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# Delinquency and the Parent

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# DELINQUENCY AND THE PARENT

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THE LAW OF juvenile delinquency, like the criminal law, is concerned with the correction of anti-social activity. The distinction between the law of delinquency and the law of crimes is rationalized by the obvious fact that the young persons, between the ages of seven and sixteen,[1] who are treated as delinquents, are immature persons. They have arrived at the age of moral responsibility, they *can* know right and wrong, they *can* act with knowledge of the quality and nature of their actions. Yet they have not that degree of understanding, that experience of life, that extent of self-control, that stability of resolution, which are necessary bases for adult conduct. Because of their immaturity, certain activity in juveniles menaces society though the same activity by adults would not jeopardize the public peace; such activity therefore is classified among delinquent offenses, though it is not criminal. Acts, criminal in an adult, are declared delinquencies in consideration of the immaturity of the juvenile offender.[2] Further, the delinquency jurisdiction undertakes to adjudicate, correct and punish juveniles by employing criteria of responsibility plus procedures and remedies adapted to the limited perceptions and peculiar sensibilities which characterize the immature.[3] Everyone concerned with delinquency will agree that immaturity and its implications are facts basic to a philosophy or rationale of delinquency legislation, procedure and administration. It is submitted, however, that young people's natural status of moral dependency upon their parents is a fact equally basic and important in the philosophy of delinquency. This fact is not so crassly obvious as that of immaturity, and there is good reason to believe that a denial of it or a greater or less indifference to it characterizes the philosophy which guides many persons sincerely and actively concerned with delinquency as a problem of our society and as a subject upon which our legal institutions must operate.

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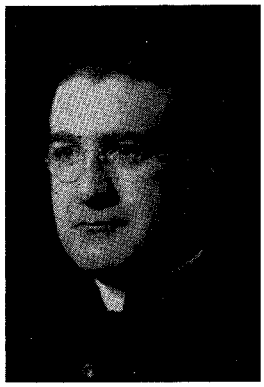
[1] N.Y.C. DOM. REL. CT. ACT §2 (15).

[2] *Ibid.;* N.Y. CHILDREN'S CT. ACT §2 (2).

[3] See People v. Lewis, 260 N.Y. 171, 183 N.E. 353 (1932).

*The juvenile,* considered under this aspect of moral dependency, is better named *the child.* The correlative of the child's moral dependency is the parents' moral responsibility. Taken together, these elements of dependency and responsibility constitute the natural parent-child relationship.



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In the philosophy of St. Thomas Aquinas, this relationship is a datum of nature and has its ultimate origin in the creative act of God. Using his characteristic teleological approach, St. Thomas considers the act of human generation. He examines the facts which are manifest in the nature of the act and in its natural consequences. As creation is the act of God, one who assumes to make himself a partner or agent in that act acts rationally only if he assumes the responsibilities which are its natural consequence, and he has the rights necessary to execute those duties. It follows that every man and woman who voluntarily and morally performs that act by which one places himself in the creative chain of causality, thereby establishes a bond of responsibility, practically life-long, between himself and the child he begets. On the other hand, nature binds the child, until maturity, to the parents who begot him.[4]

St. Thomas then[5] describes the integration of the parent-child relation with those moral ties of right and duty which run between the child and the general society of men. The doctrine may be summarized in four principles – the first having reference to the basic relationship, the other three being corollaries of the first.

1. Under God's ordinance, expressed in nature, the parents, as originators of a child's being, have a bond with him which is anterior to any ties which arise between the child and other men by reason of "some combination in external works." Of this latter sort are the bonds of society which

[4] In the passage here quoted, St. Thomas is developing the thesis that fornication is wrongful in natural law and that marriage is a natural institution. The conclusions stated above are intermediate premises in this argument. "Now though the semen is superfluous for the preservation of the individual, yet it is necessary to man for the propagation of the species. . . . The emission of the semen then ought to be so directed as that both the proper generation may ensue and the education of the offspring be secure. Hence it is clear that every emission of the semen is contrary to the good of man, which takes place in a way whereby generation is impossible. . . . Likewise it must be against the good of man for the semen to be emitted under conditions which, allowing generation to ensue, nevertheless bar the due education of the offspring. . . . A further consideration is, that in the human species the young need not only bodily nutrition, as animals do, but also the training of the soul. Other animals have their natural instincts to provide for themselves; but man lives by reason, which takes the experience of a long time (seven years) to arrive at discretion. Hence children need instruction by the confirmed experience of their parents: nor are they capable of such instruction as soon as they are born, but after a long time, the time in fact taken to arrive at the years of discretion. For this instruction again a long time is needed; and moreover, because of the assaults of passion, whereby the judgment of prudence is thwarted, there is need not of instruction only but also of repression. For this purpose the woman by herself is not competent, but at this point especially there is necessary the concurrence of the man in whom is at once reason more perfect to instruct, and force more potent to chastise." *Of God and His Creatures,* SUMMA CONTRA GENTILES, Bk. III, c.122 (Rickaby transl.).

