JUVENILE JUSTICE IN CANADA:

THE END OF THE EXPERIMENT

A Thesis

Presented to

the Faculty of Graduate Studies

University of Manitoba

In Partial Fulfilment

of the Requirements of the Degree

Master of Laws

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by

Lawrence Charles Wilson

April, 1976

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INTRODUCTION

On July 31, 1975 a new era in juvenile justice was heralded with the release of Young Persons in Conflict with the Law,[1] a report of the Solicitor General's Committee on proposals for new legislation to replace the Juvenile Delinquents Act.[2] For over sixty years, judges, lawyers and social workers have wrestled with a great experiment, the union of criminal justice and social welfare philosophy. This experiment, its origins and effects, is the subject of this presentation.

Initial discussion will focus on the incorporation of the concept of parens patriae, whereby the State assumes the role of a protective parent, into our system of criminal justice. This merger has failed to meet the expectations of those who first advanced it. In fact, our present system offers children nothing more than unfilfilled promises:

> We have been deceiving ourselves in claiming that our legislation and our judicial decisions are moral. It is true that they are usually based on good intentions and that they are in accordance with values. This, in the light of our modern, scientific approach is insufficient. Moral action is not simply action in accordance with values; it must mean action in accordance with the probability of achieving values. In that sense, action based on good intentions alone is

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1. Young Persons in Conflict with the Law, a Report of the Solicitor General's Committee on Proposals for new legislation to replace the Juvenile Delinquents Act, (Communication Division, Ministry of the Solicitor General, 1975).

2. Juvenile Delinquents Act, R.S.C. 1970, c. J-3.

> not only irrational, it is also immoral. Our present juvenile justice is full of good intentions; but it commands little respect from those who are subjected to it and who, despite their youth and limited education, are able to gain insight into its moral and legal weakness.[3]

The original proponents of specialized juvenile courts envisaged a system which would protect the best interests of society and the child. Apologists for present institutions contend that this goal would have been achieved if society had chosen to allocate sufficient resources and personnel to ensure adequate treatment. There is considerable evidence to the contrary; evidence which suggests that intensive treatment will not produce lower recidivism rates among youthful offenders. The most unsettling aspect of recent research is the suggestion that association with the juvenile court, and the resultant stigmatization, actually produces, rather than prevents, anti-social behaviour.

Thus, the opening chapters of this work will attempt to establish that Canadian children have been caught up in an ill-conceived experiment destined to fall far short of its laudable objectives. The remainder of the presentation will analyze the extent of this failure.

Canadian courts have had several opportunities to examine our juvenile justice system. For example, the Supreme Court of Canada considered the constitutional validity of the Juvenile Delinquents Act[4] and determined that it fell within the scope of the federal criminal law power. This decision is highly questionable. It will be suggested that where active intervention is required in the life of a child and his

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3. Grygier, T., "Crime and Society" in McGrath, W.T., Crime and Its Treatment in Canada, (Toronto, 1965), p. 35.

4. Juvenile Delinquents Act, R.S.C. 1970, c. J-3.

family, welfare legislation, which is essentially a matter for the provinces, is the most appropriate basis for action.

Similarly, the statute and its interpretation by the courts violates the spirit of the Canadian Bill of Rights[5] and particularly its "equality before the law" provision. In this context, the trial of juveniles and other areas such as the role of the police and the right to counsel will be discussed at length.

This presentation concludes with an examination of the future of juvenile justice in Canada and suggests that the solution to delinquency will not be found in isolated legal structures and institutions. The evolution of juvenile justice in Canada is only one aspect of the need to re-evaluate the nature and purpose of the family, the school, the church, the government and other traditional social institutions.

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5. Canadian Bill of Rights, R.S.C. 1970, Appendix III.

CHAPTER ONE

THE PHILOSOPHY OF JUVENILE JUSTICE

For centuries the law has acknowledged the need to protect children. Very early recognition was given to the plight of the child who had lost his natural guardians. Originally, this protection was granted through the Crown's prerogative power to act as parens patriae for those in need of help. Parens patriae was a power which was delegated to the courts of equity through the office of the Chancellor and has remained in some branches of the law relating to children until the present day.[1] When first recognized, it was essentially a parental jurisdiction; the State simply assumed the duties and obligations of the natural parents.

