Revue de droit de l'Université de Sherbrooke

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LEGAL REPRESENTATION AND DUE PROCESS IN DELINQUENCY PROCEEDINGS

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Volume 9, Number 1, 1978

URI: https://id.erudit.org/iderudit/1110750ar
DOI: https://doi.org/10.17118/11143/19777

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Publisher(s)

Revue de Droit de l'Université de Sherbrooke

ISSN

0317-9656 (print)
2561-7087 (digital)

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Cite this article

Dickens, B. M. (1978). LEGAL REPRESENTATION AND DUE PROCESS IN DELINQUENCY PROCEEDINGS. *Revue de droit de l'Université de Sherbrooke*, *9*(1), 201–232. https://doi.org/10.17118/11143/19777

Article abstract

Les objectifs sociaux traditionnellement poursuivis par les lois fédérales en matière de délinquance ont fait oublié qu'elles tiennent leur origine du droit criminel et non du droit social. Les résultats décevants au plan social du système instauré pour faire face aux problèmes de la délinquance de même que l'affirmation de plus en plus marquée de sa nature criminelle ont conduit à la réévaluation du rôle des tribunaux pour jeunes délinquants et celui des avocats qui représentent ces derniers.

D'une part, de nombreuses décisions judiciaires illustrant comment les jeunes accusés se voient privés des garanties procédurales sans bénéficier en retour de considérations particulières inhérentes à leur âge, sont à l'origine du désenchantement à l'égard du système. En effet, s'ils sont reconnus coupables d'une infraction dont seuls les jeunes délinquants peuvent être accusés, ils sont passibles de peines qu'on n'imposerait pas aux adultes.

D'autre part, les théories modernes sur la déviance, notamment celle de « l'étiquetage des délinquants », (labelling theory) ont accentué le mécontentement. En vertu de cette théorie, la délinquance n'est pas reliée à une forme de comportement, mais elle résulte de la stigmatisation du comportement par le processus judiciaire.

Cette désillusion à l'égard du système a créé un mouvement en faveur de la décriminalisation, de la déjudiciarisation et du respect rigoureux des garanties procédurales pour les jeunes délinquants comme pour les délinquants adultes. Les délinquants juvéniles doivent pouvoir compter sur les services d'un avocat pour protéger leurs droits et faire connaître leur avis comme le veut le processus contradictoire.

La représentation des jeunes délinquants par des avocats est un phénomène nouveau. Cette situation a entraîné une certaine confusion quant à leur rôle. Certains perçoivent leur rôle comme étant celui d'un *amicus curiae* alors que d'autres estiment plus approprié d'agir comme un travailleur social.

En raison de la nature pénale du processus, il est possible que seule l'approche traditionnelle de type légaliste soit appropriée. Toutefois, il ne serait pas nécessaire que les avocats (spécialisés en droit pénal ou criminalistes) s'astreignent à suivre un entraînement spécial pour représenter le jeune délinquant devant les tribunaux pour jeunes, même s'il est souhaitable qu'ils connaissent les mesures et les ressources auxquelles ils peuvent avoir recours et qu'ils s'appliquent, en autant que cela soit possible à se mettre à la portée de leurs jeunes clients.

LEGAL REPRESENTATION AND DUE PROCESS IN DELINQUENCY PROCEEDINGS*

par Bernard M. DICKENS**

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* Il s'agit d'une collaboration d'un professeur de la Faculté de droit de Toronto. L'auteur ne traite donc pas de la nouvelle *Loi de la protection de la jeunesse*, L.Q. 1977, c. 20.

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PLAN

1. Introduction

In the first sixty years after federal enactment in 1908[1] of the Juvenile Delinquents Act,[2] the question of the role of legal counsel for the juvenile accused of delinquency remained not only unanswered, but almost unasked.[3] Uncritical acceptance that courts exercising delinquency jurisdiction had remained faithful to the benign and protective intentions of their founders had for long shielded their practice from the scrutiny of advocates of due process. Lawyers rarely appeared in delinquency hearings in juvenile or family courts,[4] and their role in such appearances had never been defined. Indeed, the provision in the Juvenile Delinquents Act that:

> "It is the duty of a probation officer ... (b) to be present in court in order to represent the interests of the child when the case is heard"[5].

tended to suggest that lawyers might have no role at all.

Growing disappointment with the performance of juvenile courts, aggravated by successive failures of recent proposals for federal legislative reform,[6] has brought the courts under more critical attention, and inspired the belief that if they cannot be reformed from outside,[7] the inequities of their practices can at least be mitigated from within. Increasing emphasis upon observance of due process requirements may also reflect both a history of unattained goals of achieving juvenile welfare through the justice system, and a conservative response to failed hopes of redirecting the lives of wayward youths. In 1975, a Solicitor General's

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1. S.C. 1908, c. 40.
2. R.S.C. 1970, Chap. J-3, amended 1972, c. 17, s. 2(2).
3. For modern identification of the issue, see G. Johnston, "The function of Counsel in Juvenile Court" (1969), 7 *Osgoode Hall L.J.* 199.
4. Courts of delinquency jurisdiction are variously named *Juvenile Courts, Family Courts,* or *Juvenile and Family Courts.* In this article they will be described as juvenile courts.
5. Section 31.
6. See R.G. Fox and M.J. Spencer, "The Young Offenders Bill: Destigmatizing Juvenile Delinquency" (1972), 14 *Crim. L.Q.* 172, R.G. Fox, "New Moves in Canada's Search for Juvenile Justice" (1976), *Crim L.R.* 665, R.G. Fox, "Young Persons in Conflict with the Law in Canada" (1977), 26 *Intl. and Comp. L.Q.* 445 and Solicitor General of Canada, "Highlights of the Proposed New Legislation for Young Offenders" (1977), 37 *Crim. R. (N.S.)* 113.
7. On the interaction of federal and provincial initiatives for reform, see J. Osborne, "Juvenile Justice Policy in Canada: The Transfer of the Initiative" (1979), 2 *Can. J. of Family Law* 7.

Committee proposing (unsuccessfully) new legislation, understated of the 1908 legislation that:

> "while espousing help, and understanding of the problems experienced by young persons, this approach has not totally avoided the development of characteristics similar to the adult criminal process ... elements such as deterrence, punishment, detention and the resulting stigma have surfaced in the juvenile justice process despite initial intentions to the contrary".[8]

2. Background and Purpose of Delinquency Law

The Juvenile Delinquents Act of 1908 incorporated the historic *parens patriae* jurisdiction of the English Court of Chancery, according to which the court discharged the sovereign's responsibility to exercice quasi-parental stewardship over the defenceless, such as the young and the mentally impaired. The constitutional obstacle to incorporation in federal legislation of this protective and welfare purpose of the civil *parens patriae* jurisdiction was that it might appear better accommodated under civil provincial powers, as allocated by the British North America Act, 1867.[9] Accordingly, to justify federal control, "delinquency" was treated as conduct and made a criminal offence. Section 3(1) of the Act provides that:

> "The commission by a child of any of the acts enumerated in the definition "juvenile delinquent" in subsection 2(1),[10] constitutes an offence to be known as a delinquency, and shall be dealt with as hereinafter provided."

As an offence, delinquency falls under the criminal law power given to federal authority under section 91(27) of the 1867 Act, the validity of which was confirmed unanimously by seven judges of the Supreme Court of Canada in *Attorney-General of British Columbia* v. *Smith.*[11]

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8. Report of the Solicitor General's Committee on Proposals for New Legislation to Replace the Juvenile Delinquents Act, *Young Persons in Conflict with the Law* (Ottawa: Information Canada, 1975), p. 3.

9. 30 & 31 Vict., c. 3.

10. See text below, following note 11.

11. (1967), 65 D.L.R. (2d) 82 (S.C.C.). For criticism of this decision, see C.H. McNairn, "Juvenile Delinquents Act Characterized as Criminal Law Legislation" (1968), 46 *Can. Bar R.* 473, and for more general discussion, L. Wilson, "Juvenile Justice and the Criminal Law Power" (1977), *Sask. L.R.* 253.

Subsection 2(1) of the 1908 Act comprehensively provides that "juvenile delinquent" means:

> "any child who violates any provision of the *Criminal Code* or of any federal 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 any federal or provincial statute."

This definition covers not only criminal conduct, therefore, but also so-called "status" offences such as sexual immorality for which adults would not face criminal proceedings. Section 3(2) may appear to mitigate the harshness of this exercise of the federal criminal law power, but also to confuse the justification of the 1908 Act, in providing that:

> "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."