[5] "The father has care of the child, not only in his relations with other men, as the king has care

arise out of the individual's external needs and activities and, through these, relate him to the men among whom he lives.

2. Immediately from this basic parent-child relationship arises the parental right to have the child in their care. None who is a stranger to the parent-child relation can derive therefrom a right to have care of the child. Only where the parents' non-use or misuse of this right fails to supply the child's external needs or govern properly his societal relations may the state, in vindication of its competency over the child's external concerns, give custody of him to a person other than the parent.

3. As a societal power, the state has no rightful power to arrange those aspects of a child's life which are individual concerns. By nature, that power belongs exclusively to the parental government. The state and other individual men may exercise this power when they properly act as parent-substitute, where the parent's defect or abdication in exercise of his natural moral power jeopardizes the child's external concerns.

4. Even in its government of the child "as a member of society," in his "relations with other men," the state exercises an authority which is not exclusive of, but co-ordinate with, that of the "parental government."

of him, but also in his individual concerns, as has been shown above of God (Chap. XCIII). And this with good reason, for a parent is like God in giving natural origin to a human being. Hence divine and paternal government extend to the individual, not merely as a member of society, but as a person subsisting in his own nature by himself. . . . Everyone has care of things according as they belong to him: for solicitude about things that are no affair of yours is blamed as meddlesomeness. . . . One man belongs to another either by human origin and bodily descent, or by some combination in external works." *Of God and His Creatures,* SUMMA CONTRA GENTILES, Bk. III, c. 130 (Rickaby transl.).

## *THE PARENT-CHILD RELATIONSHIP IN THE LAW OF DELINQUENCY*

The relationship itself, as distinguished from the powers, rights and duties which derive from it, seeks direct recognition in the law of adoption. Yet the recognition given to the basic relationship in the adoption law of any legal system must inevitably be reflected in the delinquency law of that system. Exercise of the delinquency jurisdiction must affect the parental right of custody and the parent's authority to govern the internal and external concerns of his child, which right and authority derive from the natural parent-child relationship. Further, in a system of law where adoption and delinquency jurisdictions are statutory, those commissioned to exercise the two jurisdictions will more likely take a similar approach to the principles which underlie the problems presented.

In the New York adoption cases, the legal standing of the basic parent-child relation has been clearly established, its origin recognized, and its practical influence pointed out. All of this is succinctly stated in a dictum of Justice Hill:

> Parents have a natural, God-given right to the control and custody of their children. Every experienced welfare worker could advance a dozen or more reasons why children should be taken from indigent parents . . . but it is still a good policy to remember that nothing will take the place of parental love and affection.[6]

In all of the English-speaking jurisdictions, except those few in which the Civil Law has been received, adoption is a statutory institution. All of the adoption statutes, as far as we are aware, give at least this degree of recognition to the natural parent-

[6] People *ex rel.* Flannagan v. Riggio, 193 Misc. 930, 933, 85 N.Y.S. 2d 534, 536 (Sup. Ct. 1948).

child relationship, that they require the parent's consent to his child's adoption in at least some circumstances. Some enactments, like that of New York, dispense with parental consent only when the parent has surrendered or abandoned the child, or has been adjudged incompetent or guilty of certain misconduct.[7] In other jurisdictions, particularly in the British Commonwealth, adoption laws give the courts discretion to dispense with parental consent in circumstances not specifically enumerated in the statutes.

Consideration should be given to recent holdings in some of the jurisdictions last mentioned. The effect of granting such discretion by statute is to empower their courts to evaluate the natural parent-child relationship as one fact or circumstance in the complexus of an individual situation. When taken thus, the status of the relationship is jeopardized by two hazards, as shall appear from consideration of the cases.

An effort at "scientifically objective" adjudication, and the employment of a method of construction which relies excessively upon the language of the statutes, combine to destroy or obscure the special standing which the natural relationship should have in all laws affecting children.

An Australian judge explained his exercise of statutory discretion to dispense with a natural mother's consent to the adoption of her child:

> The evidence of the psychiatrist and psychologist satisfied me that no special bond exists which cannot exist between the child and the permanent mother substitute, given a suitable substitute.[8]

[7] N. Y. DOM. REL. LAW §111 (4).

[8] Quoted by Herring, C. J., in Ax v. C-S (No. 1), [1955] Argus L.R. 943, 953; the case is discussed in Castles, *Discretionary Powers in Adoption Statutes,* 7 RES JUDICATAE 307 (1956).

