St. John's Law Review

Volume 28, May 1954, Number 2 Article 7

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Since it is in the best interest of the public that they exercise their functions zealously and fearlessly, they should not be unduly hampered or intimidated by the threat of legal action should they err. The next question concerns the amount of immunity that should be extended. It is submitted that a test of reasonableness should be applied. In determining whether a public officer is to be held personally liable, the jury should decide whether the officer acted reasonably. The concept of reasonableness assumes that the officer has acted in good faith and that there was substantial evidence warranting the course of action pursued. To adequately protect the private citizen, the burden of proof should be on the officer to establish the reasonableness of his act.

The suggestions made above do not amount to a panacea. The many facets of every legal problem preclude the possibility of pat solutions satisfactory to all interested parties. It is hoped, however, that they will recommend themselves as a workable method of approach to the problem of the tort liability of administrative officers.

THE RELIGIOUS PROTECTION CLAUSES IN NEW YORK'S CHILDREN'S COURT ACTS

At the turn of the century, a group of citizens in Illinois impressed upon the legislature of that state the need for a court for children.[1] This legal and sociological development rapidly extended to other states, so that today, a scant half-century later, most states have separate courts for children.[2] The idea was born of necessity. Prior to that time, children who committed offenses were placed on equal footing with adults,[3] and were subjected to the same penalties as more mature criminals. Since, however, criminal jurisprudence includes the concept of rehabilitation,[4] and since impressionable children should be trained, guided and protected, special treatment and consideration for such children is entirely warranted.

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[1] See Neary, *Selecting Clients for the Juvenile Court*, YEARBOOK, NAT. PROBATION ASS'N 209 (1936). Children, however, were tried in a separate session of the criminal court as early as 1863 in Massachusetts. 6 N.Y. STATE CONSTITUTIONAL CONVENTION COMMITTEE, PROBLEMS RELATING TO BILL OF RIGHTS AND GENERAL WELFARE 659 (1938). There are indications that sentences imposed upon children during the colonial period were not actually carried out. KAHN, A COURT FOR CHILDREN 17 (1953); TEETERS AND REINEMANN, THE CHALLENGE OF DELINQUENCY 69 (1950).

[2] See 6 N.Y. STATE CONSTITUTIONAL CONVENTION COMMITTEE, *op. cit. supra* note 1; NEARY, *op. cit. supra* note 1.

[3] See TEETERS AND REINEMANN, *op. cit. supra* note 1, at 70.

[4] See ROONEY, LAWLESSNESS, LAW AND SANCTION 40 *et seq.* (1937); SNYDER, CRIMINAL JUSTICE 23 (1953).

New York State adopted the concept of a court for children into its constitution in 1921,[5] although in early years there had been a Children's Court which existed as an adjunct of the Court of Special Sessions.[6] In this state, children are now deemed incapable, with certain exceptions, of committing crimes.[7] Consequently, the Children's Courts of New York are not criminal courts,[8] but rather, they are instrumentalities through which delinquent or neglected children are helped and protected and thus become useful members of society. The courts which have jurisdiction over these children are two: the Children's Part of the Domestic Relations Court of the City of New York,[9] territorial jurisdiction of which is limited to the city; and the Children's Court,[10] which is found in other counties of the state.

These courts, like children's courts of other jurisdictions, are designed to aid the child.[11] It becomes necessary therefore, that in rehabilitating and protecting children under their jurisdiction, the courts take care that all possible benefits be extended to them. The courts should concern themselves not only with the physical and mental, but also with the spiritual, welfare of the child.[12] In recognition of this need, the New York State Constitution was amended to provide that ". . . whenever a child is committed to an institution or is placed in the custody of any person by parole, placing out, adoption, or guardianship, it shall be so committed or placed, when practicable, to an institution governed by persons, or in the custody of a person, of the same religious persuasion as the child." [13] This mandate is implemented by both the Children's Court Act [14] and the New York City

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[5] N.Y. CONST. Art. VI, § 18.

[6] This court was established in 1902. The Children's Court became separate and distinct from the criminal court system in 1924. See 6 N. Y. STATE CONSTITUTIONAL CONVENTION COMMITTEE, PROBLEMS RELATING TO BILL OF RIGHTS AND GENERAL WELFARE 664 (1938).

[7] N.Y. PENAL LAW § 486. "The word 'delinquent' shall include any child over seven and under sixteen years of age (a) who violates any law of this state or of the United States or any municipal ordinance or who commits any act which if committed by an adult would be a crime, except any child of fifteen years of age who commits an act which if committed by an adult would be punishable by death or life imprisonment. . . ."