Legislative ambivalence towards the "offence to be known as a delinquency"[12] and a child who "shall be dealt with, not as an offender, but as one ... requiring help and guidance"[13] reflects historic and modern conceptual uncertainty as to how misbehaving children and adolescents should be treated, and vagueness as to the interaction of criminal process and social rehabilitation. It has been observed of the juvenile court that "The court has always been a hybrid - a legal creation but a social administrative institution, a bridge between law and the social sciences".[14]

Canadian history reflects European history in the duality of its approach to deviant or unacceptable behaviour in the young, in equating deprived children with dangerous children.[15] Neglected children in need of control and supervision were considered worthy of sympathy, but were also closely identified with delinquents. They were considered, if not actually criminal, at least pre-criminal.[16] The

12. 1908 Act, section 3(1), above.

13. Section 3(2), above.

14. G. Parker, "The Juvenile Court Movement" (1976), 26 *U. of Toronto L.J.* 140.

15. See S. Houston, "Victorian Origins of Juvenile Delinquency: A Canadian Experience" (1972), 12 *History of Ed. Q.* 254.

16. The history of the Canadian juvenile justice system leading to enactment of the 1908 legislation is admirably explored by Jeffrey S. Leon in "The Development of Canadian Juvenile Justice: a Background for Reform" (1977), 15 *Osgoode Hall L.J.* 71.

potential of needful children growing up without proper parental guidance to fall into criminal activity, notably in depredations upon property, was considered to justify their legal direction into correct schooling and training in the virtues of industry. There was a perceived need for "protect[ing] and reclaiming destitute youths, exposed either by the death or neglect of their parents to evil influences and the acquisition of evil habits, which in too many cases, lead to the commission of crime".[17] Society aimed at once to protect neglected children from themselves and others and to protect others from neglected and therefore potentially criminal children. Thus,

> "In drafting specific delinquency legislation, the reformers undertook the delicate task of attempting to design new procedures which promoted simultaneously the welfare and best interests of children through a philosophical approach similar to that of the *parens patriae* doctrine and prevented and controlled the misbehaviour of children *in a criminal law context*".[18]

The benign and protective purpose of the Juvenile Delinquents Act is expressed in section 38, which provides that:

> "This Act shall be liberally construed in order 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 his parents, and that as far as practicable every juvenile delinquent shall be treated, not as criminal, but as a misdirected and misguided child, and one needing aid, encouragement, help and assistance."[19]

Consistently with the aim to benefit the child and to treat him "not as criminal, but ... misdirected and misguided", the process of the juvenile court was designed to reflect a welfare hearing rather than the rigid procedural formality of criminal process.[20] Section 17 of the 1908 Act provides that:

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17. Preamble to *An Act to Incorporate the Boys' Industrial School of the Gore of Toronto*, 1862, 25 Vict., c. 82 (Can.).

18. Leon, note 16 above, at pp. 72-73, emphasis in original.

19. Note that the section speaks of "a juvenile delinquent", showing its applicability only after a finding of delinquency, and not to a juvenile in process of trial for alleged delinquency.

20. This is historically traceable to the time when felony was capitally punished, and no power of criminal appeal existed except to stay execution of judgment upon grounds of procedural error. Criminal procedure developed highly refined technical rules, as lawyers for the convicted argued potentially lifesaving distinctions.

"(1) 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.

(2) No adjudication or other action of a juvenile court with respect to a child shall be quashed or set aside because of any informality or irregularity where it appears that the disposition of the case was in the best interests of the child".

It was in this spirit of informality and pursuit of children's best interests that Canadian juvenile courts functioned for several decades, under the control of non-legally qualified judges, without legally qualified presenters of cases against alleged delinquents, and without lawyers for the defendants. Probation officers and welfare workers, perhaps aspiring to judicial appointment, were influential in the process of the courts, and in determining the destiny of the youths who passed through them. Against this background, modern disillusionment has developed, not only with the lack of rehabilitative success of juvenile dispositions, but with the effects of juvenile process.

3. Sources of Disillusionment with Juvenile Process

a) Judgments

Critical literature and judicial decisions in the United States of America over the past decade or so have had an unavoidable influence upon assessments of the Canadian juvenile justice process. The strong pressure of American doctrinal writing was in itself likely to have permeated Canadian perceptions by cultural osmosis, in view of the relative sparseness of indigenous Canadian commentary, even had there not been a growing presence in Canada of sociological and related scholars trained in the schools of the U.S. Similarly, libertarian activism in U.S. courts led to a series of judicial decisions of the highest authority, which reflected upon the tenor of contemporary writing and exposed the essential ground-rules of juvenile law and procedure. These judgments sharpened Canadian comparative perceptions.

In the celebrated *Kent* case,[21] the U.S. Supreme Court rejected the view that juvenile court judges could ignore constitutional protections in addressing the personal, social and moral problems of alleged delinquents. The Court observed that:

21. *Kent* v. *United States*, 383 U.S. 541 (1966).

> "While there can be no doubt of the original laudable purpose of juvenile courts, 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 constitutional guarantees applicable to adults ... There is evidence, in fact, that there may be grounds for concern that the child receives the worse of [two possible] worlds: that he gets neither the protections accorded to adults nor the solicitous care and regenerative treatment postulated for children."[22]

A second landmark case the following year, the *Gault* case,[23] demonstrated the substance of the Supreme Court's concern. Invoking the procedural standards of the U.S. Bill of Rights,[24] the Court was devastatingly critical of the utter inadequacy not only of juvenile courts' performance, but of state laws under which intrusion into the life of a minor found delinquent could considerably exceed powers of criminal punishment.

The *Gault* case involved a youth aged 15 who was charged with making an obscene telephone call. Upon being found to have committed the offence, upon the most tenuous and poorly documented evidence, he was incarcerated in a state institution where he could have been lawfully detained until reaching the age of 21. Had he been aged 18 and therefore liable to conviction as an adult, the maximum punishment imposable would have been a fine of between $5 and $50, or imprisonment for a period not exceeding two months. The Supreme Court identified a long list of procedural improprieties in the juvenile process leading to Gerald Gault's incarceration from the point of arrest, through the obtaining of a "confession", to the point of disposition. It was noted that:

> "Under our Constitution, the condition of being a boy does not justify a kangaroo court. The traditional ideas of Juvenile Court procedure, indeed, contemplated that time would be available and care would be used to establish precisely what the juvenile did and why he did it - was it a prank of adolescence or a brutal act threatening serious consequences to himself or society unless corrected? ... The essential difference between Gerald's case and a normal criminal case is that safeguards available to adults were discarded in Gerald's case."[25]

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22. At pp. 555-6.

23. *In re Gault*, 387 U.S. 1 (1967).

24. That is, the first Ten Amendments to the Federal Constitution of 1789.

25. 387 U.S. 28-9, *per* Fortas, J.

The Supreme Court reaffirmed these principles in 1970 in the *Winship* case,[26] in noting that the need for proof beyond a reasonable doubt is required in juvenile as well as in adult cases, Brennan, J. observing that "The same considerations that demand extreme caution in fact-finding to protect the innocent adult apply as well to the innocent child".[27]

Since intrusions into juveniles' lives upon a finding of delinquency may exceed those imposable upon adult offenders, as the *Gault* case showed, the need for caution may indeed be greater. It must also be recalled that under current Canadian law, delinquency includes "status" offences for which adults would not be liable at all, such as sexual conduct, and absence from home or school.[28] Were the demonstrated results of systems of rehabilitative management of delinquents capable of promising relief to those found delinquent and to society at large from their subsequent wrongdoing, an argument for at least partial surrender of traditional procedural protections might be maintainable. The general failure of those systems casts further doubt, however, upon the values that should be surrendered in their cause.

The Supreme Court of Canada, in its decision of October 1978 in *Morris* v. *The Queen,*[29] has given additional point to the need to afford those charged with delinquency full legal protections. The Alberta Court of Appeal's decision of May, 1977 in *R.* v. *MacKay, R.* v. *Willington*[30] had upheld the validity of the proclamation, under section 2(2) of the Juvenile Delinquents Act, that in Alberta a female was a "child" under the Act when under the age of 18 but that a male was under the Act's provisions only when under the age of 16. While clearly discriminatory on grounds of sex, the proclamation of the Governor in Council was held not to violate the Bill of Rights,[31] since the discrimination was not unfavourable. It was construed not to penalise females between 16 and 18 by exposing them to juvenile courts, nor males of the same age by denying them access, but to afford females the greater privilege and protection of the court's

26. *In re Winship*, 397 U.S. 358 (1970).

