The Century of the Child

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The Century of the Child

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From these Delinquencies proceed greater crimes.

Shorter Oxford English Dictionary

Introduction

Lawyers are inveterate labellers—or, to state it differently, within its narrow logic, the law demands of its practitioners an ability to classify and categorize. When labels are being applied to the more crucial aspects of human behaviour, the results are not likely to be more than compromise solutions to intransigent social problems. This labelling process has shown its inadequacies in the legal approach to crime. The last decade has seen a lively debate on the dichotomy of law and morals, which has led to a re-examination of the efficacy of punishment and penal methods. In similar vein, this rethinking of penal philosophy has reformed the legal procedures in the administration of justice. The law is attempting to solve, by its own methods, problems relating to crime, which are also social, economic and political. The legal solution is applauded because serious injustices and inadequacies in our present system are being remedied. The formalistic changes are accepted because we know of no better system than the present one. Yet, one wonders whether this is not a very short-range solution which simply postpones society's dilemma.

This labelling process, and its inherent inadequacies, have arisen in the legal treatment of problems relating to children. The lawyers have had almost as much to say in this area as in adult crime, and they are starting to supply limited answers. In relation to juvenile justice and family law, their answers may be even more unsuitable than in an examination of adult crime. The labels seem useful: "neglect", "unmanageable", "in need of care and protection", "the best interests of the child" and "delinquent". These words have become legal labels although their meaning may not be

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quite as explicit as "guilty", "innocent", "murder" and "larceny". The law is a crude and unsubtle weapon to apply to the problems of the child. The crucial question is whether these legal remedies are worse than the alternatives which are likely to present themselves.

The etymological history of "delinquent" is not only interesting, but currently important. At one stage, the word had general usage applied to anyone, including a debtor, who did less than was expected of him. Today, "juvenile delinquent" is a term which is badly tainted, and social reformers are looking for euphemisms, which have not yet attracted an unfortunate emotional quality in the eyes of the public, such as young or child offender.¹ This change of name seems symptomatic of the inadequacy and short-sightedness of the present overhaul of child problems, and, in particular, of that supreme euphemism, the juvenile court.

The juvenile court has only existed for seventy years, but very few institutions of such recent origin have been subjected to such endless scrutiny, re-evaluation and overhaul. The phenomenon of juvenile delinquency has also spawned innumerable research projects, theses and theories from a wide variety of disciplines and viewpoints. One must not forget, however, that, at the core of this problem is the law, which created the juvenile court, the neglected child and the juvenile delinquent.

The aetiology of juvenile delinquency has been traced to many sources² but most of these have proved fruitless and hopeless in terms of its diminution or eradication. There is, perhaps, one common factor, that is, parentage, or to put it more generally and

² E.g. Glueck, One Thousand Juvenile Delinquents: Their Treatment by Court and Clinic (1934); Unraveling Juvenile Delinquency (1950); Aichorn, Wayward Youth (1935); Barron, The Juvenile in Delinquent Society (1954); Bovet, Psychiatric Aspects of Juvenile Delinquency (1951); Thresher, The Gang (1927); Shaw, Delinquency Areas (1929); Burt, The Young Delinquent (1925); Cohen, Delinquent Boys: The Culture of the Gang (1955); Neumeyer, Juvenile Delinquency in Modern Society (1949); Rubin, Crime and Juvenile Delinquency: A Rational Approach to Penal Problems (1958); Downes, The Delinquent Solution: A Study in Sub-cultural Theory (1966); Cloward and Ohlin, Delinquency and Opportunity (1960); Whyte, Street Corner Society (1943); Polsky, Cottage Six (1962); MacIver, The Prevention and Control of Delinquency (1966). This is a representative list of works on juvenile delinquency. For a more comprehensive bibliography, see Block and Flynn, Delinquency: The Juvenile Offender in America Today (1956) and Tompkins, In the Interest of a Child (1959).

For an incisive criticism of past research see Woolton, Social Science and Social Pathology (1959), p. 301 et seq.
cynically, birth. Above that, there is little solid knowledge upon which we can rely.

The studies on the juvenile court and on other institutions for children have ranged from those which demand a return to a system similar to adult penology, to ones which would separate child problems from the direct influence of legal institutions. The important lesson to be learned from these studies is that they have focussed on a legal-administrative examination of legal problems and in the very centre has been the juvenile court. This very focus, it is suggested, has been a mistake, which, if not irremediable, is likely to require a half century of re-thinking.

I. Some Historical Observations.

In her remarkable work, The Century of the Child, Ellen Key quotes a dramatic work called The Lion's Whelp:

The next century will be the century of the child, just as this century has been the woman's century. When the child gets his rights, morality will be perfected. Then every man will know that he is bound to the life which he has produced with other bonds, than those imposed by society and the laws. You understand that man cannot be released from his duty as father even if he travels around the world; a kingdom can be given and taken away, but not fatherhood.

Miss Key's book was written at the end of the nineteenth century. This prophecy embraces an astute prediction and a painful irony. On the legal and materialistic level, the prophecy has proved correct. The last century has seen a completely new attitude toward childhood. Children are no longer looked upon as chattels, as small adults who merely learn by watching their elders and parents at play and at work in everyday life. Children are now encouraged to express themselves rather than be "seen and not heard". The mid-twentieth century has seen the continued emancipation of women and has created a new status for children, namely "teen-age". With teen-age has come greater social and economic

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3 For a description of these developments, see Parker, Some Historical Observations on the Juvenile Court (1967), 9 Crim. L. Q. 467.
5 The history of the family is well described in Ariès, Centuries of Childhood: A Social History of Family Life (1962), passim, and Calhoun, A Social History of the American Family (1919), vol. III, p. 157 et seq.
6 This term has become so well accepted that we find that Sir Ernest Gowers has given it his blessing in Fowler, A Dictionary of Modern English Usage (2nd ed., 1965), p. 617. Gowers welcomes this Americanism as a "suitable and colourless" word where alternatives had failed. He explains: "Juvenile is tainted by its association with delinquent and Court... Young persons, the statutory expression, is prim, and unsuitable... Unfortunately (teenage) seems to be acquiring an overtone of
independence, and an entirely new culture has developed, which is little understood by the adult world and its institutions.

