

The Role of the Lawyer in Juvenile Court

Since the end of the Second World War, the traditional values and the inherited assumptions of the law are being challenged as never before in the law's long history. Speaking to the Cambridge University Law Society, in 1949, Lord Radcliffe said: "It is nothing new to say that we are at a crisis, for the crisis is a devalued currency. It is a commonplace to say that the law has suffered a revolution under new social and administrative conditions, for we know that we are all spinning like tops and are dizzy with change."¹

While we are in this state of dizziness, it is timely to take a fresh look at the role of the lawyer. How well is he fulfilling his role? Is his professional equipment adequate to the demands made upon it by new social and administrative conditions? Does his present legal education answer his present need? Does this education rest upon a broad enough basis? Can a man who knows only law be a competent lawyer in today's world? Fifty years ago, Mr. Justice Holmes declared: "For the rational study of law the black-letter man may be the man of the present, but the man of the future is the man of statistics and the master of economics."² Even Holmes's clear vision could not have foreseen how fast and how far the world would travel in fifty years.

The traditional role of the lawyer - that is the lawyer who specializes in court work - is an ancient and honourable one, and a very necessary and important one. Sir Edward Parry calls the advocate the priest in the temple of justice, without whose ministrations the world would hear little of that important message - the message of justice.³

An advocate is the representative of his client but he is the servant of the law. To gain his cause he will never betray his master. He is not an intellectual mercenary who sells his services for doubtful purposes or questionable ends. He will not chip the cube of truth to make it roll - no, not for all the money and the honours that his profession may bestow. I must be understood as speaking of the nine and ninety; not the one out of a hundred, who is no credit to himself or to his profession.

Words do not come in an easy way to the lawyer who seeks to talk about his profession. Fortunately, he does not have to stretch his mind to find adequate words. The words of others lie ready to do him service. All that need be said about the lawyer has been said, and well said, before. To support my theme, I borrow two comments which have become classic on the role of the lawyer.

1 10 Cambridge Law Journal, 361

2 The Path of the Law, Collected Legal Papers (1920) 187

3 The Seven Lamps of Advocacy (1923) 13

The first is from a speech given by Elihu Root to the Yale Law School in 1904. "He is a poor-spirited fellow," said Root, "who conceives that he has no duty but to his clients and sets before himself no object but personal success. To be a lawyer working for fees is not to be any less a citizen whose unbought service is due to his community and his country with the best and constant effort. And the lawyer's profession demands of him something more than the ordinary public service of citizenship. He has a duty to the law. In the cause of peace and order and human rights against all injustice and wrong, he is the advocate of all men, present and to come."⁴

The second is from the judgment of Mr. Justice Crampton in the case of *The Queen v. O'Connell*. In speaking of the role of the advocate, His Lordship said: "He is a representative, but not a delegate. He gives to his client the benefit of his learning, his talents, and his judgment; but all through he never forgets what he owes to himself and to others. He will not knowingly misstate the law - he will not wilfully misstate the facts, though it be to gain the cause for his client. He will ever bear in mind that if he be the advocate of an individual, and retained and remunerated (often inadequately) for his valuable services, yet he has a prior and perpetual retainer on behalf of truth and justice; and there is no Crown or other license which in any case or for any party or purpose can discharge him from that primary and paramount retainer."⁵

In fulfilling his duty to the law in our present world, the lawyer must ask himself some questions. Has the law responded adequately to the changing scope and character of life in a changing society? In short, has it kept in step with the times? Has it kept its lines of communication with the present day world open. Are the rules of evidence and procedure by which the law is brought into motion, the best that can be devised, or do they bear too prominently the birthmarks of their origins? Granted that a trial is an orderly search for the truth in the interests of justice - not a sporting contest that one wins if he plays the right move and loses if he plays the wrong one - granted this, is the search for the truth being conducted by out-of-date rules? Above all, is the adversary system the last word of efficiency in this search? Or, does the adversary system, in fact, belong to a pre-Copernican stage in the development of the law?

But the field is large and I have set myself limits. It is not my purpose to deal with the role of the lawyer generally. It is with the role of the lawyer in juvenile court that I am mainly concerned with here. My reason for restricting myself to this narrow scope is this: I believe that the juvenile court is on the right track, that it is presently pointing the way which all other courts, in the interests of justice, truth and ef-

4. quoted by Whitney North Seymour in *Listen to Leaders in the Law*, edited by Albert Love and James Saxon Childers (1963) 239.

5. (1844) 7 *Irish Law Reports* at 313.

ficiency, must eventually follow. The juvenile court is a crucible in which new philosophies and procedures, new methods and techniques, are being forged which will be translated in the fullness of time into all other courts.

The idea, which had been slowly maturing over the generations, that a child should not be treated on the same basis as an adult, that he should not be tried in the ordinary criminal courts when he brought himself within the compass of the law, led to the establishment of the Juvenile Court. The world's first juvenile court was established in Cook County, Illinois, in 1899. The act under which it was created was sponsored by the Chicago Bar Association - a fact conveniently overlooked sometimes by social workers who want to claim the credit for themselves. The association explained the philosophy behind the new court in these words:

"The fundamental idea of the juvenile court law is that the state must step in and exercise guardianship over a child found under such adverse social or individual conditions as to develop crime... It proposes a plan whereby he may be treated, not as a criminal, or legally charged with crime, but as a ward of the state, to receive practically the care, trust and discipline that are accorded the neglected and dependant child, and which, as the Act states, 'shall approximate as nearly as may be that such should be given by its parents.'"⁶

The Canadian Parliament passed an act establishing a juvenile court in 1908. This act reflected the philosophy of the founders of the court in Cook County. Witness Sec. 38 of the present Juvenile Delinquents Act: "This Act shall be liberally construed to the end that its purpose may be carried out, namely that the care and custody and discipline of a juvenile delinquent shall approximate as nearly as may be that which should be given by its parents, and that as far as practicable every juvenile delinquent shall be treated, not as a criminal, but as a misdirected and misguided child, and one needing aid, encouragement, help and assistance."⁷ In short, the court is designed to reclaim a delinquent child as a useful member of society and not to punish him. The desire to help a child who is in need of help must be its chart and compass.

