Osgoode Hall Law Journal

Volume 7, Number 2 (January 1970)

Article 4

The Function of Counsel in Juvenile Court

Greg Johnston

THE FUNCTION OF COUNSEL IN JUVENILE COURT

GREG JOHNSTON*

> Notice that it is the child's perception of the situation that is considered to be the important one. The effect of a relationship on the child is clearly depedendent on the evaluation rather than the intent.[1]

Dissertations on the topic of lawyers and juvenile courts inevitably exhort lawyers to acquaint themselves thoroughly with the purposes and philosophy behind the juvenile courts. The writer endorses this view. Any lawyer planning to become involved with the operation of these courts must become familiar with a jurisprudence oriented towards individualized justice[2] governed by the basic policy of dealing with every child in terms of his best interests,[3] and involving the application of a variety of therapeutic techniques, ranging from probation to institutionalized care, designed to correct the developmental errors which cause children to act out in ways so contrary to social norms that the court is compelled to deal with them.

Rehabilitation or cure are the ultimate purposes of any disposition rendered by the court which is required by statute to deal with the child as would a wise and judicious parent.[4] The child is not to be considered a criminal but rather one in need of guidance, counsel and assistance[5] so that he may mend his ways and become a productive member of society. To achieve these ends, the court must rely heavily on the psychiatric and the social sciences.[6] Consequently, it is empowered with almost unlimited discretion to investigate the child's background and character through the use of probation officers,[7] to evaluate evidence both as to fact and as to disposition[8] and to determine the format or procedure employed in the hearing.[9] This

---

*Greg Johnston, LL.B. Osgoode Hall Law School, was a member of the 1968 graduating class.

[1] J. Schulman, MANAGEMENT OF EMOTIONAL DISORDERS IN PEDIATRIC PRACTICE (Chicago: Yearbook Medical Publishers Inc., 1967) 39.

[2] Juvenile Delinquency Act, R.S.C. 1952, c. 160, s. 38.

[3] Juvenile Delinquency Act, R.S.C. 1952, c. 160, s. 9 (1).

[4] *Id.*

[5] *Id.*, s. 3 (2).

[6] W. Sheridan, STANDARDS FOR JUVENILE AND FAMILY COURTS (Washington, D.C.: Department of Health, Education and Welfare, U.S. Government Printing Office, 1966) 1.

[7] Juvenile Delinquency Act, *supra* note 2, ss. 29-32.

[8] *Id.*, s. 16. In fact, the court need never determine the issue if it chooses to adjourn the case *sine die.*

[9] *Id.*, s. 38. See also Kent v. U.S., 86 S.Ct. 1045 (1966) and Re Ly (No. 1) (1944), 82 C.C.C. 106.

discretion extends to all matters of disposition and control over a child judged to have been in a condition of delinquency, even to the extent of ordering the re-hearing of the charge in an adult court at any time until the child reaches twenty-one whether or not the child has been subject to treatment or institutionalization by virtue of the court's original adjudication in the case.[10] A court with such broad powers has been most aptly compared to the Court of Star Chamber in terms of the scope of its powers and its unfettered discretion.[11] Fears concerning the almost limitless powers resting on the court are generally allayed by the constant reiteration of the standard cliche that the court, by its very nature, is compelled to treat the child fairly.

The philosophy and purposes of the court as set forth in a variety of articles[12] and judgments[13] are swathed in a terminology and jargon best described as "psycho-socio-legalese". The arguments are superficially cogent and the whole philosophy is so compelling that the lawyer may be easily seduced into abdicating his responsibility to become involved in the process and to act as a check on the court and its aides in the exercise of it powers and discretion. The lawyer may justifiably feel that the introduction of a legalistic approach to the questions of therapy and rehabilitation would inevitably and unnecessarily cause the whole process to bog down.

It is interesting to note here that the lawyer, who in any civil action would subject an orthopaedic surgeon, neurosurgeon, mechanical engineer or other expert in a similiarly precise science to a rigorous and ruthless cross-examination, appears to be willing, to presume, for purposes of juvenile court proceedings, that the comparatively new and reputedly imprecise social sciences have suddenly achieved such precision that witnesses in this field cannot be challenged. Yet their evidence, in matters of diagnosis and treatment procedures, subject children to controls and limitations frequently more rigid, inflexible and rigorous than those faced by the most hardened criminal in maximum security institutions.[14]

The first question which the lawyer must ask, however, is not what impact, either positive or negative, the injection of traditional legal approaches would have on the court, but rather, what is the effect and impact of the court on those presently subject to its jurisdiction and operations as they are presently conducted without more than a minimal involvement of trained lawyers. The answer is both shocking and disturbing.

