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THE PROBLEM OF THE QUID PRO QUO

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INTRODUCTION

In the twilight of the nineteenth century, a Committee of the Chicago Bar Association looked toward new horizons in the administration of justice, calling for State guardianship of children "found under such adverse social or individual conditions as develop crime." In prospect was a new vista of "care, custody and discipline" approximating "as nearly as may be" that which should be provided by parents.

The court that Committee recommended is today an established part of the legal apparatus not only in Chicago, but in every sizeable American city and in most counties across the land. Informal procedures designed to facilitate an untrammeled administration of justice have become a familiar part of our social life and certainly need hardly be regarded by members of the bar as novelties. This article, indeed, may be read by the great-great-grandchildren of those who were responsible for the original legislation.

Something more than sixty years is a brief span in the history of law, but it does encompass close to a third of the history of the republic. These have been years in which this society has legitimized in courts also regarded as service agencies the employment of sanctions customarily attendant upon the administration of justice. A new mode of address, nominally founded in chancery jurisprudence, has been evolved to handle certain offenders. They are heard without many of the protections against State abuse which a hallowed tradition has built into criminal law.

Jurisprudentially, The Albert Committee's Report on New York State's New Family Court Act contends that "a special agency for the care and protection of the young and the preservation of the family"[1] has been established. This "special agency" is charged with concern with the entire way of life of those brought before it. And in making dispositions (enforcing services) with the authority of the State brought to bear, only at the outset is attention focussed upon specific acts of cited individuals.

There has been a major compromise of the protections which a bitter experience has taught must be afforded citizens. The justification suggested is that in these courts, perhaps uniquely, the State acts as fond parent rather than as the executor of the censurious conscience of the community. A broad range of social services afforded those appearing before the court has been offered as the *quid pro quo* for those formal guarantees which have been concertedly circumscribed.

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1. N.Y. Joint Legis. Committee on Court Reorganization, Rep. II (The Family Court Act) 2 (1962).

In the light of these contentions, it is appropriate to examine the record with regard to the *quid pro quo*. It also may be appropriate to question the desirability of converting tribunals from adjudication-disposition centers into quasi-social-service agencies.

In every great American city today, thousands of families find themselves continually in a desperate impasse. Theirs is not merely an acute crisis situation, but a way of life characterized by chronic disorganization and a hideous deterioration of morale. Dwelling in socially—as well as physically—encapsulated enclaves near the heart of the metropolis, the hopeless, the ineffective, the improvident, those for whom socially inacceptable behavior or an immanent dependency has become the life style are a challenge to social planning. A case can be made, therefore, for the desirability of new ventures both in the prevention of social breakdown and in the provision of ongoing rather than occasional services. Whether a court is an appropriate agency for planning and providing such services seems, in the light of the record, highly debatable.

Students of social disorganization have for several decades suggested that the people encountered in the social courts seem to be a veritable cross-section of the population of certain neighborhoods of the city these courts are designed to help. This is a population not dissimilar to that served by many of the regular welfare agencies. It is a population not even perceptibly different from those who might be found if a researcher were merely to inquire into the situation of the next door neighbor of each individual appearing before the courts. Just who becomes the beneficiary of the court's good offices seems very largely dependent either upon fortuitous factors or upon the exercise of discretion in the law enforcement processes.

As for the appropriateness of the services rendered by (or through) the courts, the range of "parental" outlook among presiding judges has flabbergasted informed observers for generations. Writing from the vantage point of the Los Angeles Children's Court more than thirty years ago, Van Waters observed:

> The range of conflicting philosophies to which the child may be subjected is tremendous. For example, theft committed by a fourteen-year-old boy may result in probation, or a long term in an adult prison [presently rare] or commitment during minority to a juvenile training school or placement in a foster home; nor is the type of treatment always determined by differences in the child's case history. All degrees of intelligence and social experience are found in these various agencies. In the United States the local political situation and public opinion have more to do in determining juvenile court policy than a scientifically wrought plan.[2]

Over a generation's time, we have made some progress, but many social workers would subscribe today to the observation of Fritz Redl of the National Institute of Mental Health that:

2. 8 Encyc. Soc. Sci. 532 (1932).

> Decisions whether a child should have a foster home, an institution, out patient therapy, a psychiatrist or something else are still made on the most amazingly mystical or at least non-explicit basis. Worse, scientific lingo is amply used to disguise the fact that actually value judgments or personal preferences for traditionally accepted or rebelliously preferred treatment methods usually govern . . . .[3]

The foundation upon which the courts here discussed have been erected is concern with the whole person and not merely with the particular act which leads to his appearing before the bar of justice. Yet it is a commonplace observation among behavioral scientists and mental health personnel familiar with the courts that numbers of judges, in making dispositions, clearly concern themselves not with the offender but with the offense (if it happens to be of a type with which they are preoccupied).

