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“Need” and “Overt Act” in Juvenile Court Law

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The current trend of academic analysis of the juvenile court as a treatment organization and the emphasis on treatment aspects of juvenile court activities have led to a popular assumption that the court applies a criterion of need in dispensing its services. A traditional legal analysis would suggest the application of a criterion of overt act. Even if we assume that the intention of juvenile court legislation is to apply some criterion of need, the question then becomes one of how needs are demonstrated or measured. A criterion of demonstrated need brings one full circle to a requirement of overt act.

THE most recent development in correction might be summarized as follows:

A correctional institution should be like a hospital. Just as a hospital has separate sections or wards for the treat-

ment of different kinds of illnesses, so should a correctional institution have separate sections for the treatment of different kinds of personalities. Just as a hospital has several different kinds of clinical services, so should a modern correctional institution have several kinds of

clinical services for the examination, diagnosis, and treatment of different kinds of disorders.

Such remarks reflect the general approach that antisocial behavior is an illness, the remedy for which is differentiated treatment.

A Treatment Approach

If we analyze correctional treatment in terms of hospitalization, then we might well ask: Does the court become the admitting office?

If we analyze some of what is being said in the juvenile court field, the comparison seems apropos. Consciously or unconsciously, the treatment enthusiasts reason somewhat as follows: Differentiated treatment is the accepted remedy for antisocial behavior; to be effective such treatment must meet the needs of the person; the needs of that person must then be the critical element in determining the treatment; study and experience have shown certain common needs among persons exhibiting antisocial behavior; treatment facilities cannot be created overnight and are therefore established on a forecast of certain demands; once facilities are established, persons should be selected on the basis of *need* for treatment. The court then selects and admits for treatment.

A parallel line of reasoning takes off at the point where we say that "study and experience have shown certain common needs among persons exhibiting antisocial behavior" and goes on to say that further study shows (or will show) that, if you examine and analyze the life of the person prior to his exhibiting antisocial behavior, you will find that certain of his needs are apparent. Consequently, it behooves us, in the

interest of society and of the individual, to attempt to fill these needs at the earliest possible point in life. If this is done, persons should be selected who need treatment, and the differentiated treatment should be supplied. The court should select and admit for treatment.

Each of these lines of reasoning can be reinforced with strong and appealing economic arguments which compare the cost to society of continuing antisocial behavior with the cost of effective treatment.

Those who conceive of the juvenile court as a treatment organization then conclude by reasoning that the modern juvenile court has developed differentiated services and facilities, has the authority to require the use of these services, and should therefore select individuals for treatment according to their needs.¹

We must pause here to make it clear that throughout this discussion we are talking of the situation where the treatment is imposed upon the persons and not the situation where the persons voluntarily seek help for their needs. This is a cardinal distinction frequently overlooked or ignored by persons comparing the juvenile court to other treatment organizations. The usual medical hospital or clinic admits its patients on a voluntary basis, and they leave on a voluntary basis. They are neither restrained nor constrained to accept treatment. Freedom to accept or reject medical or hospital care is protected even when the government is paying the expense of such care. In Michigan, for example, the Afflicted Children's Act provides as follows:

¹Cf. Orman W. Ketcham, "The Unfulfilled Promise of the Juvenile Court," *Crime and Delinquency*, April, 1961, pp. 97-110.

Nothing in this act shall be construed as limiting the power of a parent or guardian or person standing in loco parentis to determine what treatment or correction shall be provided for a child.—Michigan Statutes Annotated, § 25.422 (22).

The government is empowered, of course, to protect public health against "dangerous communicable diseases and contagious diseases." But can it be said that science is yet in a position to prove the contagion of delinquency or neglect? I think not, and any such analogy must fail.

Doctrine of Overt Act

On the other hand, those who look at the court from the point of view of its judicial function have focused on the questions surrounding the initiation of court action. Starting with the premise that in a democratic society the individual is free to live as he sees fit until he violates the laws of society, they reason that there must be a legal reason for the intrusion of court action into his life. Even the best intended treatment represents such an intrusion, and when it is ordered by a court it also represents coercion. In contemplating the nature of a legal reason for court action, they borrow from the background of law to say that a legal reason is given when there is proof of an *overt act* that violates the laws of society.