27. At p. 365.

28. The Federal Solicitor General's most recent proposals for reform would exclude status offences. See Part 4, below.

29. (1978), 43 C.C.C. (2d) 129.

30. (1977), 36 C.C.C. (2d) 349.

31. R.S.C. 1970, Appendix III.

welfare-oriented concern.[32] The informality of process permitted under section 17,[33] and the tolerance of "informality or irregularity where it appears that the disposition of the case was in the best interests of the child",[34] is shown in a different light in view of the *Morris* decision.

The *Morris* case arose when a 19 year old, being tried for breaking and entering, testified in direct examination that he had never been arrested or convicted of a criminal offence. At cross-examination, he admitted four findings against him of delinquency, arising from incidents of attempted theft, wilful damage, theft and illegal possession, and breaking and entering. In charging the jury, the trial judge observed that "it seems quite clear to me that in his evidence in chief, the accused lied".[35] Morris appealed against his conviction without success to the Quebec Court of Appeal, and was granted leave to appeal further to the Supreme Court of Canada. Here, the only issues argued concerned the propriety of the trial judge permitting cross-examination upon the appellant's record as a juvenile, and the trial judge's charge to the jury upon the denial of earlier arrests or convictions made in direct examination.

Spence, J. in the Supreme Court noted that the absence of arrests need not be inconsistent with findings of delinquency, since the acts alleged "were of a minor nature in the case of a juvenile and it is quite within the realm of possibility that he should have been summonsed (sic) to appear before the Juvenile Court Judge, but not arrested ... Therefore, in so far as the learned trial Judge expressed to the jury the opinion that the accused had lied when he said he had never been arrested, such charge was plainly incorrect".[36] Further, and more significantly, the record of the four so-called "convictions" showed that hearings or dispositions in the first, third and fourth had been adjourned *sine die*,[37] and placement in a boys' farm and

32. Accordingly, it also left females liable to proceedings for status offences, for which males of the same age would not be liable as such. A male sex partner of the same age as the female might be charged as an adult with contributing to her delinquency, under section 33 of the Act, but this does not necessarily follow; see *R. v. Frost* (1977), 37 C.C.C. (2d) 65 (Man. Prov. Ct.).

33. See text above, following note 20.

34. Section 17(2), *ibid.*

35. (1978), 43 C.C.C. (2d) 134.

36. *Ibid.*, at p. 135.

37. Section 16 of the Juvenile Delinquents Act provides that "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*".

training school at the second hearing had been cancelled. Accordingly, no convictions were registered on the appellant's juvenile record.[38]

The juvenile record was considered relevant at trial under both section 593 of the Criminal Code, which provides that:

> "Where, at trial, the accused adduces evidence of his good character the prosecutor may, in answer thereto, before a verdict is returned, adduce evidence of previous conviction of the accused for any offences",

and under section 12 of the Canada Evidence Act,[39] which provides that:

> "(1) A witness may be questioned as to whether he has been convicted of any offence, and upon being so questioned, if he either denies the fact or refuses to answer, the opposite party may prove such conviction".

Spence, J. considered that these sections applied only to *conviction* of any *offence*, and that, even if on Morris's record there had been a finding of delinquency, this could not be considered a "conviction", because section 3(2) of the Juvenile Delinquents Act provided that a child adjudged to have committed a delinquency shall be dealt with "not as an offender".[40] Further, the options provided in section 20 as to disposition "do not include or even refer to the conviction of the child".[41] Accordingly, "it can only be concluded that it was the express policy of Parliament that a child found to be a juvenile delinquent should not be stigmatized as one who had been convicted".[42] Spence, J. determined to allow the appeal and quash Morris's conviction, and three other justices, including Laskin, C.J.C., concurred in his decision and reasoning. They were in a dissenting minority however, since five justices ruled to dismiss the appeal, and thereby approved the use made at trial of the juvenile record.

Section 20(1) provides that "In the case of a child adjudged to be a juvenile delinquent the court may, in its discretion... (b) adjourn the hearing or disposition of the case from time to time for any definite or indefinite period". Adjournment *sine die* is a frequent form of disposition, or non-disposition, in juvenile courts.

38. Pratte, J. noted, however, that the written record was not complete; see (1978), 43 C.C.C. (2d) at p. 144.

39. R.S.C. 1970, c. E-10.

40. See text above, before note 12.

41. (1978), 43 C.C.C. (2d) 139.

42. *Ibid.*

In a lengthy, detailed judgment for the majority, Pratte, J. recognized that conviction could not stand if the judge had incorrectly formed the opinion he expressed to the jury that the defendant had lied. In that the defendant himself admitted to "convictions", Pratte, J. found that there was evidence of untruthfulness, and that the opinion of the trial judge was therefore validly formed. He considered the adjournments *sine die* to be under section 20(1) of the Juvenile Delinquents Act, applicable to "a child adjudged to be a juvenile delinquent", rather than under section 16,[43] and that adjudication was for violation of provisions of the Criminal Code. Pratte, J. discounted the reasoning of Spence, J. that the appellant had no understanding of the legal significance of the distinction between a "conviction" and an adjudication of delinquency, and that he should accordingly not be bound by his repetition of the words put to him in cross-examination. Indeed, Pratte, J. denied that there was any such significance.[44]

The Supreme Court majority considered the main issue in the case to be whether cross-examination of the appellant upon his record as a juvenile was admissible in evidence under section 12 of the Canada Evidence Act[45] or under section 593 of the Criminal Code.[46] It was concluded that, since the Juvenile Delinquents Act was federally enacted pursuant to the criminal law power,[47] and defines "delinquent" to include a proven violator of the Criminal Code, the expression "any offence" in section 12 of the Canada Evidence Act clearly includes such a delinquency.[48]

Regarding the argument that invoking the juvenile record violates the intent and spirit of the Juvenile Delinquents Act, it was observed that, whatever the virtue of these objectives and the desirability of their being attained,

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43. See note 37 above for sections 16 and 20(1).

44. (1978), 43 C.C.C. (2d) 151.

45. See text above at note 39.

46. See text above following note 38.

47. *Attorney-General of British Columbia* v. *Smith*, see note 11 above.

48. Pratte, J. would "express no opinion as to whether the meaning of the word 'offence' as used in s. 12(1) of the *Canada Evidence Act* should otherwise be restricted so as to exclude certain kinds of delinquencies"; (1978), 43 C.C.C. (2d) 149. This failure to state that status offences are inadmissible under section 12 leaves open the possibility of finding that they may be admitted as "offences", although the contrary may appear to follow from the reasoning given for Criminal Code violations.

> "A law that would encourage the successful suppression of truth could hardly be said to be conducive to the rehabilitation of delinquents, be they juvenile or not. If a witness does not speak the truth, the higher interests of justice require that the truth be told to the jury."[49]

Had Morris not testified in examination in chief as to a blameless past, the juvenile record might not have been put to him in cross-examination, and that perhaps is the narrow lesson defendants and their lawyers may learn from the case. At a broader level, however, the case indicates that a record of adjudication of delinquency can have a significant consequence for a juvenile who as an adult may be charged with an offence, and that this extends beyond liability to heavier sentence to affect the very conduct of the trial itself. The juvenile record will not be tolerated to be suppressed if an adult defendant gives any evidence suggesting his good character. A juvenile delinquent may accordingly compromise his right when an adult to give evidence of good character.

Evidence of good character may be given not only by its express claim, but by inference and even by inadvertence. An accused's evidence of having earned an honest living for four years has been held to justify cross-examination as to character and past convictions,[50] as has evidence upon a larceny charge of previous occasions of returning lost property to its owners[51]. An adult with a juvenile record, even based upon his induced and uncomprehending admission, may accordingly be at disadvantage in defending a criminal charge. A juvenile at risk of a delinquency adjudication may be indelibly impressed with bad character[52] and the need for legal representation in the face of that prospect appears as obvious as the thought that a probation officer can adequately "represent the interests of the child when the case is heard"[53] is ludicrous.

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49. *Per* Pratte, J. at (1978), 43 C.C.C. (2d) 151.

50. *R.* v. *Baker* (1972), 7 Cr. App. R. 252, cited *ibid.* at p. 156.