[8] N.Y. CHILD. CT. ACT § 45. "This act shall be construed to that end 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, and that as far as practicable they shall be treated not as criminals but as children in need of aid, encouragement and guidance." N.Y. DOM. REL. CT. ACT § 89. See also People v. Lewis, 260 N.Y. 171, 176, 177, 183 N.E. 353, 354, 355 (1932), *cert. denied,* 289 U.S. 709 (1933).

[9] Laws of N.Y. 1933, c. 482.

[10] Laws of N.Y. 1922, c. 547.

[11] See People v. Lewis, *supra* note 8; Goldsmith, *Legal Evidence in the New York Children's Courts,* 3 BROOKLYN L. REV. 24 (1933).

[12] *Cf.* American Bishops, *The Child: Citizen of Two Worlds* in OUR BISHOPS SPEAK 164 (Huber ed. 1952).

[13] N.Y. CONST. Art. VI, § 18.

[14] N.Y. CHILD. CT. ACT § 26.

Domestic Relations Court Act.[15] Other states have similar provisions.[16]

Placing of Child in Voluntary Institution

Where a child, who is neglected, dependent or delinquent, is placed in the custody of an institution, that institution should be conducted, where practicable, by persons of the same religious persuasion as that of the child.[17] The reasoning is that since the child is away from his home, his religious faith should be protected with care and diligence. In placing children in sectarian institutions, the state is fully cooperating with religious bodies in rehabilitating these children. The constitutional doctrine of separation of Church and State is not infringed upon in these situations, because the purpose of the statute permitting this placement is to promote the public welfare.[18] The child and the state alone are the beneficiaries.[19] Indeed, in *Everson v. Board of Education*,[20] which first defined this separation doctrine, the Supreme Court stated that "[t]he fact that a state law, passed to satisfy a public need, coincides with the personal desires of the individuals most directly affected is certainly an inadequate reason for us to say that a legislature has erroneously appraised the public need." [21] This cooperation between voluntary institutions under religious auspices and the state in rehabilitating and protecting children indicates ". . . the religious nature of our people and accommodates the public service to their spiritual needs." [22] Furthermore, the complete child—mind, body and soul—is cared for in such institutions.

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[15] N.Y. DOM. REL. CT. ACT § 88.

[16] See, *e.g.*, ALA. CODE tit. 13, § 361 (1941); ARIZ. CODE ANN. § 46-132 (Supp. 1951); ARK. STAT. § 45-229 (1947); DEL. CODE ANN. tit. 10, §§ 984, 1178 (1953); D.C. CODE tit. 11, § 11-918 (1951); ILL. REV. STAT. c. 23, § 211 (1951); IND. STAT. ANN. § 9-3217 (Burns, Supp. 1953); IOWA CODE c. 232, § 232.24 (1950); MINN. STAT. § 260.20 (1949); MO. REV. STAT. § 211.140 (1949); NEB. REV. STAT. § 43-216 (1943); N.C. GEN. STAT. ANN. § 110-35 (1952); OHIO REV. CODE ANN. tit. 21, § 2151.32 (Baldwin, 1953); OKLA. STAT. tit. 20, § 824 (1951); PA. STAT. ANN. tit. 11, § 252 (Purdon, 1939); R.I. GEN. LAWS c. 616, § 12 (1938); VT. STAT. § 9899 (1947); VA. CODE ANN. tit. 16, § 16-172.48 (Supp. 1952); WYO. COMP. STAT. ANN. § 58-610(2) (1945) (private homes only). The Connecticut statute permits clergymen of the various religions to instruct children in public institutions. CONN. GEN. STAT. § 2838 (1949).

[17] See NAT. PROBATION ASS'N, STANDARD JUVENILE COURT ACT § 19; KAHN, A COURT FOR CHILDREN 108 (1953).

[18] See Dunn v. Chicago Industrial School for Girls, 280 Ill. 613, 117 N.E. 735 (1917). In that case, the court sustained an appropriation of funds to a Catholic institution. Young girls of the Catholic faith were committed there by the Juvenile Court. The court, noting that the funds were used to educate and care for the children, held that the constitutional prohibition against aiding a particular religion was not contravened.

[19] *Cf.* Cochran v. Louisiana State Board of Education, 281 U.S. 370 (1930) (books of non-sectarian nature furnished to parochial schools).

[20] 330 U.S. 1 (1947).

[21] *Id.* at 6.

[22] Zorach v. Clauson, 343 U.S. 306, 314 (1952).

