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Juvenile Justice and the Blind Lady*

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ROSCOE POUND called it the highest form of justice. That was 1940 and Mr. Pound was referring to the individualized justice of that bold social experiment known as the juvenile court. In 1967, Justice Fortas of the U.S. Supreme Court called it the worst of both worlds. Mr. Fortas was also talking about the individualized justice of the juvenile court. In 1989, writing for the majority in *Heath A. Wilkins* v. *Missouri*, Justice Scalia said that the Missouri juvenile court's certification procedure ensured individualized consideration of the maturity and moral responsibility of a 16-year-old youth before he was required to stand trial as an adult. The U.S. Supreme Court's determination in this regard was pivotal in its decision to uphold the death penalty imposed on Wilkins by the State of Missouri.

One hundred and twenty years after its informal founding in Suffolk County, Massachusetts, and 92 years after its formal founding in Cook County, Illinois, the U.S. juvenile court and the juvenile justice system it anchors are alive and in many ways surprisingly robust, but the ground is rapidly undulating under its foundations. As we enter the twenty-first century, there are more than a few pressing issues to be resolved in our juvenile justice system.

Mission

Of the 38 states that articulate a mission for the juvenile court, 37 still assert acting in the interest of the child as the state's primary means of responding to the children who come within its purview, but change is in the wind (Szymanski, 1991a). Arizona, a few years back, passed the so-called PIC Act requiring juvenile courts to impose Progressively Increasing Consequences (PIC) on repeat delinquent offenders. Conceptually, this notion of progressively increasing consequences is more akin to the juvenile court's original concept of "individualized justice" than it is to the criminal court's concept of punishment proportionate to the harm caused by the criminal act. But it does not seem to be exactly what the founders had in mind when they spoke of tailored dispositions that were in the interest of the child. Other states, such as Utah, California, and Minnesota, have departed much farther from tradition by requiring that offenders be held accountable and/or responsible for their criminal law violations, while taking care to avoid any taint of criminality. None of these statutes are very eloquent on just what courts are supposed to do to avoid the taint of criminality while holding juveniles responsible for their "criminal behavior," and as might be expected the issue has become more than a little clouded, as exemplified by the recent actions of the Texas legislature authorizing juvenile courts to impose prison sentences of up to 30 years for certain classes of offenders. Texas courts are also *presumably* supposed to impose these periods of confinement while acting in the best interest of the state's children. Of course, it is at least arguable that it may be in the best interest of the child to sentence him to 30 years in prison, but the logic begins to get brittle somewhere past the age of majority since adult/criminal offenders whom courts sentence to prison for punishment rarely serve 30 years.

If the trend continues in the direction of holding youth accountable for their criminal law violations, we will soon need to re-examine our assumptions about the "criminal responsibility" of juveniles. We cannot continue to hold persons accountable for their criminal behavior without finding them culpable and therefore criminally responsible for their actions. If indeed juveniles are to be held criminally responsible for their behavior, the preferred forum for achieving that goal appears to be the criminal court--the medium that has always been available on a case-by-case waiver or transfer basis, but one that is now increasingly being prescribed by legislatures.

The Protective Side of the Mission

Although ambivalence shrouds the court's mission for delinquents, no such uncertainty exists with regard to neglected, dependent, and abused children. The decade of the eighties has witnessed an unprecedented movement of neglected children into the courtroom. The engine for this movement has been the rapidly disintegrating American family and Public Law 96-272, which requires courts or a court-approved tribunal to periodically review children in placement and assure that reasonable efforts are made by protective service agents to avoid placement of children in the first instance. Of course, the primary goal of these

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requirements is to sustain children in their families of origin where possible, but to move with dispatch in finding a permanent home for the child--if efforts to restore the family's functioning fails.

