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An Aspect of the Texas Juvenile Delinquency Law - Morals

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An Aspect of the Texas Juvenile Delinquency Law — "Morals"

Defendant, a fourteen-year-old girl, left home frequently and stayed away for indefinite periods of time. On these occasions, she would stay with a girl who, according to defendant's mother, was a prostitute. The defendant, only partially dressed, was found by a policeman and her mother in a downtown apartment with a young adult male. She was adjudged a delinquent and remanded to the custody of the Texas Youth Council pursuant to the Texas Juvenile Act.[1] Her confinement was set for an indefinite period of time, not to extend past her twenty-first birthday. The provision of the Act relied upon by the court defines a delinquent child as one who "habitually so deports himself as to injure or endanger the morals or health of himself or others."[2] *Held, affirmed*: The meaning of the word "morals" is sufficiently clear to convey to the person of ordinary intelligence those activities which are forbidden, and therefore, the word "morals" is not unconstitutionally vague. *E.S.G. v. State*, 447 S.W.2d 225 (Tex. Civ. App. 1969), *error ref. n.r.e., cert. denied*, 398 U.S. 956 (1970).

I. The Void-for-Vagueness Doctrine

When a statute is challenged as unconstitutional on the basis of vagueness, some standard must be used to apply the void-for-vagueness doctrine. In *Connally v. General Construction Co.*[3] the Supreme Court held that if men of common intelligence would have to guess at the standard required of them by a particular statute, then that statute must be struck down. In *Boyce Motor Lines, Inc. v. United States*[4] the Court concluded that a criminal statute must give notice of the conduct expected of one who would avoid its penalties, and it should provide the judge with insight into its applications and should guide the attorney in defending a client charged with its violation. The Court stated that because most words cannot be reduced to mathematical symbols, and because most statutes must attempt to deal with an untold number of fact situations, no more than a reasonable degree of certainty can be demanded.[5] The Court recognized that practical necessities limit legislators in spelling out prohibitions; therefore, it is appropriate to consider the problems with which Congress was dealing when it enacted the statute in question, and why Congress chose the particular language that it used.[6]

Several state courts have held that the standard to be used in deter-

[1] Tex. Rev. Civ. Stat. Ann. art. 2338-1 (1968).
[2] *Id.* § 3(f).
[3] 269 U.S. 385 (1926).
[4] 342 U.S. 337 (1952).
[5] *Id.* at 340.
[6] *Id.* at 341-42.

mining statutory vagueness is whether the words challenged are of long usage and common understanding.[7] "Long usage" requires that either the particular jurisdiction, or other jurisdictions, have used the challenged word or phrase in previous statutes.[8] "Common understanding" means that when other statutes using similar language have been challenged, they have been upheld by the courts as sufficiently clear and unambiguous.[9] If this test is met, courts will usually sustain the statute in question.[10]

Texas courts have announced a similar mode of determining unconstitutional vagueness in statutes. A statute may be somewhat ambiguous so that judicial interpretation is necessary, but an act will not usually be sustained unless its terms are as certain as the subject matter permits.[11] In *Wilson v. State* the defendant was found guilty of driving while intoxicated "to some extent."[12] The statute under which he was convicted made it a criminal offense to drive upon any public road or highway in the State of Texas while "intoxicated or in any degree under the influence of intoxicating liquor."[13] The Texas court of criminal appeals found this language to be unconstitutionally vague, because no criterion could be established to enable the trial court to define the meaning of the statute in instructing the jury.[14]

Strict construction of penal statutes is preferred.[15] "[T]he more severe the penalty, and the more disastrous the consequences to the person subjected to the provisions of the statute, the more rigid will be the construction of its provisions in favor of such person and against enforcement of such law."[16] Thus, a law should not be permitted to survive if it is not reasonably calculated to inform a person that he is violating it, or is about to violate it.[17]

In *Oriental Oil Co. v. Brown*[18] the appellant asserted that the appellee, in violating a penal statute, had been negligent per se. The applicable portion of the statute provided: "It shall be unlawful for any person to operate or drive any motor or other vehicle upon the public highways of Texas . . . within or through any town or village not incorporated, at a greater rate of speed than twenty (20) miles per hour . . . ."[19] Appellee complained that no one could determine exactly where the boundaries of an unincorporated town or village were located, and that each driver would be forced to rely on his own judgment as to when he was within such a town or village. The Texas Commission of Appeals, citing tertiary

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[7] *See* Gunn v. State, 89 Ga. 341, 152 S.E. 458 (1892); Diamond Auto Sales, Inc. v. Erbe, 251 Iowa 1330, 105 N.W.2d 650 (1960); State v. Katz Drug Co., 352 S.W.2d 678 (Mo. 1961).

