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The Need for Reform in the Juvenile Courts

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THE NEED FOR REFORM IN THE JUVENILE COURTS

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The following brief but significant entry appeared in a Peterborough Judge's notebook: "Verdict — guilty. The jury recommends the prisoner to mercy on account of youth". Later in the same notebook the tragic yet inevitable disposition of the matter appeared: "George Green, convicted of murder; sentenced to be hanged on Wednesday, the twenty-sixth of June, 1850". There was nothing particularly unusual about these notations except that George Green was eleven years old. Over one hundred years later, another Criminal Court jurist sitting in Goderich, Ontario, addressed a child in a similar manner — "You will be taken out from this place to be held in custody until December 8th, 1959, at which time you will be hung by the neck until you are dead". This time the Judge was addressing a fourteen-year-old boy, Steven Truscott, convicted of the murder of another child, a girl, his own age.

To the credit of the Federal Cabinet, both these sentences were commuted to life imprisonment. One might have expected that Canadian law dealing with children would have become more liberal over the last 100 years; but in many ways it has not. These cases are cited merely to show that children who come before the criminal courts today continue to face the risk of receiving very harsh sentences. Although Canadians would not permit these barbarous sentences to be carried out,[1] they still exist under the Criminal Code of Canada. Surprisingly, those who practice under these criminal laws, the lawyers and judges, have been slow to demand substantial change in them.

In an effort to alleviate some of these problems, the Juvenile Courts were established under *The Juvenile Delinquents Act* in 1908.[2] The purpose of these new courts was clear. The Act's draftsman, W. L. Scott, described it as follows: "The Juvenile Court was the first attempt in the history of jurisprudence to eliminate from the law the element of hostility toward the law-breaker, and to substitute, therefor, a social objective."[3] The "social objective" of the Court was defined by The Association of Canadian Child Welfare Workers in 1925 in the following way: "While it (The Juvenile Court) is part of the system of justice and legal discipline, it is essentially a *behaviour clinic,* and a community agency for juvenile rehabilitation." Despite the progressive and rehabilitative nature of this legislation it was opposed by

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1 The only crime in Canada that still carries the death sentence is the first degree murder of a policeman or prison guard.

2 *The Juvenile Delinquents Act,* S.C. 1908, c. 40.

3 W.L. Scott, *The Juvenile Court in Law and Action* (Ottawa: 1927).

the Minister of Justice for more than a year before it was passed by the legislature. In fact, without strong support from such socially-minded organizations as the Association of Canadian Child Welfare Workers and the Canadian Council on Child Welfare, both of whom objected to the technique of dealing with children in adult criminal court, the Act might never have been passed.

However laudable the intentions of *The Juvenile Delinquents Act* may have been it has not worked perfectly. In fact, not only was it possible to sentence a 14-year-old to death in 1959 but many of Mr. Justice Fortas' recent criticisms in *In Re Gault*[4] also apply to the Canadian scene. The Juvenile Court system has not, according to Mr. Justice Fortas lived up to the expectations of its founders nor has it provided such essential elements of fairness as notice of the charge, the right to counsel, or the privilege against non-incrimination. There is at present some dispute in Canada as to the appropriate response to these criticisms. The Federal Government seems to have reacted to them by introducing Bill C 192, *The Young Offenders Act.*[5] It seems to me, however, that the new Act would create far more problems than it would solve. Instead of building on the positive, rehabilitative approach of *The Juvenile Delinquents Act,* it is an attempt to return to an era when children were treated as criminals rather than victims of circumstance. *The Juvenile Delinquents Act* recognizes, quite correctly, that juvenile delinquency is not an offence but rather a state in which the child is in conflict with his social group. Fortunately, the Bill was withdrawn after strong protest from concerned groups all across Canada.

A better approach, and one that seems to have general acceptance among social work agencies and mental health associations, is to try and correct the deficiencies within the existing legislation. Many positive steps have already been taken in this direction.

The *Ontario Legal Aid Act,*[6] has taken important steps to insure that children and their parents are adequately represented. Under the Act, lawyers acting as Duty Counsel are assigned to the court and are able to advise parents and children about their legal rights if they are undefended by private lawyers. Prior to 1967, one of the serious problems was that countless children came before our Ontario courts completely ill-equipped to speak to a plea, points of law, admissibility of evidence, or even to comprehend the law that they were accused of breaking. Because these young clients lacked counsel, many judges performed the role of judge, defence, crown attorney, interrogator of witnesses, as well as that of cross-examining the crown, the police and the defendant. Unfortunately this practice made complete fairness impossible. No one person can perform all these roles with complete objectivity and skill. Not all jurisdictions in Ontario, let alone the rest of Canada, enjoy this advanced and progressive procedure to protect children. Yet until all courts have the services of a lawyer to appear on behalf of all young people appearing before our courts, justice will be left undone and many of Mr. Justice Fortas' criticisms will remain valid.