This legislation has added approximately 400,000 cases of children in foster care to the annual dockets of juvenile and family courts in the United States. This sudden increase has not been accompanied by a commensurate increase in resources and, therefore, has strained the court's capacity to the point of breaking. Typically, juvenile and family court judges now spend at least one-half of their bench time hearing such matters, when they were spending less than 20 percent on such cases prior to the advent of Public Law 96-272.

The future portends even more court involvement in protective service matters as states become more and more intrusive into family affairs by default as the family falls apart. Family theorists now insist that there are at least 13 recognizable forms of the family, as contrasted with only three such forms when we entered the decade of the sixties (Taylor, 1985). One clear implication of this rapidly changing social situation is that courts of juvenile jurisdiction are likely to be predominantly courts for protecting children by the turn of the century. In other words, they will be right back where they began 100 years ago but, this time around, the primary basis for their jurisdiction will be neglected, abused, and dependent children rather than delinquents.

Structure for Juvenile Justice

Before the phenomenon of specialized juvenile courts ever became pervasive in the United States, a court reform movement had already begun that sought to stamp out specialized courts. Fired by the early efforts of the Institute for Judicial Administration, the quest for unified court systems became a passion in the 1970's with the development of the National Center for State Courts and the growth of the Institute for Court Management. For a time in the late seventies, it appeared that specialized courts of all sorts, from water courts in the West to orphans courts in the East, were slated for extinction. But, as it turns out, appearances are often deceiving. As we enter the decade of the nineties, there are only six states that are judged by the National Center for State Courts (1988) to qualify as truly unified court systems. In fact, at the moment, the momentum is in the opposite direction.

One of the trendy movements in court reorganization these days is the discovery of comprehensive family courts. Ironically, this movement begins just as we are interring the remains of the last traditional American family, but such trivialities never seem to phase court reformers. The family court has been around for some time, with the first one established in Toledo, Ohio, in 1914, followed by such communities as Baton Rouge, Louisiana, and Biloxi, Mississippi, in the decade of the fifties. In the late fifties, the then National Council of Juvenile Court Judges, the National Council on Crime and Delinquency, and the U.S. Children's Bureau combined to idealize family courts with a Model Act called the Standard Family Court Act, but the idea never really caught on. New York established a state-wide family court but did not vest it with divorce jurisdiction. Outside of that effort, no other large state attempted to establish family courts until New Jersey in 1982. In the meantime, the District of Columbia, Delaware, Rhode Island, Hawaii, and later South Carolina, had all established their own versions of family courts; but recently the States of Nevada, Missouri, Arizona, and Utah are all considering the establishment of family courts. The State of California recently rejected such a proposal.

In contrast to the family court movement, there is only one state-wide juvenile court in the United States, that being in Utah, though several other states including the State of Louisiana are actively debating the establishment of such courts. Even so, it appears that generic, one-size-fits-all, trial courts are in for rough sledding, at least for the short term. Part of the reason for this trend appears to be the increasing complexity of court management in large urban areas; in fact, the primary reason for the rejection of a proposed family court in the State of California was the perceived difficulty of administering comprehensive family jurisdiction within one institution. California, for some time, has been moving in the direction of even further specialization of its juvenile division of superior court in large urban areas. Los Angeles County is in the process of building 27 new court facilities to house the juvenile division's "dependency courts." Other large jurisdictions, such as Philadelphia and Detroit, are moving in a similar direction though they have yet to build separate facilities to house the courts. In the words of a least one California trial lawyer, "It is impossible for even the best trained attorney to master all facets of family practice, so it seems implausible that a single

court could effectively manage the entire range of jurisdiction" (Mallory, 1991).

Administration of Juvenile Services

Juvenile probation is still largely a court-administered service. In spite of--or perhaps because of--the recommendations of sundry national commissions and reform organizations, the judiciary still has either appointing or supervising authority, or both, over juvenile probation officers in 41 of the 50 states (Torbet, 1989). Juvenile probation officers currently number in excess of 20,000, and the workload numbers continue to grow at an annual rate of 400,000 cases not including intake screening, investigation, and predisposition study caseloads (Hurst, 1990a).