The Industrial Revolution brought with it material well-being for the child and his parents, but the social health of the child has made dubious progress. The Industrial Revolution caused the growth of the cities, the breakdown of the family as an economic unit, the absence of the father from the daily routine of the household, and, eventually, the phenomenon of the working mother. This period saw the rise of the middle class—a social group who did not have the economic freedom of the rich with their nursemaids or the carefree attitudes of the very poor whose children grew up on the streets. The middle class had to operate in a social milieu which had never existed before; they were directly responsible for child-rearing and felt the pressure to maintain a social position and material comforts for the family. This state of affairs has produced serious pressures on the family unit. Ironically, while the importance of the family as a cohesive, self-supporting social organism has all but disappeared, the ideal of parenthood has developed an artificial sanctity. These influences have had important consequences for child neglect, delinquency and parental pathology. In Riesman's terms, the family became other-directed rather than inner-directed.8

In the wake of the Industrial Revolution, came cities, tenement slums, the city streets as playgrounds and the “dark satanic mills” of a manufacturing society replacing the uncomplicated and self-sufficient rural environment. Along with these undesirable changes came the influences of the social thinkers and reformers—such as Galton, Darwin, Spencer and Froebel—which produced or accelerated the socialization of the family and a social ferment which we are still experiencing. In the family circle itself we saw the ex-

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1 This “teen-cult” has produced a distinctive set of fashions, including clothes, music, leisure (particularly in the use of the mass media), automobiles, sexual mores and marriage rites. These factors should not be too lightly rejected particularly when we discover that for the first time the young form the majority of the population (with all that means in terms of potential political and social pressures) and have great economic power in the affluent society. The study of teen-age has produced a literature of its own: e.g. Lear, The Child Worshippers (1963); Friedenberg, The Vanishing Adolescent (1959); Hechinger, Teen-Age Tyranny (1962); Erikson, ed., The Challenge of Youth (1965).


8 E.g. Dalton, Hereditary Genius (1869); Spencer, The Study of Sociology (1872). For a description of the influences on American social reform, see House, The Development of Sociology (1936), pp. 219-227.
ploitation of labour, including that of the mother and children, leading to a new materialism which has enabled today's child to be dependent on the parents for longer periods leading to a break-up of the old family life, more (not less) working mothers, and a deceleration of maturity and the real independence of children. The urban-community (including its schools and youth clubs) replaced the family as the social unit. The disintegration of the insular family unit was accelerated by the absence of the older generations in the home. In recent years, the multi-generational family has become increasingly unfeasible because of the transient nature of the modern family. These are the social factors which are producing social, emotional and penal problems.

On the level of the child's material welfare, we have seen great advances. The century of the child has produced a cornucopia of child-saving devices. These advances literally affect the child in the womb. The mother receives pre-natal care and help at the confinement so that infant mortality is relatively unknown and physical deficiencies in babies are drastically reduced. Well-baby clinics, free milk and school lunches, school nurses and Dr. Spock have contributed to improved child health. The practice of pediatrics has burgeoned, the drinking water is fluoridated and the child is inoculated against diptheria and similar diseases.

The change in the status of the child has been legal as well as social. The laws in relation to property and tort have been amended to offer him more protection and greater rights. Factory laws have been passed forbidding the hiring of children in factories and mines. Compulsory education statutes have been enacted and the school leaving age has been consistently raised in the last fifty years. The educational opportunities have so increased that the government is now subsidising children at the tertiary education level. Child neglect laws and other child welfare provisions have been introduced and are administered by children's aid societies and governmental agencies. The age of consent has been raised and enforced. Training schools and reformatories have been built. Probation for juvenile delinquents has been universally accepted. And, of course, the juvenile court has emerged as an important social agency.

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10 See Report of Select Committee on Youth (1967) where the limitations on youth's driving, drinking and voting rights are examined.
11 E.g. Ontario Factories Act (1884), 47 Vict., c. 39.
12 E.g. Ontario Public Schools Act (1874), 37 Vict., c. 28.
14 E.g. Ontario Children's Protection Act (1893), 56 Vict., c. 45. Also see McFarlane, The Development of Probation Services in Ontario (1966).
The increased activity in the behavioural sciences has not neglected the child. Child psychology and the study of child behaviour has also added to this century of the child. Some of the earliest organised attempts to help disturbed children were connected with the pioneer juvenile court in Chicago, where Dr. William Healy (and Augusta Bronner) set up the Juvenile Psychopathic Clinic which flourished until Dr. Healy's transfer to the Judge Baker Clinic in Boston where he made important contributions to the study of deviant child behaviour. The work of the Chicago Clinic was possibly decisive in the early successes of the juvenile court in that city. As a general principle, there are strong indications that the efficacy of the juvenile court suffered when the attention of psychiatry and psychology was diverted from the court-related clinics to the establishment of child guidance clinics which concentrated their attention on the schools. Today's children and teen-agers have been reared on a strong diet of child psychology, and, in particular, on the advice of Dr. Spock. Unfortunately, the formal application of psychological theory by professionals has been haphazard due to lack of personnel and resources; this has resulted in emergency, preventive work being the usual mode of operation. The application of child psychology theory by parents and guardians (including school teachers) has been half-baked and largely ineffectual; increased anxiety has been created by the mere fact that parents have been indoctrinated with the indispensability of child psychology.

