NON-CRIMINAL BEHAVIOR

INTRODUCTION[1]

By statute Maine's district courts have jurisdiction over the following acts commited by children:[2]

- habitual truancy[3]
- behaving in an incorrigible[4] or indecent and lascivious manner[5]

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1 For relevant sections of our reports on Maine's statutes and regulations, see "Statutes of Maine's Juvenile Justice System: Report on Task 3", pp. 25-50 and "Regulations of Maine's Juvenile Justice System", pp. 25-43.

2 15 M.R.S.A. Section 2552 (Supp. 1975)

3 Note that since the problem of truancy was discussed in the materials on PREVENTION and since the Commission has already formulated its preliminary recommendations in that area, truancy will not be discussed here.

4 Other states that still have an incorrigibility provision in their juvenile statutes include: Alabama, Florida, Georgia, Indiana, Mississippi, New Jersey, Ohio, South Carolina, Washington, West Virginia, and Wyoming.

5 Other states with similar statutory language include Alabama, Michigan, Nevada, New Jersey, and Washington. Many states have a "wayward" child category in their statutes - for example: Alaska, Delaware, Iowa, Kentucky, Minnesota, Mississippi, Montana, Nebraska, New Hampshire, Ohio, and Wyoming.

- knowingly and willfully associating with vicious, criminal or grossly immoral people[6]
- repeatedly deserting one's home without just cause[7]
- living in circumstances of manifest danger of falling into habits of vice or immorality.[8]

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6 Some states have an "unruly" child category, for example: Georgia, North Dakota, Ohio, and Tennessee. Others use language such as "ungovernable," for example: Alaska, Delaware, Indiana, Iowa, Louisiana, Maryland, Minnesota, Mississippi, Montana, Nebraska, New Hampshire, New Jersey, New Mexico, New York, North Dakota, Pennsylvania, South Carolina, Tennessee, Vermont, Vermont, Virginia, West Virginia, Wisconsin, and Wyoming.

7 Almost all states have some provision about "runaway" children in their statutes. Maine has signed the Uniform Interstate Compact on Juveniles which provides for the return of runaway children to their own state. 34 M.R.S.A Section 181 (1957 as amended through 1972).

8 Many states have a statutory language prohibiting children from leading "idle, dissolute lives", for example, Alabama, Michigan, Nevada, New Jersey, and Washington. Also note that in 1973, a Maine court upheld the adjudication of a juvenile for living in circumstances of manifest danger of falling into habits of vice or immorality against a claim that it violated the Due Process Clause of the United States because it was vague and overbroad. The court stated that the language merely requires a person to conform to an "imprecise but comprehensive normative standard" of conduct. S*** v. State, 229 A.2d 560, 568 (Me. 1973).

A. Brief Description of Maine's Current Statutory Provisions

1. Behaving in an Incorrigible or Indecent and Lascivious Manner[9]

The scope of this category is uncertain and there have been no cases defining these terms within the context of juvenile offenders.

However, by implication this section may include only those acts done by a juvenile which, if continued would make it reasonably likely that he would fall into "habits of criminal conduct."[10] This rationale is based on the predictive aspects of the court's jurisdiction.[11] However, it provides little assistance in the actual process of determining what conduct is regulated.

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9 Arguably, prostitution and alcohol or drug abuse fall under this category, although they are also often considered to be "private crimes." And the Commission is aware that Maine courts often exercise jurisdiction over children who are prostitutes or substance abusers under this statutory rubric. However, the Commission conceded prostitution and substance abuse by children during its session on CRIMINAL BEHAVIOR held on September 10, 1976 and so these "victimless crimes" are not specifically considered here.

10 See, S*** v. State, 299 A.2d 560, 569 (Me. 1973) in which the court stated that the jurisdiction of the juvenile court was based on the desire to correct the behavior of juveniles who indicated a likelihood of becoming criminal adults if their conduct was not changed.

Although this case dealt with conduct manifesting the danger of falling into habits of vice or immorality, the logic of the case should apply to all non-criminal acts.

