Anticipated Misuse of Psychiatry Under The New York Juvenile Offender Law*

ABRAHAM L. HALPERN, M.D.**

Psychiatrists concerned about the delivery of mental health services in the criminal justice system have long recognized the practice of state legislatures to enact laws directly affecting the mental health field but without the slightest participation by organized psychiatry in the legislative process.[1] Not only is the 1978 New York State Juvenile Offender Law[2] such legislation, but anyone familiar with the administration of criminal justice and alert to the possibilities of misuse of psychiatry would, on learning of the provisions of this law,*** view it with the greatest foreboding.

A mammoth Crime Package bill containing sweeping changes in the juvenile justice system was introduced in a special session of the Legislature on July 14, 1978, passed within a matter of days, and signed into law by the Governor on July 20, 1978.[3] The law became effective on September 1, 1978, ushering in a new era in the handling of youngsters by the courts of New York State. Until now, juvenile delinquency was under the exclusive jurisdiction of the Family Court. Thus, New York differed drastically from every other state in the Union, except for Vermont.[4] As a no-waiver state, New York did not permit the transfer of juveniles, *i.e.*, persons under the age of 16, to adult Criminal Courts no matter how serious their unlawful conduct. In one fell swoop legislation was passed which moved New York to the other extreme, requiring youngsters to be processed in the first instance through the regular Criminal Courts rather than the Family Court. It is important to note that the legislation was not based on any research findings supporting this method of handling juvenile offenders nor on any demonstration of a failure of the stringent revisions[5] of the Family Court Act which had become effective on February 1, 1977. The latter had completely revised the method of handling persons fourteen or fifteen years of age who committed a "designated felony act."

A designated felony act includes any one of a number of very serious acts which if committed by an adult would cause him to be charged with a felony crime such as murder, arson, kidnapping, manslaughter, rape, sodomy or

*This paper was presented at the Tenth Biennial Area II Meeting of the American Psychiatric Association, New York, New York, November 4-5, 1978.

**Dr. Halpern is Chairman, Department of Psychiatry, United Hospital, Port Chester, New York, and Clinical Associate Professor of Psychiatry, New York Medical College.

***The possible unconstitutionality of the Juvenile Offender Law will not be examined in this article. However, several provisions appear to be violative of the Equal Protection Clause. For example, 14 and 15-year-olds who are charged with murder in the second degree may be permitted to plead guilty to a lesser crime for which they are criminally responsible, while a 13-year-old is precluded from this option since he can be criminally responsible only for murder in the second degree.

robbery. The adjudication of juvenile delinquency on the basis of the commission of a designated felony act carried with it the mandatory placement of the individual with the Division for Youth for periods ranging from three to five years with confinement to a secure facility followed by restrictive placement for prolonged periods varying with the seriousness of the designated felony act.

It is a fact that the incidence of such felony acts had significantly dropped even before the new Family Court legislation went into effect in 1977. For example, 94 juveniles were arrested for murder in New York City in 1973,[6] 54 in 1975,[7] and an estimated 25 in 1976.[6] All reports since February 1, 1977, indicate that with the more severe and responsible handling of serious offenders there has been a substantial reduction in the commission of designated felony acts by juveniles.[8]

It is also a fact that the Juvenile Offender Law of 1978 was passed hastily by the Legislature in an election year, and signed by a Governor who was being assailed by his political opponents, and allies as well, as a coddler of criminals because he had vetoed a death penalty bill. Were it not for this, it is inconceivable that New York would have taken the extreme step of by-passing the Family Court in the initial processing of any juvenile offender.