From a statistical point of view the practical effect on the child associated with juvenile court proceedings may be expressed as nil, or, at best, next to nothing. A careful survey of the current available data is most frightening. The difference in rates of prevention or rehabilitation among groups of

---

[10] *Id.*, s. 20 (3).

[11] Warren, *Equal Justice for Juveniles* (Fall 1964) JUV. CT. JUDGES JOURNAL.

[12] *See supra* note 6 and *infra* footnote 14.

[13] *See supra* note 8 and Re Application of Gault, 87 S.Ct. 1428 (1967).

[14] Glueck, *Some "Unfinished Business" in the Management of Delinquency,* (1964) 15 SYRACUSE L. REV. 629.

children receiving no treatment, those receiving casual counselling and those receiving extensive and sophisticated psychological and psychiatric care was not significant at all.[15] Data relating to recidivism in juvenile delinquency[16] and the proportion of delinquents continuing into a life of adult crime show a remarkably similar distribution and percentage of juvenile offenders.[17] If it may be reasonably presumed that those children who obtain the greatest amount of service and therapy from the courts and associated institutions are the recidivists, the results are even more frightening because there is reliable data to indicate that well over 50% of all adult offenders were juvenile offenders.[18] The inevitable inference is a strong positive relationship between the degree of association with the juvenile court processes and the propensity for a life of adult crime.[19]

The apparent reasons for the dismisal performance of the court to date are multifold: inadequate financial support from government, overcrowded court schedules, understaffed probation services, inadequate or poorly trained staff, inadequate facilities and the inability of the social scientists to cope with the problems presented to them.[20]

---

[15] Teuber & Powers, *Evaluating Therapy in a Delinquency Program in Psychiatric Treatment.* 31 PROC. ASSN. RES. NERV. AND MENT. DIS. 138; see also *infra* note 22 at 483.

[16] W. Lundin & C. Thomas, STATISTICS ON DELINQUENTS AND DELINQUENCY. (Springfield, Ill.) 241 and 262.

[17] *Id.*, at 126.

[18] See *infra* note 22 at 481. The Metropolitan Toronto Police Youth Bureau puts the figure at 80%.

[19] In light of the similar type of data and the interpretation given to it in the "cigarette-lung cancer" controversy, the inevitable inference here is that involvements in the juvenile court process is a cause of adult crimes.

If we observe that Teuber and Powers indicate that treatment if anything seems to breed recidivism, and couple this with the recent California parole study, thoroughly discussed in The Tyranny of Treatment, a paper presented at the June, 1967 meeting of the Canadian Corrections Association, which indicates no significant value in any type of probationary treatment geared to reduce recidivism, it seems that most of the effective treatment must be done in institutions. The statistical study referred to indicates that 30% of juvenile delinquents return again before the juvenile courts. At the same time there is a 50% return rate to institutionalized care among juvenile delinquents. The percentage of juvenile delinquents who move on to a life of adult crime is also 30% and make up 80% of the adult offenders. The studies referred to appear to be experimentally sound and involved a stringent matching process among the groups. The statistical studies indicate the use of sufficiently random selection to be considered statistically accurate. The result is that the only observable variable affecting the groups was the intensity of involvement and treament as a result of coming before the juvenile courts. It is no doubt ludicrous to suggest such involvement causes adult crime, but it is equally unwise to presume such treatment will cure the child or will, in fact, be in the best interests of the child. It is, of course, arguable that the court process deflects potential criminals from such a pattern of behaviour but at best this would seem to be a by-product of the intent of such a system.

The relationship between the various studies does seem to indicate, however, that the Juvenile Court process may be the epitome of present techniques for predicting the the probability of a career in adult crime by determining the intensity with which it was compelled to deal with any individual over the life of his juvenile career; this, too, is a valuable service, but again says little for the therapeutic processes intended and supposed to be available through the court's disposition of the case.

[20] See *supra* note 14 at 21.