New York courts have given much weight to both constitutional and statutory provisions regarding the placing of children in institutions conducted by persons of the same religious persuasion.[23] Some states, on the other hand, in attempting to provide for rehabilitation of children by means of "Youth Authorities" have repealed these religious protection clauses.[24] Even if these institutions provide chaplains, and conduct formal religious services, the spiritual values which aid in rehabilitating children are generally lost.[25]

Probation of Child to Officer of Same Religious Faith

The Domestic Relations Court of the City of New York, alone of all children's courts in the nation,[26] provides that, where practicable, the probation officer shall be of the same religious faith as that of the probationed child.[27] It has been suggested that this provision prevents an efficient operation of the probation department.[28] Assignment by religion of the child, it is urged, is wasteful since an officer may be compelled to spend much of his time travelling to meet his wards, and thus detracts from the time he may spend with them. A corollary to this proposition is that frequently two probation officers will visit the same neighborhood, because the children on probation are of different faiths. Finally, it is suggested that capable officers will treat all children equally, notwithstanding religious beliefs. Geographical apportionment of cases, in essence, is propounded as the most efficient method.

Many reasons suggest themselves as to why a probation officer should be, if possible, of the same religion as that of the child. Probation is case-work. The success of this case-work depends upon a close relationship between the officer and the child. The more factors which are present to help weld this relationship, the greater is the chance of success in rehabilitation and treatment. Cultural, linguistic and religious ties are among those which help to achieve that result.

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[23] See Matter of Santos, 278 App. Div. 373, 107 N.Y.S.2d 543 (1st Dep't 1951), *appeal dismissed,* 304 N.Y. 483, 109 N.E.2d 71 (1952).

[24] See, *e.g.,* KY. REV. STAT. ANN. § 199.160 (Baldwin, 1943), repealed by Act of 1952, H 157 (Baldwin, Supp. 1953). See also CAL. WEL. & INST. CODE §1730 (Deering, 1952). In commitments to institutions other than the Youth Authority, California's statute is similar to those of other states. CAL. WEL. & INST. CODE § 552 (Deering, 1952).

[25] "Paid chaplains are in all the institutions and consideration to difference in religious faith is given. In general the services are formal and would appear of no great spiritual value to the hungry individuals who attend." Van Waters, *Problems Presented to the Federal System of Justice by the Child Offender* in 2 REPORTS, NAT. COMM'N ON LAW OBSERVANCE AND ENFORCEMENT 78 (1931).

[26] See KAHN, A COURT FOR CHILDREN 300 (1953).

[27] N.Y. DOM. REL. CT. ACT §§ 25, 88.

[28] See KAHN, *op. cit. supra* note 26. Research, however, has not indicated that the courts themselves feel that such assignment by religion detracts from the efficiency of the probation department.

While it is undoubtedly true that a probation officer of a different faith can work efficiently with children, he may be less equipped to understand and to interpret for the child who is seeking guidance, the problems which are peculiar to the child's religious faith such as dietary laws or attendance at church. Furthermore, where the probation officer is of another persuasion, he is at a disadvantage in explaining the meaning of the child's religion.

Not to be neglected in considering this problem are the parents of the child. Those who profess a religious faith are more at ease with a probation officer who is of the same religion, and thus, the child's problems are more easily explored. Also, the probation officer of the same faith as the child is undoubtedly more familiar with the facilities his church offers for probationed children.

A more serious objection leveled against the practice of assigning probation officers by religion is that such a practice might violate civil rights. The argument is that since assignment of probation officers is by religion, then hiring of them may depend upon their religion.[29] This, it is stated, may contravene the Civil Rights Clause of the New York Constitution.[30]

This objection, however, appears unfounded. It is to be noted that the two constitutional provisions are not inconsistent. One prevents discrimination on the basis of religion; the other requires that where practicable, the probation officer be of the same religious faith as the child. Neither provision is absolute, but each should be given full effect.[31] The Civil Rights Clause expands [32] upon the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution,[33] and its purpose is to prevent discrimination in hiring *solely* on the basis of religion, race, color, or creed. The motivating factor in hiring a probation officer of a particular religious faith and rejecting another candidate is not because of *his* religious persuasion, but because the public policy of this state, as set forth in its constitution, declares that where practicable, the officer shall be of the same religious faith as the probationed child. Where the juvenile delin-

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[29] See KAHN, *op. cit. supra* note 26.