51. *R.* v. *Samuel* (1956), 40 Cr. App. R. 8, cited *ibid.*

52. See also *R.* v. *D.G.* (1978), 42 C.C.C. (2d) 273 (P.E.I.S.C.), holding that a juvenile charged with delinquency in a form constituting an indictable offence under the Criminal Code may be subjected to compulsory fingerprinting under the Identification of Criminals Act, R.S.C. 1970, c. I-1, s. 2, since he is "charged with... an indictable offence". See similarly, *R.* v. *A.N.* (1978), 39 C.C.C. (2d) 329 (B.C.C.A.).

53. Juvenile Delinquents Act, section 31.

b) Theories

Modern theorists of deviant behaviour have linked the juvenile justice system and recidivism of delinquents in a cause and effect relationship. Proponents of labelling theory in particular contend that contact with the system can have serious unintended negative consequences, in language related to the conclusion of Spence, J. in the *Morris* case that a child found delinquent should not be "stigmatized".[54] The labelling approach focuses on the social definition of norms which identify violators, and thus marks a departure from theories seeking to explain inherent factors distinguishing violators of the law from conventional, law-abiding people.[55] Labelling theorists are seen as developing earlier symbolic interactionist theory,[56] which accepts that human nature is relatively plastic and subject to change, and this latter theory itself emerges out of the wider and more traditional field of social psychology, which links sociology and psychology.

These related perspectives, which are overlapping although not concentric, theorize that human behaviour reflects changing concepts of self. Children's views initially are necessarily based upon relations with parents, but children acquire new views upon interaction with new groups in the socializing process of maturation and learn new definitions of behaviour. Labelling theorists go beyond symbolic interactionists, however, by intensifying a concern with the stigmatizing effects of arrest and trial upon delinquency suspects and the influence of disposition, and of correctional authorities and institutions, upon their image of themselves.[57] Accepting that society is characterized by cultural conflict resolved in favour of the powerful and influential, they conclude that delinquents, who are inherently normal and capable of restoration, will come to conceive of themselves in the terms in which legal officials address and label them, namely as delinquent individuals prone to commit violations of social norms.

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54. (1978), 43 C.C.C. (2d) 139.

55. This is, of course, a gross over-simplification of the evolution of theories of deviance. Causes of delinquency had traditionally been sought, however, in the inherent characteristics of individuals, in the organization of communities, and in the groups with which delinquents associated. Labelling theorists are concerned not with presumed or alleged causes of delinquency, but with societal reactions to it; see L.T. Empey *American Delinquency: Its Meaning and Construction* (The Dorsey Press, Homewood, Ill. 1978) 341 *et seq.*

56. See L.T. Empey, note 55 above at p. 313 *et seq.*

57. See A.R. Mahoney, "The Effect of Labelling Upon Youths in the Juvenile Justice System" (1974), 8 *Law and Society R.* 583.

Many youngsters misbehave, damage others' property, miss school, shoplift and engage in comparable depredations that are annoying without endangering the social structure. Chastisement and punishment may be an appropriate response to such misbehaviour. When their search for interest, excitement and challenge results in contact with the justice system and its officers, however, they may feel that they have become different from normal youths, and that they are inherently delinquent; they may feel helplessly beyond redemption. This view is reinforced in the destructive way society responds to them, suggesting to them that they are indelibly marked with bad character.[58] Frank Tannenbaum, who first advanced the tenets of labelling theory, described this as the "dramatization" of evil, and noted how:

> "The process of making the criminal ... is a process of tagging, identifying, segregating, describing, emphasizing, making conscious and self-conscious; it becomes a way of stimulating, suggesting, emphasizing, and evoking the very traits that are complained of ... The person becomes the thing he is described as being."[59]

Concentration on society's reaction to the deviant as itself being the source of delinquency, rather than upon the deviant himself as an individual, which developed in the 1960s, caused critical attention to be focused upon the juvenile court process as an easily visible expression of society's reaction to delinquency. Suspicion developed of moral crusaders - described as "moral entrepreneurs"[60] - who seek new rules by which new forms of deviance are created. They are typically led by people of influence and power, who move from an elevated social status to change people beneath them.[61] Upon the enactment of new deviance-defining rules, enforcement machinery is created for implementation of the rules, resulting in new agencies and officials which cumulatively furnish a bureaucracy. The bureaucracy employs functionaries to perform mechanical tasks of enforcement of the rules against individuals, the employees being primarily motivated by the language of the rules

58. This may indicate the inherent vice of the Supreme Court majority's reasoning in the *Morris* case, although the actual conduct involved there was repetitious and not necessarily to be dismissed as youngsters' typical misbehaviour.

59. F. Tannenbaum, *Crime and the Community* (Columbia U.P., New York: 1938) 19.

60. H.S. Becker, *Outsiders: Studies in the Sociology of Deviance* (Free Press, New York: 1963) 147 *et seq.*

61. See generally A.T. Platt, *The Child Savers: The Invention of Delinquency* (U. of Chicago Press, Chicago: 2nd. ed., 1977).

and the promotion of a personal career, rather than inspired by the vision of the original crusade. The rule-enforcers' self-interest compels them to urge the importance of the rules and to safeguard them against repeal and even against simplification. The interests of the individuals against whom the rules are enforced are disregarded behind a facade of fair sounding rhetoric.

Further, the rules are applied selectively in accordance with a sub-set of unstated rules. Thus, not all sexually active or promiscuous female minors are charged with status offences, and committed to state institutions for their "safety" until they reach majority or more. Not all youths who drink under age, or take vehicles without authority, or damage others' property, will be charged in juvenile court. Factors such as class and race enter into the decisions, as do instant assessments of whether the individuals in issue conform to the image the enforcers of rules have of violators of the rules. Stereotyping perpetuates and justifies itself by selecting for definition as violators and therefore for processing by the system the individuals conforming to the stereotype.[62]

Labelling theory has made the influential observation that:

> "Deviance is not a property *inherent* in certain forms of behaviour; it is a property *conferred upon* these forms by the audiences which directly or indirectly witness them".[63]

Identification of the dysfunctional effects of conferring the delinquency label, both on the person labelled and on the society that must support the labelling bureaucracy, has led to further proposals concerning the juvenile justice system, including decriminalization, diversion of individuals from the system, and more strict observance of due process within the system. A more political embodiment of these themes is in the concept, or theory, of radical non-intervention.[64]

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62. See the call for these unstated rules to be articulated, made by Kenneth Culp Davis in his seminal book *Discretionary Justice* (Louisiana State U.P., Baton Rouge, La.: 1969).

63. K.T. Erikson, "Notes on the sociology of deviance", in H.S. Becker, (ed.) *The Other Side: Perspectives on Deviance* (Free Press, New York: 1964) 11. In that the deviant informs society of what is wrong and what is acceptable conduct, he does not just disrupt social stability, but also preserves stability by the lesson his definition as a deviant teaches; see K. T. Erikson, *ibid.* at p. 15. Deviance thus has a social function, and may meet a social need of reinforcement of values. When a sizeable number of social members are deviants, the function of deviance fails, and the tests of deviancy, for instance regarding use of marijuana, come under pressure for reform.

64. The essence of radical theory is that delinquency is defined by the ruling segments of capitalist society, based on self-interest, to create social conditions making the

4. Responses to Disillusionment

a) Decriminalization

The general theme of removing unnecessary laws underlies much current thinking and many decriminalization proposals of the Law Reform Commission of Canada.[65] In the juvenile field, a Department of Justice Committee in 1965 recommended narrowing the scope of delinquency,[66] and this has been proposed in the Young Offenders Bill introduced in mid-November 1970, in the Young Persons in Conflict with the Law proposal which followed it in 1975, and in the latest proposal of 1977 for a Young Offenders Act. The federal Solicitor General has stated that:

> "The proposed legislation would deal only with offences against the Criminal Code and other federal statutes and regulations. The general offence of delinquency would be abolished and offences now included under the Juvenile Delinquents Act such as infractions of provincial statutes and municipal by-laws and status offences would be excluded.
>
> The general intent of this proposal is to exclude from the criminal law less serious misconduct that could better be dealt with by other social or legal means, leaving minor behavioral problems to the provinces under child welfare and youth protection laws."[67]

The conclusion is that status offences should be decriminalized and that the behaviour in question, whether, for instance, sexual or involving running away from home or truancy from school, should be treated, if at all, under civil provisions. This conclusion finds a place in the mainstream of modern thinking in North America.[68]

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children of the working-class delinquent, in order to employ legal machinery to maintain control over them; see L.T. Empey, note 55 above, at p. 369 *et seq.* See also E.M. Schur, *Radical Nonintervention: Rethinking the Delinquency Problem* (Prentice-Hall, Englewood Cliffs, N.J.: 1973).