The courts of equity were not concerned with matters which were criminal or even quasi-criminal in nature; protection was granted exclusively to neglected, destitute or dependent children. The Chancellor lacked any means of investigating the social situation of the child such as a probation officer, or any other social worker, would have today.[2] Further, his officials and he experienced considerable difficulty attempting to define precisely the difference between young criminals and neglected children. In the narrow sense, they were concerned only with children beyond

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1. Parker, G. "Some Historical Observations on the Juvenile Court" (1967), 9 Crim. L.Q. 467, 469. According to Halsbury's Laws of England, Third Edition, Volume 7, p. 225, the concept of parens patriae dates back to the 16th century. The Sovereign enjoyed the prerogative right of taking care of the persons and estates of infants, idiots and persons of unsound mind, and of superintending charities.

2. Ibid, p. 478.

the control of their parents. Delinquent children, if limited to those who have committed acts which would be crimes in the adult sense, would not be included in this category. However, it evolved that by such delinquency they had proved themselves to be beyond the control of their parents and should now be looked after by the State.[3]

Serious anti-social or criminal acts of children were dealt with severely by the early English courts; during the 17th and 18th centuries the fundamental aim in criminal jurisprudence was not reformation but punishment - punishment as retribution for the wrong, punishment as a warning and deterrent to others.[4] There are numerous reported decisions about young children who were hanged for minor offences or foolish pranks.[5]

As the common law developed not only was there a complete exemption from criminal responsibility for any child under the age of seven but, in addition, there was a rebuttable presumption that a child between the ages of seven and fourteen was incapable of committing a crime.[6]

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3. Wang, K., "The Continuing Turbulence Surrounding the Parens Patriae Concept in Juvenile Courts" (1972), 18 McGill L.J. 219, 221.

4. Ibid, p. 220.

5. "The History of the Pleas of the Crown", Sir Mathew Hale, 1736, p. 25 footnote (u), contains the following: 'At Abigdon Assizes, Feb. 23, 1629, before Whitlock justice, one John Dean an infant between eight and nine years was indicted, arraigned, and found guilty of burning two barns in the town of Windsor; and it appearing upon examination that he had malice, revenge, craft and cunning, he had judgment to be hanged, and was hanged accordingly.' Schmeiser, D.S., Cases and Comments on Criminal Law, (Toronto, 1966), p. 596.

6. Department of Justice Committee on Juvenile Delinquency, Juvenile Delinquency in Canada, (Ottawa, 1965), p. 53.
These rules are now found in sections 12 and 13 of the Criminal Code, R.S.C. 1970, c. C-34 which read as follows:

> 12. No person shall be convicted of an offence in respect of an act or omission on his part while he was under the age of seven years.
> 13. No person shall be convicted of an offence in respect of an act or omission on his part while he was seven years of age or more, but under the age of fourteen years, unless he was competent to know the nature and consequences of his conduct and to appreciate that it was wrong.

Acceptance of this principle was not universal and late 19th century reformers were incensed by the application of the harsh rules of criminal law and procedure to children who were sometimes below the lawful age of criminal responsibility.[7]

This newly awakened concern for children extended beyond young people who were considered criminal or incorrigible. The reformers sought to protect and redeem the victims of vicious environments, unfortunate heredity and cruel treatment at the hands of parents and employers. The juvenile court movement was but part of a social movement to clear slum tenements, to enact and enforce humane factory laws, to ameliorate prison conditions and save future generations from misery, pauperism and crime.[8]

Consequently, through the notion of parens patriae, the concept of juvenile courts designed to protect socially and economically disadvantaged young people was developed at the turn of the century. Spurred on by the cries of the reformers, legislators introduced laws which would treat young people guilty of criminal acts by civil process. This union of criminal law and social welfare philosophy and the dichotomy which developed when some functions of both jurisdictions were placed in the hands of the juvenile court has exercised the minds of social worker, lawyer, and judicial officer to the present day.[9]

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7. Parker, supra, footnote 1, p. 476. For an excellent discussion of the work of the first advocates of a juvenile justice system see Parker, supra, footnote 1; Wang, supra, footnote 3 and the references contained therein. It is important to note that the initial impetus for the movement was concern for the treatment of the child after, rather than before, conviction. The actual mechanics of the juvenile's trial and disposition were given little consideration.