II. The Rise of Juvenile Justice.

As has been stated earlier, the juvenile court has become the focal point in all examinations of juvenile delinquency. While the juvenile court is no doubt a worthy institution, the factors which gave rise and fostered the century of the child are much wider than the narrow, artificial concept of juvenile delinquency. Furthermore, the role of the juvenile court and similar child-saving measures should probably be broader-based. The history of the juvenile court would suggest that this is the case.

The juvenile court idea did not flower overnight—without antecedents or as a unique concept. To speak of the juvenile court as a unique idea is erroneous because it was simply part of a much

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15 Healy, The Individual Delinquent (1915); Healy and Bronner, Delinquents and Criminals—Their Making and Unmaking (1926); New Light on Delinquency and Its Treatment (1936); Treatment and What Happened Afterward (1939).
larger movement in child-saving. Only after its establishment was
the court looked upon as a panacea or an end in itself.

The social forces which produced the court arose from a num-
ber of sources. All of these forces could be called child-saving
but the motivations of the reformers varied widely. Spencer’s\textsuperscript{16} influence had convinced many that a science of society existed and
that the only way in which social problems could be solved was
by a socialization of the sectors of society which produced or were
the victims of most of the evils. The State had to assume respon-
sibility where private individual effort failed. This idea has been
rationalized in the notion that the child and his parents entered
into a social contract with the State which undertook to protect
and foster a child who had become a victim of the industrialized
society in which he lived.\textsuperscript{17} Closely related was the idea that society
had to be protected against the undesirable forces which could
destroy it. Social hygiene or social defence demanded that the
respectable middle class values of society be preserved by re-
moving the cancer of poverty, misery and degradation of child life
in the slums and streets of the large cities of Britain, the United
States and Canada. These forces were operating on the problems
of child-saving at the same time as the social gospel,\textsuperscript{18} practical
Christianity and constructive philanthropy. These influences were
less sophisticated but more powerful and pervasive; although there
were few who could articulate social Darwinism or Spencerian
sociology, almost all of the middle and upper-class were out-
wardly devout practising Christians. The Victorian maiden ladies
and clubwomen deplored mere financial aid (which would degrade
and entrap the pauper\textsuperscript{19}) and instead supplemented charity dona-
tions with voluntary social work known as “friendly visiting”.
They were not content with these good works. They studied Spen-
cer, or at least encouraged students of sociology and psychology
whom they subsidised. These philanthropists had been responsible
for reforms in the factory laws, in establishing reform schools (as
early as the eighteen twenties) and probation for juveniles. At the
turn of the century, social work emerged as a profession\textsuperscript{20} and

\textsuperscript{16} Supra, footnote 9.
\textsuperscript{17} Ketcham, The Unfulfilled Promise of the Juvenile Court (1961), 7
Crime and Delinquency 97.
\textsuperscript{18} Rauschenbusch, Christianity and the Social Crisis (1913).
\textsuperscript{19} The annual reports of The National Conferences on Charities and
Corrections are full of debates on the relative virtues of indoor and out-
door relief.
\textsuperscript{20} See Lubove, The Professional Altruist: The Emergence of Social
Work as a Career (1965)
Jane Addams⁴¹ and Julia Lathrop at the Hull House settlement made philanthropy a practical and full-time occupation. They were following the example of the London settlements and the work of Octavia Hill and Mary Carpenter.

In the light of these social reforms which required little direct relationship to legal institutions (except in the form of legislation), perhaps it seems strange that the reformers should pin their hopes for child-saving in a legal institution such as a juvenile court. The historical answer is not a simple one. The history behind the establishment of the court is also important in the light of the juvenile court’s present status and of the climate of modern child-saving. The mere establishment of reform and training schools had not ensured that, in all instances, children would be sent to these specialised institutions. The reformers of the late nineteenth century were strongly influenced by the contamination theory of social ills; they believed that children would certainly become criminals, or at least moral delinquents if they were forced to associate with adult criminals, beggars and paupers in penitentiaries, jails, lock-ups, police courts, poorhouses or as beggars and boot-blacks on the city streets. Therefore, as an unsophisticated form of social hygiene, they demanded separate institutions so that child-life could be preserved, and, where necessary, purified. (This did not stop many of them from also believing the Lombrosian ideas that there were criminal types and that some families, such as the Jukes, bred criminals from the cradle). Although many of the proponents of the juvenile court idea were determined to keep children out of adult institutions, they had no intention of establishing a legal institution to handle the problem. In some communities, they were satisfied with administrative devices which would place all child problems in the hands of child welfare agencies which were charitable institutions financed by private donation or by the municipalities.⁴⁴ In some places, notably the United States, they were persuaded to clothe the juvenile court in legal garb because the lawyers could more easily persuade the legislatures of the need for reform and because they wished to avoid constitutional challenge.

⁴¹ E.g. Addams, Twenty Years at Hull House (1910). See also, Lasch, ed., The Social Thought of Jane Addams (1965), and Lasch, The New Radicalism in America (1965), pp. 3-37.
⁴² Lombroso, Uomo Delinquente (1876).
⁴³ Dugdale, The Jukes (1877).
⁴⁴ E.g. The experience in South Australia described in Parker, op. cit., supra, footnote 3, at pp. 483-495.
At most, the reformers saw the court as a clearing house for child problems. If one reads the social reform literature of the Victorian era, the optimism of that period is immediately evident. The reformers had such high hopes for their training schools that they did not envisage the re-admittance of recidivists in those institutions. The concern of some for wayward children was not long-suffering and they planned that any graduate of a reform school who transgressed again would be a suitable candidate for penal treatment. The juvenile court was not seen as an institution which would necessarily subsist in perpetuity because, as the health, education and welfare of the community were perfected (and pauperism and drunkenness disappeared), the problems of child-life would disappear. Therefore, there is every reason to believe that the founders of the juvenile court would not accept the present state of the court in which children return as often as twenty times during their minority and sophisticated junior criminals gain leniency from its procedures and dispositions.