It is surely a tenet of the individualized process that the same offensive act has different meaning in the troubled lives of different offenders and that (conversely) offenders troubled by essentially similar difficulties may manifest their problems in altogether dissimilar fashions. Yet the court in action frequently manifests minimal appreciation of any such proposition.

QUID: CONSTITUTIONAL PROTECTIONS COMPROMISED

The informal process of this ostensibly non-criminal court typically makes short shrift of the formalities stipulated in our constitutional guarantees.[4] It is certainly true that in most matters brought before the court, the facts are scarcely in dispute; it is likewise true that most judges are scrupulous about *pro forma* gestures with reference to the right to counsel and the privilege of refraining from self-incrimination. Nonetheless, the atmosphere all too frequently suggests a firm resolve to proceed to some already contemplated disposition, or an equally firm desire to activate the wheels of some particularly cherished apparatus of service.

Reference is made *infra*, to some of the alarming gaps in the complex of services for which the Legislature has bartered a measure of the historic protections afforded those haled before a criminal court. It seems not unfair to observe at this juncture that a tyranny benign in intent is on that account no less tyrannical. Among those *adjudicated* juvenile delinquents in 1959, the Joint Legislative Committee found close to one in three[5] were charged only with being ungovernable, mischievous, a truant, or a runaway.[6] The proportion

3. 4 Children 18 (1957).

4. See People v. Lewis, 260 N.Y. 171, 183 N.E. 353 (1932); for a general discussion, see also 43 C.J.S. *Infants* § 97 (1945) ("the constitutional guarantees respecting defendants in criminal cases do not apply in juvenile proceedings").

5. N.Y. Joint Legis. Committee on Court Reorganization, Rep. II (The Family Court Act) 7 (1962).

6. Under N.Y. Family Ct. Act § 712(b), these youngsters are denominated "in need of supervision" and are not to be committed to institutions for juvenile delinquents. They may, however, be placed in the custody of an authorized agency or a "youth opportunity center." A loss of liberty is clearly one consequence. For disposition generally, see N.Y.

of delinquents actually *committed* may appear small (one youngster in six according to the statistics provided the Joint Legislative Committee),[7] but it would be well to remember that more than ten times as many children fall into the toils.

They have fallen into the hands of courts in New York and in other states where the following privileges and practices (and there are still others) frequently or practically[8] do *not* obtain:

(1) a formally explicit indictment, and a trial without delay
(2) representation by counsel
(3) compulsory process for the production of witnesses
(4) the right to a public trial, and by a peer jury
(5) the right of confrontation and cross examination of witnesses
(6) the right not to testify against oneself
(7) protection against "cruel or unusual" punishment

Against the contention that guilt cannot be held to be established unless the weight of evidence falls "beyond a reasonable doubt" it has been argued that in this non-criminal court "a preponderance of evidence" suffices. And an uncorroborated confession may legally prove the case.[9] Whether judges must make written findings of fact at all seems left open.[10]

Under section 846 of the new New York law, it would appear that recalcitrant adults (for whom a maximum six-month jail term is stipulated) may be dealt with more tenderly than juvenile delinquents (who, under section 758(c), may be committed to a correctional institution for as long as three years). Indeed, under section 312(b), a child can be found "neglected" and taken from his parents not only if he "suffers . . . serious harm from . . . improper guardianship" but even if he is deemed "likely to suffer serious harm"!

> When children are taken from their homes and families and deprived of their liberty by incarceration in an institution, they are being punished. . . . Furthermore, the record by now is abundantly clear that children are being committed by juvenile courts on far less

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Family Ct. Act § 754. For placement, see N.Y. Family Ct. Act § 756 including the April 1963 amendment which permits the continued placement of such children in state training schools through 1964, as a "temporary" expedient. See N.Y. Sess. Laws 1963, ch. 809, 810, 811.

7. N.Y. Joint Legis. Committee on Court Reorganization, Rep. II (The Family Court Act) 9 (1962).

8. Neither a statutory provision, nor a *sotto voce* reminder suffices to make of a formal protection a practical reality. Personnel attuned to the temper of adversary proceedings may find the "service" aspirations (and responsibilities) of the socialized courts make for an unaccustomed atmosphere, but, as Article 2, part 4 (Law Guardians) of the Family Court Act indicates, they potentially can make a not inconsiderable contribution. The desirability of something more effective than customary guardian *ad litem* procedure is strongly suggested by the kinds of occurrences mentioned in 15 Interim Report, Juvenile Delinquency Evaluation Project, New York City 10 (1960).