8. Id.

9. Ibid, p. 470.

Since the inception of the juvenile court concept there has been a basic conflict between those who seek to protect and provide guidance for the child in need and the civil libertarians who emphasize concern for the preservation of a child's legal rights.[10] Attempts to reconcile the two positions have been described as an exercise in futility.[11]

The juvenile court may be seen either as a duplicate of an adult court, with some changes in venue and procedure to protect the child, or it may be regarded as an altogether different institution. The former approach proceeds on the assumption that the adult trial process contains valuable safeguards for the accused person which are no less necessary for children than they are for adults. Indeed, they may be far more necessary. The alternative approach presumes there is a fundamental difference between the treatment of crimes committed by adults and the anti-social acts of children. The protagonists of this doctrine regard any court which is a mere modification of the adult court as inappropriate for the disposition of cases involving juveniles.[12.]

Canadian courts have never adequately examined the history of the parens patriae philosophy and the evolution of juvenile justice. It is

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10. Fox described the conflict as between "....those who contend that, in dealing with juvenile delinquency, the state should assume and maintain coercive power over the misbehaving child, primarily by reference to his or her apparent need for care, protection or treatment, and those, on the other hand, who would limit the state's criminal jurisdiction over children to cases in which the commission of a substantial criminal offence can be demonstrated." Fox, R.G., "The Young Offenders Bill: Destigmatizing Juvenile Delinquency?" (1972), 14 Crim. L.Q. 172, 214.

11. "But the introduction of detailed rules of criminal procedure and protection will inevitably lead the juvenile courts away from their informal rehabilitative function and towards an adversary process that cannot maintain the same concern for the general welfare of the child." Grosman, B.A., "Young Offenders Before the Courts" (1971), 13 Can. B.J. (N.S.) 2:6-7, 6.

12. Parker, supra, footnote 1, p. 469.

conceivable that such an examination would have prevented many of the subsequent problems which they encountered. Judges in other jurisdictions have considered the origins of juvenile delinquency legislation. Fortas J. stated in the United States Supreme Court decision of In Re Gault:

> These results were to be achieved, without coming to conceptual and constitutional grief, by insisting that the proceedings were not adversary, but that the state was proceeding as parens patriae. The Latin phrase proved to be a great help to those who sought to rationalize the exclusion of juveniles from the constitutional scheme; but its meaning is murky and its historical credentials are of dubious relevance. The phrase was taken from chancery practice, where, however, it was used to describe the power of the state to act in loco parentis for the purpose of protecting the property interests and the person of the child. But there is no trace of the doctrine in the history of criminal jurisprudence.[13]

Fortas J. concluded that the incorporation of parens patriae into the criminal law has produced a system of tyranny:

> The right of the state, as parens patriae, to deny the child procedural rights available to his elders was elaborated by the assertion that a child, unlike an adult, has a right "not to liberty but to custody." He can be made to attorn to his parents, to go to school, etc. If his parents default in effectively performing their custodial functions - that is, if the child is "delinquent" - the state may intervene. In doing so, it does not deprive the child of any rights, because he has none. It merely provides the "custody" to which the child is entitled. On this basis, proceedings involving juveniles were described as "civil" not "criminal" and therefore not subject to the requirements which restrict the state when it seeks to deprive a person of his liberty.
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> Accordingly, the highest motives and most enlightened impulses led to a peculiar system for juveniles, unknown to our law in any comparable context. The constitutional and theoretical basis for this peculiar system is - to say the least - debatable...the results have not been entirely satisfactory. Juvenile Court

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13. In Re Gault, 387 U.S. 1, 16 (1966) per Fortas J.