The philosophy of the court, embodied in the Canadian Juvenile Delinquents Act, that the child was treated as "mis-guided" rather than criminal with the court acting as a surrogate wise and kindly parent, strengthened the concept of a philanthropic rather than a penal body. The personnel of the courts, particularly the judges and probation officers, were to be social workers first and lawyers and jailers last. In the early history of the court, these tribunals were fortunate in attracting inspired amateurs who dispensed individualized justice, fatherly advice and friendly admonitions. Whence, then, came the end of innocence?

III. The End of Innocence.

The recent history of juvenile delinquency is too well known to require re-iteration. Yet, as has been explained before, juvenile
delinquency is simply the end-product of the failure, and not the root of the failure of our efforts in child-saving. Obviously, the Victorian reformers had been absurdly and naively optimistic, and yet even they could not have foreseen the problems which have haunted the past fifty years of this century—the wars, the depressions, the failure of the welfare state to solve social ills, the continued exodus from the rural areas and the resulting urban blight. The incidence of crime has increased and the family unit has continued to disintegrate. (This data is particularly applicable to the Negro family in the United States, which is in almost the same situation today as the immigrant family of seventy five years ago).

Similarly, the founders of the juvenile court could not foresee that the behavioural sciences would not live up to their early promise and the trust placed in them. Perhaps it should have been possible to predict that the court would atrophy. The history of the juvenile court is, in some respects, analogous to the decline of the chancery as the fountain of equity (from which the juvenile court had drawn some inspiration). As the business of the juvenile court became heavier and more difficult, the work of the judge in solving child problems became less individualised and more hurried. More tasks had to be left to the court officials with resulting rigidity and lack of imagination.

Although Ellen Key was describing the social situation at the turn of the century, her remarks seem appropriate to the efforts we have made in child-saving and general social amelioration:

All philanthropy—no age has seen more of it than our own—is only a savoury fumigation burning at the mouth of a sewer. This incense offering makes the air more endurable for passers-by, but it does not hinder the infection in the sewer from spreading.

Perhaps her solution does not appear to us to be the answer we are seeking today, but her remarks contain some important indications of the way we are headed:

Either there must be such a transformation of the way in which modern society thinks and works that the majority of women will be restored to motherhood, or the disintegration of the home and the substitution of general institutions will inevitably result.

The last ten years have seen vigorous re-examinations of the juvenile court. There were second thoughts on the court many years ago, but these revisions were mostly attempts to shore up the court against attacks from the outside. The court withstood litiga-

29 Ibid., p. 99.
tion by parents who attacked the court's constitutional status.\textsuperscript{30} The National Probation and Parole Association,\textsuperscript{31} the Juvenile Court Judges' Association and the Children's Bureau of the United States Department of Health, Education and Welfare\textsuperscript{32} have attempted to strengthen the court by means of standardized legislation and procedures. Some states initiated the salutary system of family courts\textsuperscript{33} which attempted to examine all problems of the family under one judicial roof. Many jurisdictions, notably California, have developed extensive institutional programmes which aim at more successful rehabilitation of deviate youth. California was also one of the first to make a thorough examination of the administration of juvenile justice.\textsuperscript{34} That state's report was made public at the same time as the English Departmental Committee, presided over by Lord Ingleby, made its findings public.\textsuperscript{35} Their conclusions were diametrically opposed. The Californian study recommended a stricter adherence to legal formalities, while the English report suggested that the procedures in English juvenile courts should be more informal. The views expressed in these reports were predictable; the American juvenile institutions, including the juvenile court, had had a surfeit of social welfare and applied behavioural science which had achieved little. The new approach was primarily a reaction against this failure. The English, on the other hand, had more recently discovered sociology, psychology and psychiatry, and were reacting against the rigidity of procedure and the stereotype handling of cases which seems endemic to English institutions. The Californian courts had been


\textsuperscript{31} The National Probation and Parole Association was later called the National Council on Crime and Delinquency. The first model Act was the Proposed Model Juvenile Court Act (1914), published in Flexner and Baldwin, Juvenile Courts and Probation (1914). Further editions of the model Act sponsored by the Association have appeared in 1925, 1928, 1933, 1943, 1949 and 1959.

\textsuperscript{32} The Children's Bureau has produced Juvenile Court Standards, Bureau Publication, No. 121 (1923), Standards for Specialized Courts Dealing with Children, Bureau Publication, No. 346 (1954), and Standards for Juvenile and Family Courts, Bureau Publication, No. 437 (1966).

\textsuperscript{33} The first family court with jurisdiction over both domestic relations and juvenile cases was established in Cincinnati in 1917. Domestic relations courts had been started with the Buffalo court in 1910.

\textsuperscript{34} Report of the Governor's Special Study Commission on Juvenile Justice (1960).

\textsuperscript{35} Report of the Committee on Children and Young Persons, Cmnd. 1191 (1960).
overmanned, while the English courts were only glorified justices' courts.

The Californian report deplored the "sharp divergence in values, norms and philosophies" practised in the juvenile courts of that state, and, for the sake of uniformity and justice, recommended that the spirit of the Model Juvenile Court Act should be followed. The views of the Californian investigators are well stated in a passage which they quote:

Those who serve in juvenile courts have varying degrees of competence to do so, coupled with differing views about the functions of courts as social institutions and therefore of their responsibilities and aims in relation to individual offenders. This means that there tends to be no such thing as a juvenile court system... but rather a broad legal framework within which each specific court develops its own individuality, its social climate, its ethos. The result is that we are abandoning the certainties of a rigid legal system without yet being able to substantiate another kind of certainty based upon scientifically determined diagnosis and treatment. This creates not only a dilemma but also a real danger in view of the unique characteristics of courts as social institutions—the fact that society entrusts to them the ultimate sanction of compulsion.