11 Id.

2. Knowingly and Wilfully Associating with Vicious, Criminal, or Grossly Immoral People

A juvenile court also has jurisdiction if a child has knowingly and wilfully associated with vicious, criminal or grossly immoral persons.[12] Again there are no cases that speak directly to this issue. Since both knowledge and wilfulness are elements of the offense, it may be necessary to prove these conditions.[13] However, these terms have never been adequately defined in the context of the juvenile law.[14]

Therefore, it must be assumed that juveniles may be adjudicated under this section only if their action presents a reasonable likelihood that it will result in future criminal conduct.[15]

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12 15 M.R.S.A. Section 2552 (Supp. 1975).

13 See, L*** v. State, 320 A.2d (Me. 1974) holding that the juvenile court only needs to find those elements specifically related to the punishment of the offender.

14 Because juveniles have a different capacity for action than adults, it would be difficult to apply adult standards in interpreting the juvenile's conduct.

15 See footnote 10.

3. Repeatedly Deserting One's Home Without Just Cause

A child may also come under the district court's jurisdiction if he repeatedly deserts his home without just cause.[16] Again there have been no cases interpreting this section.

This section presents two problems of interpretation. First, it requires the child to "repeatedly" run away from home. Thus, the child who only runs away once technically does not fall within this provision although the state's interest in protecting him may be as strong as its interest in the repeater.

The statute also requires that the child act "without just cause." However, this language is not defined. Obviously, a child might desert his home for one of numerous reasons.[17] Thus, the circumstances which may bring a child under a juvenile court's jurisdiction are unclear.

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16 15 M.R.S.A. Section 2552 (Supp. 1975).

17 For example, a child may run away because he is sexually abused, or lacks adequate nutrition. See Brunswick v. LaPrise, 262 A.2d 366 (Me. 1970) in which the court held that the parent was liable for the support of the child even if the child left home involuntarily. The court in that case did not decide whether a pregnant daugher who refused to abide by her father's requirement that she relinquish the child had left voluntarily or involuntarily.

4. Living in Circumstances of Manifest Danger of Falling into Habits of Vice or Immorality

Finally, the district court has jurisdiction over a child who is living in circumstances of manifest danger of falling into habits of vice or immorality.[18]

This section has been upheld as constitutional. The language of the statute represents "an imprecise but comprehensible normative standard."[19] The court went on to say that this "standard" seeks to prepare the child for a useful adult life and to prevent him from becoming a criminal.[20] The conduct prohibited is that conduct which presents evidence of a manifest danger that the juvenile will fall into habits of criminal conduct.[21]

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18 15 M.R.S.A. Section 2552 (Supp. 1975). Certainly this category bears a close relationship to that of the neglected child, who is defined as a child living in circumstances which seriously jeopardizes his health, wealth or morals. 22 M.R.S.A. Section 3792 (Supp. 1975).

19 S*** v. State, 299 A.2d 560 (Me. 1973).

20 Id. at 568.

21 Id.

> The terms "vice" and "immorality" refer only to those vices and immoral acts which are defined by statute as criminal and whose elements are defined by statute, case law or the common law.[22] Despite these limitations, it certainly may be argued that this section does not present clear "standards" of conduct for juveniles.

B. Background Material

The juvenile court's jurisdiction over children's non-criminal misbehavior has long been seen as a keystone of its "child-saving mission." It is both widespread and widely invoked: Every state has some ground of jurisdiction extending the juvenile court's power to cases involving anti-social but non-criminal child behavior.[23] Sound data are not available, but it is estimated that beyond-parental-control and truancy cases may comprise half the cases heard in U.S. juvenile courts. In one county which undertook a thorough study, it was found that such cases accounted for forty percent of all minors detained and seventy-two percent of court-ordered out-of-home placements and commitments.[24]

For better than a decade, there has been increasing criticism of jurisdiction over non-criminal behavior of

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22 Id. at 569. Thus, the court seeks to prevent a judge from applying his own particular moral standards. Id. at fn. 4 p. 569.