The juvenile court was intended as a partnership between law and social work. Law was to be the foundation on which it rested but the role of lawyers was to be kept to a minimum. "In tracing the emergence of delinquency legislation, it appears quite clear that it originated along legalistic lines and within a judicial frame of reference. Some critics of the law, notably social scientists, have maintained that delinquency

6. quoted by Roscoe Pound *The Juvenile Court and the Law*, 10 *Crime and Delinquency* (1944) 498

7. R.S., c. 160.

might be more appropriately defined in social-psychological terms."⁸ Care was to be exercised in the selection of a juvenile court judge. "The public at large," said Judge Julian W. Mack, in 1909, "sympathetic to the work, and even the probation officers who are now lawyers, regard him as one having almost autocratic power. Because of the extent of his jurisdiction and the tremendous responsibility that it entails, it is, in the judgment of the writer, absolutely essential that he be a trained lawyer thoroughly imbued with the doctrine that ours is a 'government of laws and not of men'."⁹

All the conventional trappings of an adult criminal court were to be dispensed with. "Lawyers were unnecessary - adversary tactics were out of place, for the mutual aim of all was not to contest or object but to determine the treatment plan best for the child. The plan was to be devised by the increasingly popular psychologists and psychiatrists; delinquency was thought of almost as a disease, to be diagnosed by specialists and the patient timely but firmly diagnosed."¹⁰ In a nutshell, the Juvenile Court was established to give children a higher brand of justice than the brand that was available in adult courts. Individualized treatment is the keynote of the juvenile justice system. Its basic philosophy places the Court under an obligation, when making a disposition, to consider the doer and not the deed.

Such was the dream of the sponsors of the juvenile court system. But this dream remained high in the clouds. It never came down to earth for two reasons: first, the specialists did not have nearly as many answers as they thought they had - they had no medicine to administer to the distressed souls of children - the sciences that investigate the springs of human behaviour are, in fact, still in their cradle days; and second, the court itself was not provided with the necessary resources to carry out the work for which it was designed. It soon became evident that the juvenile court could not fulfill its promises - which is not to say that it should be abolished. The way lies ahead. We cannot beat an inglorious retreat to the dark ways of earlier centuries. We must remain in the 20th century. For all its failure to measure up to its hopes and expectations, the juvenile court has been, in Judge Alfred D. Noyes's words, "America's (and Canada's) greatest contribution to the cause of justice for children."¹¹

In 1966, Mr. Justice Fortas, in speaking for the Supreme Court of the United States, sounded a note which heralded a legal renaissance in the juvenile court. "While there can be no doubt of the original laudable

8. Juvenile Law and Procedure in California, Ernest R. Kamm, Derald R. Hunt and Jack A. Fleming (1968) 15.

9. 23 Harvard Law Review, 119.

10. Juvenile Delinquency and Youth Crime, The President's Commission on Law Enforcement and Administration of Justice (1967) 3.

11. 16 Crime and Delinquency (1970) 162.

purpose of juvenile courts," he said, "studies and critiques in recent years raise serious questions as to whether actual performance measures well enough against theoretical purpose to make tolerable the immunity of the process from the reach of constitutional guarantees applicable to adults. There is much evidence that some juvenile courts ... lack the personnel, facilities and techniques to perform adequately as representatives of the State in a *parens patriae* capacity... There is evidence, in fact, that there may be grounds for concern that the child receives the worst of both worlds: that he gets neither the protections accorded to adults nor the solicitous care and regenerative treatment postulated for children."¹²

This being the case, said the Supreme Court, let us make sure that the child gets, at least, those guarantees of due process that are accorded to adults who appear before the Courts. And first among these guarantees is the right to be represented by counsel. "The right to representation by counsel is not a grudging gesture to a ritualistic requirement. It is of the essence of justice."¹³

In *re Gault*, decided in 1967, the United States Supreme Court, reaffirmed this position. "A proceeding when the issue," is whether the child will be found to be "delinquent" and subjected to the loss of his liberty for years is comparable in seriousness to a felony prosecution," it ruled. "The juvenile needs the assistance of counsel to cope with problems of law, to make skilled inquiry into facts, to insist upon regularity of the proceedings, and to ascertain whether he has a defense and to prepare and submit it. The child 'requires the guiding hand of counsel at every step in the proceedings against him'."¹⁴

In neither the *Kent* case, nor the *Gault* case, did the Supreme Court contradict the general philosophy of the juvenile court. It simply said that the hearing in juvenile court "must measure up to the essentials of due process and fair treatment,"¹⁵ and that to insure this purpose the assistance of counsel is necessary.

Reaction to the legal renaissance in the juvenile courts of United States has been widespread. Here are two comments which suggest the divergence of opinion it has prompted. "The *Gault* decision has given aid and comfort," contends Hon. Alfred D. Noyes, Judge of the Juvenile Court for Montgomery County, Maryland, "to those who would destroy

12. *Kent v. United States*, 383 U.S. 541 - reprinted *Juvenile Courts, Cases and Materials*, edited by Orman W. Ketcham and Monrad C. Paulsen (1967) 257.

13. *Ibid* 261.

14. 387 U.S. 1 (1967) reprinted as an addendum *Juvenile Courts, Cases and Materials*, 502 at 523.