9. N.Y. Family Ct. Act § 744(b); such confession is "insufficient" only if "made out of court."

10. In this connection, see Note, 61 Harv. L. Rev. 1434 (1948), discussing findings of facts under Federal Rules of Civil Procedure.

> grounds than would justify a criminal court in depriving an adult of his liberty.[11]

In New York City, for example, the court has been known to make a finding of juvenile delinquency (presumably in order to move with vigor in the provision of ameliorative services) on the basis of evidence that a child was stealing a ride on the back of a bus.

The court is represented as a "service" and "treatment" center (and it is, indeed, the agency of last recourse for many whom community agencies, governmental and philanthropic, have failed or refused to serve). Yet too cavalier a desire to "get on with it" should be given pause by conservative evaluation both of scientific assessment skills and of the level of certainty to be ascribed to presently developed services. Younghusband, discussing "The Dilemma of the Juvenile Court" recently observed that:

> [we have] juvenile court programs based on humane and enlightened motives, without knowing or having what it takes to produce the results which we feel should follow as a result of our humane intentions. . . . To understand and treat persons presupposes that we do in fact know how to diagnose and treat them and that we have the necessary facilities available.[12]

Quo: A Dubious Provender of Treatment & Service

It would be germane to question whether the children who are noticed by the police are those most in need of the court's "service." And it would be germane to question whether of those children apprehended precisely those actually "petitioned" are most in need of the court's "service." If it be assumed at least that those actually adjudicated are among the children in the community who actually are in need of help, what have the courts been providing?

(a) Of the alternate dispositions a judge may elect, perhaps the simplest is to counsel the child and discharge him in the custody of his parents or guardians. The quality of "service" in such an eventuality clearly turns upon the salutary effect being haled into court may have on a youngster. Or it may be a function of the quality of the judge's professional skill as a counsellor.[13]

(b) A more forceful disposition is to suspend judgment or to continue the proceeding while making interim arrangements for appropriate custody of the child. In this instance (and in a not dissimilar eventuality when the presiding judge solicits information to be made available at some future date) it is not uncommon that when the case is resumed (if the bench is sizable)

11. Antieau, *Constitutional Rights in Juvenile Courts,* 46 Cornell L.Q. 390 (1961).
12. 33 Soc. Service Rev. 11 (1959).
13. The N.Y. Family Court Act requires only that up-State judges have been members of the bar for ten years (§ 134); in New York City it is stipulated that the mayor "shall select persons who are especially qualified for the court's work by reason of their character, personality, tact, patience and common sense." (§ 124) Are there then no specifically *professional* skills which qualify a person to counsel a child in trouble. And is counselling a proper task for the bench, in any event?

the judge to whom reports are provided may be a different judge, conceivably with his own approach and his own set of inquiries.

(c) The judge may place a child on probation, placing more or less essential reliance upon an officer of the court to discharge the *parens patriae* role, to supervise, advise and inspire the delinquent child. Such a disposition, while occasioning the State a measure of expenses, permits the child to remain in his natural *milieu* and spares him the burden of the full weight of authority the judge can bring to bear.

What can be said of the qualifications of probation officers and the opportunities afforded them in serving youth? While New York sanctions the employment of volunteers, the Joint Legislative Committee Report comments: "Professional staffing of the probation service is desirable for the Family Court properly to discharge its responsibilities under this Act."[14]

Just what the Committee regards as "professional" is left undefined. But of some two thousand probation officers who provided information in a nationwide survey just four years ago, not one in ten had completed the masters curriculum in social work.[15] And half the nation's counties have no juvenile probation service of their own.[16]

The National Probation and Parole Association (as of 1957) lists 50 as the maximum number of cases to which a juvenile probation officer can be expected to provide adequate supervision. This actually envisions, on the average, *but one visit a month* to the probationer. Yet only 3% of juvenile probation officers nationally carry work loads within the standard. *Three out of four juvenile probation officers carry more than twice the recommended maximum load.* This means that some 77% of the juveniles being "supervised" by probation officers are seen on the average only once every nine weeks![17]

(d) A last major type of disposition is commitment to a state or private institution.[18] Such "service" costs perhaps fifteen times as much as adequate probation supervision,[19] and much will depend upon the kind of "treatment" provided in the particular institution in which the child ends up.[20]