23 See "Goals of Maine's Juvenile Justice System: Report on Task 1" Appendix XIII.

24 County of Sacramento, CA, Probation Dept., The Sacramento 601 Diversion Project: A Preliminary Report (1971).

children.[25] Recent years have seen sharply mounting challenges, both in legislatures and in the courts.[26]

The following appear to be the chief arguments propounded for absolution of jurisdiction over non-criminal behavior of children.[27]

1) The unruly child jurisdiction fails to provide effective rehabilitation; it simply doesn't work. No evidence supports its central theses that the behaviors encompassed in its ambit are evidence of probable future law violation of that official intervention will present future crimes. In fact, such evidence as there is indicates that quite the reverse may be the case. Rates of recidivation are in some places appallingly high; in one California county, a study undertaken before a "diversion" project was commenced revealed that half of the "beyond-control" offenders were charged with a subsequent offense within 7 months from the date of first court contact. But note that there seems to be some

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25 For an early attack on the vagueness and overbreath of the empowering statutes, see Rubin, S, "Legal Definition of Offenses by Children and Youths,(1960) Illinois Law Forum 512, 1960.

26 See: Report of the Cal. Assembly Interim Committee on Criminal Procedure: Juvenile Justice Processes, 1971, recommending abolition of the juvenile court's beyond-control child statute.

27 The following material is not organized in a hierarchical sequence.

regional variation: In two studies undertaken in the summer of 1973, in New York City and nearby Rockland county, investigators found children referred to the court as PINS reoffended in only 36.36 percent and 25 percent of the cases respectively.[29]

2) The handling of non-criminal misbehavior requires a diversion of effort, time and resources of the juvenile justice system that is vastly disproportionate to any good achieved. If the unruly child jurisdiction were abolished, resources and personnel - included, let it be noted, lawyers for children - could better attend and serve those cases involving conduct which more seriously endangers the community. Non-criminal cases appear to involve institutionalization with stupefying frequency. For example, in one jurisdiction about which data is available, such cases accounted for more than 32 percent of the cases referred, more

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28 Sacramento Co. Probation Dept., Preventing Delinquency Through Diversion: The Sacramento County Probation Department 601 Diversion Project - A First Year Report, 1972

29 Andres, R.H, and Cohn, A.H., Unruly Children: The Juvenile Non-Criminal Offender, 117, 167 unpub. manuscript prepared for the IJA/ABA Juvenile Justice Standards Project, Oct. 1973.

than 40 percent of the detention petitions filed, and more than 72 percent of all out-of-home placements (not counting neglected child placements).[30]

3) Cases involving "unruly" children who have violated no penal law present issues for resolution which are peculiarly ill-fitted for, and unbenefited by, legal analyses and judicial fact-finding. The judicial system can decide quite well whether a person did a given act or not; it cannot properly decide what a person is. And that is what we demand that it do in cases of "incorrigible" children. The law is simply inept as a corrective of the kinds of family dysfunction these cases most frequently involve. Legal compulsion cannot restore (or provide) parent-child understanding and tolerance nor can it build up mechanisms for conflict resolution within any given family.

4) The non-criminal jurisdiction of juvenile courts affronts what has been termed the "Fairness Principle": Adult runaways and dropouts often do not face court-imposed sanctions. Though there is considerable contrariety of thought on the manner, it has been suggested that maintenance of the "incorrigible"

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30 Sacramento, Co. Probation Dept., The Sacramento 601 Diversion Project: A Preliminary Report 10, 1971.

child jurisdiction offends constitutional guarantees of due process and equal protection.[31] In short, the non-criminal jurisdiction of juvenile courts seeks to demand of children a greater and more exact adherence to desired norms than we are willing to impose on adults.

5) Many, if not virtually all, statutes conferring on the juvenile court jurisdiction over the unruly child are arguably void for vagueness; language extending such jurisdiction to a minor who is "leading or is in danger of leading an idle, dissolute, lewd or immoral life" falls far short of such specificity as would allow the actor to determine what conduct fell within the prohibitions of the statute, so that he or she could gauge behavior accordingly. Given the typical overbreadth of these statutes, every child in the country could be made out to be the proper subject of juvenile court jurisdiction, if there were a sufficiently-detailed chronical of their behavior.

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[31] See Sidman, "The Massachusetts Stubborn Child Law: Law and Order in the Home" 6 FAM. L. Q. 33, 49-56, 1972.