15. "The phrase "due process of law," says Mr. Justice Black, in *re Gault*, "has through the years evolved as the successor in purpose and meaning to the words "law of the land" in *Magna Charta* which more plainly intended to call for a trial according to the existing law of the land in effect at the time an alleged offense has been committed."

the concept of individualized justice for children through a nonadversary judicial proceeding where the judge personally administers the precept of *parens patriae*."¹⁶

Hon. Orman W. Ketcham, Judge of the Juvenile Court of the District of Columbia, disagrees most wholeheartedly with this view. "It is my sincere belief," he asserts, "that the presence of lawyers in juvenile courts will not only provide better justice, but will also have a significant impact upon the legal and social work professions and upon the juvenile court itself. The result may bring profound social changes in many areas where youth and authority are presently in conflict."¹⁷

My experience as a juvenile court judge compels me to share Judge Ketcham's view. I would, however, like to qualify the statement that the presence of lawyers in juvenile courts will provide better justice, by adding the rider that these lawyers should be lawyers who understand what the juvenile court system is trying to do, who are in harmony with its basic philosophy, who take a social-legal, and not a strict legal, approach to the problems of children.

When a lawyer comes into a juvenile court, throws his brief case down on the counsel table, and announces to the court: "I represent this accused. He is pleading not guilty," the presiding judge knows at once that the lawyer thinks that he is in a criminal court for children, that he does not know what it is all about, that he has never understood, if, indeed, he has read, Section 3 of Juvenile Delinquents Act, which declares:

3(1) The commission by a child of any of the acts enumerated in paragraph (h) of subsection (1) of section 2, constitutes an offence to be known as a delinquency, and shall be dealt with as hereinafter provided.

(2) Where a child is adjudged to have committed a delinquency he shall be dealt with, not as an offender, but as one in a condition of delinquency and therefore requiring help and guidance and proper supervision."¹⁸

In other words, in Canada, a juvenile court has no power to denominate a juvenile as a criminal nor to make an adjudication that may be deemed a criminal conviction. As I have said, a lawyer is the representative of his client but the servant of the law. A lawyer who represents a juvenile may find that he best represents his client and best serves the law if he insures that his client gets the help and guidance and proper supervision that he may very obviously need. For a lawyer to offer a technical defence which leads to a finding of not delinquent may

16. Has Gault Changed the Juvenile Court Concept, 16 *Crime and Delinquency* (1970) 159

17. 60 *Northwestern University Law Review* (1965) 585.

18. *op. cit.*

be in the very worst interest of his client. To beat the rap is an invitation to a juvenile to try it again. If he follows this course he may become beyond all help and guidance and proper supervision. He may become confirmed in the habit of law-breaking.

The juvenile court is a special kind of court and needs a special kind of lawyer. If this were not so, if the juvenile court did not operate on different principles than an adult court, there would be no need for a special court for juveniles. As Mr. Justice Blackmun, of the Supreme Court of the United States, said: "If the formalities of the criminal adjudicative process are to be superimposed upon the juvenile court system, there is little need for its separate existence."¹⁹

Every person who has a hand in the work of the juvenile court system, from the police constable on the beat to the judge on the bench, has as his first concern to keep as many juveniles out of the system as possible. Once a juvenile gets into the system, he tends to stay in it. Delinquency is not a rare social disease. It is simply one of the elementary facts of life. There is not a grown man (or woman either) in the land who can put his hand on his heart and say truthfully that in his youth he never committed a delinquency.

If anyone doubts this statement let him refer to the definition of delinquency given in Sec. 2 (h) of the Juvenile Delinquents Act. Here it is: "juvenile delinquent" means any child who violates any provision of the Criminal Code or of any Dominion or provincial statute, or of any by-law or ordinance of any municipality, or who is guilty of sexual immorality or any similar form of vice or who is liable by reason of any other act to be committed to an industrial school or juvenile reformatory under the provisions of any Dominion or provincial statute."²⁰

This definition includes two quite different kinds of offences - those offences which would be crimes if committed by adults, and 'status' offences, those acts that are offences only by reason of their being committed by persons having the status of children.

"An area of jurisdiction unique to juvenile courts," explains Judge Ted Rubin and Referee Jack F. Smith, "is that of conduct illegal only for children. Often included in such offences are truancy, violation of curfew laws, use of alcohol and tobacco, incorrigibility, "beyond control of parents," and running away from home. The last three of these offences obviously have much to do with inadequacies of parents. Truancy may reflect inadequacies of schools. Yet children brought before the courts by their parents, police or truant officer on these charges are often adjudicated as delinquent and so are stigmatized for the indefinite future."²¹

19. *McKeiver v. Pennsylvania*, 403 U.S. (1971) 552

20. *op. cit.*

21. *The future of the Juvenile Court* (1968) 8

The juvenile who does not get caught is, perhaps, the lucky one. If a boy or a girl commits some minor infraction of the law, and is dealt with in the wrong way there is a very real chance that he or she may become a confirmed delinquent. Milton L. Luger, the Director of the New York State Correction Systems Division of Youth, says frankly: "It would probably be better for all concerned if young delinquents were not detected, apprehended or institutionalized. Too many of them get worse in our care."²²

Fortunately, most children get the delinquency out of their systems. They pass through an unsettled period in their lives without acquiring permanent anti-social habits. As the President's Commission on Law Enforcement and Administration of Justice put this point: "Most youths phase out of their predelinquency, so called, and their law flaunting; they put away childish things, ordinarily as they become established in society - by a job, marriage, further education, or the slow growth of wisdom."²³ In a survey conducted by Dr. L. Bovet for the World Health organization, this point is made even more forcefully: "The study of concrete facts," says Dr. Bovet, "notably of the works of such criminologists as S. and E. Glueck, Grassberger, and Frey, reveals that, of the numbers of young delinquents brought before a court, a small percentage only (about 10% - 20%) tends to prolong delinquency into adult years. That means that about 80% - 90% of the juvenile delinquents brought before a court will not offend again, or at least will not retain their delinquent tendencies beyond the crisis of their juvenile adaptation."²⁴

All facts point to the conclusion that delinquency is a social disease with a good prognosis, if it is handled properly.

