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Criminal Law--Juvenile Delinquency--Contributing Survives Constitutional Attack: Confusion or Certainty

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CASE COMMENTS

CRIMINAL LAW—JUVENILE DELINQUENCY—CONTRIBUTING SURVIVES CONSTITUTIONAL ATTACK: CONFUSION OR CERTAINTY

The defendants were indicted for contributing to the delinquency of minors.[1] Specifically, they were indicted for providing non-intoxicating beer to minors and engaging in sexual relations with minors. Pursuant to a motion by the defendants, the trial court quashed the indictments on the ground that the statute was unconstitutionally vague.

The West Virginia Supreme Court of Appeals considered on certification whether the allegations in the indictment charged a violation of the contributing statute and whether the provisions of that statute were void by reason of vagueness.[2] *Held*, reversed. The court stated that by considering the contributing statute together with the statutory definition of a delinquent child,[3] excluding two subsections of the latter definition,[4] the West Virginia Contribut-

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[1] W.VA. CODE ANN. § 49-7-7 (1966) provides:
A person who by any act or omission contributes to, encourages or tends to cause the delinquency or neglect of any child, shall be guilty of a misdemeanor, and, upon conviction thereof, shall be fined not to exceed five hundred dollars, or imprisoned in the county jail for a period not exceeding one year or both.

[2] State v. Flinn, 208 S.E.2d 538, 541 (W.Va. 1974).

[3] W.VA. CODE ANN. § 49-1-4 (1966) provides:
"Delinquent child" means a person under the age of eighteen years who:
(1) Violates a law or municipal ordinance;
(2) Commits an act which if committed by an adult would be a crime not punishable by death or life imprisonment;
(3) Is incorrigible, ungovernable or habitually disobedient and beyond the control of his parent, guardian, or other custodian;
(4) Is habitually truant;
(5) Without just cause and without the consent of his parent, guardian, or other custodian, repeatedly deserts his home or place of abode;
(6) Engages in an occupation which is in violation of law;
(7) Associates with immoral or vicious persons;
(8) Frequents a place the existence of which is in violation of law;
(9) Deports himself so as to wilfully injure or endanger the morals or health of himself or others.

[4] *Id.* §§ 7,9.

ing Statute was not void for being unconstitutionally vague. *State v. Flinn*, 208 S.E.2d 538 (W. Va. 1974).

Statutes placing criminal sanctions upon those who contribute to the delinquency of minors have been adopted by almost every state in the union.[5] Since delinquency was unknown at common law,[6] the crime of "contributing" to delinquency could not have constituted a violation of common law. Therefore, any definition of "contributing" must come from statutory enactments.[7]

Apparently, the purpose for which the contributing statutes are presently used is open to substantial question.[8] One ostensible purpose for enacting statutory prohibitions against contributing to the delinquency of minors was to deter parents from either neglecting or corrupting their own children.[9] However, this premise has been criticized. The most comprehensive study of the merits of punishing parents found that such punishment had no effect whatsoever on the curbing of delinquency.[10] Further, considerable doubt exists as to the worth of contributing statutes to our criminal

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[5] "Contributing" statutes are found in virtually every state of the union and embrace a wide variety of prohibited acts. Granting jurisdiction to the juvenile court, the criminal court, or to both courts concurrently, these statutes make it a crime to 'contribute' to the delinquency or neglect or dependence of a child under a given age, normally, up to the age at which juvenile court jurisdiction ceases.

Paulsen, *The Legal Framework for Child Protection*, 66 COLUM. L. REV. 679, 690 (1965).

[6] State v. Dunn, 53 Ore. 304, 309, 99 P. 278, 280 (1909).

[7] *Id.*

[8] "[The contributing statute] is used against persons other than parents. However, in such cases it is almost invariably used as a substitute for another, more appropriate statute. . . . The contributing statute is not essential to the proper prosecution of such cases." S. RUBIN, CRIME AND JUVENILE DELINQUENCY 37 (2d ed. 1961).

[9] There are those who think that there is a simple cure for juvenile delinquency. Since delinquency starts in the home (they say) and parents are responsible for the quality of home life (evidently), one would make the parents responsible in law, and hence punishable if the home causes or fails to prevent a child's delinquency. Such punishment, or its threat, will deter delinquency.