> history has again demonstrated that unbridled discretion, however benevolently motivated, is frequently a poor substitute for principle and procedure. In 1937, Dean Pound wrote: "The powers of the Star Chamber were a trifle in comparison with those of our juvenile courts"...[14]

Different jurisdictions have experimented with a variety of methods designed to cope with children who commit breaches of the law; all are premised on the belief that the State must intervene.[15] Approaches to juvenile justice range from the processing of all such complaints under child welfare legislation whereby delinquent children are viewed and treated as children in need of protection to the other extreme whereby all children who break the law are formally brought before the juvenile court on a delinquency complaint.[16]

Since the introduction of a formal juvenile justice system in Canada, we have, for the most part, opted for a non-legalistic approach.[17] However, constitutional limitations precluded creation of a national scheme based on welfare legislation.[18] The original Juvenile Delinquents

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14. In Re Gault, 387 U.S. 1, p. 17-18 (1966) per Fortas J.

15. For a thorough examination of the historical development of juvenile delinquency legislation in Canada, Europe, the United States and Australia see Parker, supra, footnote 1; Wang, supra, footnote 3; Debates of the Senate, Session 1906-7, Third Session, Tenth Parliament, p. 804-807, 820-830, 876-880, 887-902; Debates of the Senate, Session 1907-8, Volume II, Fourth Session, Tenth Parliament, p. 971-983, 1150-1165.

16. Canadian Association of Social Workers, Brief on Bill C-192, The Young Offenders Act, (Ottawa, 1971), p. 1.

17. There was movement towards a more rigid, legalistic system in the proposed Young Offenders Act, Bill C-192, Third Session, Twenty-Eighth Parliament, which was introduced by Solicitor General George McIllraith on November 16, 1970. The legislation was subsequently withdrawn by the government.

18. Infra, Chapter 3.

Act[19] had to be framed within the confines of the federal criminal law power,[20] thereby intensifying the clash between philosophy and implementation.

Our initial venture into juvenile justice was introduced in the House of Commons on June 19, 1908, by the Honourable A. B. Aylesworth, Minister of Justice.[21] He stated that it was the government's intention to obviate the necessity for children, when accused of crime, being tried before the ordinary tribunals. The legislation would prevent the possibility of children, who might be reclaimed if treated otherwise than as criminals, being sent to the ordinary prisons of the country with the older, hardened offenders.[22]

Although these objectives were greeted with enthusiasm, Mr. Lancaster, the Member for Simcoe, was appalled at the lack of attention given the potential impact of the legislation. He was somewhat concerned that this new law, containing thirty-five sections, was introduced during the dying hours of the session and that Parliament was asked to pass, but not consider it.[23]

Despite the protests of Mr. Lancaster, the entire debate and third reading in the House of Commons took just a little over ten minutes.

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19. Juvenile Delinquents Act, S.C. 1908, c. 40. The Act was introduced in the Senate on April 4, 1907. See Debates of the Senate, Session 1906-7, Third Session, Tenth Parliament, p. 556.

20. Infra, Chapter 3.

21. Debates of the House of Commons, Session 1907-8, Volume VI, Fourth Session, Tenth Parliament, p. 10916.

22. Debates of the House of Commons, Session 1907-8, Volume VIII, Fourth Session, Tenth Parliament, p. 12399-12400.

23. Ibid, p. 12400-12401.

A few minor changes in the legislation were enacted in 1929,[24] but these had little or no impact on the basic philosophy of juvenile justice in Canada. The amendments enacted at that time related largely to procedure and were of such a nature as to make the Act work more smoothly.[25]

The Juvenile Delinquents Act[26] is one of the few pieces of Canadian legislation which explicitly states the principles which should underlie its administration. The tone of the statute is clearly non-punitive; a juvenile is not convicted or sentenced but is "adjudged" and "dealt with" and at all times he is to be treated "not as criminal, but as a misdirected and misguided child, and one needing aid, encouragement, help and assistance."[27] For his protection, all juvenile proceedings are

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24. Juvenile Delinquents Act, S.C. 1929, c. 46.

25. The Act was introduced on May 29, 1929 by the Honourable Ernest Lapointe, Minister of Justice. See Debates of the House of Commons, Session 1929, Volume II, Third Session, Sixteenth Parliament, p. 2016.