The Ingleby Committee, which reported in 1960, made more specific suggestions on legal matters. The Report criticized the practice of the juvenile court in apparently trying a case on a petty offence and yet dealing with the child on a different ground so that the child received what appeared to be a disproportionate sentence. They recommended that a more social welfare approach should be applied to all children simply in need of care and protection and any child under twelve years, whatever offence he had allegedly committed. At the same time, the minimum age of criminal responsibility would be raised to twelve years. On the court's procedure the Committee recommended that:

... in its dealings with younger children who commit offences and with children whose primary need is for care, protection or control, it should get still further away from the conceptions of criminal jurisdiction, while keeping as far as practicable the sanctions and methods of treatment at present available.

Neither of these studies thought fit to re-examine the philosophy of the juvenile court. The Californian study complained of

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37 See supra, footnote 31.  
39 See op. cit., footnote 35, pp. 32-34 for the arrangements recommended for disposition.  
40 Ibid., p. 30.
the vagueness and ambiguity of the juvenile court statute, and the English report was trying to create a proper juvenile court system where none had previously existed. Neither group challenged the basic premises of the system (although the Ingleby Committee suggested greater social welfare activity without providing clear guidelines).

*The Kilbrandon Report* took a fresh approach to the problems of child welfare, including juvenile delinquency. The Departmental Committee was prepared to examine the whole problem. The Report pointed out that the legal distinctions between juvenile delinquency and child neglect were "very often of little practical significance" because in random cases the symptoms of misbehaviour and malfunction could just as easily reflect serious emotional disturbance, difficulties in the home environment or sheer high spirits. These conditions of delinquency and neglect required a variety of solutions but primarily "education" in the broadest sense. The Report stated:

Each case had...to be assessed on its merits, and the type of training, whether stressing the protective aspect, the disciplinary, or for that matter the need for special instruction in formal educational subjects on account of educational backwardness, had no necessary connection with the legal classification of children as delinquents or as children in need of care or protection.\(^4\)

The classifications could not be viewed as:

...presenting a series of distinct and separately definable problems, calling in turn for distinct and separate principles of treatment. The basic similarity of underlying situation (sic) far outweighs the differences, and from the point of view of treatment measures the true distinguishing factor, common to all the children concerned, is their need for special measures of education and training, the normal upbringing processes having, for whatever reason, fallen short.\(^5\)

The Committee judged the present treatment methods inadequate and also decided, agreeing with the Ingleby Committee, that the juvenile court's treatment of the child was often out of proportion to the act for which the child was before the court. They felt that the court was a poor compromise which was pre-occupied with legal procedures and classifications to the detriment of the protection and educative principles inherent in the true philosophy of child welfare.\(^6\) The Kilbrandon recommendations called for

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\(^4\) *Children and Young Persons, Scotland, Cmnd. 2306 (1964).*


\(^4\) E.g. The Kilbrandon Committee suggested that the legal age of criminal responsibility was totally artificial and unhelpful. *Ibid.*, p. 31.
drastic change. The juvenile court would be abolished. The few cases in which there were disputes as to the basic allegation which brought the child to the attention of the authorities should continue to be resolved by a court of law. In all other instances child problems should be the responsibility of a juvenile panel made up of specialists in children's problems. While the procedures of the panel would not differ widely from the present arrangements, the disposition action taken by the panel would be very different. These measures would concentrate on working with the families of the children to provide specialized and individualized education and training. In describing this new plan, the Committee pointed out the inadequacies of juvenile courts; that the court has not had the resources to keep pace with the rise in the child population and in the increase of juvenile delinquency in particular. Therefore, the "educative principle" had to be applied:

... which cannot hope to operate with any measure of success except under a procedure which from the outset seeks to establish the individual child's needs in the light of the fullest possible information as to his circumstances, personal and environmental. The establishment of those needs is in itself a task calling for essentially personal qualities of insight and understanding which obviously cannot be guaranteed under any system of selection. None of the existing systems of selection can be said to start from such a basis, and, difficult and demanding though the duties are, we are confident that the alternative would be able to draw on a much wider field of suitable persons than is at present the case. The task of the new body calls for skills quite different from those involved in adjudicating legal issues, and it is quite inappropriate that it should be expected to combine the two functions.45

Since the publication of the Kilbrandon Report, the English Government has produced a White Paper, The Child, The Family and the Young Offender46 which recommends the setting up of family councils, similar to the juvenile panels, which would concentrate efforts in child-saving on family welfare services. Neither of these proposals has yet been put into effect.

The Canadian Government has also made a recent survey of juvenile delinquency.47 The Minister of Justice's Committee has taken a North American view. The British proposals are rejected and the suggested Canadian remedy is similar to that recommended for California. The juvenile court is looked upon as a compromise between a criminal court and a welfare agency in which the functions of the latter would be tolerated so long as the rights of the

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46 Cmnd. 2742 (1965).
juvenile were adequately (although not constitutionally) protected. After making an excellent and perceptive survey of the theories pertaining to juvenile delinquency and offering some conventional wisdom on the need for more research and follow-up studies, the Report seems to place its hopes on the juvenile court. The Committee recommends that the juvenile court be given more adequate supporting services but tends to diminish the extra-judicial role of such agencies as police youth bureaus.48

The Canadian proposals were inadvertent precursors of the recent decisions of the United States Supreme Court in Kent v. United States49 and Re the Application of Gault.50 In these cases the procedures of the juvenile court, waiver to adult court in Kent and notice of hearing, trial procedure and right to counsel in Gault, were closely examined and criticized for their laxity, injustices and imprecision. Neither decision goes so far as to make the same guarantees as are found in Miranda v. Arizona51 or Escobedo v. Illinois52 or to invoke the United States Bill of Rights. Fortas J., speaking for the majority in both cases, does point out that perhaps the philosophy of the juvenile court has not been honoured and, instead, the child has been getting the worst of the two worlds of quasi-criminal court and social welfare agency, and there have been serious inroads into personal liberties. In the future, juvenile court judges would be obliged to provide reasons for waiving a case to adult court and such waiver would not be made until a full investigation had been carried out. In Gault, the Supreme Court decided that the child's parents must be given adequate notice of the hearing, that the child may be represented by counsel who should have the opportunity to present a case for his client with free access to court records and to cross-examine witnesses.