"Overt act" as applied in the criminal law embodies several concepts. It includes the requirement that the act which is made a crime be defined clearly enough for a person to know what is considered criminal. It includes the legal requirement of some criminal intent by the accused. It includes the rule that in addition

there must be some act or omission by the person accused, that this act or omission be defined in the law as criminal, and that the act or omission include all the necessary elements to constitute a particular crime as defined.²

For the purposes of this paper I have given an abbreviated discussion of the legal meaning of "overt act." Yet it should be enough to show that it means something more than a physical act or omission, as shown in the following examples:

Some act of commission or omission lies at the foundation of every crime.—State v. Labato, 7 N.J. 137, 80 A.2d 617 (1951).

Criminal intent alone is not punishable.—Sherman v. United States, 10 F.2d 17 (C.C.A. Mich., 1926).

That which is unlawful is not necessarily criminal.—Wallace v. Indiana, 232 Ind. 700, 116 N.E.2d 100 (1953).³

A mistaken belief, coupled with intent, cannot make a lawful act a crime.—Missouri v. Taylor, 345 Mo. 325, 133 S.W.2d 336 (1939).⁴

Conflicting Views?

We thus have two apparently conflicting views in the interpretation of juvenile court laws. One says that the juvenile court is primarily a treat-

² 22 C.J.S. *Criminal Law* § 37 (1961).

³ In this case a man was prosecuted for attempted suicide. The charge was ultimately dismissed because it was found that while suicide was unlawful in Indiana it was not defined as a crime. Consequently, the attempt could not be a crime.

⁴ In this case a man was prosecuted for bribing a juror. He intended to bribe and he committed the act of tendering the money, but he was under the mistaken belief that the man he approached was a juror—when in fact he was not. Consequently, the charge was dismissed.

ment organization and its "clients" are selected on the basis of need. The other says that treatment is a secondary step, that the juvenile court is first a juridical organization which determines the violation of the laws of society on the basis of the acts of individuals and then orders treatment when appropriate.

It will be the purpose of this paper to explore some of the ramifications of the "need" and "overt act" approaches and to see whether they are really mutually exclusive.

Misplaced Delinquency Jurisdiction?

At this point we may dispose of one related question. Some have argued that the difficulty stems from the inclusion of delinquency jurisdiction within the juvenile court, that delinquency does not fit into the *parens patriae* theory, the overall justification for juvenile courts.⁵ They say that the inclusion of such jurisdiction was really an accidental by-product of the effort to remove children from deplorable prison conditions and that it was obtained without any real consideration of the court proceedings or the legal rights involved.⁶ They reason that the conflict between "need" and "overt act" can be resolved by removal of delinquency jurisdiction from the juvenile court. The finding of delinquency can then be based upon proper proof of an overt act in a more traditional forum. At the same time the protec-

tive arm of the juvenile court can be extended in neglect situations on the basis of the needs of the children or the family. The legal logic is that the delinquency matter involves a charge which may result in depriving the child of his liberty. His liberty is therefore entitled to safeguards which our law has developed for its protection. Among these safeguards is proper proof of the overt act. They dramatically point out that liberty is restrained every bit as much in a training school as in a jail or a prison.

On the other hand a neglect charge, they say, is aimed not at the child but at the parents. They point out that under the *parens patriae* theory the state has an obligation to supply parental guidance when such guidance is not given by the natural parents. The proceeding, therefore, is to protect the child by implementing this policy. It must then follow that a true interpretation of the policy provides for filling needs that are unmet by the parents. It is therefore appropriate, and within the policy, for the court action to be determined on the basis of needs not met by the parents.

I suggest that this distinction is illusory and not well founded and that a historical and traditional legal justification of this argument breaks down when exposed to a basic theoretical legal analysis.

Parents and Children: Rights and Duties

Regardless of any question of personal liberty, the law and nature have established a network of rights between child and parent. These rights generate corresponding reciprocal duties. Thus the right to cus-

⁵ Jack J. Rappeport, "Determination of Delinquency in the Juvenile Courts: A Suggested Approach," *Washington Law Quarterly*, April, 1958, p. 123.

⁶ Edward Lindsey, "The Juvenile Court from a Lawyer's Standpoint," *Annals*, March, 1914, p. 143.

tody implies a duty of the parent to provide food and shelter and a corresponding duty of the child to live with the parent. It is not necessary to pursue this further for our purposes, for it can readily be seen that such an analysis can be made of every conceivable right involved in the parental relationship. At this point it is necessary only to see that such rights exist and that the law protects the additional right of the child and parent to develop their relationship without interference from external forces. The family can live as it sees fit within the laws of society.

