach for future work.)

Developed industrial nations experience the realities of dysfunctional justice: the daily inability of the justice system to sustain and maintain a consistent theory and practice for social order and predictability. The progressive idealogy of rehabilitation as an effective approach to behavior control and modification has collapsed. In the legislative halls of America and Europe, new deterrence concepts and punishment theorists hold the policy field[1]. Progressive criminologists and sociologists are searching for a post-rehabilitation theory and model. The recent conference in Oslo was an effort to advance this search.

In the United States, various criminal justice experiments or system "adjustments" are taking place: alternative sentencing

programs[2]; community crime prevention programs; and, victim compensation projects. The effort receiving considerable attention in the past few years is the "alternative " to justice movement. The focus of this paper is this justice movement and the limitations and potentials that it offers.

The "alternative" to justice movement includes theorists from the former rehabilitation school, who stress restitution to victims and de-emphasize punishment of offenders. These restitutionists or "healers" of the movement consider mediation a more effective instrument for resolving disputes than the adversarial proceedings of court, and are often critiqued for being "soft-on-crime". The movement also includes the neo-deterrence or punishment theorists. They favor alternative justice mechanisms as a new approach to social control. These retributionists or "coercers" of the movement are often challenged for "widening-the-net" of state influence over individuals and situations heretofore not subject to state intrusion or record keeping. The present limitation of the "alternative" justice movement, as demonstrated by their respective critiques, is its association with traditional justice agencies, and, thereby, its inability to disassociate itself from the underlying theories and justifications for the formal justice system.[3] Healers and coercers are arguing about aspects of the formal justice system, its component limitations and processes, when they debate the issues in the "alternative" justice movement.

Before advancing to an examination of a conceptually different and alternative justice theory and model, a context is needed to better understand the debate within the present "alternative" justice movement. Moreover, this context will provide a deeper appreciation for the lack of alternatives presented and serve as a background to the final section of this paper.

It is now widely documented and discussed that the justice system, as an effective instrument for the fair and prompt redress of conflict, is dysfunctional. Procedural, social, racial, and economic differences between disputants are recognized as serious impediments to equal and effective justice.[4] More poignant are those critiques that assess the state's ability for change as problematic, when the state's role in societal life is often perceived as part of the problem.[5] Thus state sponsored or encouraged "alternative" justice mechanisms invite close scrutiny.

The state has been involved in promoting and developing the "alternative" justice movement. While there are many rationales for initiating alternative justice programs, the more challenging include:

* <u>The complexity of societal activity and the need for state intrusion in civil mattters</u>:

Non-state social control mechanisms (church, family, neighborhood homogeneity, etc.) have broken down in modern urban society. As social activity becomes more complex and less restrained by social custom, the state has an increasing interest to supplement or augument the social control mechanisms and become more involved in the "civil" side of social interaction and events.

In such an environment, the distinctions between civil and criminal become blurred and diffused. The development of state supported, non-criminal justice forums[6] is not the development of alternatives <u>to</u> justice, as much as they are extensions and changes within traditional justice. From this perspective, often promoted by the coercers within the movement, the complexity of urban life makes the threat of criminal sanctions (deterrence) too distant and removed to serve as an effective social instrument. Thus the interest in exploring control mechanisms that fetter and impact traditionally civil interactions.[7]

The most explicit model encompassing this rationale is the state sponsored or encouraged involuntary, coercive mediation program.

The deflection of social discontent and the potential for social organizing:

Organized discontent can serve to mobilize people for social change. This is true for those who understand that the formal system of justice cannot meet their needs. A dysfunctional system of justice does pose the potential for social protest and organizing. In California, one extreme of this is the organizing promoted by the "coercers" to rid the judiciary of "healer-oriented" judges. From a justice perspective, a more divisive organizing would include increased attacks on the legal profession and judiciary from diverse citizens' lobbies.