The United States Supreme Court took pains to state that it believed the philosophy of parens patriae should be retained as the rationale of the juvenile court. One suspects that the court did not fully consider the philosophy of the juvenile court in terms of its origins and its initial aims. The Supreme Court is not alone in such deficiencies. The underlying policy was ignored in the same way that penal policy was ignored in Escobedo53 and Miranda.54 The law was showing its addiction to labels. In all four de-

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48 Ibid., pp. 111-112.  
49 (1966), 383 U.S. 541.  
51 (1966), 86 S. Ct. 1602.  
52 (1964), 373 U.S. 478.  
53 Ibid.  
54 Supra, footnote 51. One important exception was the judgment of the Federal Court of Appeals in United States v. Freeman (1966), 357 F.2d.
cisions of the Supreme Court mentioned above there was a pre-
occupation with the magic of "due process" which should, of
course, be translated into community action. This conversion of
the formality of due process into community action is a very
difficult task. In the juvenile court cases, the Supreme Court found
itself in a delicate position. The legal profession was watching
very closely to see whether the court would continue its hitherto
uninhibited application of due process. The social workers saw
in due process, with its demand for increased formality and legal
technicality, a threat to their treatment programme. The social
reformer, who was neither preoccupied with therapy, philosophy
or constitutionality, hoped that the decisions would provide the
greatest impetus to child-saving since 1899 when the juvenile court
was established in Illinois. This last group saw the potential for
social reform as analogous to the Supreme Court's crucial role,
since 1954, in improving the status of the Negro in particular and
American society in general.

At best, the decisions in Kent and Gault were compromises
which smacked of expediency. Neither decision reflected a change
in policy or a proper appreciation of the need for re-evaluation.
What, then, are the changes likely to result from Kent and Gault?
There will be few long-range effects arising directly from these
cases. The well-run juvenile courts were already applying the
guidelines laid down by the Supreme Court and the other courts
will improve their procedural standards. Lip service will be paid
to the procedural requirements laid down.\textsuperscript{55} The juvenile court
and the concept of juvenile delinquency will apparently continue
to be the victims of euphemism.

The decisions could be valuable if they act as warnings that
the law may take more drastic action against the socialized court
if its standards are not improved in some jurisdictions. The warn-
ing inherent in Justice Fortas' call for improvement may result
in expanded programmes and concerted and intensive community
action. There are some indications that the President's Commission
on Law Enforcement and Administration of Justice are trying to
encourage these programmes.\textsuperscript{56} These, however, are long-range

\textsuperscript{606} where Kaufman J. gave consideration to the treatment facilities avail-
able to deal with problems of criminal insanity.

\textsuperscript{55} See Parker, The United States Supreme Court and the Police (1967),
9 Crim. L.Q. 54 where it was suggested that the decisions in Miranda and
Escobedo would become mere formalities. The recent study of post-Miranda
police procedures in New Haven, Connecticut, seems to corroborate this

\textsuperscript{56} The following proposals were made: "The formal sanctioning system
plans which might result from the decisions. Presuming that there is not an overall assault on child problems, the immediate effect of the decisions will be the more frequent presence of the lawyer in juvenile court. At the present time, the average lawyer has little knowledge of the juvenile court, its aims and origins. If the juvenile court is to continue in its present form, the crucial test will be the effect which lawyers will have in that court. If the lawyers invade the juvenile court and attempt to use the tactics usually (and properly) employed in the adult court, then the juvenile court, as a viable, unique institution, could become extinct. If the adversary system is introduced into that court, then the court may as well become a tribunal where full recognition is given to the elements of due process. This undesirable situation is not, however, inevitable. The New York Family Court Act has made provision for legal representation, through law guardians, without resort to the worst facets of the adult criminal trial. The Canadian Report on Juvenile Delinquency made similar suggestions. The Ontario legal aid plan is operating a pilot scheme in the Metropolitan

and pronouncement of delinquency should be used only as a last resort.

In place of the formal system, dispositional alternatives to adjudication must be developed for dealing with juveniles, including agencies to provide and coordinate services and procedures to achieve necessary control without unnecessary stigma. Alternatives already available, such as those related to court intake, should be more fully exploited.

The range of conduct for which court intervention is authorized should be narrowed, with greater emphasis upon consensual and informal means of meeting the problems of difficult children.

The cases that fall within the narrowed jurisdiction of the court and filter through the screen of prejudicial, informal disposition methods would largely involve offenders for whom more vigorous measures seem necessary. Court adjudication and disposition of those offenders should no longer be viewed solely as a diagnosis and prescription for cure, but should be frankly recognized as an authoritative court judgment expressing society's claim to protection. While rehabilitative efforts should be vigorously pursued in deference to the youth of the offenders and in keeping with a general commitment to individualized treatment of all offenders, the incapacitative, deterrent, and condemnatory aspects of the judgment should not be disguised.