Although diagnostic skills can indicate that a child *could* have committed a certain act or type of act, the knowledge that the child in question did in fact commit the offence is often essential to the diagnosis. This problem is discussed in the *Task Force on Juvenile Delinquency*[21] which illustrates the problem by reference to a recent case in California. The accused was convicted as a sex-psychopath. Later, he was proven to be a victim of misidentification and was not, in fact, the party who had committed the act. However, the whole psychiatric examination and diagnosis was based on the fact that he had committed the act. "Thus the mistake as to fact not only resuled in an imporper conviction but renedered invalid the psychiatric judgment of the defendant's personality and propensities. However, advanced our techniques for determining what an individual is . . . what he has done may often be the most revealing evidence of what he is."

Therapy of course relies on diagnosis and is proposed on the basis of probable success in either removing or controlling the cause of the behaviour. The probability of successful treatment is remote, so much so that a team of social scientists, discouraged with the progress in preventing and treating juvenile delinquency felt compelled to state:

> Therefore the burden of proof is on anyone who claims specific results for a given form of therapy in Juvenile Delinquency.[22]

A survey of writers in the field of the management of emotionally disturbed children has revealed the following remarks which are indicative of the conundrum facing the juvenile court in its casework approach to individualized justice:

> In the sphere of psychologic medicine the borderline between normal and abnormal behaviour is often vaguely and ill-defined. A small appetite is physiologic during years one to five... The small appetite may, however, reflect a deep-seated emotional upset.... Just as sibling rivalry, which is a natural phenomenon may exceed normal limits and consequently require treatment....An important factor to keep in mind in assessing the etiology of a behaviour disorder is that a mechanism which seems obvious may be of secondary importance.[23]

However,

> Care is necessary in phychologic disturbances as in physical ailments, that the therapeutic measures used will not do more harm than the offending symptoms.[24]

At this point it would be simple to suggest that the primary, if not the sole function of a lawyer in a juvenile court proceedings would be to get the child out of the system and into the street as quickly as possible. The purpose of this paper, however, is neither to ridicule the social scientists nor to scuttle the juvenile court movement. It is to discover if there is any way in which a lawyer can enhance the function of the juvenile court and assist it to move on to its admirable and idealistic objectives.

---

[21] At 33.

[22] See *supra* note 15, and *infra* note 23 at 483.

[23] H. Bakwin & R. Bakwin, CLINICAL MANAGEMENT OF EMOTIONAL DISORDERS IN CHILDREN (Philadephia: W. B. Saunders Co., 1960) 186.

[24] *Id.*, at 256.

The introductory quotation exhorts us to appreciate the situation from the child's point of view. This approach, it is submitted, is entirely lacking in the juvenile court process. No doubt the *bona fide* intent is there but the nature, intent and purposes of the process are hardly comprehensible to a child. The child views the process in terms of the act committed.[25] He is before the court because of an act contrary to social convention or the Criminal Code at the one extreme or for breach of a local municipal by-law at the other.[26] Initially, his only means of evaluating his own conduct and the court process with which he is associated, is in terms of the treatment and disposition given to others for similar misconduct. In his eyes one apple-stealer or runaway is the same as any other apple-stealer or runaway and by simple youthful logic each should be treated in essentially the same way. He is in no way prepared to understand the concept of individualized justice. But he will enter the arena and observe a court in operation expecting to defend his own best interests, and will appreciate little of what he sees. The probation officer in whom he confided will appear to be a "flunky" of the court in the child's eyes.[27] If he stands alone immediately before the judge, as in the Metropolitan Toronto Juvenile and Family Court, he will probably be aware of a flow of conversation going on around him. He will be invited to cross-examine witnesses and to lead evidence in his own defence (with the assistance of his parents and counsel, should counsel be present), an impossible task for the average layman let alone a child.[28] The court, however, will probably appreciate his lack of technical training and encourage the child to speak on his own behalf after warning him that his statements may be used in evidence against him. It is worthwhile noting two comments made by judges faced with the task of getting the children to speak:

> A method of coaxing him to speak, which is sometimes effective, may be likened to a military manoeuvre. An attacking general seldom commences operations by a headlong assault on the enemy's centre. He is more likely to begin by cautious reconnaissance and a delicate probing of the enemy's flanks. The same applies with young children; an enveloping movement is more likely to succeed than a direct assault. 'Why did you steal your father's watch?' is bad strategy. The enemy closes his ranks and you are rebuffed.[29]

Should the child be reluctant to speak, the same writer suggests the following approach:

> But you must remember that people are generally more ready to believe someone who is willing to be questioned about his story than someone who refuses to be questioned.[30]

Authority in the form of the court and its entourage, generally prevails and the child is coerced into rendering a full and detailed account of what frequently in both fact and language, the child presumes the court wants to

---

[25] See *infra* note 31 at 113.