[30] N.Y. CONST. Art I, § 11. "No person shall be denied the equal protection of the laws of this state or any subdivision thereof. No person shall, because of race, color, creed or religion, be subjected to any discrimination in his civil rights by any other person or by any firm, corporation, or institution, or by the state or any agency or subdivision of the state." See also N.Y. EXECUTIVE LAW § 296. The usual practice in New York City is to hire probation officers for the Domestic Relations Court without regard to religion. As needed, these officers are assigned cases in the Children's Part according to religion; those remaining are assigned to the Family Part.

[31] *See* People *ex rel.* Smith v. Board of Supervisors, 148 N.Y. 187, 190, 42 N.E. 592 (1896).

[32] See 6 N.Y. STATE CONSTITUTIONAL CONVENTION COMMITTEE, PROBLEMS RELATING TO BILL OF RIGHTS AND GENERAL WELFARE 223 (1938).

[33] U.S. CONST. AMEND. XIV, § 1. ". . . nor [shall any state] deny to any person within its jurisdiction the equal protection of the laws."

quency situation is as acute as it is in the nation today, this plan is not only practicable, but also extremely propitious. Furthermore, since the criterion is the child, and his welfare, and not the officer's religion, there is no inhibition imposed by the Civil Rights Clause since a legitimate public purpose may be served by reasonable means without regard to the constitutional limitation of equal protection.[34]

Conclusion

The Legislature of the State of New York has appropriated funds for a commission to study the organization of courts in this state and to propose methods whereby the system might become more efficient.[35] Especial attention is being given to the Domestic Relations Court which has jurisdiction over the fundamental basis of society, the family, and the cornerstone of the society of the future, the child. The need for a more efficacious method of treating family problems has been demonstrated by several authorities.[36] But in the desire to cure existing defects in these courts, care must be taken to preserve that part of the institution which is useful and conducive to the best welfare of the child.

The Roman Catholic Bishops of the United States have emphasized the necessity of educating the child to be a useful and worthwhile citizen by including in his education respect for God, country, and laws.[37] *A fortiori,* a delinquent or neglected child needs to be taught respect for religious and moral principles, since these develop in him a sense of responsibility.

Mr. Justice Hill, presiding justice of the Domestic Relations Court, has remarked upon the need for religion in rehabilitating the child:

> No real character is built without the alloy of religion. The mixing of this particular alloy in with human conduct so that it will be accepted and used, and not rejected, is one of the most delicate operations known to science—and it is a science, a science of love and understanding, as any clergyman will tell you.
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> . . .
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> Religion cannot be forced down the throat. Authority and punishment sour it. Necessarily, the judge is associated with authority. He serves an essential purpose in bringing back to shore the boy or girl who is swimming out to sea in

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[34] *See* People v. Arlen Service Stations, Inc., 284 N.Y. 340, 344, 31 N.E.2d 184, 185 (1940).

[35] Laws of N.Y. 1953, c. 591.

[36] See GELLHORN, CHILDREN AND FAMILIES IN THE COURTS (1953); KAHN, A COURT FOR CHILDREN (1953).

[37] See American Bishops, *The Child: Citizen of Two Worlds,* in OUR BISHOPS SPEAK 164 (Huber ed. 1952).

> the face of a tempest. But, after the child is turned back and landed on shore, the job is only half done. That child must be convinced of the danger he incurs, and the task of doing this is exceedingly difficult for one who had to use force, so to speak, to rescue him against his will from the waves.
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> A judge is suspect to this child who hates the adult world. He represents the ultimate in authority and punishment to which most of our children are case-hardened by the time they reach us.
>
> It is just common sense that advice and leadership are accepted only from those whom you respect and love. *Probation officers, in time, are able to establish that rapport with the sick child which makes it possible for them to talk helpfully about character and spiritual values. . . .*
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> . . . Religion should not be associated with punishment. *So this judge will not attempt to mix in the alloy of religion at this inopportune moment. He will leave this important task to the future when the child will be receptive to words of wisdom imparted by someone whom the child has learned to respect and accept.*[38]

It would seem, therefore, that probation officers of the same religious persuasion would be more effective than officers of another faith.[39]

The task of restoring these children is huge. Religion helps to give them a proper sense of values. Since religion is an important factor in the training and protection of the total welfare of the child, the religious protection clause of the New York Constitution is instrumental in achieving this goal.

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[38] Cited in KAHN, *op. cit. supra* note 36, at 111 (emphasis added).

[39] See COOLEY, PROBATION AND DELINQUENCY 14 (1927). Compare NAT. CONFERENCE ON PREVENTION AND CONTROL OF JUVENILE DELINQUENCY, RECOMMENDATIONS FOR ACTION 99 (1947); TEETERS AND REINEMANN, THE CHALLENGE OF DELINQUENCY 617, 618 (1950).