Informal justice mechanisms are perceived as being responsive to these complaints. Moreover, such mechanisms continue the traditional justice system's policy of isolating complainors as disorganized disputants. Finally, informal mechanisms, exceeding traditional justice's legal limits, convene private dispute resolution sessions, thus precluding the organizing potential normally associated with the system's class action suits. In this regard, it is worth noting that in California, the only group to oppose recent legislation establishing informal justice mechanisms was the media lobby on access to information and open hearing principles.[8]

Perhaps the most extensive model of state co-option of an alternative justice activity is the Polish Social Conciliatory Commissions.

* The suppression of conflict and the limited mechanisms for conflict expression:

As the only formal mechanism for the resolution of conflict, the legal system channels, limits and often suppresses the expression and, thus, resolution of conflict. While conflict is an aspect of daily life, the legal system through definitions and procedures refines and rigidifies particular disputes as appropriate for judicial consideration. Given this approach and analysis, it is not that there are too many conflicts, as there are too few vehicles for the timely expression and resolution of conflict.

Informal justice mechanisms are accordingly promoted by the healers within the movement, even though these mechanisms are extensions of the formal justice system. These alternative mechanisms do provide a different type of conflict expression, and serve to extend the participation norm beyond witness, defendant, and juror.

> The varied attemptes by many "alternative" programs in the United States to be neighborhood-oriented relate to this intent on expanding the number and scope of conflict resolution vehicles. Regretfully, limited conceptual analysis and organizational structure leave most programs wedded to the traditional justice system. In this regard, the Community Board Program in San Francisco, California, is a notable exception, and an alternative concept and model to the traditional justice system.

The above rationales are not abstractions. Existing "alternative" justice mechanisms extend the prevailing justice system, and generally fall within one of two categories:

I. State encouraged or supported, involuntary and coercive referral models: "Agency-Mediation Programs"

The "agency-mediation" model inter-relates a criminal justice agency's (often--prosecutor[9], court[10], or police[11]) case referral procedures to a specific mediation program. The model demonstates the primary linkage between a justice agency's interests and power and the operation of a mediation center. The case referral by an agency is generally coerced and disputant participation often involuntary. The rationale for this process is that "but for" the agency's pressure disputants will not attend the mediation session.

Further, since most, if not all, of these referrals represent matters that the agency would not formally pursue, the coercive referral, following the establishment of a criminal justice case file on those involved, presents the classic widening-the-net phenomena so criticized by criminologists and movement "healers". This is a critical issue and one deserving of close examination and research. It directly relates to the social control rationale articulated above. It is submitted that agency-mediation programs are promoted not because they handle criminal referrals, but precisely because they are not legitimate criminal cases or ones that criminal agencies would realistically pursue. The case re-

ferral is a direct extension of the agency into the non-criminal or civil side of urban life.

This justice extenion stems from the recognition that traditional social control forms (family, church, stable neighborhoods) nolonger exercise a controlling influence. Instead of examining whether changes in the impact of industrialization and urbanization on family and community life would restore their former influence, the breakdown of social control serves as a basis for expanding the state's influence in this heretofore non-state area. From this analysis it is not because of economic or social factors that crime flourishes, but rather from "weakened social control".[12] "If society's social control is so weakened that crime flourishes, it is natural to try precisely to strengthen society's 'social control'."[13]

From this perspective, state sponsored, agency-mediation models respond to the weakened social control out-there in society, and place the state and not those weakened social mechanisms as the primary control entity. The coercers of the "alternative" justice movement disavow the coercive aspect of the agency-mediation model and highlight its social (conflict resolution) value. Ironically, most of the literature justifying agency-mediation models start with an analysis that older social control entities (family, church, school, etc.) have broken down and nolonger perform conflict resolution functions. Thus, the logic follows, the need for state supported conflict resolution mechanisms.[14] It is interesting that there is no reference to developing or reviving the community's responsibility for these traditional social functions.