[26] Juvenile Delinquency Act, *supra* note 2, s. 2 (h).

[27] See *infra* note 31 at 144.

[28] W. Cavanaugh, THE CHILD AND THE COURT (London: Victor Gollancz Ltd., 1949) 194; J. Watson, THE CHILD AND THE MAGISTRATE (London: Jonathan Cope. 1965) 71; see also *supra* note 6 at 71-73.

[29] J. Watson, *supra* note 28 at 74.

[30] *Id.* at 79.

hear. There is, however, little room for excuse or explanation by the child in his own behalf. The act must merely be construed by the court as a symptom of the deep-seated emotional problem which produced the undesirable conduct. It is this problem which the court intends to deal with, and in doing so creates a remarkable sense of inconsistency in the mind of the child. Probation reports, social work and psychiatric evaluations, frequently incomprehensible and unintelligible to the child, will be introduced as they form the basis for disposition. At this stage in the proceedings the child will find that there certainly is a difference between one apple-stealer and another. The probability is that the child will never appreciate the difference save in terms of the tremendous variation in disposition and consequences apparently flowing from the same act.

It is little wonder that the child views the proceedings as "... a setting which is conducive to the sensing of rampant inconsistency".[31] The net result of the process in the eyes of the child is even more discouraging:

> The inclusion of personal and social character as relevant criteria in judgment has been consequential... that hardly anyone, and least of all the recipients of judgment who have some special interest in these matters, is at all sure what combinations of the widely inclusive relevant criteria yield what sorts of specific disposition.[32]

The result is best expressed by the same writer:

> The little that he hears and understands in court is enough to maintain and refuel the delinquent's sense of injustice... [he] senses rampant inconsistency... an all powerful and challengeless exercise of authority by judges and probation officers based in the child's eyes on inconsistency, hyprocrisy, favoritism and whimsy.[33]

The child emerges from the process marked as a "little league criminal" by peers, teachers, social workers, neighbours and the community at large. Frequently, this label remains and will inhibit or frustrate the child throughout his adult life by making it impossible to achieve certain types of employment or professional accreditation.[34] Occasionally, however, if he is a member of the "subculture of delinquency"[35] a finding of delinquency will enhance his status within his group. Often this finding will be the result of a confession made to protect another member of the group in reliance on the fact that probation is the dispostion most frequently garnered by first offenders.[36]

It is also essential to remember that the effect of being classified as a "delinquent" frequently has such an impact on the young mind that he is encouraged to relate himself to the image this term conjures up in his community and proceed to act the part to the fullest, giving to his community the

---

[31] D. Matza, DELINQUENCY AND DRIFT (New York: John Wilson & sons Inc., 1964) 112.

[32] *Id.* at 115

[33] See *supra* note 14 at 31.

[34] *Id.* at 23; *and* REPORT OF THE DEPARTMENT OF JUSTICE COMMITTEE ON JUVENILE DELINQUENCY (Ottawa: Queen's Printer, 1965) 36.

[35] See *supra* note 31 at 12-25.

[36] *Id* at 110.

very conduct it expects of him as a delinquent. Thus a child whose misconduct is nothing more than a function of normal maturation is enticed and encouraged into playing a role for which he is not only unprepared but is unsuited.

The Function of Counsel

What role then should a lawyer play in this process? What would his primary function be?

It is submitted that at present the dispositions of the court are essentially penal in nature.[37] This may explain why some lawyers view their role and function to be similar to that in adult criminal cases. There is, however, a far more important and significant role for the lawyer in the juvenile court process; a role which would not only insure that the child will get a full and fair hearing in the matter of adjudicating the facts on which the charge of delinquency is based, but also that the disposition of the case is, in fact, in the best interests of the child. It is submitted, as well, that it would significantly enhance the probability of a successful disposition in terms of prevention or rehabilitation.