A child's first contact with the authority of the law is generally through a police officer. This contact may be a vital experience, for good or ill, in the child's life. As Lieutenant Vincent A. Burke, of Chicago, the home of the first juvenile court, says: "The role of the juvenile police officer is generally acknowledged as a crucial one in the overall correctional process because his contact with a delinquent youth constitutes the start of the remedial treatment and, to a large degree, determines the minor's conception of the ensuing procedures. Though this is widely recognized, little attention has been given to the fact that the most important point of contact between a police juvenile officer

22. quoted by Ramsay Clark in *Crime in America* (1970) 240.

23. *Juvenile Delinquency and Youth Crime*, The President's Commission on Law Enforcement and Administration of Justice (1967) 94. Norval Morris and Gordon Hawkins maintain that we make a basic error if we entertain the idea that juvenile delinquency is a pathological phenomenon which requires explanation. "The majority of juvenile delinquents both convicted and unconvicted," they assert, "do not subsequently pursue criminal careers; only a minority become recidivists. The fact that in America, as in the rest of the world, only a minority of young criminals become persistent adult criminals indicates that for most young people it is a passing phase of development and not a static condition." *The honest politician's guide to crime control* (1970) 155

24. *Psychiatric Aspects of Juvenile Delinquency* (1951) 44.

and a young offender occurs at the time the child is processed for the first offence. This confrontation may structure the child's beliefs and expectancies, not only about the police and other professionals in the field of corrections but, more importantly, it may also influence the child's concept of himself."²⁵

In the conviction that the first step in dealing with children is the all important step, a Youth Squad was established in Winnipeg, in 1968, to deal with the problems of juveniles in trouble with the law. The members of this squad are carefully chosen for their special qualifications for dealing with children and are given special training. They deal positively, imaginatively, with the problems of children, in the belief that an ounce of legal prevention is worth a pound of legal cure. Many of the children who come to the notice of the Youth Squad are invited to attend a First Offenders Class. This class has proved itself beyond measure as a useful weapon in the fight against juvenile delinquency. Only 3.9% of the 600 children who took this course, in 1973, have become reinvolved with the law.

All juveniles who are apprehended by the Youth Squad are screened - that is consideration is given to whether or not a juvenile may be directed out of the juvenile court system. For example, if a boy is found drunk on the street, two alternatives are open to the police; first, the boy can be taken home to his parents and warned to watch his step in future, or he can be referred to the juvenile court. All such referrals are received by the court's intake service. This service is one that is unique to the juvenile court system. A joint statement issued in 1967, by the National Conference of Lawyers and Social Workers in United States, explained its function thus: "The intake service should evaluate which cases might be adjusted without resort to formal judicial proceedings and, where appropriate, attempt to adjust such cases through social investigations and counselling, either using its own resources or by referral to other community services."²⁶ Intakes' initial task is to determine whether in the best interests of the child and of the community, formal court action need be taken. If the decision is that no such action is necessary in the circumstances, the juvenile is dealt with on a non-judicial basis. He will not be required to make an appearance in court.

If intake decides that it is necessary to lay a formal complaint against a juvenile, there is still the possibility that a further step in the screening process may be taken. This step may be taken by the presiding judge, under the authority of Section 16 of the Juvenile Delinquents Act, which reads: "The Court may postpone or adjourn the hearing of a charge of delinquency for such period or periods as the court may deem advisable, or may postpone or adjourn the hearing sine die."²⁷

25. From a Manual in use in the Juvenile Courts of Cook County.

26. Lawyer-Social Worker Relationships in the Family Court Intake Process (1967) 5

27. *op. cit.*

In the case of *R. v. S.*, the Manitoba Court of Appeal ruled that the word 'hearing' as defined in this section means that stage of the proceedings down to the entry of a plea, or a finding, of delinquency.²⁸

In other words if a plea, or a finding, of delinquency is recorded a hearing may not be adjourned sine die. Thus by adjourning a case sine die, before this stage has been reached, the judge avoids the necessity of having to label a child as a juvenile delinquent.

The delinquency label has been described as a "self-fulfilling prophecy." One way for a child to become a juvenile delinquent is for him to be called a juvenile delinquent by those who are in a position of some authority over him, as the police or his school teachers. In other words, if a child is given an image of himself as a juvenile delinquent, he has a compulsion to live up to that image. He may say to himself, "I might as well have the game as the name."

The juvenile court, like America, was promises. Its primary purpose was to rehabilitate a juvenile, not to punish him. The court was to direct its attention, not to doing something to a child because of what he has done, but to doing something for a child because of what he is, and needs. This purpose may defeat itself. As Dr. Victor Eisner explains: "It is a paradox that the mechanism that society had set up to" understand, protect, and help the child or youth" was often the very mechanism that, by labelling him as a delinquent, made him unemployable and thus sentenced him to a life of poverty... One more point about the labelling process: There is no way to reverse it. Once the label has been applied, a boy remains either a delinquent or a former delinquent. This consequence is contrary to the original purpose of juvenile courts, but it is unavoidable."²⁹

Thus, once a delinquent, always a delinquent. The delinquency label may be attached to a boy for a single childish mistake, and it may cast a shadow over his whole future, blighting the hopes he has made for himself, condemning him to forego any long term plans he may have in mind.

A decision of the House of Lords³⁰ illustrates the disastrous consequences that may flow from a court record. When he was seventeen years of age, Mr. Faramus had a conviction recorded against him in Jersey. Two years later, when the island was under German occupation, he had a second conviction, and was deported to Germany where he spent some time in Buchenwald concentration camp. After the end of

28. (1946) 2 C.R., 191.

29. *The Delinquency Label* (1969) 15 and 16.