There is no attempt by the state to improve the ability or capacity of urban communities to manage conflict resolution mechanisms. The one state supported activity in this direction was quickly isolated and de-valued.[15] The intent of agency-mediation programs is to provide another layer of state sponsored, social

control beyond the direct application of individual deterrence-punishment theories. The "alternative" justice movement in large part is an experiment by the state to expand justice control mechanisms through the rationale of "weakened social control". The emphasis is upon "increased formal control out there in society, as a balancing of weakened informal control." [16]

Having the above serve as the basis for state intervention in the civil area is a dangerous precedent. If the decline of family, school, neighborhood, and church serve to justify state intervention in civil relationships and activities there will develop less state interest in re-vitalizing or improving these important social, non-state entities. If "weakened social control" serves as the basis for expanded state intervention and social control what incentive is there by the state to commit resources to directly strengthening these weakened social entities? Further, might not the unwillingness to strengthen such entities be related to the fact that the negative impact of industrialization and urbanization would have to be more directly addressed? Moreover, by focusing on increased crime as an aspect of weakened social entities, there is a direct policy avoidance of addressing what is weakening the social entities. And, there by, perhaps, causing crime.

Finally, as an implicit statement of its secondary concern for conflict resolution (over social control), agency-mediation programs suffer limitiations not dissimiliar from the formal justice system. Most particularly, it is often unable to get or coerce the participation of all relevant parties to the conflict. [17]

Before agency-mediation programs are expanded in the United States serious examination is warranted of the public policy and practical consequences of this aspect of the "alternative" justice movement.

State endorsed, voluntary, non-coercive referral model: The Polish Social Conciliatory Commissions

The most explicit state sponsored, non-coercive, extra-judicial mechanism is the Polish Social Conciliatory Commissions.[18] The Commissions were initially developed outside the state structure through "spontaneous" neighborhood movements that began in Wroclaw and Lodz in the early '50's. "Good neighbor committees" were created in order to resolve social conflicts wothout sending the case to court. These commissions flourished during a political period that supported a broad range of democratic activities. By the beginning of the '60's, this political trend shifted; however, the legal profession encouraged the development of the commissions and their establishment as part of the local governance structure. In 1965, the Law on Social Courts was adopted.

The parliamentary debates on the proposed legislation stressed the desire to have social courts as organs of social self-government, as entities for educational activity, and as structures that were voluntary and separate from the state courts. This approach resulted in a limitation on the prosecutor's case referral authority to one of application to the commissions and not automatic acceptance by the commissions.

However, instead of "spontaneous movements" serving to establish commissions, the law gave the authority to establish and administer the commissions to the All-Polish Committee of the Front for National Unity (APC/FNU). The FNU provides directives for the type of persons best suited to be on the commissions and for the method of recruitment. The initiative for a commission must come from a committee of the local FNU, and commission members are selected by the FNU. The FNU is an arm of the Communist Party.

FNU has established commissions in most urban and rural

communities in Poland. However, local awareness of the commissions or how to use them does not seem very extensive.[19] Moreover, as the number of commissions increased, the greatest source of case referrals have become the courts and state agencies. Discussions with persons close to the commissions suggest the substantial decline, and in some instances dis-use, of the commissions as a recipient of individual case referrals.[20]

Whereas, the commissions developed initially outside the justice structure during a period when local self-rule was popular, their absorption within the justice process and as a program of the FNU present contradictions. While the legislation stressed the separation of the commissions from the formal justice system, it integrated the "spontaneous" or local aspect into the formal structure of the FNU. Although, the commissions do not have judicial authority, they are part of the state apparatus. As a state entity, the very efficacy and purpose of the commissions has shifted, representing now more court and agency interests than resident initiatives.

In many respects the early history of the Polish Social Conciliatory Commissions resembles the struggle presently taking to establish non-state, free trade unions. The present issue is whether the unions must recognize the "leadership" of the Communist Party. This is precisely the issue that was legislated-away in the formation or legalization of the commissions: the requirement that the FNU serve as the leadership of and structural coordination for the Polish Social Conciliatory Commissions.

The history of the commissions highlights a practice of state co-option of a social movement through "supportive and encouraging" legislation. While early statistical data is nearly non-existent, present figures indicate that on the average an urban commission will hear approximately 15 cases/year. The limited number of cases suggest the limited functional use of the commissions. Per-

haps, the two open questions presented by the commissions are:

* What type of entity might it have evolved into had the state not co-opted it? And,
* To what degree does a voluntary commission that seeks social harmony and cooperation without the power of the state an extension of state social control? As a corollary: assuming social control, how extensive is it without the application of state coercive authority?