6) The unruly child and PINS statutes essentially impose sanctions upon a status, not upon a specific act.[32]

7) The exercise of the juvenile court's non-criminal jurisdiction works a stigmatization on the minor involved which affects both his or her conception of self and the conception of the minor held by others. To make non-criminal behavior a separate jurisdictional basis for intervention from that of delinquency - i.e., law violation - in no way abates the stigma, any more than saying that delinquency proceedings are not criminal removes their taint.[33]

8) Allowing formal intervention in non-criminal cases isolates the child from the family, undermines familial autonomy and authority, and cuts against the development of mechanisms within the

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32 See Robinson v. California, 370 U.S. 660 (1962), overturning a California statute making the status of narcotic addiction a criminal offense. The decision rested on the constitutional prohibition against cruel and unusual punishment, which the court found was violated when a person was jailed for a status that amounted to a medical problem.

33 There is presently some thought that "labeling theories" and processes of stigmatization may have a lot less impact and effective consequence on juvenile behavior than the proponents of labeling theory have suggested. See, e.g., Mahoney, A.R., "Youths in the Juvenile Justice System: Some Questions About the Empirical Support for Labeling Theory," unpub. paper prepared for J.J.S.P., 1973.

family to establish controls and resolve disputes. It thus impedes the child's maturation into an adult who possesses effective ways of handling and adjusting problems of inter-personal relationships. Moreover, it encourages parents to abdicate their functions and roles to the court: Court appearance with an incorrigible child bespeaks parental failure, and having been thus marked as failures, the parents may be all too willing to give over their child to a system that is all too willing to take him or her. It seems probable that many families are deflected from trying to work matters out in their own (and likely more effective) way simply because the court is there.

9) Similarly, the existence of the non-criminal jurisdiction weakens the responsibility of community agencies and dulls their ability to respond to problems that are essentially theirs.

10) The non-criminal jurisdiction serves to further racial and economic discrimination, though the degree will vary greatly with locale and size of jurisdiction.

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34 Thornberry, "Race, Socio-Economic Status and Sentencing in the Juvenile Justice System" 64 J. CRIM. L. 90 (1970); Cohn, "Criteria for the Probation Officer's Recommendations to the Juvenile Court Judge" 9 CRIME & DEL. 262 (1963).

10) There are no good data on the point, but the non-criminal jurisdiction is thought to afford an unfortunate and convenient haven for the lodging of cases which properly belong under the rubrics of neglect or delinquency. In the case of an older child, the probation officer may be reticent to file and the court equally reticent to sustain a neglect petition, since that would mean (in many if not most jurisdictions) housing the child in a non-secure shelter facility geared to the handling of much younger children. This may be particularly true of runaways; the system seeks to creak along on the assumption (usually unvoiced) that a youth who has once run away from home is always a flight-risk. In delinquency cases, such matters as drug possession and prostitution are frequently brought as beyond-control cases. It is often said that this is done to shield the child from the stigma of delinquent adjudication. The observation of British juvenile courts made better than a decade ago seems to apply to our system with at least equal force: The juvenile court often appears to be trying a case on one particular

ground and then to be dealing with the child on some quite different ground.[35]

11) Finally, the non-criminal jurisdiction is posited on the assumption that beyond-control behavior is predictive of future criminality, and that coercive intervention in such cases is preventive of future law violation. There is no evidence that the assumption is correct, and indeed much more indication that it isn't.

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35 H. M. Home Office, Report of the Committee on Children and Young Persons, Ingleby Committee, and Comd. 1191 at 26, 1960.

36 Glen, J., "Juvenile Court Reform" Procedural Process and Substantive Status, 1970 WIS. L. REV. 431, 444; and Rosenheim, M.K., Notes on "Helping" Juvenile Nuisances 2, unpub. ms., 1973. (Available from the University of Chicago, School of Social Work.)