30. *Faramus V. Film Artistes' Association* (1964) A.C. 925.

hostilities, he returned to Britain and joined a trade union, the Film Artist's Association. Eighteen years later he became a member of the union's executive committee. In some way the union discovered that he had two convictions recorded against him and expelled him. He applied to the courts for reinstatement in the union. He had lived an exemplary life for 18 years but he had not lived down his past. His case reached the House of Lords, which regretfully had to deny him the relief he sought. The union operated a closed shop and his expulsion was in effect an economic death warrant.

"Does a criminal record in a juvenile matter?" John A.F. Watson, Senior Chairman of the Juvenile Courts for the Inner London Area, asks this question, and gives his own answer. "Some people say it does not," he says. "I cannot agree. I think it deplorable that a child, found by a court to have done something wrong - stolen something, perhaps - should be made conscious of a black mark which the police may bring up at any time in his life if he slips up again. Children are like puppies. They need to be dealt with promptly and be forgiven... I read the other day of a man of twenty-seven convicted for the first time as an adult in a London court. The police solemnly informed the bench that he had a previous record. He had been found guilty of stealing before - at the age of nine."³¹

I should like to think that this sort of thing could not happen here - but I simply cannot bring myself to do so.

A heavy responsibility rests on all persons who are concerned in any way with the juvenile court process to see that as many children as possible are diverted from the system before there is a formal adjudication of delinquency made by the court. The court must be the agency of last resort. Courts are not a primary agency" All children need a family, a school, health care, social and recreational opportunities; but not all children need a juvenile Court."³²

In this regard, let us consider some facts and figures. In Manitoba, in 1972, the total number of juveniles who were referred to the Juvenile Court for alleged delinquent behaviour (other than for complaints alleging traffic violations) was 7,863. The following table indicates how this number of juveniles was dealt with:

number diverted out of the Juvenile Court system by screening at intake level	3,124 (39.8%)
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31. *The Child and the Magistrate* (revised edition, 1965) 370.

32. Rubin and Smith *op. cit.*, 67. (footnote 21)

number of cases adjourned by the court sine die	1,750 (22.3%)
number of juveniles placed on probation	1,064 (13.5%)
number transferred to adult court for trial (under Sec. 9 of the Juvenile Delinquents Act)	21 (.26%)
number committed to training school	50 (.62%)
number of complaints dismissed by the court	49 (.62%)
number of juveniles dealt with by the court in other ways, which involved the delinquency label	1,805 (22.90%)

What relevancy do these facts and figures have to our present theme - the role of the lawyer in Juvenile Court? I suggest that there is no role for the lawyer to play in over 60% of the cases that are referred to the juvenile court system in Manitoba - that is those cases which are screened at intake level (39.8% in 1972) and those which result in adjournments sine die (22.3% in 1972). I suggest that in these cases a juvenile may be better off without a lawyer. There is always the danger that he may get the wrong kind of lawyer - the kind who someone (Judge Ben Lindsey, if my memory serves me) called a legal robot, a lawyer who follows the letter of the law blindly in an unimaginative trance.

I do not want my position to be misunderstood. I do not question the right of a juvenile to be represented by counsel at any stage of any proceedings which may involve him in juvenile court. I only question the advisability of defence counsel appearing in proceedings that result in a juvenile avoiding the delinquency label. And if counsel is provided in such cases at public expense, I say that limited resources can be used to better purpose. My constant fear - and experience convinces me it is not an idle fear - is that if the wrong kind of a lawyer appears for a juvenile, he may succeed in keeping the juvenile in the court system and leave him in the end wearing the brand of juvenile delinquent. This would be the inevitable result, if a juvenile, who, on the advice of his lawyer, insisted on entering a plea of not delinquent, and after hearing of the complaint which brought him before the court, a finding of delinquent was made. The court must hold a hearing if counsel for a juvenile insists. An adjournment sine die will only be made if the juvenile admits that he has done wrong. The court proceeds on a basis which, perhaps, may best be explained in the words of Gandhi: "A full

and candid admission of one's mistake should make one proof against its repetition. A full realization of one's mistake is also the highest form of expiation."³³

There are two stages to every hearing in Juvenile Court. The first stage is adjudicatory. A basis must be established in law and in fact before the court can intervene in the life of a juvenile. "Nothing can override the principle," said Jean Graham Hall, in a comment on the British Children and Young Persons Act 1969, "that the court must first try the issue, and determine if the allegation is proved... The case must be made out before questions of welfare can be entertained. The juvenile court is not, and never has been, primarily a social agency."³⁴ At the adjudicatory stage the judge enters into an inquiry as to the truth of the allegations that bring the juvenile before the court. Most juveniles admit these allegations. If a plea of not delinquent is entered by a juvenile, the court embarks upon hearing into the complaint made against him. The standard of proof in Canadian Courts has always been proof beyond a reasonable doubt. In United States, the question was open until the Supreme Court gave its decision in *re Winship*.³⁵ This case held that the constitutional safeguard of proof beyond reasonable doubt must be applied during the adjudicatory stage of a hearing in juvenile court. Mr. Justice Harlan, in a concurring opinion in this case, spoke these words which indicate that the court was not trying to destroy the juvenile court's general philosophy but to fulfill it: "It is of great importance," he said, "in my view, that procedural structures not be constitutionally imposed that jeopardize "the essential elements of the State's purpose" in creating juvenile courts... In this regard, I think it worth emphasizing that the requirement of proof beyond a reasonable doubt that a juvenile committed a criminal act before he is found delinquent does not (1) interfere with the worthy goal of rehabilitating the juvenile, (2) make any significant difference in the extent to which a youth is stigmatized as a "criminal" because he has been found to be a delinquent, or (3) burden the juvenile courts with a procedural requirement that will make juvenile adjudications significantly more time consuming, or rigid. Today's decision simply requires a juvenile court judge to be more confident in his belief that the youth did the act with which he has been charged."³⁶

After an adjudication, a case ceases to be a legal problem and becomes a social one. The second stage of a hearing in juvenile court is dispositional. At this stage the judge seeks to find some disposition which is in the best interests of the child. In Winnipeg Juvenile Court, few dispositions - less than one in ten - are made without the assistance

33 The Wisdom of Gandhi, (1967) 67

34 10 The British Journal of Criminology, 79

35 397 U.S. 353 (1970)

36 *ibid.*, 374

of a pre-disposition report prepared by a probation officer. This report discusses, in considerable detail, the personal characteristics and social background of the juvenile. Unfortunately, many times a judge has to let golden chances pass him by because there is not at the disposal of the court any resource which answers to the need of the juvenile.