[8] Diamond Auto Sales, Inc. v. Erbe, 251 Iowa 1330, 105 N.W.2d 650 (1960).

[9] State v. Katz Drug Co., 352 S.W.2d 678 (Mo. 1961).

[10] Gunn v. State, 89 Ga. 341, 342, 15 S.E. 458, 459 (1892).

[11] *See* Comment, *Constitutional Law—Indefinite Statutes Defining Crimes*, 8 TEXAS L. REV. 253-60 (1930).

[12] 123 Tex. Crim. 415, 59 S.W.2d 399 (1933).

[13] TEX. PEN. CODE ANN. art. 802 (1961).

[14] 123 Tex. Crim. 415, 416, 59 S.W.2d 399, 400 (1933).

[15] Missouri, K. & T. Ry. v. State, 100 Tex. 420, 100 S.W. 766 (1907).

[16] *Id.* at 421, 100 S.W. at 767.

[17] *Ex parte* Slaughter, 92 Tex. Crim. 212, 243 S.W. 478 (1922).

[18] 130 Tex. 240, 106 S.W.2d 136 (1937).

[19] TEX. PEN. CODE ANN. art. 827a, § 8 (1961).

authority with approval,[20] pointed out that a statute establishing a rule of conduct not greatly different from the rule of ordinary care, while too indefinite to be capable of enforcement in criminal proceedings, may be definite enough to furnish a rule of civil conduct.

Thus, Texas follows the majority of American jurisdictions in analyzing the validity of statutes. However, Texas goes one step further and declares that penal statutes which may be void for indefiniteness may be upheld in some instances as a valid civil rule.

II. Juvenile Proceedings And Statutes

Proceedings. At the turn of the century, an increasing social awareness prompted public recognition that the juvenile offender should be corrected as a child rather than punished as an adult.[21] The child, as a result of his incarceration with hardened criminals, might never escape the social stigma of a criminal conviction.[22] Despite the fact that the child was free to avoid any contractual obligations because he lacked sophistication in dealing with businessmen, he was nonetheless subject to adult penalty standards whenever he violated the law.[23]

The impetus necessary for legislative action was provided by the Chicago Women's Club and the Catholic Visitation Aid Society, which are credited with urging the first juvenile laws.[24] On July 1, 1899, the Illinois state legislature established the first juvenile court, and by 1920 only three states lacked a juvenile court system.[25] In the juvenile courts, proceedings were characterized as civil, and the term "criminal" was not attached to a juvenile offender.[26] Understanding, guidance, and protection were stressed, and such concepts as guilt, punishment, and criminal responsibility were supposedly de-emphasized.[27]

As a result of this paternalistic approach, rights accorded adult citizens were not provided in juvenile proceedings. In most jurisdictions, the juvenile had no right to counsel or right to trial by jury; in fact, "under the juvenile code, a child was to have a right not to liberty, but to custody."[28] In *In re Gault*[29] the Supreme Court recognized that the term "delinquent" had come to involve only slightly less stigma than the term "criminal." Therefore, the Court announced that the basic requirements of due process and fundamental fairness must be met in juvenile delinquency proceedings: "Under our Constitution the condition of being a boy does not justify a kangaroo court."[30]

Prior to *Gault*, in *Dendy v. Wilson*,[31] the Supreme Court of Texas

[20] 130 Tex. at 241, 106 S.W.2d at 137, citing 42 C.J. *Motor Vehicles* § 37, at 631 (1928).
[21] S. Glueck, The Problem of Delinquency 259 (1959).
[22] *Id.* at 257.
[23] J. Mack, The Chancery Procedure in the Juvenile Court 311 (1925).
[24] C. Vedder, The Juvenile Offender 255 (1954).
[25] *Id.* at 235-36.
[26] S. Glueck, *supra* note 21, at 259.
[27] *Id.* at 257.
[28] Term Paper, *Juvenile Delinquency*, 21 Baylor L. Rev. 352, 353 (1969).
[29] 387 U.S. 1 (1966).
[30] *Id.* at 28.
[31] 142 Tex. 460, 474-76, 179 S.W.2d 269, 274-77 (1944).