GOALS - TO INCREASE OR ELIMINATE THE NUMBER OF CHILDREN ABOUT WHOM PETITIONS FOR NON-CRIMINAL BEHAVIOR ARE FILED IN JUVENILE COURT

TO INCREASE THE AVAILABILITY, AND USE OF NON-COURT RELATED TREATMENT SERVICES TO BOTH NON-CRIMINALLY MISBEHAVING CHILDREN AND THEIR FAMILIES

The notion that the ideal solution is the complete abolition of juvenile court jurisdiction over non-criminal misbehavior is seductive, and perhaps wholly right. It is also probably, at present, infeasible. First communities are unlikely to accept it. Second, and more important, if they did, we would likely be substituting the tyranny of untrammeled agencies for the tyrannies of the court sytem; the history of family and juvenile agencies generally does generate confidence in their ability to respect basic rights or to render effective treatment. And, possibly, treatment "voluntarily" entered into swiftly takes on a coercive continuance.

The ultimate solution may indeed be the abolition of jurisdiction over this kind of behavior. This can only be urged or achieved when there have been developed workable standards for and restrictions upon the agencies and

resources that will supplant the court. As intermediate steps toward that end, the Commission might consider the following:

a) Alter the jurisdictional basis for court intervention in such cases, perhaps treating them essentially as neglect cases. (A showing of neglect is a defense to a finding of beyond-parental-control status which is rarely urged, and the visceral feeling is that - difficult and intractable though these cases are - they are in great measure closer to neglect problems than to delinquency.) Perhaps the jurisdictional rubric should speak in terms of the absence of minimal parental care or control of the child and thus attempt to embrace both neglect and misbehavior cases.

b) "Delinquent" handling for misbehavior cases should be entirely abolished - i.e., it should not be possible for a court to send children involved in non-criminal misbehavior to a delinquent institution at any stage, so long as the behavior does not offend the penal law. Since most states prohibit the intermixing of neglected and delinquent children, including misbehavior cases under the neglect ground of jurisdiction would facilitate this.

c) Establish standards for voluntary and compulsory diversion and non-correctional handling of misbehavior cases. Access to these programs should be available on a voluntary basis for parents and children, but the police, the probation system and other referral sources should be compelled to make use of them. The goal would be to restrict severely the numbers and kinds of cases that come to court.

d) Court approval of placement ought to be required in any cases where out-of-home placement is not voluntary, or where even if voluntary it will continue for longer than a fixed period (say three months). Such approval should only be given after a jurisdictional finding and dispositional study, upon full hearing in which the minor would be represented by counsel.[37]

e) Court approval of out-of-home placement should only be given upon a very strong showing (either beyond a reasonable doubt or upon clear and convincing evidence) that there exist reasonable means of treatment short of court intervention, that they have been tried, and that they have not availed to resolve the problem.

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[37] Perhaps in the case of voluntary placements, consent decrees would be appropriate.

GOAL - TO PROVIDE THE JUVENILE COURT WITH JURISDICTION OVER CLEARLY SPECIFIED AND DEFINED ACTS WHICH THREATEN TO HARM OR WHICH DO HARM TO OTHERS

One can say what behavior ought not to be cognizable:

1) Truancy, whether under a beyond-control rubric or on the basis of violation of a compulsory-education statute, because the court ought not to be a club to conceal and continue the deficiencies of the educational system.[38]

2) Violations of penal laws (especially drug use and other "victimless crimes")[39] because
   a) Their inclusion will impede the abolition of "delinquent" placements for non-criminal misbehavior, and
   b) there is a real danger that the "non-delinquency" jurisdictional rubric may be used to circumvent evidentiary restrictions imposed in delinquency cases.

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38 As the Commission decided during its August 5, 1976 meeting.

39 A policy the Commission adopted during its September 10, 1976 meeting.

3) First time offenders. Possibly the Commission should take the position that no first-time instance of non-criminal misbehavior ought to be the subject of anything but voluntary care. Yet it would seem that there is some danger in that position, even granting that most misbehavior is simply transitional deviance and can safely (and best) be officially ignored. The problem is that not all runaways or even curfew violations are the same, or have the same meaning to different children and different parents.

4) Misbehavior which might indicate leading or a tendency to lead, an "idle, dissolute lewd, or immoral life," insofar as it is phrased in anything like those terms.