The restriction of judicial consideration to the evidence of the expert witnesses has interesting implications. It could be warranted only by an unexpressed finding that all the facts bearing upon the existence of a basis for relationship between the mother and child were not facts of common knowledge, but facts peculiarly within the special knowledge of the psychiatrist and psychologist.[9] There was on the record other evidence of facts pertinent to the question, for the judge's failure to consider this other evidence was one ground for reversal in the appellate court.[10] The Australian psychologists, like the New York social workers mentioned by Justice Hill, are disciples of special sciences, prone to see all facts in the light of the assumptions of their discipline, and to give little weight to facts which are not assessable by their special methods of investigation. This myopia of the specialist is alien to the jurist whose science requires him to establish facts from every area of human experience, objective and subjective, natural and even supernatural. Of course, the parent-child relationship has aspects which no serious psychiatrist, who examines the emotional impact of anticipating and experiencing the birth of a child, will ignore. And the experienced social worker will likely agree with Justice Hill, that peculiar bonds of affection beneficial to the child are at least a usual concomitant of the bond of blood.

The Australian appellate court had a second ground for reversal, expressed in the opinion of Chief Justice Herring.[11]

[9] This inference assumes that the Australian rule of evidence is similar to the New York rule expressed in Dougherty v. Milliken, 163 N. Y. 527, 533, 57 N.E. 757, 759 (1900).

[10] Ax v. C-S (No. 1), [1955] Argus L.R. 943, 950.

[11] *Ibid.*

Prima facie, the welfare of the child is best served by restoring the natural mother-child relationship. In the opinion of another member of the court, the form of the applicable legislation recognized that natural ties are most important of all, except in very special circumstances.[12]

Clearly the remarks of Chief Justice Herring and his associate, like the dictum of Justice Hill, carry more than an appreciation of the special facts appearing in an individual case. They seem to carry a commitment to the principle that the parent-child relationship is a value *in se,* known to the law through a philosophy which searches out the ultimate truths of human existence. Without such a commitment, in our law and in our judges, the plan of nature and of God for the nurture of children is demeaned to the status of special fact, to be discovered, if at all, through the opinion evidence of a specialist who has examined a woman and a child under the assumption that human nature has no common design and no common Cause.

In the adjudication of the English and Australian adoption laws, the parent-child relationship has been subjected also to the hazards of statutory language. The Australian High Court[13] has construed the New South Wales statute which, at least in this particular, is very similar to its Victorian counterpart applied in the case just discussed. Power is given to dispense with parental consent "where, having regard to the circumstances, the court deems it just and reasonable to do so."[14] The High Court held that this discretion was not abused where considerations of the disappointment of foster parents and of their ability to give the child superior advantages outweighed the right of the parent to withhold consent to adoption.[15]

The English Adoption Act of 1950 empowers the court to dispense with consent if it is satisfied that the parent's "consent is unreasonably withheld."[16] The provision is lucidly construed by Mr. Justice Devlin in a concurring opinion given in the Queen's Bench Division.

> In my judgment, the test to be applied for the purpose of s. 3 (1) (c) [of the 1950 Act] is this: Is the attitude of a father, in refusing his consent, unreasonable, i.e., is the father being unreasonable as a father? . . . The welfare of the child is, of course, of indirect importance, because a father who had no regard for the welfare of his child in reaching such decision is not reasonable. . . .[17]

But the Justice seems not to conceive that the courts must recognize the parent-child relation as a value *in se.* Rather, to him, it is a consideration having just that weight which the statute gives to it. He contrasts the provision applied in the case in which he is writing with the parallel clause of the Adoption of Children Act of 1926. There it was enacted that the court could dispense with a parent's consent if he were "a person whose consent ought, in the opinion of the court . . . in all the circumstances of the case, to be dispensed with."[18] And he declares:

> That proviso gave an absolute discretion to the court, and, in exercising their powers

[12] *Id.* at 976.

[13] Mace v. Murray, [1955] Argus L.R. 292.

[14] N.S.W. CHILD WELFARE ACT, 1939, §167 (d).

[15] Mace v. Murray, [1955] Argus L.R. 292, 298-300.

[16] ADOPTION ACT, 1950, §3 (1) (c).

[17] Hitchcock v. W. B., [1952] 2 All E. R. 119, 123 (Q.B.).

[18] ADOPTION OF CHILDREN ACT, 1926, §2 (3).

> under a section so worded, the justices would, no doubt, be right in regarding the welfare of the child as the matter of paramount importance.[19]

The juvenile delinquency jurisdiction is rarely called upon to terminate the legal status of parent and child, and it does not, therefore, directly confront the basic natural relationship as the adoption jurisdiction does. Yet the appreciation of that relationship's inherent dignity and value, and the commitment to maintain its dignity in the law, must be influential in those cases where a children's court deals with the parental rights deriving from that relationship.