While the administration of juvenile probation has been a rather stable phenomenon over the past two decades, the structural reorganization of juvenile corrections, other than probation, has been a rapidly changing phenomenon. As we enter the final decade of this century, there are only 14 states that administer juvenile correctional institutions within a state department of corrections. That number is down from 20 states in 1980. The current trend is in the direction of establishing a state-level department of youth services, or children and youth services, or the equivalent. Thirteen states currently organize their juvenile corrections services in such a manner. However, most state-level juvenile corrections services (23) are administered by state departments of social service or their equivalents.

In view of the movement to hold juveniles accountable for their "criminal behavior," a movement back toward placing such services within adult departments of correction is to be expected but is not happening yet. It is quite possible that we have begun to recognize that juveniles requiring correctional institutionalization require a substantively different course of remedial action than that required by adult criminals, but in our form of democracy that is quite unlikely. What is more likely is that the current trend toward establishing separate state agencies is the result of a chance confluence between political self-interests and the always safe political harbor of more efficiency in government.

Community-Based Services

This lofty ideal ought to be catalogued under "reforms that failed because everybody liked them but no one bothered to take any action." Community re-integration, community-based services, neighborhood-based services, and the like, caught fire during the Great Society movement of the sixties but crashed and burned along with many of the programs of that era. Community-based services continue to be a part of our rhetoric but not a part of our repertoire. The primary reason for this dilemma is that juvenile correctional services, other than probation, are state-owned and administered, and state-owned services have a way of getting located where the Speaker of the House and the Governor want them located, not where it makes sense to locate them. Those states that have had the most success with achieving community-based services, such as Pennsylvania, have done so because all services for children and families are owned and operated at the local level rather than the state level. In other words, for community-based services to become a reality, they need to be Of the Community, By the Community, and For the Community. That means total local control. That means Home Rule, a feature of our society that has been quietly interred—along with the traditional family.

Another means by which a few states have had some success in building community-based services is through the private services lobby. States—such as Massachusetts, Michigan, and New York—that have a strong private services lobby have built a range of community-based services. Ironically, even though community-based services have never been given a fair test, the logic of the idea remains compelling and has begun to fire rhetoric that transcends community-based and talks about family-based services. So far, unless you live in Scotland, it is just so much talk.

Deinstitutionalization of Status Offenders

Even though labeling as a theory of delinquency causation had largely been discredited by the time the Juvenile Justice and Delinquency Prevention Act was passed in 1974, the logic of that so-called theory permeated the provisions and requirements of the Act (Gove, 1975). Consequently, the Act required that participating states remove status offenders (runaways, truants, ungovernable) from places of secure detention and commitment. More specifically, the Act sought to remove status offenders from all association with delinquent offenders, especially in training schools and detention homes.

Seventeen years after the passage of the Juvenile Justice and Delinquency Prevention Act, states have largely succeeded in removing status offenders from state training schools and have

achieved a modicum of success in removing them from pretrial detention facilities. However, the number of status offenders in out-of-home placement has not changed. There were approximately 10,000 such offenders in placement in 1975 and the number was similar in 1987 (Thornberry et al., 1991a). The place of confinement has changed though, with group homes and small residential treatment facilities being the major recipients of status offenders diverted from training schools and detention facilities.

However, the rate of juvenile court referrals for delinquency and status offenses has continued to increase—from 45 per 1,000 eligible youth in 1975 to 57 per 1,000 youth in 1988 (Snyder et al., 1987; Snyder et. al., 1990a; and Snyder, 1990b). In 1975, the rate produced 1.4 million such referrals and the same number in 1988. This anomalous appearing situation was caused by a decrease in the eligible child population that equaled the increase in rate of referral. In 1975, status offenders represented 25 percent of the total, or approximately 300,000 referrals. That proportion had decreased slightly to 21 percent by 1988 but status offenders are still very much a part of the juvenile justice system workload.