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[4] *In the Matter of the Application of Paul L. Gault* (1966), 387 U.S. 1.

[5] First Reading, November 16, 1970.

[6] *The Legal Aid Act,* R.S.O. 1970, c. 239.

The duty counsel lawyer acting on behalf of a child is charged with protecting the child's legal rights and assisting him in obtaining the help, direction, and assistance that, in his opinion, are available and necessary. This should be no more and no less than the objectives of the crown and the police when they submit their case. The duty counsel must be convinced that the charges against his young client are valid and that the plea is consistent with the facts. His role differs from a private lawyer hired by the parents to the extent that a private counsel's primary objective is to free his client from the jurisdiction of the court. In my experience, however, legal aid or duty counsel lawyers are committed to the proposition that they are paid by the State to protect the legal rights of children while at the same time taking advantage of all the potential powers of the Court to promote the best interests of the child. If this is done, they will do a much better job of furthering the immediate and future needs of their young client than their private counterpart. Having legal aid lawyers in court to represent children when private counsel has not been procured, is the only effective way to protect children's legal rights. Legislation by itself cannot provide that guarantee.

It would follow from this presentation that *The Juvenile Delinquents Act* should include a section that would insist that any child facing charges in any court must be represented by counsel, not by a friend, a parent or someone — "appointed by the Judge". Counsel should be a legal aid duty counsel, or if a trial appears inevitable on a not guilty plea, then a legal aid lawyer or the child's own private legal counsel should be made available.

A number of minor, updating amendments to *The Juvenile Delinquents Act* would also go a long way toward making the Juvenile Court a fairer, more effective institution. For example, a child should be defined by the Act as any boy or girl apparently or actually under the age of eighteen. This amendment would raise the age limit by two years in most jurisdictions and would also establish a uniform age across the country. Under the present section, age limits vary from province to province with the result that sixteen year olds who commit the same crime in different provinces may be treated quite differently. For example, if a sixteen year old is apprehended for car theft in Alberta he will be tried in Criminal Court because the juvenile age is sixteen. However, if the same person had committed the offence in British Columbia, Manitoba, or Quebec where the age is 18, he would be tried in a Juvenile Court and probably treated more leniently.

Objections to the name 'juvenile delinquent' do not justify changing it. Those opposed to it argue that it adversely affects the child by labelling him; however, the consequences that may flow from the use of this label, are not nearly as serious as alternatives such as robber, rapist or thief.

Section 4, which states: "The Juvenile Court has exclusive jurisdiction in cases of delinquency including cases where after the committing of the delinquency, the child has passed the age limit", should be used more often. At present *The Training Schools Act*[7] prohibits the admission of any child who has attained the juvenile age of sixteen regardless of the offence or the age of

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[7] *The Training Schools Act*, R.S.O. 1970, c. 467.

the child when the offence was committed and thus prevents the therapeutic use of this institution for such persons. If this section was repealed, Juvenile Court judges could use s. 4 of *The Juvenile Delinquents Act* to extend their jurisdiction over these people and commit them to the custody and supervision of a Training School when the situation warranted it.

Contrary to many people's opinion, Training Schools are not institutions of last resort for children. Sometimes, a Training School should be a first consideration if the needs of the child require this type of controlled treatment program. Any attempt by the provincial government to restrict the use of this resource would be most regrettable.

We in Canada should also look to experiments being carried out in the United States, where there is a nagging concern about Mr. Justice Fortas' remarks. In Wichita, Kansas, Juvenile Court Judge Michael Corrigan held a complete juvenile case under the watchful eye of the TV cameras for all interested viewers to see and hear. Needless to say, it was seen by a large and interested TV audience. Judge Corrigan's use of television to show the public how the Court handles children's problems and the legal philosophy underlying the court's approach is commendable. This experiment must have made many people aware of the court's care for and interest in children in trouble with the law, and is a useful piece of social education. No one, however, including Judge Corrigan would seriously suggest that all juvenile trials should be shown on TV, but an occasional viewing can be most informative and reassuring to the public. The somewhat abortive attempt to try a child accused of a drug offence before a juvenile jury of her peers last fall in Juneau, Alaska was another interesting experiment to try to gain more rapport with youth.

Conclusion

We have taken some important strides forward over the last sixty years in our juvenile court system. These include the humanitarian, sociological approach of *The Juvenile Court Act* and, more recently, the introduction of duty counsel in the Juvenile Court. It is important, however, that we continue forward in this same vein by extending the duty counsel concept to other parts of the province and by resisting any attempt to change the basic orientation of our present Act.

The age limit of a "child" should be raised to eighteen and this should apply uniformly across Canada. Judges should be given the power to send "children" to Training Schools even though they may have passed the legal age limit of children. Furthermore, Judges should not hesitate to use Training Schools more often; they are not human disposal dumps but rather an important rehabilitative institution.

If we preserve what is good and fair in our system and amend what is unfair, we will meet many of the criticisms that have been directed at Juvenile Courts in the past few years.