### *THE PARENTAL RIGHT OF CHILD CUSTODY*

Custody is the right to have actual care of the child in his individual and social concerns. It is an immediate corollary of the natural parent-child relationship. The authority of the sovereign to intervene in the custody of children has been justified as a consequence of his duty to protect helpless persons found within his dominions.[20] Its exercise for the purpose of depriving the parent of custody has always required a finding that the parent is unable or unwilling to execute his duties in the child's regard.[21] Our American courts early held that the parents' primal right of custody is subject to intervention by the courts on behalf of the child's real and permanent interests.[22] Judge Desmond declares the state of our law:

> No court can, for any but the gravest reasons, transfer a child from its natural parents to any other person [citations omitted], since the right of a parent, under natural law, to establish a home and bring up children is a fundamental one, and beyond the reach of any court. [citing the U. S. Supreme Court in *Meyer v. Nebraska*] . . . It is significant that the several counsel who have filed briefs on this appeal have found no reported New York case where, for any reason, a small child has been ordered delivered from the custody of a decent parent in a decent home into the hands of others.[23]

The jurisdiction of the Children's Courts of New York in custody matters is limited, and, to the extent it is granted, is concurrent with the jurisdiction of the Supreme Court,[24] which enjoys the full parens patriae power.[25] By limitations imposed in the statutes,[26] the Children's Court custody jurisdiction respects only neglected, abandoned, or delinquent children,[27] and trans-

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[19] *Ibid.*

[20] Finlay v. Finlay, 240 N.Y. 429, 431, 148 N.E. 624, 626 (1925).

[21] See United States v. Green, 26 Fed. Cas. 30, No. 15256 (C.C.D. R.I. 1824); Butler v. Freeman, Amb. 302, 27 Eng. Rep. 204 (Ch. 1756); The King v. DeManneville, 5 East. 221, 223, 102 Eng. Rep. 1054, 1055 (K. B. 1804); De Manneville v. De Manneville, 10 Ves. Jun. 52, 32 Eng. Rep. 762 (Ch. 1804).

[22] See United States v. Green, *supra* note 21; Wilcox v. Wilcox, 14 N.Y. 575, 578 (1856); Matter of Waldron, 13 Johns. R. 418, 421 (N.Y. Sup. Ct. 1816).

[23] People *ex rel.* Portnoy v. Strasser, 303 N.Y. 539, 542, 104 N.E. 2d 895, 897 (1952). See *In re* Serby's Adoption, 2 A.D. 2d 988, 157 N.Y.S. 2d 892 (2d Dep't 1956); *In re* Knapp, 156 N.Y.S. 2d 668, 671 (Surr. Ct. 1956).

[24] In New York, the Supreme Court is the highest trial court and, in addition, has a limited appellate jurisdiction.

[25] MacLaren v. Kincaid, 283 App. Div. 817, 128 N.Y.S. 2d 793 (2d Dep't 1954).

[26] N. Y. CHILDREN'S CT. ACT §§6(8), 20, 22 (b), (e), 30-a (7).

[27] Walsh v. Walsh, 146 Misc. 604, 263 N. Y. Supp. 517 (Child. Ct. 1933).

fers of custody made by this jurisdiction must be temporary.[28] In some circumstances relatives must be preferred as custodians. In any case, the religious faith of the child must be protected, as the New York Constitution[29] provides.

The Children's Court Acts do not explicitly advert to the natural character and legal pre-eminence of the parent's right to have custody of his child. There is no published information from which one can adequately estimate the extent to which considerations of the parents' natural right may influence the judgments of the Children's Courts or their other dealings with delinquent children.

One can only hope that the need does not often arise for the Appellate Division to correct a Children's Court judgment upon the grounds that the parental right of custody was unwarrantedly invaded. In one case, however, a thirteen-year-old delinquent boy had been committed to a reformatory. The Appellate Division said,

> . . . [W]e feel that the rehabilitation of this boy will be better served under parental guidance than under institutional care. Concededly, the boy comes from a good home and has intelligent and respected parents who are deeply concerned about his welfare. Because of the extreme youth of the offender and the conceded good home environment, we think *both the boy and his parents are entitled to one more opportunity for his natural development.* . . .[30]

[28] *In re* Caposella, 255 App. Div. 987, 8 N.Y.S. 2d 509 (2d Dep't 1938); *In re* Stanton, 119 N.Y.S. 2d 868 (Child. Ct. 1952).

[29] N. Y. CONST. art. VI, §18.

[30] *In re* Anonymous, 281 App. Div. 1061, 121 N.Y.S. 2d 281 (3d Dep't 1953).

### *PARENTAL GOVERNMENT OF CHILD'S INDIVIDUAL CONCERNS*

The parent's exclusive right to govern one of his child's individual concerns, the child's religious formation and practice, has been clearly recognized in our constitutional law. This right of the parent has been held to be an aspect of the liberty guaranteed by the Fourteenth Amendment, and has been repeatedly vindicated against interference from the education laws of the states.[31] That same right, vis-a-vis the states' laws governing the activity of children in public places and in employment, has been given a less complete scope.[32] In determining the content and method of his child's education in secular learning, the parent's right of control is paramount, except to the extent that state regulations properly exercise the authority of civil government to require instruction truly necessary to equip the child for his duties as a citizen.[33]

The constitutional and statutory requirements,[34] that the New York Children's

[31] "The child is not the mere creature of the state; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations." Pierce v. Society of Sisters, 268 U.S. 510, 535 (1925) ("The Oregon School Case"). See Zorach v. Clauson, 303 N.Y. 161, 100 N.E. 2d 463, *aff'd,* 343 U.S. 306 (1952) (released time); West Virginia Bd. of Educ. v. Barnette, 319 U.S. 624 (1943), *overruling,* Minersville School Dist. v. Gobitis, 310 U.S. 586 (1940) (flag salute).