held that the juvenile court must meet the following: (1) If the juvenile defendant requests it, he must be granted a jury trial; (2) reasonable and definite charges must be filed against the defendant; (3) the defendant is entitled to have his rights[32] fully safeguarded; and (4) the customary rules of evidence in civil cases must be followed. Thus, the trial court's powers must be cautiously exercised,[33] even though the Texas Juvenile Act provides that the Act shall be liberally construed.[34] Obviously, liberal construction should not be allowed to emasculate the decision in *Gault*.

Statutes. A majority of American jurisdictions have statutes similar to the Texas Juvenile Act and allow a finding of juvenile delinquency when the defendant is found to have engaged in immoral conduct.[35] Many states also have statutes which impose penalties on adults who encourage minors to lead an immoral life.[36] These statutes are usually upheld by the courts.[37] However, in *State v. Gallegos*[38] the Supreme Court of Wyoming broke with the majority and declared unconstitutional a statute[39] making it unlawful to endanger the morals, welfare, or health of any child under nineteen years of age. In striking down the statute, the court admitted that respectable authority in many sister states approved of legislation using somewhat similar language.[40] In *In re Morrison*[41] the Supreme Court of Iowa upheld a statute[42] which allowed a finding of "neglected child" when the court found conduct likely to be detrimental to the physical or mental health or morals of the child. The only reason given for upholding the statute was that the provisions did not lack the specificity necessary to make them invalid as criminal provisions.[43]

Not only must the juvenile offender be protected from overly broad statutes, he must also be protected from an all encompassing definition of delinquent child. Just as there are several degrees of criminal blameworthiness in adult offenders, so too are there degrees of delinquent

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[32] These "rights" are not defined by the court.

[33] Ballard v. State, 192 S.W.2d 329, 332 (Tex. Civ. App. 1946).

[34] TEX. REV. CIV. STAT. ANN. art. 2338-1, § 2 (1968).

[35] ALA. CODE tit. 13, § 350 (1958); ALASKA STAT. § 47.10.010 (1962); ARIZ. REV. STAT. ANN. § 8-201(6) (1956); ARK. STAT. ANN. § 45-204 (1964); CAL. CIV. CODE § 601 (West 1954); CONN. GEN. STAT. REV. § 17-53 (1958); DEL. CODE ANN. tit. 10, § 901 (1953); FLA. STAT. ANN. § 39.01 (1961); IDAHO CODE ANN. § 16-701 (1967); IND. ANN. STAT. § 9-3204 (1956); IOWA CODE § 232.2(13) (1969); LA. REV. STAT. § 13:1570 (1968); ME. REV. STAT. ANN. tit. 15, § 2552 (1964); MD. ANN. CODE art. 26, § 52(e) (1957); MICH. COMP. LAWS § 712.2 (1948); MINN. STAT. § 260.015 (1959); MISS. CODE ANN. § 7185-02(g) (1966); MO. REV. STAT. § 211.031 (1968); MONT. REV. CODES ANN. § 10-602 (1943); N.M. STAT. ANN. § 13-8-26 (1955); OHIO REV. CODE ANN. § 2152.02 (Page 1965); PA. STAT. ANN. tit. 11, § 269-1(2) (1933); S.C. CODE ANN. § 15-1103(9) (1962).

[36] *See, e.g.*, CAL. WELF. & INST'NS CODE §§ 700(k), 702 (West 1954); WYO. STAT. ANN. § 14-23(d) (1965).

[37] *See, e.g.*, People v. Deibert, 17 Cal. App. 2d 410, 256 P.2d 355 (1953); Scire v. Mecum, 19 Conn. Supp. 373, 114 A.2d 385 (Super. Ct. 1955); *In re* Morrison, 259 Iowa 301, 144 N.W.2d 97 (1966); Hall v. Commonwealth, 402 S.W.2d 701 (Ky. Ct. App. 1966); State v. Patterson, 188 Minn. 492, 249 N.W. 187 (1933).