65. See for instance Law Reform Commission Reports *Our Criminal Law* (1976) and *Sexual Offences* (1978), and Working Papers 2 (*The Meaning of Guilt: Strict Liability* (1974)) and 10 (*Limits of Criminal Law: Obscenity - a test case* (1975)).

66. See *Juvenile Delinquency in Canada: The Report of the Department of Justice Committee on Juvenile Delinquency* (Queen's Printer, Ottawa, 1965), Ch. XIV.

67. Solicitor General of Canada, "Highlights", note 6 above, at p. 116. For the burden this would cast upon provincial resources, see J. Osborne, note 7 above.

68. See generally L.E. Teitelbaum and A.R. Gough (eds.), *Beyond Control: Status Offenders in the Juvenile Court* (Ballinger Pub. Co., Cambridge, Mass.: 1977), especially chapters 1-6 and 9, which are mainly critical of status offence jurisdiction. Chapter 7 rather weakly defends retained jurisdiction; for a rather better defence, not necessarily applicable to Canada, see J.D. Gregory, "Juvenile Court Jurisdiction Over Noncriminal Misbehaviour: The Argument Against Abolition" (1978), 39 *Ohio State L.J.* 242.

b) Diversion

The conceptual partner of decriminalization is diversion. Where an offence strictly so-called appears to have been committed, it does not follow that the juvenile involved need be taken to juvenile court (to be called the Youth Court under the latest proposals). He may be diverted from the formal juvenile court process and its stigmatizing effect, except where he cannot be adequately dealt with by other social or legal means. The 1977 proposals:

> "do not contain provisions for the establishment of a formal screening mechanism to guide the diversion process but, rather, set out basic factors to be considered when screening and diversion is practised. For example, the legislation would stipulate that, when considering whether to invoke the formal procedure of the court rather than using alternative social and legal measures, regard shall be had to factors such as the following:
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> — the seriousness of the alleged offence;
>
> — the previous history of the young person in respect of offences;
>
> — the manner in which the young person has responded to alternative social and legal measures in the past;
>
> — the willingness of the young person to participate in a plan to use alternative social or legal measures".[69]

Ironically, the sensitivities and disillusionment which have generated the call for diversion, may be applied to condemn it. Using "diversion" language to avoid stigmatization of "delinquency" may appear simply to mirror the use in the 1908 Act of "delinquency" and "adjudged to be a juvenile delinquent" to avoid references to "crime" and "convicted".[70] It may be anticipated that participation in diversion programmes might in time, perhaps a short time, become the new source of stigmatization, as did the juvenile court itself. A greater vice of diversion, however, may be its effect of inducing a young person, his family and community to accept that he has committed a crime, so as to be eligible for diversion; that is, to accept an official's stereotyped pre-judgment, or label, of himself as an offender, while he foregoes entitlement to legal representation and due process. Diversion, in short, may simply relocate the inequities of the present juvenile justice system at a point in advance of the juvenile court, where arbitrary, unexplained and non-rationalized discretion may be exercised

69. Solicitor General of Canada, "Highlights", note 6 above, at p. 117.

70. Although the purpose of separating young from adult offenders may have reflected the fear of criminal infection or contamination from personal association.

informally but decisively by such persons as now serve as police or probation officers. Further, a young person accepting a diversion scheme but failing to comply with its terms may become subject to multiple punishments with impaired defences and accumulated prejudice. From the perspective of legal due process, diversion may achieve less advantage than it appears at first to promise.

c) Due Process

The response to disillusionment with the juvenile justice system of calling for observance of due process is not confined to seeking regularity of proceedings simply in juvenile court. Accepting that the entire involvement of a juvenile with the process of justice is inherently threatening, from initial stigmatization through to probably ineffectual if not positively harmful disposition, which despite the official rhetoric a juvenile is likely to see simply as punishment, it appears that strict observance of legally mandated procedures is required at every point of his engagement with the machinery of law-enforcement. This is certainly no less so when the delinquency alleged involves a status offence, not chargeable against an adult. This reinforces the desirability of legal representation being available.

A person whom the police propose to charge with criminal illegality is entitled to contact a lawyer. A juvenile will quite likely have no obvious lawyer to contact, but in a number of communities sources of legal assistance exist and if a juvenile cannot himself locate them, he should at least be given an opportunity to contact a parent or friend who can act on his behalf. The presumption of innocence until guilt is proven beyond reasonable doubt applies to a juvenile no less than to an adult[71] and is not displaced by the triviality of the circumstances[72] or by the suspect conceding the accusation made against him. Indeed, the juvenile's legal rights may be in need of protection particularly at the point of police questioning; it has been noted that:

> "Research in developmental psychology suggests that the cognitive and emotional characteristics of juveniles, coupled with the circumstances inherent in police interrogations, might render very infrequent the assertion of the right to silence by juveniles".[73]

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71. See B. Kaliel, "Civil Rights in Juvenile Courts" (1974), 12 *Alberta L.R.* 341 at p. 343.

72. Even trivial matters, such as in status offences, may result in dispositions which have a major and possibly permanent effect upon juveniles' lives.

73. J.T. Grisso and C. Pomicter, "Interrogation of Juveniles: An Empirical Study of Procedures, Safeguards, and Rights Waiver" (1977), 1 *Law and Human Behavior* 321. The study does not fully support the suggestion quoted.

Further, pre-trial bail issues[74] and conditions of pre-trial detention may require a lawyer's attention.[75]

When a case reaches juvenile court, section 9(1) of the Juvenile Delinquents Act provides that where the conduct complained of is an indictable offence, under the Criminal Code or otherwise, and the accused juvenile is over the age of 14, the judge may waive juvenile court jurisdiction and order proceedings in the adult court by indictment under the Criminal Code, provided that:

> "the [juvenile] court is of the opinion that the good of the child and the interest of the community demand it".[76]

The evidence and assertions upon which the juvenile court reaches the opinion that its jurisdiction should be waived are often untested and may be erroneous.[77] Since a transferred juvenile becomes liable upon conviction on indictment to disposition under the Criminal Code,[78] the issue before the juvenile court is of profound significance to him and is worthwhile contending.[79] Even if the hearing on transfer is classified as administrative rather than judicial, it is quasi-judicial in that the *audi alteram partem* principle must be observed.[80]

When a juvenile court conducts a case, it shall be by the summary process prevailing, with appropriate adjustments, under provisions of the Criminal Code, except regarding appeals.[81] Criminal Code provisions prescribing time limits for the commencement of prosecutions for offences against the Code apply, as

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74. See the Juvenile Delinquents Act, section 15 and B. Kaliel, note 71 above at p. 346.

75. See P.A. Shamburek, "A Due Process Dilemma: Pretrial Detention in Juvenile Delinquency Proceedings" (1978), 11 *John Marshall J. of Practice and Procedure* 513.

76. Section 9(1). Section 39 also contains a waiver or transfer power, in that a juvenile found to have offended other than by an indictable offence under the Criminal Code may be dealt with under a provincial child welfare statute applicable to him, instead of under the Juvenile Delinquents Act, if that is in his best interests.

77. See "Juvenile Waiver Hearings and the Hearsay Rule — The Need for Reliable Evidence at the Critical Stage" (1978), 12 *Valparaiso Univ. L.R.* 397.

78. See *R.* v. *F.* (1974), 20 C.C.C. (2d) 11 (B.C.S.C.).

79. A transfer order should only be made for crime of a most serious nature and the juvenile and his record indicate no other solution; *R.* v. *Mero* (1976), 30 C.C.C. (2d) 497 (Ont. C.A.).

80. See *R.* v. *R.* (1969), 70 W.W.R. 292 (B.C.S.C.)

81. See the Juvenile Delinquents Act, section 5(1) (a).

necessarily adjusted, to juvenile court proceedings.[82] It has been seen that section 17 of the Juvenile Delinquents Act tolerates informality,[83] but other provisions of the Act mandate that due notice of the hearing shall be served on juveniles' parents, guardians or near relatives,[84] those served having the right to be present at the hearing, and provisions deal with such matters as limited publicity and privacy of hearings.[85]

The summary hearing shall be conducted in all regards as in an adult court, notwithstanding section 17.[86] Chief Justice Adamson of Manitoba was upheld by the Supreme Court of Canada[87] in his observation that:

> "Section 17 of the Act ... does not deprive an accused of any of the safeguards which are fundamental to our criminal jurisprudence: (1) It does not take away the right to full answer and defence; (2) Accused children should not be questioned without being warned or in the absence of parent or counsel; (3) An alleged statement or confession should not be used without it being established that it was voluntary; (4) An accused child cannot be required to give evidence against himself; (5) Witnesses who understand the meaning of an oath must be sworn; (6) The Act does not do away with open and fair trials".[88]

Accordingly, there must be an opportunity for adequate representation,[89] an adequate arraignment, explaining the substance of the

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82. *Ibid.*, section 5(2); see, however, section 5(1) (b) regarding summary conviction offences where no time is specially limited for making any complaint or laying any information. No time limitation exists unless one is prescribed for the particular substantive offence; *R.* v. *H. (No. 2)* (1976), 30 C.C.C. (2d) 513 (Ont. H.C.).