[32] Prince v. Massachusetts, 321 U.S. 158 (1943).

[33] Meyer v. Nebraska, 262 U.S. 390, 399 (1923). See Matter of Weberman, 198 Misc. 1055, 100 N.Y.S. 2d 60 (Sup. Ct. 1950); State v. Hoyt, 84 N.H. 38, 146 Atl. 170 (1929). See also Chamberlain, *The Legislature and the Schools,* 11 A.B.A.J. 492 (1925).

[34] N.Y. CONST. art. VI, §18; N.Y. CHILDREN'S CT. ACT §§6 (8), 20, 22 (b), (e), 30-a (7); N. Y. C. DOM. REL. CT. ACT §§25, 32, 61(6), 83, 86(3), 88.

Courts shall protect the religious faith of children whom they place in the care of others than their parents, do not advert to the parent's right to determine the form of his child's religious training. Nor is the parental right to control the child's secular education distinctly recognized in the acts which create and regulate the delinquency jurisdiction.

New Jersey, on the other hand, does not protect by statute or by constitutional mandate the religion of children whose custody is in the hands of the courts. A recent decision of the Appellate Division of New Jersey's Superior Court,[35] while it arrives at the same result as might be reached under the New York statute, does so by a rather unclear process of balancing interests. The court held that a child's religious training is one of the elements of "gradational significance" which may be considered in promoting the general welfare of the infant. The court gave no weight to the wishes of either parent, both having been found unfit for custody. Nor does the court indicate whether the act of the mother who had had the child baptized and instructed in the religion of the father, but who now wants the child to have no religious formation, influenced its decision. The court did consider the twelve-year-old girl's expressed preference for the father's religion, and gave her into the custody of a social agency of that faith. The direction of the court below, that the agency must place the child in a devout home of that religion, was overruled by the appellate court. The reasoning here was that the courts have no competency to evaluate one religion against another or to judge the quality of religious devotion in any home. While the decision leaves the religious agency free to select for the girl, a home which it believes to be devout in its religious practice, the rationale expressed in condemning the lower court's direction, and the designation of religious formation as one of the elements of "gradational significance" leave doubt whether the court might not ignore the religious training of a child in slightly different circumstances.

In a broad area of the child's individual concerns, his health and temporal welfare, the parental right of governance is subject to being overridden by the judgment of the courts. Where a health measure imposed by law affects the health of the general public, the attitude of the United States Supreme Court is clearly to uphold the legal regulation.[36] No case in which medical treatment was ordered for the sake of the health of an individual child has been reviewed by the Supreme Court.[37] But the cases where such orders were involved have been nearly uniformly decided against the objecting parents by the higher courts of the states.[38] Orders of the inferior courts have sometimes been overruled where the prognosis of success in the treatment was uncertain[39] and where the order was issued before

[35] Scanlon v. Scanlon, 29 N.J. Super. 317, 102 A. 2d 656 (App. Div. 1954). The New York revisions in analogous cases are discussed in Recent Decision, *Religion and Child Custody,* 3 CATHOLIC LAWYER 177 (April 1957).

[36] Jacobson v. Massachusetts, 197 U.S. 11 (1904).

[37] People v. Labrenz, 411 Ill. 618, 104 N.E. 2d 769, *cert. denied,* 344 U.S. 824 (1952).

[38] See, *e.g.,* People v. Labrenz, *supra* note 37; Morrison v. State, 252 S.W. 2d 97 (Mo. App. 1952); Mitchell v. Davis, 205 S.W. 2d 812 (Tex. Civ. App. 1947); Matter of Vasko, 238 App. Div. 128, 263 N.Y. Supp. 552 (2d Dep't 1933).

[39] Matter of Tuttendario, 21 Pa. Dist. Rep. 561 (1911), discussed in Note, 41 GEO. L. J. 226, 235 (1953).

parents had been found unfit and deprived of custody.[40]

Our Children's Courts have jurisdiction to make orders of this kind,[41] and the parents' right to object has very little statutory recognition.[42] Where the pathology is physical or acutely mental, the diagnosis of the court-appointed physicians is likely to be objective and the treatment will seldom trespass upon the parents' government of the child's personal life. An exceptional situation would be one in which the morally outrageous doctrine of *Buck v. Bell*[43] might be applied by court order in the case of a child.