[38] 384 P.2d 967 (Wyo. 1963).

[39] WYO. STAT. ANN. § 14-23 (1965).

[40] 384 P.2d at 969.

[41] 259 Iowa 301, 144 N.W.2d 97 (1966).

[42] IOWA CODE § 232.2 (1950).

[43] 144 N.W.2d at 103.

misbehavior. Yet, in most jurisdictions, no distinction is made between the juvenile who commits a lesser offense and one who commits a greater one. Most jurisdictions simply lump them all together and declare all juveniles who break the law to be delinquents. However, the states of Kansas and Illinois have attempted, through their respective legislatures, to rectify this situation.[44] In Kansas, a child can be adjudged a delinquent for the commission of a felony,[45] but in order to be adjudged a delinquent for the commission of a misdemeanor, a juvenile must have been found to be a "Miscreant child" for commission of misdemeanors on at least three previous occasions.[46] A runaway or disobedient child is classified as "wayward," and can only be declared a delinquent after being adjudged a "Wayward child" nine or more times.[47] Illinois recognizes two classifications: a "Delinquent Minor," the more serious offender, and a "Minor in Need of Supervision," the less serious offender.[48]

Other states also recognize degrees of delinquency, but none has gone nearly so far in attempting to deal with the various types of offenders. In these two states alone, lesser offenders are not subject to confinement in the state reform school along with the more serious offenders.[49] Broad discretion is still granted to the judge in disposing of any juvenile case, but the stigma of the word delinquent does not attach to the lesser offenders. The juvenile court will acquire jurisdiction over juveniles committing minor offenses and will thereby be in a position to help keep them from becoming more serious offenders.[50]

Thus, legislation and procedure with regard to juvenile delinquents have shown some progress in this country. In 1899, the United States emerged as the first nation to end capital punishment as a method of dealing with juvenile delinquents.[51] In the seventy-one years since then, legislation has progressed to the point that, in at least two states, the runaway and the disobedient child do not have to fear incarceration in the state reform school.

III. E.S.G. v. STATE

In *E.S.G. v. State*[52] a Texas court of civil appeals held that the word "morals" is not unconstitutionally vague as applied in the Texas Juvenile Act. The court based its holding on the premise that the word "morals" is sufficiently clear and comprehensive so that most persons can agree on its meaning and application. It is a word that the court felt was sufficiently explicit to inform those subject to the provisions of the Act of what will render them liable to its penalties. The court pointed out that it would

[44] ILL. ANN. STAT. ch. 37, §§ 702-3, 705-2 (Smith-Hurd 1962); KAN. STAT. ANN. § 38-826 (1964).
[45] KAN. STAT. ANN. § 38-826 (1964).
[46] *Id.* § 38-826(b)(2).
[47] *Id.*
[48] ILL. ANN. STAT. ch. 37, §§ 702-3, 705-2 (Smith-Hurd 1962).
[49] *See* Term Paper, *supra* note 28, at 362-67.
[50] *Id.* at 365.
[51] J. MACK, *supra* note 23, at 314.
[52] 447 S.W.2d 225 (Tex. Civ. App. 1969).

be an impossible task to define all of the types of behavior that could injure a child's morals. The word is of long usage, and apparently an understanding of those activities which are deemed immoral by the court should be instinctive in potential defendants. Thus, the child is left to decide for himself which activities bring him dangerously close to confinement, and, therefore, he is placed in the position of gambling with several years of his life to decide that which neither the court nor the legislature can or will decide. If the word "morals" conveys concrete impressions to the ordinary person, there is no apparent reason why the court or the legislature did not expand upon the word to give potential offenders general concepts of what is meant by the language. Perhaps the word was purposely inserted into the statute, in an ambiguous manner, to give the juvenile judge complete discretion over the wards of the state.[53] Or, perhaps the concept of *parens patriae* overwhelms the necessity of equality under the law for younger citizens.[54] But the court did not base its holding on either of these reasons.