It is interesting that one of the issues in the enactment of the legislation centered on the commissions exercising "educational measures" against wrong-doers. This consists of the fulfillment of obligations through commission supervision, community opinion, or assistance from social or political organizations. "It is community pressure which causes the interested parties to come to the commission and ask for repeal of the educational measure applied, promising improvement in their behavior."[21] These educational measures are rarely applied and discouraged by the FNU's insistence that all actions be related to the voluntary nature of the proceedings and the conciliatory procedures employed. It is speculated that the initial "spontaneous" commissions used in fact forms of social education as effective forms of social control, and sought the enactment of this process in the proposed legislation. However, the fact that it is seldom applied, and given the FNU's insistence on maintaining conciliatory and voluntary proceedings, it is assumed that there is a strong state preference for relatively ineffectual, non-aggressive commissions.

In contrast to agency-mediation programs outlined in the first section, the Polish state's co-option of the spontaneous commission movement seems in large part to avoid having an independent and competing "authority" operating in the urban neighborhoods. The FNU's stress on elements that leave the commissions ineffectual

suggest the supine posture the FNU desires for the commissions. The elements that would have strengthen the commissions--local selection of commission members, application of education measures, and broad awareness of the commissions' services--are not present. The history of the Conciliatory Commissions underscore the problemmatic nature of state sponsored "local" conflict resolution mechanisms even when they are voluntary in concept and practice.

The "alternative" justice models described above each have the state exercising an important role. It is the state's involvement that circumscribe the models as justice "alternatives". Moreover, the state's rationale for involvement speaks to concerns beyond the mere functioning of alternative justice mechanisms (as highlighted on pages three and four). The final model to explore is a non-state mechanism.

Community supported, voluntary referral model: The Community Board Program

Conceptually , the Community Board Program advances a community normative justice system. This approach is premised on a community perspective to the rationales setforth at the beginning of this paper:

* The diversity and complexity of societal life directly encourage the strengthening on non-state, social entities. This rationale urges the commitment of social resources within the community and the reviving of the community's responsibility to articulate and project social mores.

* Conflict suppression, individual or community, is destructive to the safety and vitality of individual and community life. Community-based forums provide a ready vehicle for the early expression and potential resolution of conflict. And,

* Community forums present a positive expression of resident need to organize community justice mechanisms. Moreover, the maintenance of the forum is a recognition by the community that conflicts provide important contextual material for individuals and communities.

Organizationally, Community Boards emphasize community and individual referral of cases to neighborhood panels composed of five local residents trained in value building, communication and conciliation skills. Panel sessions are open and generally held in community or church facilities. The Program places stress on the importance and value of conflict expression. In the training programs, hearing sessions, and community meetings, the Program seeks community expression of shared (normative) values. Specifically, through the case hearing experience, the Program addresses normative values within the neighborhood and panel community:

1. <u>That conflict is a positive value</u>:

This approach views conflict as having important contectual meaning, and a potential approach to improvement and change.[22] This is a distinct contrast to justice and medical models that traditionally view conflict as "acting out", a manifestation of individual deviancy or social illness. From these negative models, the justice system has developed a practice and procedure for conflict avoidance, suppression, and manipulation destructive to individual change and community awareness.