On the other hand, where there are psychological complications in a physical defect or in its treatment,[44] and especially where the case is one presenting mental pathology of the lighter sort,[45] a court order may trespass unwarrantedly upon the area of the child's life which is properly reserved to parental governance. There appear to be psychological overtones in many delinquency cases.[46] Therefore, care should be taken that the parent's rights be safeguarded in ordering psychological services for the delinquent child. Most important of the parents' rights in this regard is the right to instill in their children standards of conduct. We are not here concerned with evaluations of the conduct which has raised the issue of the child's delinquency – usually there is no difference between the values of the parent and those of the court officials in respect of such conduct. Rather, the problem here is that which arises when a psychiatrist or other officer of the court, in attempting to correct some psychological difficulty or to resolve a mental conflict in the child, declares or intimates to the child that standards of right and wrong, governing his "individual concerns" and seriously proposed to him by his parents, are erroneous.[47]

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[40] Matter of Hudson, 13 Wash. 2d 673, 126 P. 2d 765 (1942).

[41] A handicapped child, though not neglected or delinquent, is within the jurisdiction of the Children's Court. N.Y. CHILDREN'S CT. ACT §§2 (7), 6 (1) (e). Any person who knows a child to be within the court's jurisdiction may initiate a petition. *Id.* §10. Public health officers have the duty to enforce the PUBLIC HEALTH LAW which declares the state policy to provide rehabilitation services for handicapped children. N. Y. PUB. HEALTH LAW §§324 (1) (e), 2580.

[42] N.Y. PUB. HEALTH LAW §2583 (d) exempts from the mandates of sections 2580-83 (medical care of the handicapped) a child whose parents object because they rely exclusively for healing on the practice of the religious tenets of a church. This seems a much narrower protection than that afforded by N.Y. EDUC. LAW §3204 (5), which permits a child to be excused from health classes in the schools if the instruction conflicts with the religion of the child or his parent.

[43] 274 U.S. 200 (1927). The Court upheld application of the Virginia sterilization statute in the case of a feebleminded eighteen-year-old unmarried mother.

[44] See, *e.g.*, Matter of Seiferth, 309 N.Y. 80, 127 N.E. 2d 820 (1955); Matter of Rotkowitz, 175 Misc. 948, 25 N.Y.S. 2d 624 (Child. Ct. 1941).

[45] See, *e.g.*, Matter of Carstairs, 115 N.Y.S. 2d 314 (Child. Ct. 1952).

[46] In the year 1956, when 8237 delinquency cases were disposed of after investigation by the Probation Bureau of the Children's Court Division of the Domestic Relations Court of the City of New York, 1499 allegedly delinquent children were interviewed or examined by the diagnostic service of the Bureau of Mental Health Services attached to the same court. TWENTY-FOURTH ANNUAL REPORT OF THE DOMESTIC RELATIONS COURT OF THE CITY OF NEW YORK pt. II, 18, 28 (1956) (hereinafter cited as ANNUAL REPORT).

[47] On the responsibilities of the psychotherapist in matters where his patient's conscience is involved, see the Allocution of His Holiness, Pope Pius XII, April 9, 1953, 45 ACTA APOSTOLICAE SEDIS 275, 284 (1953), English translation, 25 CATHOLIC ACTION 17, 19 (June 1953).

### *PARENTAL AND PUBLIC GOVERNMENT OF THE CHILD'S SOCIAL CONCERNS*

The child in his "relations with other men" is the proper subject of the law of delinquency. The determination of the New York Appellate Division, in the case from which we quoted when discussing the parental right of custody,[48] illustrates clearly the true notion of the coordinate jurisdiction of parent and state in this aspect of the child's life.

> Judgment modified by directing that the infant delinquent be placed in the custody of his parents for the purpose of control and rehabilitation, subject to such probationary direction as the Children's Court may impose. . . .[49]

Of a very large group of children handled by the Probation Bureau of the Children's Division of the New York City Domestic Relations Court in 1956, about 60% were placed on probation, 14% were sent to institutions, and 26% were given discharges or suspended sentences.[50] From the bare statistics, it is not possible to know whether and to what extent the court recognized, encouraged, or solicited parental participation in the correction and guidance of the 4500 delinquents who were returned to the homes from which they came. Nor are we instructed by the few Children's Court cases which reach the published reports. It is notorious that delinquency cases are seldom appealed, and this fact does not necessarily postulate complete satisfaction of the parents with the decisions of the courts. Many families of delinquent children are poor or have an overwhelming sense of awe before the officers of the courts. The proceedings are usually so discreet that the family's good name is not prejudiced, and in most cases the child is soon back in the home, if, indeed, he does not live at home throughout the proceeding. Even if he is sent away, the family can easily "cover up" by saying he is visiting with relatives. There are not, therefore, the incentives of monetary gain or the avoidance of financial loss which make the expense of counsel to appeal a worthwhile investment in civil cases. Nor is the jeopardy so severe as in criminal cases, where appeals are frequent enough. The law of delinquency should not be, for these causes, deprived of the benefit of appellate guidance. Nor should the public be kept in ignorance of the application of this branch of the law – of course, that is not to say that the delinquent child should be deprived of the privacy with which the courts protect him. Pertinent here is the complaint made by Justice Follett in behalf of the rights of civil litigants and of the appellate courts' duties. The words may be repeated in behalf of citizens who feel a responsibility to know the law of delinquency: "It is of little use to decide issues of fact or of law unless it be disclosed how they are decided."[51]

A number of delinquency studies indicate the validity of the conclusion stated by the Legislative Committee of the Association of the Bar of the City of New York,

> . . . in many cases where delinquency may be traced to the home, the fault of the parents does not lie in evil intent or indifference but rather in the fact that the

[48] *In re* Anonymous, 281 App. Div. 1061, 121 N.Y.S. 2d 281 (3d Dep't 1953).