Accordingly, the adjudicatory hearing should be consistent with basic principles of due process. Counsel and evidentiary restrictions are among the essential elements of fundamental fairness in juvenile as well as adult criminal courts. The


58 Supra, footnote 1, pp. 142-145. Also note the discussion of the Israeli youth examiner system, ibid., p. 123.

59 The Legal Aid Act, S.O., 1966, c. 80. Section 13 provides that the
Toronto Juvenile and Family Court, which shows that the lawyer has a valuable place in the juvenile court so long as the practitioner is discouraged from acting in an aggressive way and is educated in the functions and aims of the juvenile court. Under such a system, there will be no great increase in the number of "guilty" pleas or technical defences raised to "beat the rap". These limitations on the lawyers' activities would not hinder them from preventing injustices due to obvious abuses of procedure and irregularities in the process. Such legal assistance can add to the "helping" flavour of the court. The experience in the Toronto court is probably typical. There has not been a startling increase in contested cases. The lawyers have done some plea-bargaining, but none of it has been crucial in terms of final disposition. The long standing philosophy and practice of the court has pervaded the lawyers' behaviour before the court. The duty counsel, under the Ontario legal aid scheme, has acted as amicus curiae, pointing out procedural and evidentiary irregularities, ensuring that the child and his parents are made aware of the hearing's significance and helping in the disposition process. The major inadequacy of the scheme is symbolic of the whole problem facing the juvenile court; the lawyer has insufficient data to help both the court and the child. He has insufficient time to read the child's file; there is a lack of diagnostic information and the resources available for disposition are inadequate. There is little indication that the lawyer has perceived an ethical problem in acquiescing in a disposition process when a "technical" defence may have been available. As stated earlier, the Toronto lawyer has been indoctrinated in the philosophy of the court, that the outcome must be in the best interests of the child.

IV. The Future.

So far, I have not suggested that the juvenile court must necessarily disappear either of its own volition or because it will be rendered powerless (to carry out its special purposes) by the requirements of legal technicalities. Perhaps the recommendations of the Kilbrandon Report are simply new and disguised euphemisms and labels. Such an outcome is certainly possible if personnel and resources are lacking. Even if the plans of the Scottish and English schemes are excellent, they may be unfeasible for Canada or the

director of legal aid has a discretion to grant legal aid in the juvenile court.

An informal but most instructive handbook has been circulated to all lawyers listed to appear in the juvenile court.
United States or any other highly industrialised society where juvenile delinquency is a major social problem.

The Kilbrandon Report did incorporate one prime virtue; it tried to look at the whole child problem and refused to be diverted by old administrative devices which had failed, or by rhetoric, which simply restated the problem. The Supreme Court of the United States, and the Canadian Report to a lesser extent, have not attempted a new look at the problem. The Supreme Court, in particular, has not solved any problems but has simply added to them. There is no suggestion in either of its judgments that the court may have offered the worst of both worlds, not because there were technical irregularities in procedure, but because the child and his parents had relied on false representations. For instance, the training school programme may not be beneficial despite the fact the child would be incarcerated for a longer period than if processed by an adult court. Perhaps the child's parents have been misled when told that a child should be institutionalised for psychiatric care when no such treatment facility existed. The child on probation may have received no advantage when the protection and guidance promised were unavailable or inadequate because the probation officer was overloaded with cases. Perhaps the child's case, in fact, received less attention in the juvenile court than an adult court would offer, because the judge (or law guardian) was processing a juvenile case every fifteen minutes and without the aid of a psychiatric report or a social evaluation. The child may be placing false reliance on the promise that a juvenile court record will not create any civic or social disability in adulthood when the truth might be that juvenile records are retained and give him a lifetime stigma. In other words, the juvenile court may be a confidence trick which masquerades as a social welfare agency when, in fact, it suffers from a chronic lack of diagnostic and treatment resources. A juvenile court which finds itself in such a condition is indeed an empty shell.

Even if some resources are available, perhaps the juvenile court is still inadequate when it is unable to treat the whole problem which the Kilbrandon recommendations are aiming at. The whole problem concerns problems of education, recreation, religion, health and parental supervision. These problems cannot be solved by the shibboleth of due process. Such issues require fully organised community resources which understand the needs of the whole child and the entire family. At the present time, there appears to be some lack of cohesion and communication between
agencies interested in children. The juvenile court must establish proper lines of communication and organisation, if the legal safeguards are important, or it must abdicate responsibility to a more capable body.

There are more sinister aspects of the operation of the juvenile court. The first is the relativity of delinquency. The term is so elastic that almost any anti-social act can be brought within the definition despite the fact that the youngster is simply indulging in childish pranks which his rural cousin or even his father had done with impunity. There is an over-emphasis on conformity and regimentation which is an invitation to vindictiveness on the part of some official. This shotgun approach means that the court can become inundated with petty community problems which sap the court's energy for more crucial tasks requiring guidance and treatment. There are many cases which need not be referred to the court and could be handled adequately by a properly trained police youth bureau. The President's Commission on Crime\(^{61}\) seems fully aware of the potentiality of police community action which, hopefully, could be extended to all departments and agencies interested in children.

Another unfortunate aspect of the operation of the juvenile court is the implicit class quality of the court. By various means, which need not be explored, many members of the middle class and most influential parents are able to keep their children out of the juvenile court. The police do not patrol respectable suburban areas or are more amenable to informal adjustment of cases where the parents and child are respectable, generally law-abiding and co-operative. If it is true that mostly children from the low socio-economic stratum are processed by the court with consequent loss of liberty and social stigma, then the court is perpetuating gross injustice. Even if the poor child is incarcerated for psychiatric care while the privileged child receives private outpatient therapy, then the system is unfair.