California and Illinois, states which like New York have high juvenile crime rates, have held to original exclusive jurisdiction of the juvenile court. Although Illinois sets a low minimum age (thirteen) for waiver into the adult criminal court, very strict compliance with United States Supreme Court holdings[9] is required at the waiver stage. In California all cases involving juveniles under the age of eighteen originate in the juvenile system.[10]

The Legislature, in passing the Juvenile Offender Law, the draconian features of which will be summarized below, chose to disregard the advice of many knowledgeable people such as Assemblyman Richard M. Gottfried, Chairman of the Assembly Child Care Committee. In 1976, when legislation to lower the age of offenders handled by the Criminal Courts to 14 was under consideration, he warned that this would only exacerbate the problem: "If there is one part of government that makes the juvenile system look good, it is the adult system."[11] He contended that overcrowded calendars and plea-bargaining in the Criminal Courts would result in young offenders "spending even more time on the streets than they do now."

The record of Criminal Courts in recent years tends to confirm the view that they are hardly likely to provide swift and sure disposition of juvenile offenders. In 1973 there were 31,098 adult felony arrests in Manhattan, of which only 545 cases (1.75 per cent) went to trial on the original felony charges.[12] In 1974, 66,198 automobiles were stolen in the city; there were 8,684 arrests, but fewer than 100 persons were eventually indicted for felony auto theft, and only a handful wound up in jail.[13]

The following are the important features of the new Juvenile Offender Law. As will be described later, defense attorneys, prosecutors, and judges, for different reasons and at different stages, will seek to use, and misuse if necessary, psychiatrists to avoid the harsh processing of the juvenile offenders.

1) Thirteen, 14 and 15-year-olds who are criminally responsible for acts

constituting murder in the second degree are subject to a mandatory minimum sentence of five to nine years imprisonment and a maximum sentence of life imprisonment.

2) Fourteen and 15-year-olds who are criminally responsible for acts constituting arson in the first degree or kidnapping in the first degree are subject to a mandatory minimum sentence of four to six years imprisonment and a maximum sentence of twelve to fifteen years.

3) Fourteen and 15-year-olds who are criminally responsible for attempted murder, attempted kidnapping in the first degree, manslaughter in the first degree, rape in the first degree, sodomy in the first degree, kidnapping in the second degree, burglary in the first degree, arson in the second degree, or robbery in the first degree are subject to a maximum sentence of 10 years imprisonment and a minimum of one-third of the maximum imposed.

4) Fourteen and 15-year-olds who are criminally responsible for assault in the first degree, burglary in the second degree or robbery in the second degree are subject to a maximum sentence of seven years imprisonment and a minimum of one-third of the maximum imposed.

5) Under certain circumstances the case of the juvenile offender may be transferred to the Family Court. In such cases the consent of the District Attorney would usually have to be obtained and the basis for his consent stated on the record. For example, removal to the Family Court in the case of a juvenile offender charged with murder in the second degree or an "armed felony" must be based solely on one or more special factors including mitigating circumstances that bear directly upon the manner in which the crime was committed.

6) Juvenile offenders are to be confined in secure facilities under the direction of the Division for Youth until the age of 21, except that offenders over 18 may be transferred to the Department of Correctional Services if the Division certifies that there is no substantial likelihood that the youth will benefit from the programs offered by the Division, and upon application to the sentencing court upon notice to the youth; a youth between the ages of 16 and 18 may be so transferred upon the same ground.

Now, with such severe punishment facing a juvenile defendant, defense attorneys certainly, judges occasionally, and prosecutors to a lesser extent, will seek some legal and socially acceptable means of averting overly-harsh penalties. Also, with the rights of criminal defendants fully extended to juvenile offenders, such as bail, every means to achieve preventive detention will be sought. It is precisely in these areas that the use and misuse of psychiatry will be resorted to, and it is crucial that psychiatrists be aware of the dangers involved as the criminal justice system seeks to escape from the monster just created for it by the New York State Legislature.