The role of counsellor to the child is the primary and most important role which a lawyer can play in the juvenile court process. This role is demanding and time consuming. It calls not only for legal expertise but a thorough knowledge of the diagnostic and therapeutic techniques developed and used by the social sciences. It requires an exhaustive search to discover the limitations in services offered by the court and an appreciation of the ramifications of such techniques if applied to the particular child. In addition, it requires the development by counsel, using either the family's or the community's resources, of a modified or alternative disposition more appropriate to resolving the problems of the child involved, or the presentation of data and evidence to show that he suffers no particular disability and does not come at all within that class intended to be adjudged or treated as one in the condition of delinquency. In performing this function the lawyer must become so closely identified with him that the child not only feels that he has a confidant but also appreciates the fact that he has established a relationship with someone in the whole process who is guided by the child's interpretation of the circumstances. The child will realize he finally has one tool available to him which is accepted by the authority with which he is compelled to deal (and against which in many instances he is in open if somewhat subconscious rebellion). The great fear in this relationship is that the lawyer becomes a "mouth-piece" for the child; a person whose unemotional, legalistic search for loopholes will make a farce out of the whole juvenile court process and subject it to ridicule and contempt in the eyes of the child. While there is some justification for this fear, it certainly is no greater than the sense of contempt which one is inclined to feel for the productivity, or lack thereof, of the juvenile court to date.

---

[37] See *supra* note 31 at 125; and also pp. 70-71.

The purpose in having the lawyer become closely involved with the child is to permit and encourage the child to become closely and consciously involved with the juvenile court process. He can explain in a manner comprehensible to the child just why one apple-stealer is treated differently from another. The child, through his counsel, can present his views to the court, make his arguments, raise his own questions and achieve a sense of participation in the proceedings. Thus, the child is at least equipped to interpret the court's function. If he becomes involved positively from the beginning of the process, the sense of inconsistency and capriciousness which to him seems to permeate the process will be alleviated if not removed.

Another function of the lawyer is to check and to challenge the modes of disposition presented to the court. Although this role may be difficult it is by no means impossible. The general argument is that the dispository function is so highly specialized and technical that any lawyer involving himself in this area of the process is operating beyond his depth. If the lawyer is unprepared, this assertion is true but no more so than in the case of a lawyer unprepared to scrutinize or rebut expert evidence in any other civil or criminal proceedings. The *President's Task Force on Juvenile Delinquency* states:

> As for the dispositional stage, insofar as the dispositional judgment turns on facts—facts of the offender's prior involvement, facts of his relationship with his friends and neighbours, facts of his personality and background—as much care as in the adjudicatory stage is needed to assure reliability. Moreover the proper dispositional choice requires the exercise of judgment on a variety of imponderables —the questions of the success of probation?—will the community accept him?—foster home?—institution? The outcome is critical for the life of the child and justice requires that he have the assistance of counsel in advancing his own interest before the court—by offering alternative plans... or by calling attention to the factual and theoretical assumptions, the speculations, the degree of thoughtfulness and thoroughness of the probation officer's report.... The contribution of lawyers in choosing the most suitable dispositional alternative for the child, both at the prejudicial intake step and at the judicial disposition stage cannot be overestimated, serving as it does both to protect the child and to advance the social interest in the prevention of delinquency.[38]

Probation officers, social workers, psychiatrists and pschologists are a group of sincerely dedicated people often working in almost impossible situations to achieve admirable, if impossible, goals. But they are human and, as such, are fallible, liable to the weaknesses of ordinary mortals including laziness, fatigue, boredom, carelessness, inconsistency, superficiality and a host of other traits which tend to affect both the ability and effectiveness of all of us at one time or another. Also professional and technical training can create their own biases with the inevitable result that "someone who has worked a long time in a specialized discipline has a tendency (and this is certainly true of lawyers) to overvalue that discipline, to have the feeling that the solution for all the world's problems will come through that discipline."[39] The lawyer's responsibility is to make sure that these shortcomings have not so affected the personnel involved in recommending the disposition that it has been rendered ineffective or particularly harmful to the child in question.

---

[38] See *supra* note 21 at 33.

[39] PROCEEDINGS OF THE INSTITUTE OF THE FAMILY (April 9, 10, 11, 1959, Duke University, Durham, North Carolina) 10.