[49] *Ibid.*

[50] ANNUAL REPORT pt. II, 18.

[51] Shaffer v. Martin, 20 App. Div. 304, 46 N.Y. Supp. 992 (4th Dep't 1897).

> parents do not have the mental capacity, comprehension or moral resources necessary to cope with the problem of guiding their children.[52]

Obviously, the cooperative correctional governance of the delinquent by court and parents has little or no application in such cases. The court is left to its own resources, and does no injury to parents who are incapable of understanding or of assuming their responsibilities.

But we know almost nothing of the principles which actually guide the court in its dealings with "intelligent and respectable parents who are deeply concerned about their children's welfare."

Nor do we know how the courts operate when the parents are contributing to delinquency by "evil intent or indifference." Perhaps they are deprived of custody, but that fact does not appear from the court reports or from the independent studies. Perhaps deprivation of custody is not a proper procedure in such cases. Perhaps the courts proceed to correct the children of these parents by pursuing a course which ignores the evil or indifferent parent – if so, the procedure seems indefensible. It would be good to know what efforts are made to turn the evil parents from their path and to put a path under the feet of the indifferent. Certainly these efforts rarely involve punishment of the parent. For in the Children's Courts of this city, the ratio of "adult proceedings" to juvenile delinquency cases, during the years 1955 and 1956, has been less than 2 per 1,000.[53]

[52] BULLETIN OF THE COMMITTEE ON STATE LEGISLATION, ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK 433, 436 (1956) (hereinafter cited as BULLETIN).

[53] The actual figures are given in ANNUAL REPORT pt. II, 18.

The Report of the Bar Association Committee[54] is fairly representative of criticism leveled against a proposal made by the New York State Temporary Commission on Youth and Delinquency to the Legislature of 1956.[55] The recommended legislation had two purposes, to bring before the Children's Court the parents of every child found delinquent, and to better enable the Court to direct the conduct of parents found to have contributed to the delinquency of their children. The Temporary Commission and other groups and individuals urged the proposal as a more effective means of enlisting the cooperation of the evil and indifferent parent in effecting his child's rehabilitation; they believed that some considerable proportion of the parents of delinquents are of the class contemplated. The opposition to both phases of the proposal was largely premised upon the conclusions expressed in the Bar Association Committee Report, that the enactment was unnecessary, inefficacious and possibly destructive of the "disturbed parent-child relationship."[56] Much of the opposition decried any measure involving a threat of punishment to delinquent parents.

The first phase of the proposal, to require the courts to summon the parents of any child whose delinquency is in issue, seems an elementary and almost indispensable step toward effecting cooperation between the court and the indifferent and ill-disposed parent. Yet this phase was eliminated before enactment. The second phase of the proposal was enacted with the provision for review which, it is said, has made

[54] BULLETIN 433, 436.

[55] REPORT OF THE NEW YORK STATE TEMPORARY COMMISSION ON YOUTH AND DELINQUENCY 38 (December 1955).

[56] BULLETIN 433, 435.

application of the new sub-section impracticable. As far as can be learned, no order authorized by the enactment has been made in the ten months that have passed since its effective date, July 1, 1956.

The enactment[57] empowers the court to issue a written order specifying conduct to be followed by a parent who has contributed to his child's delinquency. The conduct specified shall be such as would reasonably prevent delinquency. The order may be reviewed immediately in County Court, General Sessions or Supreme Court. Willful violation of the order is a criminal contempt, triable before a judge other than the one who issued the order, and punishable by maximum penalties of thirty days in county jail or $250 fine.

It is noteworthy that the enactment does not, as do statutes making parents liable in tort for their children's acts, permit punishment of the parent for any act of his child. The parent is to be punished only for his own willful violation of a specific written order. The order's specificity and reasonableness may be reviewed by the normal procedures after the parent is alleged to have violated it, in addition to the extraordinary provision for immediate review which seems quite unnecessary and which has offered a good excuse for not making the orders.