Consequently, when the child is institutionalized for a delinquency, much more than his personal liberty is involved: the natural and common law rights of both parent and child are violently affected. So also, when a child is institutionalized for his protection as a consequence of a neglect action, the *reason* may be *different* but the *result* is the *same*, and the same network of rights is violently affected in the same way. (It seems too obvious to mention that here again, included in those rights, may be the right of personal liberty.) The same can be said of remedies less severe than institutionalization. Foster care, whether ordered as a result of delinquency or neglect, results in a modification of the parents' right to custody and control and of the child's right to association with his own parents. The essential legal effect is to modify the existing rights and duties in both instances.

Societal Norms

In both situations society, protecting itself against violations of its norms, is declaring that certain behavior opposed to its interests will

not be tolerated. In one situation the behavior is roughly equivalent to criminal violations, while in the other it *may* be criminal. The essential fact remains that in both situations society has decreed that certain conduct is inimical to its best interests. You can make a tentative distinction only if you are prepared to concede that in one situation a penalty is imposed as punishment. Even then, as we have seen, the distinction breaks down for, in terms of the legal rights and duties, the effect remains the same.

For these and related reasons I suggest that a transfer of delinquency jurisdiction from the juvenile court would not and does not resolve the conflict between "need" and "overt act."

While there is some reason for believing that the establishment of the juvenile court was an emotional reaction to certain social conditions prevailing at the time,⁷ let us assume that the early drafters and those who followed did know what they were doing. Let us assume they intended to establish a new kind of organization that would perform a new function in government.

What were to be the criteria by which this organization operated? Every organization has criteria for admission. Even your local luncheon club establishes criteria for admission to membership.

Statutory Construction

Was need to be the sole criterion for the juvenile court? Is it fair to say that the framers of juvenile court legislation intended to reject com-

⁷ Herbert H. Lou, *Juvenile Court in the United States* (Chapel Hill: University of North Carolina Press, 1927).

pletely all elements of the concept of overt act? We have seen that many principles and rules are bound up in that one term. Certainly, if such a sweeping revision were intended, the drafters would have said so explicitly. In fact, it is a general rule of statutory construction that statutes will not be interpreted so as to impliedly abrogate well-grounded, existing common law rights.⁸ It is also true, as a general rule, that statutes will be strictly construed when restrictive to individual rights.⁹

We can reasonably suppose that the framers of juvenile court legislation were aware of existing law and existing rules of statutory construction; consequently they would have been explicit if they had intended to make such a drastic change.

I am not aware of any juvenile court legislation which provides that "proceedings shall be undertaken to determine the needs of juvenile . . ." or includes language of similar import. Nor am I aware of statutory language such as "The juvenile court shall assume jurisdiction of juveniles within the county according to their individual needs. . . ." I have no knowledge of *any* statute that uses the term "need" in its definition of the court's jurisdiction.

The unvarying pattern of such legislation is to define court jurisdiction in terms of certain factual situations that involve actions or omissions of individuals and provide a basis for court proceedings, as illustrated in the following:

One who habitually violates the law or otherwise spends time improperly. . . .
—Iowa Code Annotated, § 232.3.

⁸ 50 *Am. Jur.*, Statutes § 403 (1944, rev. 1962).

⁹ *Id.*, § 407.

Child leading injurious life . . . [or] has committed a violation of law or ordinance. . . .—Louisiana Revised Statutes, 1960 Supp. § 13.1570.

Neglected, in an injurious situation, uncontrollable or accused of crime. . . .—Baldwin's Kentucky Statutes Annotated, ch. 208, § .020.

The child shall be alleged to have committed a violation of law.—Florida Statutes Annotated, ch. 39.03 (b).

(1) Who has violated any municipal ordinance or law of the state or of the United States; . . . (2) Who has deserted his home without sufficient cause . . . (3) Who repeatedly associates with immoral persons. . . .—Michigan Statutes Annotated, § 27.3178 (598.2).

Liberal Construction Clause

Granted, a majority of such statutes also include a liberal construction clause usually containing language similar to this:

. . . shall be liberally construed so that the care, custody and discipline of the children brought before the court shall approximate as nearly as possible that which they should receive from their parents.—Annotated Laws of Massachusetts, ch. 119, § 53.

What is frequently overlooked is that this direction of liberal construction pertains to the *disposition*, which is *subsequent* to the determination that the child is an appropriate one for court concern. The *initial* determination for court action must depend upon the proof of acts or omissions defined in the statutes.