Id. at 35.

[10] Judge Paul W. Alexander, of Toledo, Ohio, conducted the most comprehensive study of the merit of punishing parents for the crime of contributing to the delinquency of their children. During a ten year period he heard over a thousand contributing cases. One-half of the defendants were parents, and three-fourths of them pleaded guilty or were found guilty. Judge Alexander found no evidence that punishing parents had any effect whatsoever on curbing delinquency. *Id.* at 96.

justice system.[11] Such statutes have been disavowed by authorities in the area, and experience has demonstrated that such statutes are almost invariably invoked in situations dealt with by other statutory provisions, especially those statutes governing sexual offenses.[12] Finally, wide legal skepticism exists as to the constitutionality of contributing statutes,[13] due to the problem of adequately defining adult criminality in the area of juvenile delinquency.[14]

The ineffectiveness, and at times the counterproductivity, of such statutes has led to an almost universal rejection of contributing statutes by organizations whose primary function is legislative revision. The drafters of the Model Penal Code have proposed legislation concerning the endangering of the welfare of children,[15] but the words "contribute to the delinquency" or "corrupt the morals" of a child are not included in that or any other provision of the Model Penal Code. Similarly, both the Standard Juvenile Court Act of 1949 and the Standard Act of 1959 have excluded contributing statutes from their provisions,[16] and the United States Children's Bureau has advocated the elimination of contributing statutes.[17]

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[11] The general criticism is made that [a]s long as "contributing" statutes are on the books, the danger exists that they will be used, and when they are used, the danger exists-is almost inevitable-that they will be abused. It would be the better part of wisdom for the legislatures to repeal these laws, for they cannot be safely regarded as statutes which are harmless and may be ignored.

Id. at 42.

[12] MODEL PENAL CODE § 207.13, Comment 1 (Tent. Draft No. 9, 1959).

[13] "The formulations of the contributing statutes are imprecise, and this vagueness may raise serious constitutional questions." Paulsen, *supra* note 5, at 691.

[14] "It is one thing to give broad scope to an authority to promote the welfare of children, but quite another thing to give a criminal court equivalent latitude in defining crimes for which adults shall be punished. *The vagueness of current statutes in the field presents serious constitutional problems.* . . ." (emphasis added). MODEL PENAL CODE § 207.13, Comment 1 at 184 (Tent. Draft No. 9, 1959)

[15] MODEL PENAL CODE § 207.13 (Tent. Draft No. 9, 1959) provides: "A parent, guardian, or other person supervising the welfare of a child under 18 commits a misdemeanor if he knowingly endangers the child's physical or moral welfare by violating a legal duty of care, protection or support." This section is the only section within the Model Penal Code that deals with the duties of a parent to a child. "[I]ts significance lies as much in what it does not make criminal as in what it does penalize. Notably, it will not be an offense under this or any other Section of the Code to 'contribute to the delinquency' or 'corrupt the morals' of a child. . . ." *Id.* Comment 1 at 183.

[16] Paulsen, *supra* note 5, at 691.

[17] It will be noted that no recommendation is made that there be a

In light of the serious theoretical and practical problems present in such statutes, the foundation upon which the West Virginia Supreme Court of Appeals based its holding in *Flinn* warrants close scrutiny. The court began by citing extensively from *State v. Harris*,[18] and chastizing the circuit court for its failure to cite *Harris* in ruling upon the constitutionality of the statute.[19] In *Harris*, the court held the contributing statute constitutional and affirmed the conviction of the defendant for "contributing" because he kept the prosecutrix and her younger sister out until eleven o'clock at night against her father's wishes.[20] One authority has classified *Harris* as "an outrageous prosecution for contributing to the delinquency of a minor."[21] In 1959 *Harris* achieved national prominence when the drafters of the Model Penal Code, in analyzing contributing statutes, determined that such statutes should be dropped from the code because those statutes, "[w]ith such far-reaching definitions of delinquency . . . [expanded] the range of behavior prosecuted as contributing to delinquency [to be] as broad as the whole penal code and more."[22] The drafters based that statement on ten separate state supreme court decisions; *Harris* was one of them.