Significantly, the court relies heavily on a California decision to sustain the statute. In *People v. Deibert*[55] a California court of appeals held that a statute making it a criminal offense to commit any act or omission which tends to cause or encourage a minor to lead an idle, dissolute, lewd, or immoral life, met constitutional standards of certainty and definiteness. The court also held that the word "immoral" was sufficiently definite to inform those subject to the statute of the type of conduct prohibited.[56] "Morals," the court held, was to be accepted in its general sense to allow the legislature to come to grips effectively with the problems of juvenile delinquency, and the wording of the statute should be upheld if commonly understood by men of ordinary intelligence.[57] By using this case as one of its two sole authorities, the court in *E.S.G.* appears to charge minors with knowledge equal to that of an adult. The court confirms this suspicion by relying on *Lowe v. Texas Liquor Control Board*,[58] where the appellant sought a reversal of the revocation of his package store permit. The revocation was pursuant to a penal statute[59] which allowed revocation in the event that the business was conducted in a manner offensive to the general welfare, health, peace, morals, and safety of the people. The court rejected appellant's argument that the statute was couched in vague terms and further held that the word "morals" had a well-accepted and well-understood meaning.[60] Again, however, the court in *E.S.G.* has relied upon a case dealing with an adult to substantiate its reasoning.

The dissent in *E.S.G.* emphasizes that a statute must be sufficiently clear to give notice to potential offenders of required or prohibited ac-

[53] S. GLUECK, *supra* note 21, at 257.
[54] *Id.*
[55] 17 Cal. App. 2d 410, 256 P.2d 355 (1953).
[56] 256 P.2d at 356.
[57] *Id.*
[58] 255 S.W.2d 252 (Tex. Civ. App. 1952).
[59] TEX. PEN. CODE ANN. art. 666-12(6) (1961).
[60] 255 S.W.2d at 257.

tivity in order properly to ward off a vagueness attack.[61] The thrust of the dissenting argument is that while courts have consistently upheld the word "morals" in statutes, none has been able to offer a satisfactory definition of what the term means. It is argued that "morals" is a word which defies definition, and in fact has no objective meaning. The dissent continues that a vagueness attack cannot honestly be answered by declaring the language definite while confessing a complete inability to express its meaning. As the dissent points out, the search for a valid definition has been contested by theologians, philosophers, and judges for centuries; yet the majority expects unsophisticated juveniles to conceptualize and comprehend the full impact of the word. The dissent closes with a recognition that upholding such vague statutes easily becomes a method of enforcing conformity.

IV. Conclusion

The scope of the "immoral" activities involved in the Texas Juvenile Act remains unknown. At least one court has held that the term "morals" encompasses common decency, cleanliness of mind and body, honesty, truthfulness, and proper respect for established ideals and institutions.[62] Under such a standard, a juvenile could be placed under the custody of the state for almost any act for a period ranging from six months to eleven years, depending upon his age, the circumstances of the case, and the disposition of the judge or jury. Except for those rights acquired through the *Gault* decision, juveniles are left to the mercy of the juvenile judge. His discretion is almost unlimited.[63] The legislature apparently preferred to leave the decision to the discretion of the judge to determine when the juvenile had gone wrong—but at that point it is too late for the juvenile to do anything about his dilemma.[64] Even if stricter standards for vagueness are adopted, juveniles, unlike adults, cannot be presumed to have read, learned, and understood the law.

Kansas and Illinois have attempted a unique solution. By differentiating between miscreant children and juveniles who have committed more serious crimes, lesser offenders are provided the opportunity to wipe the slate clean and start on a new life once they have been corrected for their improper activity. This was the original intention of those who pushed for humanitarian reform in 1899[65] and appears to be the preferable approach to carry out that intent.[66]

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[61] 447 S.W.2d at 231 (Cadena, J., dissenting).

[62] State v. Klein, 93 So. 2d 876, 881 (Fla. 1957).

[63] *See* Term Paper, *supra* note 28, at 360.

[64] *Id.*

[65] J. Mack, *supra* note 23, at 311.

[66] In Texas, from Sept. 1, 1966, to Aug. 31, 1967, 3,033 children were declared juvenile delinquents. 25.6% of that number were committed for activities which would not carry criminal punishments for adults. The juvenile records of these delinquents are frequently investigated by the F.B.I., the military, and certain employers. The fact that one has a juvenile record is also frequently considered by a court when an adult offender requests that his sentence be probated. Thus, juvenile offenders may face additional problems after they attain majority with respect to employment and imprisonment, and one of the primary goals of the juvenile statutes has been frustrated. *See* Term Paper, *supra* note 28, at 356.