Another problem which arises in these circumstances is the interpersonal relationships which arise among persons working closely together over a long period of time. This is a criticism frequently levelled at Magistrates. Their continued association and proximity to the Police Administration is presumed to create a strong (although natural) bias towards the police with whom they are in constant contact, and in many cases personally intimate. Similarly, persons with long term relationships working in similar disciplines appreciate the demands and stresses placed on their fellow professionals and are often aware of the good intentions of their fellows. However, the interpretation of information by one so closely related to the project can be biased. Because he is aware of the objectives and intentions of the researcher he may be more receptive to the data presented than would normally be given on a purely objective and non-familiar interpretation. This also holds true in terms of inter-agency relationships with the inevitable result that a person working with an agency with a good reputation in the field is frequently treated as representing the opinions of that agency. The result can be unfortunate in that an inept or inexperienced person's opinion or evidence can carry much more weight than it deserves because of the ability of the author to hide under the cloak of the reputation of the agency. It is incumbent on the lawyer to ascertain in each instance the probability of such bias and to achieve an objective analysis both of the data produced and of the capability and qualifications of the particular witness presenting such information.

The fuction of the lawyer then is to act as a check on an apparently unfettered authority, to question and honestly challenge proposals for disposition and therapy even to the extent of determining the validity of the very base on which proposals are made. It is interesting to note the comments of two writers, the first a lawyer, the other a sociologist, concerning this function:

> Social workers like all humans are sometimes prone to incompetence, laziness, and even bias, and it is the duty of counsel to guard his client against the consequence of such inadequacies.[40]
> ... Opposition remains the social mechanism which compels total and critical assessment of facts.[41]

The question inevitably arises as to whether the lawyer is equipped to fulfill this function. Suggestions for more intensive training in law schools, in-service training for practitioners, and a specialized bar have all been mooted and in some instances introduced into practice. They are valid and worthwhile suggestions but tend to overlook a factor common to all good litigation lawyers —the thorough, comprehensive and complete preparation of their case briefs:

> There is such a thing as self education, and there is no reason why lawyers should not through their own...study succeed in mastering fellow disciplines... the average lawyer does a great deal of that. There are a very few lawyers who try lawsuits who do not... have to master a good bit of the knowledge that psychiatrists have, that doctors have, that medical specialists have, even that sociologists have. Many an eminent specialist... called as an expert and subject to cross-examination, has perhaps been amazed at the knowledge the trial lawyer has shown in cross-examining.[42]

---

[40] Isaacs, *The Role of the Lawyer in Representing Minors in the New Family Court,* (1963) 12 BUFF. LAW REV. 501, 516.

[41] E. Lemert, THE JUVENILE COURT—QUEST AND REALITIES, see also *supra* note 14 at 103.

[42] See *supra* note 39 at 8.

This is not to suggest that the task is either easy or straight-forward. Aside from acquainting himself with a variety of social scientific theory and jargon, the lawyer must personally prepare himself to deal intimately with the child. It is conceivable that the initial verbal communication will be meaningless to both parties. The lawyer will have to learn to interpret the child's idiom and establish a meaningful rapport with the child. The lawyer must be sensitive to the child, give him credit for, but not overestimate, his abilities and capacity.

> The adolescent must be listened to carefully and, immature though his point of view may seem, his concerns must be dealt with seriously on a more-or-less adult level.[43]

While the ideal location for training in the areas of sensitivity and communications is in the law school, it is not impossible for the practitioner to garner the same training through a variety of community and provincial agencies which offer such training to the public at large.

A further question arises, however, when one suggests that the lawyer become involved as the confiidant and interpreter to the child in the process and that he assume the responsibility for establishing the important initial working-relationship between the child and authority. It is suggested that the logical person to undertake this task is the social worker or the probation officer. The probation officer fulfills a necessary and important function for the court but this duty inevitably compromises his relationship with the child. The social worker, on the other hand, is not competent to deal with the legal issues arising in the adjudicatory process and sees himself as a non-involved participant in the dispositional proceedings. Professionally, he feels bound not to challenge openly submission of fellow social scientists. His role, it appears is task-oriented, geared to care or therapy within the terms established by the court. Yet he recognizes the child needs a voice in the proceedings. He adheres to the principle that the child should be involved, but he wishes to allow this function to devolve upon the lawyer so that he may maintain his position of objectivity, remaining non-judgmental and passionately dispassionate.

There are some, however, who believe that the advent of lawyers in juvenile court proceedings would signal a return to formalism, a constant search for legal loopholes and wholesale technical argument. The last two fears are essentially groundless. The introduction of lawyers on both sides would do much to remove the possibility of such hassles and technical arguments will not seem nearly so formidable to the Crown's side when they are to be dealt with by a trained lawyer rather than a legally untrained person as is the present general practice. Often these arguments are presented to judges who have little or no legal training and are given much more time and weight than they merit, a fault for which there is an obvious and immediate remedy.