83. See section 17(1) and (2) in text above at note 20.

84. See section 10. Written notice specifying the alleged delinquency is a condition precedent to the trial judge having jurisdiction; see *R.* v. *Cote* (1976), 31 C.C.C. (2d) 414 (Sask. Q.B.).

85. See sections 12 and 24 and *Re Juvenile Delinquents Act* (1975), 29 C.C.C. (2d) 439 (Ont. Prov. Ct.). B. Kaliel points out that an open and public trial may not necessarily be precluded by section 12: see note 71, above, at pp. 348-350. See also *R.* v. *Gerald X* (1958), 25 W.W.R. 97 (Man. C.A.), Adamson C.J.M. at p. 112, and *contra R.* v. *H. and H.*, (1947) 1 W.W.R. 49 (B.C.S.C) Manson, J. at pp. 54-56.

86. Section 17(1) permits informality only where "consistent with a due regard for a proper administration of justice".

87. *Gerald Smith* v. *R.*, (1959) S.C.R. 639.

88. *R.* v. *Gerald X*, note 85 above.

89. Adamson, C.J.M., *ibid.* at p. 111 observed that, "In the case of an undefended child it is imperative that he be given that opportunity to have a parent, guardian or

delinquency alleged and a clear occasion must be given to plead guilty or not guilty; a mere invitation to make a statement in response to the charge alleged will not suffice,[90] although it remains uncertain whether taking the plea must be as formal as in an adult court.[91]

Upon a plea of not guilty, or upon an ambiguous response to the arraignment, which must be treated as a plea of not guilty, trial shall proceed and the prosecution's evidence shall be taken first. To establish a juvenile's age and identity, evidence may be taken before arraignment, but it has been held improper to take evidence from a juvenile's mother and a probation officer before arraignment relating to the substance of the charge and whether the accused had any history of having been in trouble.[92] It must be shown that any confession given by the juvenile to a person in authority was made voluntarily, as in the case of an adult.[93] An opportunity must be given the juvenile to cross-examine prosecution witnesses and to call defence witnesses and give evidence himself.[94] Similarly, for an adjudication of delinquency, whether for conduct constituting an indictable offence under the Criminal Code or for a mere status offence, there must be proof beyond reasonable doubt.[95] Upon such an adjudication, a juvenile has a right to speak to sentence.[96]

This may be a point at which counsel for the juvenile may make a major contribution to the proceedings, by questioning the probation officer whose report is relevant to disposition. Questions may concern alleged facts about the juvenile and his home circumstances the probation officer considers significant, the recidivism rate associated with detention in any institution the report considers suitable for a custodial disposition and, for instance, the reasons for disfavouring less invasive alternative

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counsel present and if he is not given that opportunity the magistrate has no jurisdiction". In the Supreme Court of Canada, see note 87 above, the proposition was accepted, except regarding lack of jurisdiction.

90. See *Gerald Smith* v. *R.*, note 87 above. See generally B. Kaliel, note 71 above, at p. 346.

91. See the different positions of Locke and Martland, J J. and Cartwright, J. in *Gerald Smith* v. *R.*, note 87 above.

92. *R.* v. *B.*, (1956) 19 W.W.R. (N.S.) 651 (B.C.S.C.).

93. On a coerced "confession", see *R.* v. *Jacques* (1959), 29 C.R. 249 (Que. Welf. Ct.).

94. *R.* v. *T.*, (1947) 2 W.W.R. 232 (B.C.S.C.).

95. *R.* v. *Moore* (1974), 22 C.C.C. (2d) 189 (B.C.C.A.).

96. See *R.* v. *B.*, note 92 above, where upon arraignment the juvenile replied, "That's right, sir", and was not permitted to speak further.

dispositions. Evidence to rebut allegations and conclusions in the probation officer's report may be introduced and alternative interpretations of the facts shown in the report may be offered. Effectiveness of challenge to the report may depend, of course, upon the time available for its consideration and for preparing evidence and argument in rebuttal. Accordingly, if the report is not made available before trial, an adjournment may have to be sought after adjudication in order that the disposition stage of the hearing shall take place only after time has been allowed for preparation.[97]

Consideration of a juvenile's involvement in criminal law-enforcement, from initial interrogation by police or other authorities upon suspicion, through to trial and sentence, and indeed beyond sentence to an appeal or other challenge,[98] shows the contribution his legal representative may make to observance of due process. The issue of the role of a lawyer for an accused juvenile may play in court may appear ambiguous, however, in light not of doctrine but of recent empirical evidence.

5. The Role of the Lawyer in Juvenile Court

Since the Juvenile Delinquents Act provides that it is a probation officer's duty "to be present in court in order to represent the interests of the child when the case is heard",[99] the question arises of whether a lawyer has any role in juvenile court.[100] Even in modern times, there has been resistance to the introduction of lawyers and their tendency to stiffen the due process component of trial in what is considered essentially a welfare-oriented tribunal.[101] Since no conflict between the interests of the state and the interests of the juvenile has been recognized in the traditional conceptualization of the juvenile court, procedures for conflict identification and resolution have been thought inappropriate.[102] The inadequacy

97. On the right to examine reports and other evidence, see B. Kaliel, note 71, above, at p. 353.

98. By section 37 (1) of the Juvenile Delinquents Act, appeal is generally possible only upon the grant of special leave by a supreme court judge. See Y.A. Lazor, "Appeals Under the Juvenile Delinquents Act" (1976) 24 *Chitty's L.J.* 334.

99. Section 31(b).

100. The draftsmen of the Juvenile Delinquents Act of 1908 thought seriously of excluding lawyers from juvenile courts; see Leon, note 16 above, at p. 102.

101. See J.L. Isaacs, "The Role of the Lawyer in Representing Minors in the New Family Court" (1962), 12 *Buffalo L.R.* 501.

102. See P. Erickson, "Legalistic and Traditional Role Expectations for Defence Counsel in Juvenile Court" (1975), 17 *Can. J. of Criminology and Corrections* 78, at p. 79.

of probation officers as representatives of juveniles is apparent, however, from at least three perspectives.

First, the principles of legal due process are becoming progressively clarified through a body of judicial decisions[103] which probation officers are not trained to find and still less to interpret and apply.[104] A number of principles are applicable, furthermore, at the pre-trial stage, but the probation officer's duty is to act only under direction of the court and to represent the juvenile's interests when "present in court".[105] It must be remembered that in all of the cases in which due process in court was clearly disregarded, probation officers were present, supposedly representing the juvenile's interests; they did not protest the impropriety, however, for instance to preserve appeal rights.

Second, section 32 of the Act provides that:

> "Every probation officer, however appointed, is under the control and subject to the directions of the judge of the court with which such probation officer is connected, for all purposes of this Act".

This may be inconsistent with the advocate's independence of the court, and dedication to his client's instructions, and may impair his function of monitoring judicial behaviour. There may be a sense in which a lawyer is an officer of the court, and the law of contempt places him under the control and subject to the directions of the judge. A lawyer's function, however, is to insist upon observance of the law, to challenge alleged irregularity committed, proposed or allowed by the judge, and to advise the court as to legal matters. A lawyer also has the power and duty to review such reports as a probation officer may submit, for instance as to sentence. It may be evident, therefore, that a lawyer's role differs from that which a probation officer is equipped and suited to discharge.

Third, a probation officer's duty is to represent the "interests" of the juvenile.[106] This reveals the compatibility of roles of probation officers and lawyers, since lawyers present to courts not their

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103. See Part 4(c) above.

104. See, for instance, *R.* v. *B.C.* (1977), 39 C.C.C. (2d) 469 (Ont. Prov. Ct.), where a 12 year old was charged with delinquency by murder, and complex legal questions of insanity arose.

105. Note 99, above. By section 31(d), a probation officer must follow court direction to take charge of a child before trial, but this affords no protection before a court becomes seized of a matter, for instance when police are conducting investigations.