Form Versus Substance

The dynamic tension between Punishing and Acting in the Interest of Children reflected in state codes has significantly affected programs for delinquent youth in the past two decades. Most significantly, Control has been pitted against Rehabilitation, and, recently, Control has been winning.

The use of risk classification instruments has gained wide acceptance in the past 10 years within the juvenile justice system. They are currently being used to screen offenders for placement on probation or placement in the institution, just as they are in the criminal justice system where they have their origins, and they are being used in institutions to segregate security risks and determine facility placement. On the other hand, needs assessment designed to determine the focus of program intervention is beginning to look like a vanishing science.

At the community level, intensive probation is showing signs of becoming the rage of the nineties; however, in today's intensive probation, "intensive tracking" and "electronic monitoring" have replaced family-based case work, home visits, and small group intervention as preferred mediums of dealing with juvenile offenders. Community protection and individual accountability have combined to displace rehabilitation and correction of behavior in both our vocabulary and our programs. "Boot camps," "swamp camps," "gauntlet running," and maximum security institutions are the preferred mediums of community protection. Restitution, community service, fines, and short-term incarceration in secure juvenile detention facilities are the current vogue in accountability.

Competence development, translated as skill development, is as close as we currently come to designing interventions resembling rehabilitation. Literacy training, especially computer literacy, law-related education, G.E.D. training, and skills generally classified as preparation for independent living, i.e., how to open a bank account, rent an apartment, buy groceries, etc., constitute our basic repertoire of competence development.

Character development, building self-esteem, increasing moral reasoning capacity, supporting social maturation, now seem to be notions from a bygone era.

Forces Driving the Change

At the dawn of the sixties, the term Family still meant a man and woman living in state-sanctioned matrimony. In the United States, the term was definitive legally and socially. Today, we recognize legally and socially at least 13 new family forms, including the Same-Sex Family and the Room-Mate Family (Taylor, 1985). Galimony and Palimony are now firmly-established trends in family litigation. The rapid evolution of the family has often left today's youth without an established value referent within the family and without mature adult supervision anywhere in their life. These circumstances, combined with a trend in the direction of rapidly increasing so-called Single-Parent Families and Multiple-Career Families, has cast television as the primary baby sitter and socializer of our children.

One of the behavioral outcomes of the foregoing circumstance is the continued escalation in crimes of violence, especially homicide, forcible rape, aggravated assault, and weapons offenses. All four of these crimes by youth have continued to proliferate. For example, in 1965, youth under the age of 18 were arrested at a rate of 5 per 100,000 for the crime of forcible rape; by 1989, the arrest rate had doubled. In 1965, the arrest rate for aggravated assault was 30 per 100,000; by 1989, the rate had tripled. The homicide rate increased four-fold, and the weapons rate increased three-fold (Snyder, 1991).

In addition to rapidly-increasing violence by youth, the juvenile justice system has also faced

increased challenges from new types of offenders. In Marvin Wolfgang's (1972) classic study "Delinquency in a Birth Cohort," of all of the male children in the city of Philadelphia who reached age 18 in 1963 only one drug arrest was recorded from birth to age 18. His second birth cohort, born 13 years later and coming of age in 1975, recorded 737 drug arrests (Tracy et al., 1985).

Increased drug use, however, is not the most troubling part of the drug phenomenon for the juvenile justice system today. Drug dealers are. They abound in youth populations throughout the United States. As we enter the nineties, drug dealers, who are frequently no more than 13 or 14 years of age, with almost unlimited access to cash and automatic weapons, are terrorizing neighborhoods and whole communities and do not appear to be the type of delinquent offender that the founders of the juvenile court had in mind when they designed the system to give highest priority to the best interests of the child (Moore, 1991).