Formalism, on the other hand, may well have some inherent values which could contribute to the possibility of achieving some of the goals of

---

[43] See *supra* note 23 at 205.

juvenile court. If we wish to involve the child significantly in the procedure we must establish one which he can comprehend:

> ... Procedure which may be quite intelligible to an adult is often beyond the comprehension of a child. The first essential to a fair trial is that the defendant, whatever his age, shall understand what is happening....[44]

The simple format of three tables forming an equilateral triangle, the judge sitting at the apex and the two counsel tables at the base corners, creates an effect which is easily interpreted by the child. He can visualize the proceedings, interpret the roles of various parties, observe the inter-play between counsel and witness, witness and the bench, and counsel and counsel. The child should be permitted to sit with his counsel rather than be forced to stand forlornly before the bench. From this position he would be involved in the very flow of the activity and be secure with the person who is most capable of appreciating and primarily concerned with his own best interests. He would not be subject to suggestion or innuendo no matter how well intended or misguided from a benevolent bench. Oath-taking, reading of the charge, and similar procedures should be simple and straight-forward. Clerks and probation officers should remain removed from the bench unless specifically requested to perform some function, since all too frequently the illusion is created in the child's eyes that these personnel are also involved in meting out the disposition, and the child senses an overwhelming inability to cope in such an adult setting.[45] There is no great need for robes or other traditional paraphernalia.

> If what is in process, is in fact meant to be a trial it is probably better it should look like one. The child is far more likely to grasp the trial procedure if the room is arranged like a court, than if it looks for example like an office in which a head-teacher and his staff are interrogating trouble-makers and meting out arbitrary punishments, regardless of the rules of evidence or any other procedure. This is not to say that the rules of procedure are meticulously followed even in a formal atmosphere, or cannot be adhered to in an informal one, but that only in the latter it is more difficult to perceive them.[46]

Fears of unnecessary delay occasioned by requests for remands or appeal have also been expressed. Remands are obviously necessary to the preparation of a coherent and useful brief and, judging by the existing inadequacies of treatment and disposition, the present desire for and availability of immediacy in terms of trial and disposition are of little consequence compared to the desirability of a complete and thorough hearing of the issues and analysis of treatment and disposition, the present desire for and availability of immediate trial and disposition are of little consequence compared to the desirability of a complete and thorough hearing of the issues and analysis of treatment recommendations. Appeals create some problem, particularly in cases of diagnosis of psychopathy, but failure to attain family co-operation for committal still leaves the use of the "child in need of protection" sections under the *Child Welfare Act*.[47] From the point of view of the child, his parents and counsel,

---

[44] J. Watson, *supra* note 28 at 70.

[45] W. Cavanaugh, *supra* note 28 at 194; see also D. Matza, *supra* note 31 at 133.

[46] W. Cavanaugh, *supra* note 28 at 194.

[47] Child Welfare Act, R.S.O. 1960, c. 60, s. 11.

this may be much more appealing than a consent decree to a charge of delinquency which will label the child for life. In other circumstances, at least in light of the success of present treatment, appeal procedures might be a desirable alternative to having the child become subject to the therapeutic process. This attitude is obviously antagonistic, but it is intended to suggest that strong grounds must be shown by the Crown to indicate thte inherent values of the prescribed treatment before the writer would adhere to any principle granting the Crown the right to detain the child in interim care up to the time of final adjudication in the matter.

There are many suggestions afoot for varying or changing the forum in which questions of children's misconduct are to be dealt with. Much has been said about the use of a panel of experts to determine both fact and disposition, or to determine disposition after a finding of fact.[48] Inevitably the person or group making the disposition is compelled to reach a decision. The whole process is a decision-making process. Experts as a result of their training are inevitably inculcated with forms of professional bias.[49] Decision-making by a panel often results in decisions which reflect the opinions of the indigenous leader within that group; a known and experimentally proven group work phenomenon. Our present experience with a panel of experts in the form of the Ontario Municipal Board indicates that most frequently decisions handed down by this Board are made and issued by one man; there is little to suggest the same will not happen in dispositions in juvenile cases. The function of the expert, it is submitted, is not to judge but rather to submit evidence which can be objectively weighed and evaluated in the decision-making process. For the purposes of juvenile proceedings this decision is best made by a judge with some special training in the social sciences. This training should be sufficient to acquaint the judge with the scope and limitations of various forms of therapy but not so intensive as to inculcate the judge with bias towards any particular discipline. Judges dealing with dispositional functions should also be made actutely aware of the stresses or limitations on particular services or institutions used by them. A "Juvenile Court Judges Grand Jury" might suffice to bring this information to the attention of the bench. It is conceivable that the hearings in juvenile cases could be divided. The first hearing, an adjudication on the facts, to be tried before a legally trained judge, while the second hearing on disposition could be tried before a judge with special training in matters of disposition.