106. Section 31(b).

clients' "interests", but their clients' "wishes". As advocates, they protect interests, since this is what their clients impliedly want, but their key function is to speak the words their clients wish courts to hear. Even if a lawyer personally considers his client's preferences ill-advised, and privately urges the client otherwise, his duty is to follow the client's "instructions". Accordingly, the lawyer addresses the court *for* the juvenile, while a probation officer addresses the court *about* the juvenile.

While this vision of the lawyer's role emerges with doctrinal clarity, it cannot be said that lawyers practising in juvenile courts have consistently perceived their functions in this light. When lawyers first began to appear in Canadian juvenile courts with any regularity, which is only in quite recent years and in most courts for little more than a decade,[107] a number were aware of, and conscious of being unprepared for, the different environment of welfare-directed informality, impressed with or at least uncritical of the courts' benign claims, and not necessarily persuaded that their young clients had "wishes" other than to get the proceedings finished as soon as possible. Many were duty counsel provided from public funds, who were not retained or appointed by the juveniles themselves, whose "instructions" the lawyers had little opportunity to seek. The lawyers who were not young and inexperienced had often gained their experience in civil family and welfare courts, where children were not parties and often too immature to express reasonable and far-sighted views. Accordingly, the lawyers lacked a clear or consistent model of their role.

A modern empirical study of the views of juvenile defence lawyers in Toronto[108] has shown them adhering to one of three main role models, described as the legalistic, the *amicus curiae* and the social work models.

(a) *The legalistic model* is that traditionally followed by the adversarial advocate. Its purposes include safeguarding legal rights of a defendant, contesting alleged legal improprieties of opponent or judge, representing only the defendant and not, for instance, his parents, insisting upon adequate exploration of technical law and strict observance of evidentiary requirements, seeking nothing less than the defendant's exoneration and, upon

107. See P.B. Chapman, "The Lawyer in Juvenile Court: 'A Gulliver among Lilliputians'" (1971), 10 *Western Ontario L.R.* 88.

108. I. Dootjes, P. Erickson and R.G. Fox, "Defence Counsel in Juvenile Court: A Variety of Roles" (1972), 14 *Can. J. of Criminology and Corrections* 132.

conviction, the least intrusive disposition. The court must not be misled, of course, but the lawyer is faithful to his client's presumption of innocence, and makes no concession to the possibility of guilt that the client does not expressly permit after full consultation and explanation. In a juvenile court, the rigidity of procedure may be permitted to be relaxed, consistently with section 17, but not to the prejudice of the accused.

(b) *The amicus curiae model* has counsel operate as an assistant to the court, mediating between all participants in its process, such as the judge and the accused, his parents, the probation officer and other case-workers and witnesses associated with the case. The *amicus* has no commitment to any particular outcome, but is concerned neutrally to assist the court's administration of justice by responding to requests for legal advice, spontaneously offering legal advice intended to be helpful to any participant and serving as a legal resource to all. Where an accused appears at risk of improperly being found liable, the *amicus* may advise on the availability of legal aid to provide an advocate, and where procedural or evidentiary irregularity appears likely, he will not simply draw attention to it, but will advise on how the irregularity may be prevented or overcome.

(c) *The social work model* has counsel committed only to the juvenile accused, but intent upon identifying his problems and meeting his needs through the court process. Acquittal may be seen as not necessarily in his best interests, since it may leave him without access to services which may otherwise be made available over either the short or longer term. A major part of the lawyer's function under this model is to consider and speak to disposition rather than to fight for the acquittal of a juvenile whose conduct may conceivably fall within the scope of the Juvenile Delinquents Act and the specific nature of the delinquency charged. The lawyer will carefully explain to the juvenile the ways in which the system is designed and intended to seek and serve his best interests.

The social work model and the *amicus curiae* model are not without appeal, and aspects of these role models can be present in individual juvenile court practise.[109] The social work model may be misconceived for a lawyer, however, since it duplicates the function better undertaken by the probation officer, who is trained to act in

109. On the blending in one lawyer of concepts of more than a single model, see I. Dootjes, P. Erickson and R.G. Fox, *ibid.* at p. 143. The article also distinguishes the attitudes of privately retained lawyers from those of lawyers supplied under legal aid schemes.

this role, and it supposes that the delinquency system is indeed a welfare system. It is a criminal law system, however, as the *Morris* case[110] clearly shows. If the juvenile has welfare needs, these should be addressed under non-criminal child welfare provisions, through provincial courts of civil jurisdiction if need be.[111] There is nothing to indicate that it is ever appropriate to secure a juvenile's welfare by participating in a justly avoidable finding of his delinquency. Section 20(1)(h) permits a child adjudged delinquent to be committed to the charge of a children's aid society or its analogy and section 21 provides that the child may thereafter be dealt with entirely under provincial civil law. This mechanism may apply, however, only after adjudication of delinquency, the indelible criminal effects of which were demonstrated in the *Morris* case.[112] Upon a delinquency finding, a juvenile's lawyer may indeed urge employment of the civil welfare mechanism as the most humane disposition, best likely to serve the juvenile's needs, but his eligibility to this form of disposition should do nothing to weaken resistance to the finding of delinquency.[113]

Similarly, the *amicus curiae* role is not appropriate for a lawyer appointed as advocate. A lawyer clearly appointed by the court to act as *amicus* must clearly discharge the many responsibilities of this historic[114] and most honourable office with objectivity and neutrality. A lawyer appointed as the defendant's advocate, however, even at public expense and without the defendant's express approval, must keep faith with the presumption of his party's innocence, unless the client clearly relieves him of that responsibility.[115] Departure from this standard of advocacy may

110. Note 29, above.

111. For confirmation that a child's need for protection under provincial child welfare legislation is to be established on the normal civil standard of proof on a balance of probabilities, see *Re B and Children's Aid Society of Winnipeg* (1975), 64 D.L.R. (3d) 517 (Man. C.A.).

112. Note 29, above.

113. Relaxing resistance to an adverse finding may also be a breach of professional ethics. *The Rules of Professional Conduct of the Law Society of Upper Canada*, for instance, note that "The lawyer should never waive or abandon his client's legal rights... without his client's informed consent"; see *Professional Conduct Handbook* (1978), Rule 8, commentary 5, p. 22.

114. See the instructive article by E. Angell, "The Amicus Curiae: American Development of English Institutions" (1967), 16 *Int. and Compar. L.Q.* 1017.

115. On assessment of whether a juvenile is able to instruct counsel to enter a plea of guilty, see Leon "Recent Developments in Legal Representation of Children: A Growing Concern with the Concept of Capacity" (1978), 1 *Can J. of Family Law* 375 at p. 420.

offend against legal professional ethics. *The Rules of Professional Conduct* of *The Law Society of Upper Canada,* for instance, state that:

> "In adversary proceedings the lawyer's function as advocate is openly and necessarily partisan. Accordingly, he is not obliged... to assist his adversary or advance matters derogatory to his own client's case."[116]

A lawyer who determines to be less than partisan by unilaterally detaching himself from fidelity to his party's innocence and seeking to render legal services to all interests in the case may prejudice not only his client, but the integrity of the judicial process and of his own profession; for the advocate, neutrality is betrayal.

To conclude that the lawyer can conscientiously act only as an advocate according to the traditional legalistic model may at first seem inadequate, since it begs the question of whether juvenile delinquency proceedings are "adversary proceedings".[117] The question of what they are is more easily answered than the question of what they should be.[118] They are adversary proceedings, because they are criminal proceedings. They originate from exercise of the federal criminal law power, are to be conducted in accordance with due process in criminal matters, and may result in a finding of enduring criminal consequence. Disposition may differ from that of adult offenders, because at this point "The action taken shall, in every case, be that which the court is of opinion the child's own good and the best interests of the community require".[119] Accordingly, after proper determination of delinquency, disposition may be undertaken in the spirit of section 38[120] and by the informality permitted by section 17.[121] For criminal proceedings up to the point of establishing guilt to be less than adversarial, however, and for the state to compel or require any measure of collaboration by the

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116. *Professional Conduct Handbook* (1978), Rule 8, commentary 13, p. 24.

117. *Ibid.*

118. For alternative models of legal process in delinquency hearings, see K. Catton, "Models of Procedure and the Juvenile Courts" (1976), 18 *Crim. L.Q.* 181. She concludes that "It perhaps is a significant advancement that children are coming more to be accorded Due Process protections in the courts. This may be an indication that the child's status is being elevated somewhat in our society. Perhaps the child is now being seen as one who does in fact possess rights"; at p. 200.