Juvenile court legislation has added one thing more. While defining acts and omissions which give rise to a cause for action, it goes on to say that even then action is not automatically necessary. Most of our statutes add the additional provision

that action must be in the best interests of the child or the community.¹⁰ Consequently, even though the factual situation may be proven, the matter may be dismissed if in the judgment of the court further action would not be of benefit to either the child or the community.¹¹

Assuming a Doctrine of Need

Let us suppose for the moment that, in spite of a determined effort at objectivity, this interpretation of juvenile court legislation is so favored by my legal background that it is in fact erroneous. And let us suppose that although they were not explicit, the framers of juvenile court legislation did intend that a criterion of need should be applied in the determination of court action.

How, then, was this need to be determined? Were we to trust the subjective judgment of the case-worker? I think not. No matter how highly trained? I think not. We need only point out that the legislation created a *court*, with a *judge*, to show that the intention was to have this decision made by someone who was apart from the investigative and case-work process.

How, then, was the need to be communicated to this objective third party? By the use of the senses, as in any communication—by visual aids and the written and the spoken word. Since a judgment is to result, the communication is to be tested for validity and reliability. What was to be the basis or foundation for these words? The words must of necessity describe factual situations known to

the one communicating and, in addition, may convey the opinion of the one communicating. However, opinions are not formed in a vacuum. Opinions are based upon knowledge applied to a given factual situation. Consequently, the essential basis of the written or spoken word communicated to the one making the judgment is some kind of factual situation.

What kind of factual situation did the framers of the legislation have in mind which would serve as a basis for these communications? We cannot escape the fact that they stated explicitly the factual situations they had in mind. These situations are given in the statutes as definitions and as a basis for a court proceeding. In other words, even though we assume for the sake of exposition an intended concept of need, the legislative draftsmen stated that *the need would be demonstrated by the conduct of a person in certain given situations*. In effect, then, the framers are saying that one who violates a law or ordinance may have demonstrated by this conduct a certain kind of need, that one who habitually associates with immoral persons may demonstrate by this conduct a certain kind of need, and that one who is neglected or injuriously situated is placed in a factual situation which may demonstrate a certain kind of need.

Elements of Demonstrated Need

If we are correct in this reasoning, then we have shown that one of the primary elements of "overt act," the *act of commission or omission*, is also an intrinsic element in the application of a concept of need, for it is essential to the described factual situation.

¹⁰ Downs, *Michigan Juvenile Court: Law and Practice* (Ann Arbor: Institute of Continuing Legal Education, 1963), p. 66.

¹¹ Cf. *In re Sanders*, 168 Neb. 458, 96 N.W. 2d 218 (1959).

Our discussion of overt act above mentioned two additional elements: intention of the individual and prohibition by the people.

Who is there to argue that the element of intent, willfulness, malice—call it what you will—enters into the evaluation of given conduct whenever we assess the person's treatment needs? Rarely indeed is an act condemned, no matter how objectionable, when it is clearly accidental or involuntary. In common parlance we say it is "blameless." This is not to say that we demand a specific intent to accomplish a specific result. We do demand that the person must have been in control of his faculties and aware of his actions. Consequently, I believe it fair to say that the degree of intention within the described factual situation is always an element in the determination of the person's needs for treatment.

We come now to the element of some act or omission that is proscribed by society. I would be the first to agree that in interpreting juvenile court legislation we do not require the particularity of description that has been traditional in the criminal law. Nevertheless, it would be folly to say that this element of a violation of an accepted norm is lacking. Certainly, a youth who behaves in a manner acceptable to other members of society will not be the subject of court action. He attracts court attention only when he behaves in a

manner contrary to the accepted norms of society as a whole. It is only then that people see him as different and in need of treatment.

Logic and experience clearly support the notion that a "violation" is one of the elements of demonstrated need. At the same time our society has had great difficulty in establishing the norms by which to judge violation, the standard of conduct we wish to require. Consequently, the juvenile court has had great difficulty in interpreting the statutes. The language of juvenile court law is vague and ambiguous, subject to divergent interpretation. Uncertain norms make it difficult, if not impossible, to define legal duties with a reasonable degree of certainty. But this is a separate problem; it does not affect the analysis of the theoretical elements of a demonstrated need.

We can conclude, then, that the concepts of overt act and of need are not mutually exclusive. Critical analysis and objective application of a concept of need require a demonstrated need; a demonstrated need involves the same essential elements, perhaps in varying proportions, as a legal concept of overt act. I submit, finally, that one of the difficulties encountered in harmonizing these views has been an insistence on subjective determinations, along with a misunderstanding of the various ingredients of the decisions or judgments involved.