26. Juvenile Delinquents Act, R.S.C.1970, c. J-3.

27. Sections 3(2) and 38 of the Juvenile Delinquents Act, R.S.C.1970, c. J-3 read as follows:

> 3 (2) Where a child is adjudged to have committed a delinquency he shall be dealt with, not as an offender, but as one in a condition of delinquency and therefore requiring help and guidance and proper supervision.
>
> 38. This Act shall be liberally construed in order that its purpose may be carried out, namely, that the care and custody and discipline of a juvenile delinquent shall approximate as nearly as may be that which should be given by his parents, and that as far as practicable every juvenile delinquent shall be treated, not as criminal, but as a misdirected and misguided child, and one needing aid, encouragement, help and assistance.

held in camera[28] and every effort is made to separate children from adult offenders.[29]

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28. Section 12 of the Juvenile Delinquents Act, R.S.C. 1970, c. J-3 reads as follows:

> 12.(1) The trials of children shall take place without publicity and separately and apart from the trials of other accused persons, and at suitable times to be designated and appointed for that purpose.
>
> (2) Such trial may be held in the private office of the judge or in some other private room in the court house or municipal building, or in the detention home, or if no such room or place is available, then in the ordinary court room, but when held in the ordinary court room an interval of half an hour shall be allowed to elapse between the close of the trial or examination of any adult and the beginning of the trial of a child.
>
> (3) No report of a delinquency committed, or said to have been committed, by a child, or of the trial or other disposition of a charge against a child, or of a charge against an adult brought in the juvenile court under section 33 or under section 35, in which the name of the child or of the child's parent or guardian or of any school or institution that the child is alleged to have been attending or of which the child is alleged to have been an inmate is disclosed, or in which the identity of the child is otherwise indicated, shall without the special leave of the court, be published in any newspaper or other publication.
>
> (4) Subsection (3) applies to all newspapers and other publications published anywhere in Canada, whether or not this Act is otherwise in force in the place of publication.

Section 441 of the Criminal Code, R.S.C.1970, c. C-34 reads as follows:

> 441. Where an accused is or appears to be under the age of sixteen years, his trial shall take place without publicity, whether he is charged alone or jointly with another person.

29. Sections 13(1) and 26(1) of the Juvenile Delinquents Act, R.S.C. 1970, c. J-3 read as follows:

> 13.(1) No child, pending a hearing under this Act, shall be held in confinement in any county or other gaol or other place in which adults are or may be imprisoned, but shall be detained at a detention home or shelter used exclusively for children or under other charge approved of by the judge, or, in his absence, by the sheriff, or, in the absence of both the judge and the sheriff, by the mayor or other chief magistrate of the city, town or county or place.
>
> 26.(1) No juvenile delinquent shall, under any circumstances, upon or after conviction, be sentenced to or incarcerated in any penitentiary, or county or other gaol, or police station, or any other place in which adults are or may be imprisoned.

Our juvenile justice system has always been characterized as an exercise in prevention. It has been described as an attempt,within the framework of the criminal law, to identify the potential criminal at an early age and to provide, through the intervention of the juvenile court, the means of preventing anti-social behaviour from developing into serious and persistent criminality.[30]

Nevertheless, in Canada and in other jurisdictions,the sword of benevolent justice is double-edged. The juvenile court must exercise its prerogatives with a due regard for the proper administration of justice which would indicate,at least superficially, that all the rules followed by a court hearing a criminal or quasi-criminal case should be present, (i.e. oaths, rules of evidence, pleas, onus of proof, etc.). On the other hand, the Act entitles the court to relax rigid procedural requirements as it sees fit although it must not go beyond that mystical line separating due regard from disregard.[31] In addition, section 17(2) states that no adjudication of the court will be quashed because of

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30. Department of Justice Committee on Juvenile Delinquency, supra, footnote 6, p. 63.