2. <u>That peaceful expression of conflict within the community is a positive value</u>:

The <u>expression</u> of hostilities and differences within the community serves to inform and educate, providing, thereby, a base from which greater understanding and mutual work between

disputants can take place. The greater the degree of conflict expression the greater the likelihood for reduced tensions and the potential for common accords. The justice system's practice of having the conflict expressed by the disputants' representatives "robs" the disputants not only of the expression of the conflict, but the conflict itself.[23]

3. That individual and neighborhood exercise of responsibility for a conflict is a positive value:

Non-state social entities are weakened in society in large part by the state's assumption of incompetency and transfer of the "problem" to a state agency. By promoting professional attention to conflicts, and controlling to a significant degree the scope, procedures, and remedies allowed pursuant to state licencing and school accredition requirements, individuals and non-state social entities are de-skilled and made dependent upon external, state funded or state licensed entities.[24] By placing the conflict within the skill and competency of trained community people, many of whom are former disputants, the forum is able to place responsibility for the expression and resolution of the conflict on the disputants. Moreover, the forum is the community's statement of its capacity and confidence to accept responsibility to handle conflicts at the neighborhood level. The assumption of individual and community responsibility is a positive value that serves to enhance the vitality and stability of the neighborhood.

4. That voluntary resolution of conflict between disputants is a positive value:

Coerced resolutions contain inherent limitations: of parties; of enforcement; of attitude; of future relations; of understand; and, of future conflict-resolution modeling. Voluntary resolutions are first and foremost a positive statement between the disputants about themseleves, each other, and the situation. If there are limitations they recognize what they are. If other parties should participate in the dispute, disputants recognize the contribution. If additional social resources are needed they come to this conclusion and make this determination. If future problems arise, they have a process to model or can invoke the forum anew. Voluntary resolutions made in the interests of the disputants do not need coercion to maintain them. Nor are power differntials (e.g.,landlord-tenant) minimized by the introduction of coercive forms. The broad community endorsement of the forum and respect for its process are the boundary lines of its "authority and force".[25]

The community justice model looks to strengthening in-community resources, responsibilities, and skills. It is not an extension of the formal justice system or the state's record keeping apparatus Community justice forums operate within the community arena of prevention, and accordingly seek conflicts and situations before they become justice statistics. Most critically, community justice forums have the potential to link the expression and resolution of conflict not only as a disputant goal, but as a community value.

Heather Standard

It is the community's support for the normative values of conflict expression that provides legitimacy and integrity to the neighborhood forum.

The alternative justice movement is a limited, often unexamined, effort to ameliorate the dysfunctional aspects of the modern, urban justice system. As an extension of the formal justice system, this movement, especially its agency-mediation model, raises serious policy and constitutional issues that should be thoroughly examined and critiqued before further model replication is promoted. Moreover, it is essential that close examination be made to understand the basis for the demise of neighborhood social units and the increased centralization of conflict resolution processes and authority. Further, an analysis and real assessment of the state's intervention in the dispute resolution process is very important and much needed.

The latter issue raises critical social policy concerns that arise directly from the state's extension of the justice system in the dispute resolution field. Neighborhood entities (e.g., schools, churches, libraries, beat cops, local markets, etc.) serve to model, project and expect a standard of individual and inter-personal behavior. The criminal justice system, and justice generally, in contrast models and projects the minimal standard of behavioral expectation short of punishment. This is a standard that is far less than what most communities are familiar with or would want to embrace. Individuals and neighborhood entities have the ability to model the behavior of excellence provided they exercise the necessary responsibility to make this expected standard a reality. The greater the reliance on police and agency coercion and fear mechanisms, the greater the likelihood that most neighborhoods will suffer a decrease in social responsibility (i.e., neighborhood atrophy) and an increase in the levels of fear and insecurity (i.e., unacceptable behavior).

It is not possible for law enforcement or the justice system to model the neighborhood's expected standard of behavior when the justice system itself openly projects a lesser standard in ascertaining whether the peace is being maintained.

To maintain and model the higher level of social behavior, neighborhoods need to exercise social authority and responsibility. The state could advance this effort by placing increased emphasis on the importance of the neighborhood units and encouraging their greater participation in promoting the quality of neighborhood life. This would mean the state's support for and willingness to abide by those areas of work and responsibility that are promoted by the urban neighborhoods. Social policy development and implementation would have to undergo significant change inorder to achieve the suggested level of neighborhood participation. However, few alternative options are realistically available if the level of neighborhood atrophy is to be reversed and the higher standard of social interaction between people is to be promoted.