> statutory crime of 'contributing to the delinquency or neglect of a minor.' Many of the 'contributing' statutes now on the books are phrased so broadly that, when coupled with the equal broadness of the definition of 'delinquency' or 'neglect', the variety of types of adult conduct which might be found to constitute criminal conduct are infinite and more than are needed to protect children adequately. It seems sounder, therefore. . . to define the crime with greater certainty and to tie it to an act which constitutes a violation of law or an omission to perform a duty required by law. It is felt that the presently existing criminal statutes define a sufficiently broad variety of crimes to serve as an adequate basis to protect children.

Id., *citing* UNITED STATES CHILDRENS BUREAU, STANDARDS FOR SPECIALIZED COURTS DEALING WITH CHILDREN 35 (1954).

[18] 105 W. Va. 165, 141 S.E. 637 (1928). Specifically, the *Flinn* court quoted the following relevant portions of *Harris*: "The crime of contributing to the delinquency of a child is complete when acts are commited which directly tend to render the child delinquent, and it is not necessary that the child who is the subject of the crime shall be delinquent or shall oecome delinquent child." 208 S.E.2d at 541, *quoting* 105 W. Va. at 168, 141 S.E. at 638; and "The Legislature could not possibly inticipate [sic] and set out in words every particular act that might constitute the offense." 208 S.E.2d at 541, *quoting* 105 W. Va. at 167, 141 S.E. at 639.

[19] 208 S.E.2d at 541.

[20] 105 W. Va. at 169, 141 S.E. at 639.

[21] Mueller, *Mens Rea and the Law Without It*, 58 W. VA. L. REV. 34, 54 (1955).

[22] MODEL PENAL CODE § 207.13, Comment 3 at 185 (Tent. Draft No. 9, 1959).

Perhaps the sociological conditions as perceived by the court in 1928 justified the decision in *Harris*, but *Harris* appears to be somewhat less than relevant in 1974. The trial court may well have been correct in ignoring the rule and reason of *Harris*.

Next, the court in *Flinn* stated that eighteen states, including West Virginia, have interpreted contributing statutes; of these eighteen, seventeen have held the statute constitutionally valid.[23] The eighteenth state cited, Oregon, held its statute void as violative of the "delegation of powers" provision of the state constitution.[24] The Oregon court, in *State v. Hodges*,[25] did invalidate the state's contributing statute because it violated a constitutional prohibition against "delegation of power,"[26] but the case has a greater import than accorded it by the West Virginia Supreme Court of Appeals. The language of the Oregon court clearly indicates that it invalidated the statute not only because it was an improper "delegation of power," but also because it was too vague and indefinite.[27]

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[23] 208 S.E.2d at 541. The cases cited were: Anderson v. State, 384 P.2d 669 (Alas. 1963); Brockmueller v. State, 86 Ariz. 82, 340 P.2d 992 (1959); State v. Barone, 124 So. 2d 490 (Fla. 1960); People v. Friedrich, 385 Ill. 175, 52 N.E.2d 120 (1943); McDonald v. Commonwealth, 331 S.W.2d 716 (Ky. 1960); People v. Owens, 13 Mich. App. 469, 164 N.W.2d 712 (1968); State v. Johnson, 145 S.W.2d 468 (St. Louis App. 1940); State v. Simants, 182 Neb. 491, 155 N.W.2d 788 (1968); State v. Montalbo, 33 N.J. Super. 462, 110 A.2d 572 (1954); State v. McKinley, 53 N.M. 106, 202 P.2d 964 (1949); State v. Sparrow, 276 N.C. 499, 173 S.E.2d 897 *cert. denied*, 403 U.S. 940 (1970); State v. Crary, 80 Ohio L. Abs. 417, 155 N.E.2d 262 (C.P., Lucas 1959); State v. Coterel, 97 Ohio App. 48, 123 N.E.2d 438 (1953); State v. Hodges, 254 Ore. 21, 457 P.2d 491 (1969); Birdsell v. State, 205 Tenn. 631, 330 S.W.2d 1 (1959); State v. Tritt, 23 Utah 2d 365, 463 P.2d 806 (1970); State v. Friedlander, 141 Wash. 1, 250 P. 453 (1926); State v. Harris, 105 W. Va. 165, 141 S.E. 637 (1928); Jung v. State, 55 Wisc. 2d 714, 201 N.W.2d 58 (1972).