The quality, both of care and of service, has improved over the decades. A recent study using a modest Pennsylvania yardstick of $4.39 per day per child for "program services,"[21] found total expenditures across the country of only

14. N.Y. Joint Legis. Committee on Court Reorganization, Rep. II (The Family Court Act) 39 (1962) (a comment to section 215).
15. 15 Facts & Facets 2 (Children's Bureau 1960).
16. White House Conference, Children in a Changing World 25 (1960).
17. 15 Facts & Facets 7 (Children's Bureau 1960).
18. Presumably *not* because of the particular act which occasioned the adjudication, but as the course of "treatment" the judge has decided will prove most helpful to the child, taking all his problems and his entire way of life into consideration.
19. 10 Facts & Facets 26 (Children's Bureau 1960).
20. Philanthropic institutions for wayward and delinquent youth of New York City, for example, "reject on the average as many as four out of five" candidates for admission. 11 Interim Report, Juvenile Delinquency Project, New York City 1 (1958).
21. Including, for example, thirty-three cents for casework, twenty-eight cents for recreation, and $1.40 for "homelife."

$2.36; the total (including maintenance) was $8.39 on the yardstick but only $5.74 nationwide. Of 128 public training schools in the sample, four out of five were operating on substandard treatment-education expenditures.[22]

Perhaps Columbia University's Professor Monrad G. Paulsen, on the whole favorably disposed toward the individualized treatment procedures of the juvenile courts, had all this in mind when he wrote:

> If we do not provide reasonably good rehabilitation and care-taking facilities for juveniles, the youngsters ought to go free unless we can convict them of crime. When we do not give children in trouble adequate institutions, we do not merely fail them, we deprive them of constitutional rights. Parental care rather than punishment has been offered in exchange for some constitutional safeguards. The price must not be paid in counterfeit coin.[23]

The Articulation of Professionals' Expertise

The continued endeavors to transform a court of justice into a veritable social service agency or treatment facility is but one approach to the challenging problem of families in crisis, children in hazard. Conceivably, judges might be limited to adjudication, and "treatment and care" (if such are really to be provided) might be left in the hands of personnel specifically identified as professionally competent in such matters—or at least as competent as our laggard behavioral sciences permit. But that is another study.

The problem at hand is the administration of a socialized court under enabling legislation making it responsible for treatment, yet identifying probation officers and mental health personnel (clinical psychologist, psychiatrist, social worker) as "auxiliary."

Clearly in such a setting, it is incumbent upon the judiciary to define with some clarity *both* its expectations of personnel in other disciplines *and* the measure of authority delegated to them in order that they may live up to their responsibilities. An economical and productive division of labor is unlikely to eventuate in a bureaucratic apparatus left unattended, to bear the imprint of whichever strong personality may happen to rise to the top.[24] Simple fiat cannot make for competence in court officers whose preparation does not equip them for the demanding task of assessing social need in a multi-handicapped population.[25] Nor does a pious pronouncement insure that subtle articulation of segmental expertise which makes for effective team operations.

22. 10 Facts & Facets 32, 34 (Children's Bureau 1960).
23. Paulsen, *Fairness to the Juvenile Offender*, 41 Minn. L. Rev. 576 (1957).
24. "To see delinquency through the eyes of the clinical psychiatrist alone, is not to see it whole." Horwitz and Epstein, Perspectives on Delinquency Prevention 11 (N.Y.C. Mayor's Office 1955).
25. "The majority of children in the Manhattan Children's Court come from families with annual incomes of less than $2000; two-thirds come from the worst slums in the city; about half are members of ethnic minorities confronted by a multitude of social discriminations." Peck, Harrower, Beck, Horwitz, *et al.*, A New Pattern for Mental Health Services in a Children's Court 4 (1958).

A *sine qua non*, surely, is some measure of mutual respect among *all* the members of a court's staff. A judge should have some understanding of a psychiatrist's *modus operandi*. And a social worker should have the patience with judicial process that grows out of a deep seated deference to the social values which underly the rule of law.

Effective employment of "auxiliary" personnel must be based upon three propositions: 1) the judge must know enough about the processes of social study and social service to address relevant inquiries to his colleagues; 2) the colleagues must be encouraged to make spontaneous contributions of an advisory character; and 3) the nature of the responsibility specifically placed on the judge's shoulders, under the law, must be clearly understood and accepted by him as well as his colleagues.

To assess the validity of the radical assumptions upon which the structure of "individualized justice" has been erected is to scrutinize the discretion, the ingenuity, and the employment of social values that characterize the conduct of the presiding judges.