A Policy Statement of the American Council of Judges of the National Council of Crime and Delinquency emphasizes the importance of the second stage of the hearing. This stage, it states, "is usually more important than the adjudicatory hearing. A child is likely in many cases to admit to allegations of a juvenile court petition as true, and the dispositional hearing is the only point of real confrontation between the family and the court."³⁷

"Once the allegations of the petition have been upheld in a delinquency case," it continues, "it is the duty of all persons involved, including the child, his parents, and his attorney, to work toward the most suitable disposition, one that will both safeguard society and be most conducive to the child's rehabilitation."

What useful purpose can the child's attorney serve at this stage? Danile L. Skoler sums up this purpose thus: "... in the disposition decision process... lawyers provide the sophistication and articulation necessary to make effective challenges to the social histories, diagnostic findings, and corrective plans developed by probation staff. The sometimes uncomfortable presence of counsel should also enhance the accuracy, documentation, and responsibility of probation staff work, hopefully without impairing the basic social work orientation, valuable skills, and concern contributed by such personnel to the juvenile court process."

A defence attorney can present on behalf of his client and family an alternative program. When such program is before the court, as Leonard Edwards suggests, it "gives the judge an opportunity for meaningful decision-making at disposition, rather than application of a rubber stamp to the probation department's programs."³⁹

My experience on the bench has convinced me that one of the most useful purposes that a defence counsel can serve is to explain the philosophy and purpose of the juvenile court to a child and his parents. There is little wonder that there is general confusion on this score among children and parents. Dr. Clyde B. Wedder hit the nail squarely on the head, when he said: "Juvenile courts are the least understood and most

37. Provision of Counsel in Juvenile Courts (1970) 16.

38. 34 *Indiana Law Journal* (1968) 577.

39. *The Rights of Children*, 37 *Federal Probation* (1973) 39.

misunderstood of all the nation's tribunals."⁴⁰ The juvenile court is rarely in the news except as a target for criticism - and many of its critics do not realize that they are under the obligation to know what they are talking about. It is always open season for the juvenile court.⁴¹ Its failures are invariably dragged into the light of publicity - its successes are allowed to remain in the shadows. It is normal for the headlines that refer to the Juvenile Court to be twice the size of the events.

In the Report of the Department of Justice Committee on Juvenile Delinquency there is a suggestion that lawyers are not too welcome in the juvenile courts of Canada. "We think it important to take note of the fact," reads this report, "that there has long been a feeling among many persons involved in juvenile court work that lawyers are unnecessary in the juvenile court, and perhaps even undesirable."⁴² This report was published in 1965. Nine years later there has been a decided change in feeling. If I may speak from personal knowledge, I can vouch for the fact that a lot of water has gone under the bridge in Winnipeg Juvenile Court since one of its judges made the classic observation, "we don't want lawyers here, gumming up the works."

The present judges of the court are not unaware of their own shortcomings and they do not look upon them with any degree of complacency. They recall that Roscoe Pound once said: "The powers of the Star Chamber were a trifle in comparison with those of our juvenile courts."⁴³ They know what Lord Acton has said about the use and abuse of power. For this reason they welcome the lawyers who appear in court to represent juveniles. The court operates in an atmosphere of privacy, but not of secrecy, as it sometimes maintained by the critics. The judges know that to have lawyers keeping a watchful eye on what they do is a healthy situation. As Professor Norval Morris put it: "Lawyers bring a healthy scepticism to our benevolent process. I want to trust a man with power only if he doubts himself, and he doubts himself more if others are doubtful of him. Lawyers do that well because that is their job."⁴⁴

I now propose to add weight to my own view of the role of the lawyer in juvenile court by seeking the support of three experts in the field - one from Britain, one from United States and one from Canada. These three all chime much to the same tune.

Here is what the British expert, Hermann Mannheim, whose right to be heard will not be questioned, has to say... "there is much less scope

40. *Juvenile Offenders* (4th Printing, 1971) 147.

41. For example, an editorial in the *Winnipeg Tribune* for February 16, 1974, suggested that the Manitoba Legislature, then in session, should consider amending the *Juvenile Delinquents Act*.

42. *Juvenile Delinquency in Canada* (1965) 143.

43. Foreword to Young, *Social Treatment in Probation and Delinquency* (1937) XXVII. quoted by Mr. Justice Fortas in his decision in *Gault*.