[24] 208 S.E.2d at 541, *citing* State v. Hodges, 254 Ore. 21, 457 P.2d 491 (1969). *See also* 72 W. VA. L. REV. 427 (1970).

[25] 254 Ore. 21, 457 P.2d 491 (1969).

[26] *Id.* at 28, 457 P.2d at 494. There the court stated:

> Such a statute not only creates a serious danger of inequality in the administration of the criminal law, but it runs squarely contrary to the purpose of Oregon Constitution, Art. I, § 21, which prohibits the delegation of legislative power.
>
> The very looseness of the language of ORS 167.210 encourages the prosecution to utilize the statute selectively to rid the community of individuals deemed subjectively less desirable than other offenders. *It is the looseness of the language which offends due process and makes the catchall clause of the statute an instrument of potential abuse.* (emphasis added).

[27] *Id.*

A random selection[28] of the authority cited by the court in *Flinn* demonstrates that the cases relied upon are less than persuasive. For example, in *Anderson v. State*,[29] the issue before the Alaska court was whether the lack of a definition of "immoral" as used in the contributing statute rendered a section of that statute unconstitutionally vague; the court found the section to be valid.[30] On the other hand, the *Flinn* opinion declared unconstitutional a similar provision because the word "immoral" was too vague.[31] It is difficult to imagine how the court in *Flinn* could utilize authority, the validity of which was repudiated by that court in the same opinion.

In *Brockmueller v. State*,[32] the Arizona court declared, "[t]he statutes making it a misdemeanor to encourage delinquency of [a] child and defining delinquency as any act tending to debase or injure the morals, health or welfare of [a] child are sufficiently certain and definite to apprise men of ordinary intelligence of the conduct which the statutes prohibit. . . ."[33] However, the court in *Flinn* invalidated the subsection of the West Virginia Code that defined a delinquent as one who deports "himself so as to wilfully injure or endanger the morals or health of himself or others . . . ."[34] Again, the court repudiated the holding of a case which it previously approved.

In *State v. Crary*,[35] the Ohio court stated:

> This language [tends to cause delinquency] is not as precise as some might desire. Still, it seems to have been found precise enough. It is no more unprecise than the common concept of negligence. At any rate the law has proven workable and prac-

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[28] The selection of cases to be discussed was performed in the following manner: The author, prior to reading all nineteen cases cited in *Flinn*, chose seven cases for special scrutiny. There was no conscious choice of which seven cases to initially select. Of the seven cases chosen, three, for the obvious sake of brevity, were selected for specific discussion. The only one of the seven cases chosen for special scrutiny that was substantially in accord with the decision in *Flinn* was *State v. Coterel*, 97 Ohio App. 48, 123 N.E.2d 438 (1953).

[29] 384 P.2d 669 (Alas. 1963).

[30] *Id.* at 670.

[31] 208 S.E.2d at 549.

[32] 86 Ariz. 82, 340 P.2d 992 (1959).

[33] *Id.* at 82, 340 P.2d 993.

[34] 208 S.E.2d at 549, *construing* W. VA CODE ANN. §§ 49-1-4(9) (1966).

[35] 80 Ohio L. Abs. 417, 155 N.E.2d 262 (C.P., Lucas 1959).

> ticable, and nobody to date has offered a superior substitute to accomplish its laudable aim.[36]

The court in *Crary* appears to be relegating a criminal penalty to the indefiniteness of the civil concept of negligence in direct contravention to the well-established rule that a criminal statute must be most definite.[37] Furthermore, the court seems to be saying that since no one has come up with a better idea, why not keep the contributing statute. Such strained reasoning does not appear to be a particularly valid justification for upholding the contributing statute in West Virginia.