A Criminal Court judge does not have the prerogative of the Family Court judge to order preventive detention of a juvenile who, if released, poses a serious risk of engaging in unlawful conduct before the date of return to court. The need to insure that the defendant will appear at the next court date is the sole criterion the Criminal Court judge is to evaluate in setting or denying bail.[14] Since this adult standard is to obtain for alleged juvenile offenders, the judge, consciously or unconsciously, will be motivated to use

the competency examination if preventive detention can be thus achieved without making himself vulnerable to criticism. In any event, the judge has a virtual carte blanche to order a competency examination in the case of a young juvenile charged with a serious crime. It goes without saying that the commission of a felony by a 13 or 14-year-old is sufficient to raise a "bona fide doubt" as to his competence to stand trial, thereby making it almost mandatory that the judge order a psychiatric examination.[15] And how could the judge be criticized if he insisted that an in-hospital psychiatric study be undertaken for the sake of accuracy and completeness in "fairness" to the defendant?

The prosecutor, too, may request determination of competency to ensure that the defendant will not be let out on bail, and he "will often request a competency hearing to get some clue both as to subsequent legal strategy and as to how he might best use his prosecutorial discretion."[16]

If the judge does not on his own motion order a competency examination to determine fitness to proceed, there is no question that the defense attorney will move for such an evaluation unless he is able to obtain the immediate release of the defendant. The following comment by a law guardian appointed to assist a "person in need of supervision" in a non-criminal Family Court proceeding will help explain the position of a defense attorney in discharging his responsibilities to a juvenile client facing a felony conviction with a long prison sentence:

> If we agree that the adversary system is the most reliable and just method of fact-finding, then children are entitled to its benefits. If a juvenile does not desire incarceration in a reform school, he has a right to a lawyer who will defend him vigorously and to the best of his ability . . . one who will consider it his obligation to prevent that result if possible . . . The lawyer's client is the *child,* not the community or the system or the public interest. The lawyer's role is to try to achieve the result which his client wishes . . . not to play father, judge, probation officer, or social worker.[17]

The "entire devotion to the interest of the client, warm zeal in the maintenance and defense of his rights, and the exertion of his utmost learning and ability" mandated by the ethical code of the legal profession[18] virtually ensures that the psychiatric hospitalization of a juvenile charged with a felony crime will be sought, either to prevent entirely a trial from taking place by diverting the defendant to the mental health system, or, if a trial does occur, to provide the lawyer with evidence to support exculpation of his client on the grounds of mental disease or defect. How difficult, after all, would it be to diagnose a felonious youngster as having a psychiatric disorder which renders him lacking in "substantial capacity to know or appreciate either: (a) The nature and consequence of [his] conduct; or (b) That such conduct was wrong."?[19]

The fitness to proceed standard laid down by the United States Supreme Court requires that the defendant have "sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding – and . . . [to have] a rational as well as factual understanding of the proceedings

against him."[20] Now, psychiatrists, in the case of a juvenile offender, may adopt the New York Court of Appeals holding that this standard is met if the defendant has a "modicum of intelligence to assist counsel,"[21] in which case practically all defendants would be found fit to proceed, or they may adopt the competency checklists recommended by the Group for the Advancement of Psychiatry,[22] in which case practically all defendants would be found unfit to proceed. In the unlikely event that a psychiatrist finds a juvenile offender mentally competent, he can expect to be drawn and quartered by a defense attorney determined to protect his client from a long term of imprisonment. If the psychiatrist, using the checklists which call for a high degree of competency (including ability to testify if necessary and be cross-examined; ability to tolerate stress at the trial or while awaiting trial; ability to refrain from irrational behavior during the trial; ability to interpret witnesses' testimony; susceptibility to decompensation while awaiting or standing trial; ability to understand the possible dispositions, pleas, and penalties; ability to make decisions after advice; ability to follow testimony for contradictions or errors; and ability to maintain consistency of defense), finds the accused juvenile offender unfit to proceed, he then relegates the defendant to a never-never land of hospitalization for the purpose of bringing him to a state of competency which he never possessed and is not likely to attain. He helps deprive him of his right to a speedy trial and, of particular importance, of an opportunity to have his case removed to the Family Court at some stage of the proceedings.