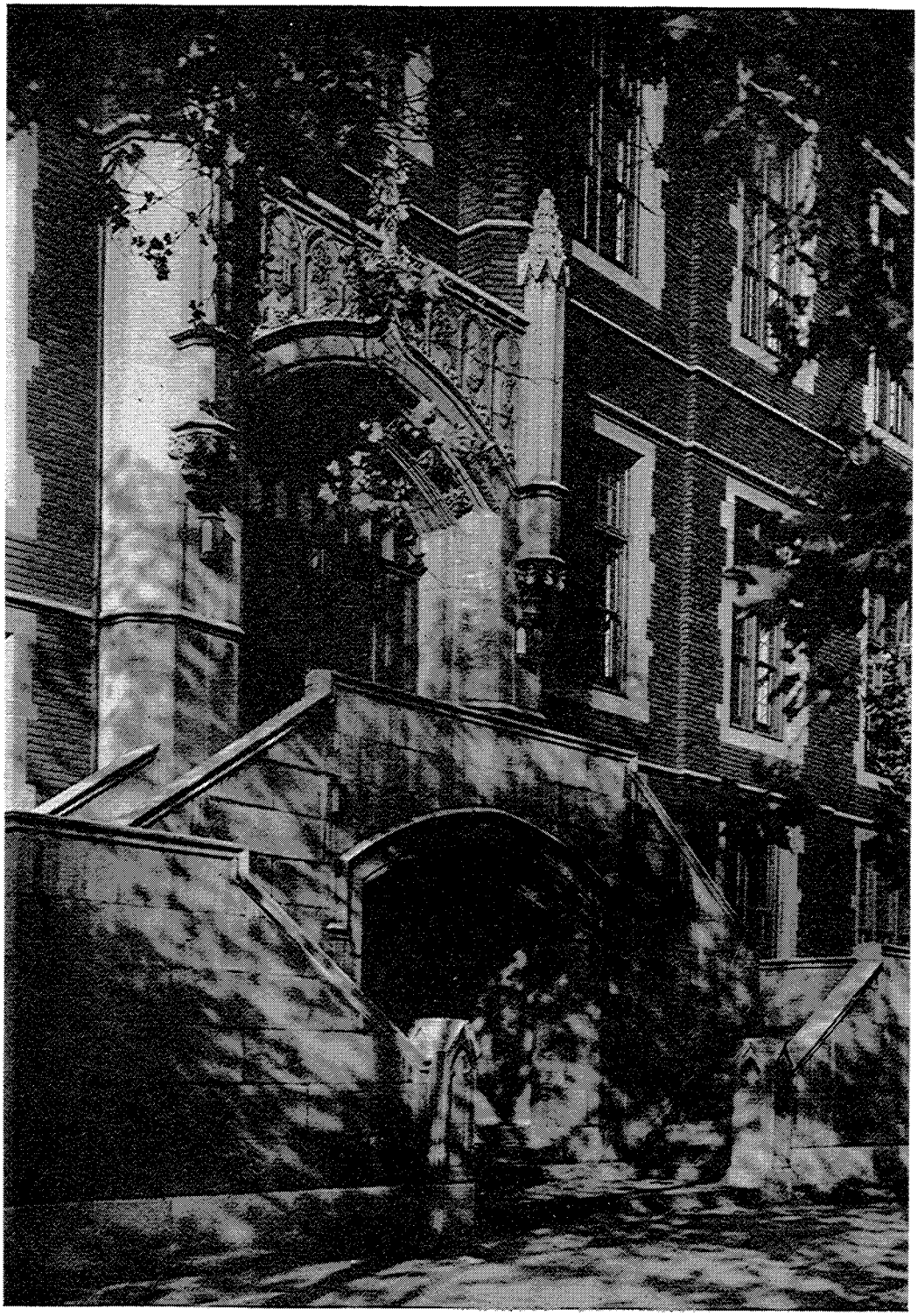
## CONCLUSION

The law, in enactment and in decision, must incorporate some absolute principle, if the principle be only the quantitative absolute that the greatest number of demands shall be satisfied. The law of delinquency must choose to follow that rule or to apply some standard of "the greatest good." Any qualitative criterion, and one invoking "the greatest good" is always such, is an absolute.

Our legal tradition asserts the rights and duties of parents as God-given and anterior to the demands of society. Our common law regards those rights and duties as determinable by reasoned inference upon the data of common observation of human nature in function. In the law of delinquency, societal interests, the welfare of the community and the welfare of the child in his external concerns, confront the natural law principles on the parental relation and the parental rights to have custody and government of the child. A delinquency law which would ignore the interests founded in nature, or subordinate these to the societal interests, would violate a traditional absolute which is still vital in our constitutional law and in our common law of domestic relations.

Statutory and decisional trends in some jurisdictions, new problems appearing in or suggested by decisions in New York Children's Courts, the dubious reception accorded a recent effort to make parental responsibility clearer in the New York statutes – all suggest the need of more closely examining the statutes and policies governing our law of juvenile delinquency. A prime requisite of such examination is a much more complete reporting of cases than is presently available. The end result of this inquiry should be a determination of the effectiveness of our law in coordinately maintaining the societal and the parental interests affected by the delinquency of children.

[57] N.Y. CHILDREN'S CT. ACT §22 (h); N.Y.C. DOM. REL. CT. ACT §83 (i).



*Main entrance to the St. Louis University School of Law.*