In the final result, the solution of child problems is a community affair in which the entire family must be involved. If the problem is one of parental pathology or family breakdown, and presuming that the child, even if delinquent, is entitled to special status and consequent special treatment, then we must perfect a system which we have been pretending to adhere to. The rehabilitation of the family must be subjected to an overall treatment programme. The education of the child must be a comprehensive

\(^{61}\) Supra, footnote 56, ibid.
one in which stereotype school instruction forms but a part. We must stop treating the child as a mere organism or abstract conception or statistic, and start solving these basic problems to promote a healthy society. The juvenile court has served a useful, if limited, purpose. Its founders had envisaged a system which would save children, not condemn the more unfortunate ones to a life of misery in the name of charity. The juvenile court has initiated reforms which have spread to the adult penal system. There are indications that the juvenile agency is in danger of falling behind adult penology and yet such a situation would be ludicrous and ironic. If the remedy is a shifting of our budgetary and resources priorities, then the job must be done. The Victorian reformers were correct to the extent that they believed that a child had first priority on being salvaged as a human being. If we are to achieve our aim of making this the century of the child, then we must work toward a co-ordinated programme which has adequate resources to save the child.

Perhaps none of the above suggestions makes a sufficiently fundamental examination of the problem. At the risk of belabouring the point, the overall impression left by the recent North American developments, which have accentuated due process and legal rights, is one of frustration. These peculiarly legal concepts stultify creative innovations in child care because they are preoccupied with form—the mere formality of this concept called due process. The transference of due process notions to the juvenile court may well create (one is tempted to say perpetuate) the penal idea which should only be applicable to the administration of adult justice. The juvenile court philosophy has a delicate and subtle alchemy about it which could easily become unbalanced if a penal philosophy were allowed to intrude. This invidious change could occur even if the lawyer tries to act in a “helping” manner. At the present time, there are some indications that the juvenile court judge applies crude penological principles because the welfare concept is insufficiently developed. For instance, the judge acknowledges the irrationality and immaturity of children and the need to foster changed attitudes in the child by supposedly applying understanding, love and personal attention to his problems; yet every day the judge is sending children to training schools which are euphemisms for punitive institutions or is threatening a child with dire punishment on future occasions in the vain hope of deterring him. These tactics may be successful in some isolated instances but more frequently the child is made indifferent, hostile
or emboldened by his experience before the court. Perhaps the court has suffered from over-exposure. The court hears too many senseless cases which required earlier diagnosis and referral to other agencies or informal disposition. Presuming that the child is not subjected to loss of liberty and there is no stigma of a juvenile record, there is a strong possibility that less not more harm would be done if these extra-judicial dispositions were used. Surely there is an even stronger possibility that the court has become overburdened with administration and institutionalisation. It is suffering from bureaucratic middle age; in such a development the court has lost its spark and inspiration and over-estimates its importance and efficacy. A machinery has been established which requires constant operation even in instances where intervention may be positively harmful or merely useless.62 The child has become a victim of the process rather than saved from it.

The present adjudicative process and the importation of due process may still be a wasteful process even where the juvenile court is operating according to its stated philosophy. At the present time over ninety per cent of the allegations are admitted by the children before the court. Therefore a formal procedure may be diverting valuable resources from the most worthwhile tasks. If the "trial" stage could be minimised in this majority of cases, then the talents of the juvenile court staff could concentrate on the perfection of the disposition process. In the remaining ten per cent of contested cases, the usual legal guarantees could be provided, as suggested by the Kilbrandon Report. Even in these cases, the adjudication would not necessarily be like an adult trial but could be fashioned after an administrative hearing but with the necessary guarantees of due process if the law insists on it.63 Alternatively, a strong argument can be made out for lowering the age limit64 operating in the juvenile court so that its true philosophy

61 The President's Commission describes a similar situation where the intended ideology of the court has been lost due to a variety of factors some of which have been referred to in the previous comments in the text: "In theory (the juvenile court) was to exercise its protective powers to bring an errant child back into the fold. In fact there is increasing reason to believe that its intervention reinforces the juvenile's unlawful impulses. In theory it was to concentrate on each case the best of current social science learning. In fact it has often become a vested interest in its turn loathe to cooperate with innovative programs or avail itself of forward-looking methods." Ibid., p. 9.

62 The possibilities of this procedure are explored in an excellent article by Handler. The Juvenile Court and the Adversary System: Problems of Function and Form, [1965] Wis. L. Rev. 7. An adversary system would be retained but in a system analogous to arbitration.

63 This could apply to psychological rather than chronological age and
can be put into effect. Such a system would enable the court to retain social policy and to resist attempts to apply penal policy to its dispositions.

Therefore, in summary, the juvenile court should avoid any stance which makes its proceedings appear like an adult court. Some critics argue that, except in the first ten years of its existence, the juvenile court has never been anything more than a slightly informal replica of its adult counterpart. Such allegations, if true, should be remedied by thorough revisions.

Most of the above comments have not suggested radical change. They have simply suggested a renaissance of the spirit of 1899. Perhaps greater changes are imminent. Reference has already been made to the social changes in the world of youth since the start of the twentieth century. The implications of the revolution of rebellious youth are still evolving. Sexual and other mores are changing. The law relating to marriage and divorce are in drastic need of amendment to bring them into line with contemporary customs. As the result of these and other influences, the role of the family may undergo further shifts in status. Sex education is being taught in the schools. In due course, society may educate its citizens in marriage and parenthood.

Leisure is increasing as automation affects industry and commerce. In turn the jobs available in this new economy require different skills. School education is undergoing strong criticism by students as well as parents. Perhaps the school as part of the community educative process offers one of the strongest potential resources for helping youth and diagnosing problems.

At the present time, the final outcome is certainly not known and we are reliant on the behavioural scientist for further information and further guidance. Perhaps by the end of the century the schools will provide diagnosis of disturbed children, suitable curriculum for youth who are presently bored by their schools. Perhaps all of this amounts to something like Victorian optimism but the century of the child demands new approaches to all these changing circumstances.

could be engineered within stated guidelines, by means of a waiver process. An intermediate youth court could be established.