I predict that juvenile felony offenders will be arrested in large numbers and that a high percentage of them will be diverted to the mental health system, either via the fitness to proceed route, or a negotiated insanity acquittal; and most of the remainder will be turned over to the Family Court for disposition, probably before a trial is completed. Few will be sentenced to imprisonment as provided by the Juvenile Offender Law. The tragedy is that while substantial sums of money were appropriated to facilitate the work of the courts and local criminal justice agencies, nothing is being done to establish proper psychiatric facilities for the specialized treatment services required by this newly designated psychiatric population.

An ominous portent of future misuse of psychiatry was sounded a few months ago by the Governor himself. According to a New York Times report,[23] "Mr. Carey said he would propose that the Division for Youth have juveniles in its custody examined by a panel of psychiatrists and others before they were released to determine whether they should be transferred to Department of Mental Hygiene facilities." He made it crystal clear that he had in mind the involuntary confinement in a psychiatric institution of persons whose terms of imprisonment in a secure facility of the Division for Youth had expired. Pointing out to the Commissioner of the State Office of Mental Health that mentally ill convicts can be transferred to a maximum security civil psychiatric hospital, he stated: "You don't have a similar responsibility where the Division for Youth is concerned. They have their own system. But in a case where you have the young juveniles and they obviously cannot be returned to society, then they are going to become the responsibility of the Department of Mental Hygiene. Are you willing to take that?" The Commissioner replied in the affirmative. Shades of Baxstrom!

Neither the solution to the dilemma of juvenile crime nor the appropriate treatment of serious juvenile offenders is the subject of this paper. I have sought only to show that there is a grave danger that psychiatry will be misused by the criminal justice system which by legislative fiat has abandoned the exclusive jurisdiction of the Family Court over juvenile offenders, many of whom will henceforth be processed through the rigorous channels of the adult Criminal Courts.

References

1. Suarez JM: Psychiatry and the criminal law. American Journal of Psychiatry 129:3, September 1972, pp. 293-297
2. Chapter 481 of the Law of 1978
3. Juvenile Justice Institute, NYS Division of Criminal Justice Services, Juvenile Justice Report 1:3, p. 1
4. Peyser A: The new juvenile offender law in New York, New York Law Journal, September 27, 1978, p. 1
5. Chapter 878 of the Law of 1976, Sec. 6
6. Chambers M: Dip noted in youth arrests for violent crimes in city. The New York Times, November 29, 1976, p. 31
7. Mancini A: Juveniles and justice. New York Post, November 13, 1976, p. 25
8. See, for example, Goldstein T: New York's juvenile justice system is under challenge. The New York Times, May 30, 1978, p. B4
9. *Kent v. United States,* 383 U.S. 541 (1966)
10. Peyser A: *op. cit. supra* at note 4
11. Mancini A: *op. cit. supra* at note 7
12. The New York Times, September 19, 1974, p. 1
13. Chambers M: *op. cit. supra* at note 6
14. Juvenile Justice Report, *op. cit. supra* at note 3
15. *Pate v. Robinson,* 383 U.S. 375 (1966)
16. Group for the Advancement of Psychiatry. Misuse of Psychiatry in the Criminal Courts: Competency to Stand Trial. Vol. VIII, Report No. 89, February 1974, p. 883
17. Newsletter of American Society for Adolescent Psychiatry, January 1975, p. 8
18. ABA Code of Professional Responsibility and Canons of Judicial Ethics, Canon 15, cited in Freedman MH: Professional responsibility of the criminal defense lawyer: The three hardest questions. 64 Mich L Rev 1469, 1470 (1966)
19. NY Penal Law, Sec. 30.05
20. *Dusky v. United States,* 362 U.S. 402 (1960)
21. *People v. Francabandera,* 33 N.Y. 2d 429 (1974)
22. GAP Report No. 89, *op. cit. supra* at note 16, Appendix B, p. 916
23. Dionne EJ: Carey to seek lengthier confinement for juveniles. The New York Times, July 1, 1978, p. 21