44. *Gault: What now for the Juvenile Court?* edited by Virginia Davis Nordin (1968) 35.

in Juvenile Courts for legal quibbles and no room for the activities of that type of counsel who regards it as his primary object to obtain an acquittal or the most lenient penalty possible, regardless of the true merits of the case. On the other hand, it should not be overlooked that, wherever specific criminal changes have to be decided by Juvenile Courts retaining at least some of the essential characteristics of a Criminal Court, juveniles may require even more than adults the assistance of trained lawyers to defend them against possible bias, ignorance or carelessness, to see to it that the rules of evidence are observed, that the facts are completely and fairly collected and the law reasonably applied. True as it is that magistrates will, as a rule, do their very best to help the juvenile in his defence, the old experience that nobody can, in the same case, be a good judge and a good advocate, cannot be altogether disregarded even in Juvenile Courts."⁴⁵

To give the American point of view many experts could be called upon to speak. I have chosen Judge Paul W. Alexander. "Good lawyers, competent men and women with a social conscience," he says, "are unquestionably of tremendous value to child and family. The honesty and intelligence of these lawyers generally enable them to see matters in true perspective and to employ their wisdom to advise their clients to seek what is best for the child in the long run; such lawyers do not attempt to win a Pyrrhic victory and obtain what the clients want but perhaps should not have. In any juvenile or family court, good lawyers are an unqualified blessing both to child and to parents. Moreover, whenever retained because of a clients' confidence in them, they assist court as well as client in helping devise and carry out the best plan for the child's future.

"When, however, a lawyer appears who possesses no social conscience or is constitutionally contentious or vainly legalistic or mentally myopic, he seems impelled to earn his fee by putting on a show for his client. He must win the case by hook or by crook, "spring the kid," and get for his clients what they want regardless of ultimate consequence to child or family."⁴⁶

My Canadian expert is Professor Graham Parker. Writing in 1967, he had this to say: "At the present time, the average lawyer has little knowledge of the juvenile court, its aims and origins. If the juvenile court is to continue in its present form, the crucial test will be the effect which lawyers will have in that court. If the lawyers invade the juvenile court, and attempt to use the tactics usually (and properly) employed in the adult court, then the juvenile court, as a viable, unique institution, could become extinct. If the adversary system is introduced into that court, then the court may as well become a tribunal when full

45. *Lawless Youth* (1947) p. 70.

46. *Juvenile Courts, Cases and materials*, edited by Orman W. Ketcham and Monrad C. Paulsen (1967) 300.

recognition is given to the elements of due process. This undesirable situation is not, however, inevitable. The New York Family Court Act has made provision for legal representations, through law guardians, without resort to the worst facets of the adult criminal trial. The Canadian Report on Juvenile Delinquency made similar suggestions. The Ontario legal aid plan is operating a pilot scheme in Metropolitan Toronto Juvenile and Family court, which shows that the lawyer has a valuable place in the juvenile court so long as the practitioner is discouraged from acting in an aggressive way and is educated in the functions and aims of the juvenile court."⁴⁷

Professor Parker refers to the New York Family Court Act, a long step in the right legislative direction. New York has been a pioneer in the field of legal aid for juveniles. But that there is more to it than simply passing a law, these words of Judge Justine Wise Polier, a New York State Family Court Judge, make evident: "The question of the responsibility of the law guardian requires clarification. Some law guardians advise children to take the stand and speak the truth. They regard the responsibility to do everything possible to avoid conviction and sentence (or "ajudication" and "disposition") as inappropriate in a juvenile court, holding that the ultimate interest of the child requires full disclosure of the evidence so that appropriate services or treatment will be provided. Others take the position that their loyalty and responsibility belong exclusively to the respondent to whom they have been assigned. They make maximum use of the "right to remain silent" even when the parents would prefer to have the child speak and the child himself wants to. They see their role as counsel for the defence whose task is to secure a dismissal by every legal means, including the right to remain silent. Sometimes this position is defended on the ground that the facilities for treatment and rehabilitation available to the court are so inadequate that a finding of delinquency may lead to inappropriate detention or placement more likely to injure the child than help him."⁴⁸

I have been dealing exclusively with the role of defence counsel in the Juvenile Court. A word must be said about the role of Crown counsel. We have come a long way since the evil days when Sir Edward Coke could abuse Sir Walter Raleigh - on trial for his life - in a manner so scandalous that Lord Mansfield was prompted to declare that he would not have been guilty of Coke's conduct to gain all Coke's reputation and estates.⁴⁹ In any court in which Crown Counsel appear today, they put truth and justice ahead of victory. There is no dissent today from the maxim: the Crown never wins, the Crown never loses." "In our law," as Mr. Justice Riddell said, "a criminal prosecution is not a contest between individuals nor is it a contest between the Crown endeavouring to

47. *The Century of the Child*, 45 *Canadian Bar Review* (1967) 757.

48. *A View from the Bench* (1964) p. 56.

49. (1603) 2 St. Tr. 7, see also Sir John Macdonell, *Historical Trials*, (1927) 171-193.

convict and the accused endeavouring to be acquitted; but it is an investigation that should be conducted without feeling or animus on the part of the prosecution with the single view of determining the truth."⁵⁰

These words leave little to be said about the role of Crown counsel generally. But there is a special obligation on Crown counsel who appear in Juvenile Court. This obligation has been well explained by Maurice M. Dore, Assistant State's Attorney of Cook County, Illinois. "The task of both the state's attorney and defence counsel in juvenile court is very demanding," he writes. "indeed, one of the advantages of a junior criminal court might be the simplification of counsels' roles. The spirit of the Act imposes a duty on counsel which is not imposed by the criminal law. The act imposes on the state's attorney the duty of seeking that which is in the best interest of the juvenile consistent with the needs of society. In criminal proceedings, the prosecutor need only be fair. At the juvenile level in addition to being fair, the Act requires that he be interested. On the reverse side of the coin, it is the duty of defense counsel at the criminal level to seek the release of his client by any lawful means. This is much too narrow a view of the role of defense counsel at the juvenile level. It would seem that the Act requires that defense counsel seek the best possible solution to the problems of his juvenile client."⁵¹

If the imagination is stretched a bit, these words leave little to be said about the role of counsel in juvenile court.