Another special population of juvenile offenders currently testing the resilience of the system are gangs that derive a large part of their status from criminal activity. Gangs have long been a part of the urban culture in the United States, but gangs featuring criminal enterprise as a prominent aspect of their dynamics are new to the world of youth. Cities such as Los Angeles and Chicago have had sections of their community terrorized by youth gangs in recent years in a manner reminiscent of nothing that has ever happened in this country before. The drug trade appears to be one of the engines driving gang activity, both from the standpoint of the economic gain to be had from the trade and the social abandon that can come from a good hit.

Of all of the juvenile justice system's failures at rehabilitation, none is more prominent than our inability to correct the behavior of rapists. The failure of the juvenile justice system in this regard is also mirrored by the criminal justice system. That failure, combined with the continued escalation in the prevalence of all forms of sexual assault, has placed the system in an increasingly difficult dilemma (Hurst, 1988). Some states are now faced with the need to plan one in five juvenile correctional beds for serious sexual offenders, without any real optimism about our ability to alter the behavior patterns of such offenders (Hurst, 1990b).

The arrest rate for females under the age of 18 for Crime Index offenses increased 10 times as fast in the 1970's and 1980's as did the rate for males (Hurst, 1987). The system had not anticipated this change in the offending patterns of youth and is still trying to cope with the influx by developing specialized programs and modifying staffing patterns to be more responsive to female offenders. This is a trend that does not appear to be likely to reverse itself in the near term.

However, the major force driving the juvenile justice system's response to serious offenders has been the continued emphasis on legal enfranchisement of youth. In our society, rights are—of necessity—balanced by corresponding responsibilities. Reformers' zealous pursuit of a full panoply of constitutional rights for juveniles has finally confronted criminal responsibility. It is not clear to these authors whether juveniles are now, have been, or will be able in the future to fully benefit from their new-found rights, but it is painfully apparent that we have concluded that they must be held criminally responsible, diminished capacity for crime and/or freedom notwithstanding.

Conclusion

As we approach the end of the 20th century, the pressure on the juvenile justice system to demonstrate the efficacy of individualized justice is greater than at any time in its short history. In state after state, legislative proposals aimed at increasing the number of youth who are subjected to criminal prosecution keep being presented to legislatures and keep passing (Szymanski, 1991b). At times in the past 5 years, our legislative proposals have caused us to appear almost desperate in our pursuit of justice system solutions to the problem of juvenile violence and criminal law violation. In our desperation, we have even begun to pass laws that would make it a crime for parents to produce a delinquent child (Hurst, 1989).

Unless our families suddenly stabilize and our massive congregate school system is broken up into manageable pieces and our neighborhoods regain their sense of community within the near future (and none of these possibilities seems very probable), the juvenile justice system in the 21st century is likely to be characterized by an absence of jurisdiction over most youth age 14 and older charged with a felony crime. This change will not come about for any positive reason but rather because we have grown afraid of our own children and don't seem to know quite what else to do—other than lock them up as criminals.

We have lost much of our optimism about the capacity of youth to change—at a time when the collective need to hurt those who take unfair

advantage of their fellow man is at its zenith. Curiously, our penchant for punishing young predators coincides with another social trend that is simultaneously peaking.

Protecting abused, neglected, and otherwise vulnerable children seems morally imperative at the moment. We are also beginning to recognize the insufficiency of adversarial win-lose proceedings as a decision-making medium in such cases. As a consequence, the juvenile court is lurching toward a more fiercely protective posture toward neglected children amid renewed interest in alternative decision-making models such as mediation and collaborative consensus. In many ways, today's juvenile court procedures in abuse and neglect cases are more reminiscent of the equity courts of old (which they replaced) than they are contemporary courts of law. More than a few scholars and accomplished jurists (Moore et al., 1990; Gladstone, 1990; and Springer, 1991) are urging significant reforms of the juvenile court, and much of the professional juvenile justice community is sufficiently frustrated with the present system to support reasoned change. The voting public is more than ready for a new "quick fix." Everything seems to be in order for yet another social experiment along the lines of the one launched in Cook County, Illinois, in 1899.

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