In many respects, it seems appropriate to re-evaluate our justice policies by assessing the resources and needs of the citizenry within their urban and neighborhood context. It is the neighborhood and family units that are the building blocks of the urban environment. Their vitality and active social participation is a valid measure of the degree to which citizen and neighborhood responsibility are authentic parts of the nation 's social urban policies. The advancement of a dispute resolution process that directly relates to individual and neighborhood responsibilities for conflict resolution serves to incorporate the neighborhood's own resources in understanding and reducing fears and conflicts. As a policy norm in a democratic society the greater use and involvment of community people in the daily affairs of urban life should be actively encouraged and promoted. The principal failure of the alternative justice movement has been its agency focus and its limited advancement of broader democratic policy norms.

NOTES:

1. Nils Christie, (n.d.) Limits to Pain (unpublished). Presented at the Oslo Conference on Conflict Management; June, 1980.

2 National Conference on Sentencing, "Quest for Alternative' National Institute for Sentencing Alternatives, Brandeis University, Sept. 16, 1980.

3 L.H.C. Hulsman, An Abolitionist Perspective On Criminal Justice Systems and A Scheme To Organize Approaches To "Problematic Situations", manuscript, May, 1979.

4 American Bar Association Report, National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice (the Pound Conference), August, 1976; Nader,L. and Singer, L, "Dispute Resolution", California State Bar Journal, 1976; President's Commission on Law Enforcement and Administration of Justice, Task Force Report: The Courts, Washington, D.C., U.S. Government Printing Office, 1967.

5 L.H.C. Hulsman, note 3; Rick Able, Informal Alternatives to Courts as a Mode of Lealizing Conflict; unpublished, 1980.

6. Department of Justice and National Institute of Justice's initiated neighborhood justice center program in Atlanta, Kansas City and Los Angeles as model state alternative justice forums.

7 Thomas Mathiesen, "The Future of Control Systems--The Case of Norway, International Journal of the Sociology of Law, 1980, 8, 149.

8. Legislative history, California Assembly Bill AB 2763,"The Dispute Resolution Act",1979.

9 Institute for Mediation and Conflict Resolution, New York City

10 Boston Urban Court Program, Dorchestor,Mass.

11 Neighborhood Justice Center, Kansas City; early history, Institute for Mediation and Conflict Resolution.

12 Mathiesen, supra note 7.

Mathiesen, supra note 7, page 154.

Griffin B. Bell, Attorney General,"Foreward",Neighborhood Justice Centers: An Analysis of Potential Models, McGillis and Mullen, Oct.,1977; U.S. Department of Justice.

The Neighborhood Justice Center in Los Angeles sought to develop a community-oriented dispute resolution forum. A strong bias by policy makers against this approach resulted in the effort being essentially unsupported. The Neighborhood Justice Centers

Field Test Draft Evaluation Report was heavily critized by the Evaluation Team's Advisory Panel for its mirroring of the Department of Justice's biases in the draft evaluation.

Mathiesen, supra note 7, page 157.

17. William L.F.Felstiner and Lynne A. Williams, "Mediation as an Alternative to Criminal Prosecution: Ideology and Limitations," Law and Human Behavior,Vol.2, No. 3, 1978.

Mauro Cappelletti and John Weisner, ed.,Access to Justice, Vol II, "Promising Institutions", Milan, 1978.

Discussion by R. Shonholtz with many academic and governmental officials regarding the scope, operation, and local familiarity with the commissions during the course of a 14-day visit in Poland, June, 1980, sponsored by The German-Marshall Fund of the United States.

Discussions with R. Rybicki, Secretariat of the All-Polish Committee of the Front for National Unity (APC/FNU), the national body that regulates and oversees the operation and maintenance of the commissions.

21. Access to Justice, supra., page 172.

Lewis Coser, The Functions of Social Conflict, A Free Press, 1956

Nils Christie,"Conflicts as Property," 17 British Journal of Criminology, page 1-15; 1977.

24. C. Lasch, "Life in the Therapeutic State", The New York Review,

Vilhelm Aubert,"On Methods of Legal Influence", The Imposition of Law, Academic Press, 1979.