119. Juvenile Delinquents Act, section 20(5).

120. See text above, at note 19.

121. See text above, at note 20.

criminal defendant or his legal representative in enabling the state to prevail to conviction, would be intolerable tyranny.[122]

It may be objected that the adversary system is in conflict with the goal of rehabilitation,[123] in that it encourages in the accused a combative spirit of justified resistance to law-enforcement authorities personified in police and prosecutors, and that it focuses defendants' minds upon particular forms of disposition as best for them, so that they will embark upon any different dispositions ordered with hostile feelings. As against this it may be argued, however, that it is rehabilitative to demonstrate to defendants the justice of the adult world, and the refusal by those authorities at whose mercy they may appear to employ their power unfairly. Requiring witnesses against them to give an adequate explanation, and permitting the juvenile defendants to be heard on their own account, may satisfy them that their cases were fully considered. Similarly, a genuine and mutually respectful discussion between prosecution, probation officers and defence of suitable dispositions may counter any sense that they are ordered as punishment or in despair. These idealized concepts of benefit to defendants from adherence to the adversary system are, of course, mere speculation, but equally the suggestion that the historic absence of adversarial hearings in some way contributed to rehabilitation can be shown false. Further, to compromise the propriety of trial process in the cause of rehabilitation presupposes the fact fair trial is designed to question, namely guilt.

6. The Supply of Lawyers

If lawyers are to discharge their role in juvenile court, they must be trained and made available. Whether they require special training, differing from that of any other lawyer, may be questioned. Specialization in criminal law and procedure may be appropriate, as for counsel for adults accused of crime, but additional training for instance in developmental psychology and in understanding and communicating with children and adolescents may be unnecessary. The Juvenile Delinquents Act has no minimum age

122. In 1937, Roscoe Pound wrote, "(T)he powers of the Star Chamber were a trifle in comparison to those of our juvenile courts"; Foreward to P. Young, *Social Treatment in Probation of Delinquents* (1937) at p. xxvii.

123. See W.V. Stapleton and L.E. Teitelbaum, *In Defence of Youth — A Study of the Role of Counsel in American Juvenile Courts* (Russell Sage Foundation: New York, 1972) at p. 2.

for delinquency; the Criminal Code is inapplicable to those aged under seven,[124] but delinquency covers offences defined by other legislation, and status "offences" defined by no legislation at all.[125] In practice, however, few young delinquency suspects are brought to juvenile court and the federal Solicitor General has proposed a minimum age of 12.[126] The need for lawyers to comprehend the nature and implications of immaturity is acknowledged, but it is applicable no less to legal representatives of immature adults and may be extended to comprehension of poverty, alienation and other conditions affecting criminal defendants. There may indeed be a danger to those accused of delinquency if lawyers were so to absorb themselves with social-work considerations of the juveniles' backgrounds and prospects that their sharp due process vision became blurred.[127]

On balance, however, special training and sensitization may be appropriate. The prevention of recidivism in the young is a cause to which all should contribute and if defence lawyers can assist their young clients with help in addition to, but not instead of, that available by their forensic skills, this is to be encouraged. The fact that adult suspects may lack lawyers of elevated sensitivity is no reason to deny juveniles better equipped representation. In particular, lawyers appearing in juvenile courts should be made aware of alternative dispositions, differences between types of institutions, and community resources to help youths in distress, whether or not they happen to be proven delinquent.[128]

As a party to the proceedings under the Juvenile Delinquents Act,[129] a juvenile has the right to retain and instruct independent

124. Section 12. Section 13 provides that a person cannot be convicted for an act performed when he was aged seven but under fourteen unless he was competent to know the nature and consequences of his conduct and to appreciate that it was wrong.

125. See the definition of "juvenile delinquent" in section 2 (1) of the Juvenile Delinquents Act, cited in text following note 11.

126. Solicitor General of Canada, "Highlights", note 6 above, at p. 116.

127. See B.M. Dickens, "Representing the Child in the Courts" in I.F.G. Baxter and M.A. Eberts, *The Child and the Courts* (Carswell, Toronto: 1978) 273 at pp. 293-4.

128. See the recommendation for a lawyers' training programme in the *Second Report of the Attorney General's Committee on the Representation of Children* (Ontario Ministry of the Attorney General, Toronto, 1978) para. 60, p. 36.

129. A juvenile is not a party to care and protection proceedings brought under the child welfare legislation of most provinces. The application to court for a care order is unilateral, the child's parent or guardian standing as respondent. Similarly, a child is not a party to a custody hearing arising out of matrimonial proceedings.

counsel, and may be able to seek a certificate under a provincial legal aid scheme, by which counsel may at least in part be paid.[130] Alternatively, the court may have a duty counsel scheme, under which lawyers are available, on rotation, to assist juvenile defendants.[131] Such counsel may act on an *amicus curiae* basis, however, rather than as the effective advocates to which defendants are entitled.[132] Duty counsel lack time for trial preparation,are available only at the court hearing and not at earlier stages, such as police interrogation, and if they seek an adjournment in order that the defence may be prepared, they may have and cause difficulty in arranging trial on a day when they will be available according to rotation. Adjourning to a day when another duty counsel attends court obviously destroys continuity of representation and preserving such continuity may tie the proceedings to the time-frame of the lawyer's availability, rather than to the time-frame of the juvenile's needs.

Accordingly, while duty counsel may be preferable to no counsel,[133] such a system may bear major flaws in supplying effective counsel. The model of the privately retained lawyer may appear better, paid where need be in whole or part from a legal aid fund or other public source. Alternatives to this exist, however, in expansion of the offices of provincial Official or Public Guardians and in the Law Guardian system, operative since 1962 in New York state.[134] Under this system, publicly paid lawyers, engaged full-time in urban centres and drawn from a panel of privately practising lawyers recommended by the local Bar association in rural areas, are engaged to consider and conduct juvenile court cases. The New York experience has not been without its critics, including those condemning the appointment of full-time lawyers paid from public funds on the basis not of skill or dedication, but on the basis of rewarding political loyalty. It shows, however, how far behind the

130. For full consideration of availability of legal aid in delinquency proceedings, see the admirable study by Jeffrey S. Leon, note 115 above, at p. 414 et *Seq.* See also Dickens, note 127, above, at pp. 280-286.

131. *Ibid.*, at p. 415. On differences in provincial provisions, see note 207, p. 415.

132. See, for instance, *The Queen* v. *M.* (1975), 22 C.C.C. (2d) 344 (Ont. H.C.).

133. For an argument that parents should have a *prima facie* right to deny their child access to counsel, and that an attorney should not independently represent a child over parental objection, see J. Goldstein, "Psychoanalysis and a Jurisprudence of Child Placement — with Special Emphasis on the Role of Legal Counsel for Children" (1978), 1 *Intl. J. of Law and Psychiatry* 109. This might permit or compel duty counsel to act in the proceedings as *amicus curiae.*

134. Described in Dickens, note 127 above, at pp. 286-289.

evolving debate and practice in the United States current Canadian consciousness appears to be of juveniles' need of effective counsel.

Recent proposals for legislation have begun to recognize the issue,[135] but do not approach the recognition of the U.S. Supreme Court in the *Gault* case[136] that "the child and his parents must be notified of the child's right to be represented by counsel retained by them, or if they are unable to afford counsel, that counsel will be appointed to represent the child".[137] In Canada, the absence of counsel does not affect the validity of the proceedings,[138] since counsel is not considered necessary to ensure the fairness of their conduct.[139] The debate appears to have advanced little beyond the crudely stereotyped disagreement between those who fear that sneering adolescents will be given self-serving lawyers to get them off on technicalities and those who fear that justice will remain available to all juveniles, but only on the same terms as dinner at the Ritz Hotel.

135. See K.A. Catton and J.S. Leon, "Legal Representation and the Proposed Young Persons in Conflict with the Law Act" (1977), 15 Osgoode Hall L.J. 107. Although this proposed Act was abandoned, this article presents a valuable analysis of thinking which may prevail in the federal Solicitor General's department.

136. Note 23, above.

137. *Ibid.* at p. 41.

138. See *Re P.* (1973), 12 C.C.C. (2d) 62 (Ont. H.C.), and *The Queen* v. *C.M.* (1975), 14 N.B.R. (2d) 43 (N.B.Q.B.).

139. See *The King* v. *Tillotson* (1947), 89 C.C.C. 389, *per* Wilson, J. at p. 391 (B.C.S.C.).