No matter what the format or form the child must be given and sense a real opportunity to be involved fully in the process. He must be given every chance to comprehend what is going on: to legitimately challenge authority, to question and confront his accusers, to appreciate the fairness of the proceedings, and to learn and appreciate the fact that it is his own best interests which govern the decisions reached. The key to involving the child is his counsel, who it appears must be a lawyer.

---

[48] KILBRANDON REPORT: (1965).

[49] See *supra* note 39 at 9-11; and also *supra* note 1 at 16 and 24.

A further question necessarily arises from a discussion such as this: how to provide counsel. Many ideas are mooted for the provision of counsel, the most popular being either the Public Defender System or the Law Guardian System which was recently instituted in New York State. The latter is the preferable of the two, in that it provides for selection of counsel from a specialized bar rather than the appointment of someone who is intimately involved with the juvenile court process and the personnel therein.

It is argued that the financial returns from juvenile cases are not sufficient to interest the private practitioner. There is obviously some truth in the latter argument but the Ontario Legal Aid Plan will overcome many of our previous problems. The lawyer interested in Juvenile Court work will never make a fortune under this plan, but he will at least be assured of negating the losses which accrued to him personally before the plan was introduced. The prime prerequisite of any plan geared to providing counsel for juveniles is that such counsel must be as independent as possible from the system and the parents so that he may approach each situation independently and objectively.

Conclusion

The role portrayed for the lawyer in this paper is obviously complex, involved and time consuming. It demands that the lawyer develop his own resources for testing and diagnosis as well as therapeutic planning.

He must develop a sensitivity to his young client, treat him openly and fairly and not tend to become judgmental or critical of the child's evaluation of the situation.[50] Conceivably the lawyer will have to learn a whole new vocabulary simply to be able to communicate with the child.[51] Although engaged by the child's parents he may well have to treat them, on occasion, as mere agents of the child for the problem of the gap in parent-child relationships may well be one which the lawyer will have to bridge. The lawyer will have to assess the capacity of the child to appreciate the proceedings and, in situations where the proceedings may have the deleterious effect of inducing the child to play the role of delinquent, the lawyer may even have to compromise his own desire and ability to have the charged dismissed at adjudication, and submit to a consent decree should the other side wish to continue. Occasionally, data will be tendered during the proceeding which, however invalid it may be, will be harmful to the child because of its impact on his concept of self or of his parents, family or friends. In this event, provision should be made to remove the child from the court; but the decision should not be automatic and is a question frequently left to the best judgment of the child's counsel.

The primary purpose of this article has been to illustrate to the lawyer just how extensively he must be prepared to be involved and to encourage him to assess every case thoroughly to determine to what extent he must employ

---

[50] See *supra* note 1 at 111.

[51] D. Abrahamsen, THE PSYCHOLOGY OF CRIME (New York: Columbia U. Press, 1960) 85-87.

his resources to truly function as "counsel" to his young child. The lawyer can and must become the vital link between the court and the child of whom it is said:

> ... is born with needs which know none of the prevailing social customs. He has no ethics, no morality, no formed means of communication. Drives lead an individual to crave satiation. The unsocialized individual is unconcerned with means, but rather with ends. One of the central issues ... is the ability to mold these drives into socially acceptable means of satiation. The child must gradually learn to live in a complex society, with a myriad of rules and customs, while obtaining satisfaction of basic needs.[52]

The function of counsel, it is submitted, is essentially that of a catalyst. With an adult's awareness he interprets the court and its processes to the child and, with the sensitivity of a counsellor, he interprets the child to the court. His sense of fair play and inherent mistrust of trite phraseology urge him to test philosophy in terms of practical results. He may fairly act as a check on the courts and as a conscience for the social scientists while assuring that the best interests of the child are coupled with the due administration of justice. This will be conducive to a more meaningful and productive approach to individualized justice.

---

[52] See *supra* note 1 at 19.