Section 17(1) of the Juvenile Delinquents Act reads as follows: "Proceedings under this Act with respect to a child, including the trial and disposition of the case, may be as informal as the circumstances will permit, consistent with a due regard for a proper administration of justice."⁵² This section does not confer on the juvenile court judge a license for arbitrary procedure. It does give him a greater scope in the search for the truth than is available to adult court judges under the present rules and procedures. When counsel insist on coming into juvenile court with their quiddities and their quillies, it is consistent with a due regard for a proper administration of justice for the presiding judge to take the lead offered by Lord Atkin, who held: "when these ghosts of the past stand in the path of justice clanking their mediaeval

50. *Rex v. Chamandy* (1934) O.R. 208. "It is now well established says Lord Devlin, "that prosecuting counsel is to act as a minister of justice rather than an advocate; he is not to press for a conviction but is to lay all the facts, those that tell for the prisoner as well as those that tell against him, before the jury." *The Criminal Prosecution in England* (1960) 23. In *Berger v. United States*, the Supreme Court of United States defined the role of a prosecutor thus: "The United States attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor - indeed he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one." 255 U.S. 22 (1921)

51. from a Manual in use in the Juvenile Courts of Cook County.

52. *op. cit.*

chains the proper course for the Judge is to pass through them undeterred."⁵³

There are rules and procedures that are basic to the work of adult court that are not workable in the juvenile court in the light of its purpose and philosophy. As Hermann Mannheim has explained, "the peculiar tasks of Juvenile Court procedure have forced Anglo-American law to make concessions to continental ideas by introducing certain provisions of an inquisitorial character."⁵⁴

Certainly the hearsay rule in all its pristine vigour has no place in juvenile court proceedings. This is not to say that the fundamental rules of evidence should not be observed, and the first rule to be followed is that he who asserts must prove, and must prove his assertions by legally acceptable evidence.

The juvenile court judge is required to learn something about social work. But the obligation works both ways. The social worker is required to learn about the law, and, in particular, about the rules of evidence. Training for the social worker in the elementary rules of evidence is long overdue. Some social workers, who come regularly to court, do not seem able to distinguish between evidence that amounts to proper legal proof, and rumours and rumours of rumours, suspicions and shadows of suspicions, gossip and echoes of gossip, hearsay three or four times removed from its original source and gathering momentum each time, like a snowball rolling down hill.

Many times the old music hall refrain which goes something like this, rings in my ears as I listen to their testimony.

"I know a bloke vot knows a cove
As'ad it from a man
Vot saw a party vot toll 'im
'E'll win it if 'e can."

I cannot conclude this article without sounding a note of warning to the legal profession. I may be speaking into the wind but I say to the lawyers get your heads out of the sands and realize what is happening at the present time. The law is in a state of seige and you do not seem to realize it. A battle to the death has been joined. Social scientists are closing in on the law. There is a concerted effort in modern society to by-pass the courts. Courts have had their day is the cry. The law is no longer necessary. Social science is the wave of the future. Under a great assortment of names, non-legal agencies are being organized to take over the work that should be done by lawyers. And why should it be done by lawyers? Not because they have any special prerogative or

53. *United Australia Ltd. v. Barclays Bank Ltd* (1941) A.C. 29.

54. *Lawless Youth* op. cit., 51.

dispensation, as a profession; but because their traditions and their taining make them sensitive to the civil rights of their fellow human beings. Mr. Justice Brandeis has warned: "The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding."⁵⁵

Learning that believes it is sufficient unto itself can be a dangerous thing. As Aldous Huxley once said: "There seems to be a touching belief among certain PhDs of sociology that PHDs in sociology will never be corrupted by power. Like Sir Galahad's, their strength is as the strength of ten because their heart is pure - and their heart is pure because they are scientists and have taken six thousand hours of social studies."⁵⁶

But, let's face the fact, six times six thousand hours spent in social studies are not proof against the mis-use of power. Constitutional checks and balances are the only guarantee. No exercise of power should be beyond the scrutiny of the law - that is the checks and balances to the abuse of power offered by the Courts.

If the present trend is not resisted, I can foresee some John Diefenbaker of the future, rising in the House of Commons to introduce a Therapeutic Bill of Rights designed to protect us from the experts who know so much better than we do ourselves what is good for us.⁵⁷

The best way to man the fortress of the law is to keep the law and all its processes in close touch with the times. Law cannot be allowed to become mummified, to remain passive in the midst of change. The same meaning cannot be read into it permanently. Words shift their values. Their emotional emphasis does not remain constant. There is a steady need to translate the law into the current vocabulary. What was good enough for our grandparents is not good enough for us, and what is good enough for us will not be good enough for our grandchildren. As Mr. Justice Cardozo has so happily put it: "The inn that shelters for the night is not the journey's end. The law, like the traveller, must be ready for the motrow. It must have a principle of growth."⁵⁷

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55. The Brandeis Reader (1956) 32. from his dissenting judgment *Olmstead v. United States* (1928) 277 U.S. 438. John Stuart Mill's words cannot be repeated too often: "The only purpose for which power can rightfully be exercised over any member of a civilized community against his will is to prevent harm to others. His own good either physical or moral is not a sufficient warrant. He cannot rightfully be compelled to do or forbear because it will be better for him to do so, because it will make him happier, because in the opinions of others, to do so would be wise or even right." *On Liberty*, Chapter 1.

56. quoted Francis A. Allen, *Borderland of Criminal Justice* (1964) 36.

57. On this theme see Nicholas N. Kittries' excellent book, *The Right to be Different, Deviance and Enforced Therapy* (1971). At page 388, Dr. Kittries asks: "How can we protect the personality of a man from the incursions of therapeutic power? Heretofore, all of our objections to the workings of the therapeutic state have been resolved by resorting to our traditional requirements of fair criteria and fair procedures as safeguards against abuse of the state's power. Yet these safeguards offer no protection against drastic therapeutic measures, no protection against the execution of the personality. A new right is needed - the right to personal and bodily integrity. It is a right that has constitutional dimensions."

58. *The Growth of the Law* (1924) 32.

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