In *Flinn* the West Virginia court made a lenghty analysis of the "void for vagueness" doctrine, drawing a distinction between those cases voiding statutes dealing with first amendment freedoms and those dealing with other areas. The court concluded a stricter standard should be applied to statutes affecting first amendment rights,[38] and suggested that, according to *Crary*, there are certain standards that need to be adhered to in construing a contributing statute. These standards are: (1) the delinquency the law is trying to prevent must be fairly evident; (2) it must be a reasonably certain result of the act complained of; and (3) it must be reasonably sure to befall a child within a reasonable time.[39]

After delineating these standards, the court applied them to the West Virginia contributing statute[40] and considered it *in para materia*[41] with the statute defining the term delinquency;[42] at this point the court invalidated two subsections of the delinquency definition.[43] The court interpreted the phrase "contributing to," suggested that it was merely a general criminal statute[44] and, therefore, was not necessarily void for vagueness.

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[36] *Id.* at 420, 155 N.E.2d at 264.

[37] "A statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law." Connally v. General Constr. Co., 269 U.S. 385, 391 (1926).

[38] 208 S.E.2d at 543.

[39] *Id.* at 548.

[40] W. VA. CODE ANN. § 49-7-7 (1966).

[41] *Pari Materia*: Of the same matter; on the same subject; as, laws *pari materia* must be construed with reference to each other. BLACK'S LAW DICTIONARY 1270 (rev. 4th ed. 1968).

[42] W. VA. CODE ANN. § 49-1-4 (1966).

[43] 208 S.E.2d at 548-49.

[44] *Id.* at 550-52. This statement is particularly significant to the extent that the court in *Flinn* differentiates between the rights one is granted by virtue of the first

The court thereupon reversed the circuit court on both questions certified for review, but the status of the three defendants, Flinn, Barker, and Gentry, was left in doubt. Nothing in the seven remaining subsections of the West Virginia delinquency statute[45] specifically covers the actions of these three defendants. The very subsections under which the defendants were indicted were declared to be unconstitutional. Upon what grounds were the three defendants still liable for prosecution? The inescapable conclusion is that persons can still be prosecuted for "contributing" to the delinquency of a minor with the word delinquency having some meaning other than those set forth in the delinquency statute. If this is the situation, no standards exist to which one may adhere in attempting to stay within the bounds of the law. In the alternative, if only those actions specified in the seven remaining subsections of the delinquency statute are the actions which constitute delinquency, the actions of the three defendants were no longer necessary actions of a criminal nature.[46] The court's specific approval of the indictments alleging only these "non-criminal" acts apparently indicates that the former interpretation was adopted.

A final lingering question surrounds the court's analysis of the word "contributing." The court found that the contributing statute, when read *in pari materia* with the delinquency statute, was sufficiently specific and certain to provide adequate notice.[47] Does this mean that in those instances in which there exist criminal penalties outside of the delinquency statute the phrase "contributing to" in the contributing statute is too vague? The answer is unclear from this decision. The court said, "The vagueness or certainty of Code, 1931, 49-7-7, as amended, is not to be judged in the abstract."[48] The combining of the terms of the delinquency statute with the terms of the contributing statute should apparently clarify the confusion, but unfortunately, this analysis does not clarify what one must do to avoid violating the constraints of "contributes to, encourages or tends to cause." No definite guidelines have been

amendment and other rights not constitutionally protected when considering the ambiguity of a general criminal statute. *Id.* at 543-46.

[45] W. VA. CODE ANN. § 49-1-4 (1966). The two deleted sections were: (7) Associates with immoral or vicious persons; and (9) Deports himself so as to wilfully injure or endanger the morals or health of himself or others.

[46] The defendants were indicted for providing nonintoxicating beer to minors and engaging in sexual relations with minors. 208 S.E.2d at 554.

[47] *Id.* at 553.

[48] *Id.* at 552.

established by the court. No clear meaning of the above phrase has been given to the man of "common intelligence."

One should be clearly appraised of the possible criminal liabilities to which he may be subjected. In order to avoid breaking the law, one must be armed with the shield of knowledge. Knowledge is the critical factor the court in *Flinn* failed to provide. The only thing the instant decision made certain was the great uncertainty already existing in a confused area of the law.

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