31. Chapman, P.B., "The Lawyer in Juvenile Court: A Gulliver Among Lilliputans" (1971), 10 Western Ont. L.Rev. 88,89.
Sections 5(1) and 17(1) of the Juvenile Delinquents Act, R.S.C. 1970, c. J-3 read as follows:

> 5.(1) Except as hereinafter provided, prosecutions and trials under this Act shall be summary and shall, mutatis mutandis, be governed by the provisions of the Criminal Code relating to summary convictions in so far as such provisions are applicable, whether or not the act constituting the offence charged would be in the case of an adult triable summarily.
> 17.(1) Proceedings under this Act with respect to a child, including the trial and disposition of the case, may be as informal as the circumstances will permit, consistent with a due regard for the proper administration of justice.

informality or irregularity.[32] The potential for abuse is obvious; the theory that in juvenile cases the court acts as parens patriae has led juvenile courts to relax or altogether omit many formal safeguards found in adult criminal courts.[33] Such practices have been justified by the assertion that the juvenile court acts for the benefit of all those concerned.[34]

Thus, Canada's juvenile justice system is a curious mixture of criminal law and social welfare philosophy. The failure to examine critically the ramifications of this union have left a legacy of unfulfilled promise. While there are many constitutional differences between Canada and the United States, the words of Fortas J. in the case of Kent v. United States are, in the writer's view, equally applicable to Canada:

> While there can be no doubt of the original laudable purpose of juvenile courts, studies and critiques in recent years raise serious questions as to whether actual performance measures well enough against theoretical purpose to make tolderable the immunity of the process from the reach of constitutional guarantees applicable to adults...There is evidence, in fact, that there may be grounds for concern that the child receives the worst of both worlds: that he gets neither the protections accorded to adults nor the solicitous care and regenerative treatment postulated for children.[35]

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32. Section 17(2) of the Juvenile Delinquents Act, R.S.C. 1970, c. J-3 reads as follows:

> 17.(2) No adjudication or other action of a juvenile court with respect to a child shall be quashed or set aside because of any informality or irregularity where it appears that the disposition of the case was in the best interests of the child.

33. Wang, supra, footnote 3, p. 224.

34. Section 20(5) of the Juvenile Delinquents Act, R.S.C. 1970, c. J-3 reads as follows:

> 20.(5) The action taken shall, in every case, be that which the court is of opinion the child's own good and the best interests of the community require.

35. Kent v. United States, 383 U.S. 541, 555-556 (1966) per Fortas J.

CHAPTER TWO

THE FAILURE OF PARENS PATRIAE

In its analysis of Canada's criminal justice system, the Ouimet Report of 1969 stated:

> The Committee regards the protection of society not merely as the basic purpose but as the only justifiable purpose of the criminal process in contemporary Canada.
> The inclusion of the offender as a member of society entitled to full protection is important. This principle prevents the application of correctional measures against convicted persons too harshly or for too long.[1]

Implicit in this statement is the question whether the best interests of society and the child are served by our system of juvenile justice. It is submitted that, in reality, existing structures and institutions do more to produce, rather than control or prevent, juvenile delinquency in Canada.

While society continues to expend enormous amounts of capital and personnel for the system, there is little to suggest that the rehabilitative goals of juvenile justice are being achieved.

From a purely statistical point of view, the practical effect on the child associated with Canada's juvenile justice system may be expressed as negligible. The difference in rates of prevention or rehabilitation among groups of children receiving no treatment, those receiving casual counselling and those receiving intensive care is not significant. Data

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1. Ouimet, R., Chairman, Report of the Canadian Committee on Corrections, (Ottawa, 1969), p. 11.

relating to recidivism in juvenile delinquency and the proportion of delinquents continuing into a life of adult crime show a remarkably similar distribution and percentage of juvenile offenders. It may be reasonably presumed that those children who obtain the greatest amount of service and therapy from the system are the recidivists, and considering the fact that well over 50% of all adult offenders were juvenile offenders, 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.[2]

Juvenile court philosophy, with its predominate emphasis on treatment, presupposes that the court will have at its disposal a variety of rehabilitative resources and professionals. It can be stated with confidence that no province has available a sufficient quantity or quality of needed services. The problem appears to be either an inadequate number of skilled personnel or a lack of financial resources in the service

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2. Johnston, G., "The Function of Counsel in Juvenile Court" (1969), 7 Osgoode Hall, L.J. 199, 201.
In a footnote the author adds: "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."
He cites data in Teuber and Powers,"Evaluating Therapy in a Delinquency Program in Psychiatric Treatment", 31 Proc. Assn. Res. Nera. and Ment. Dis. 138; W. Lundin and C. Thomas, Statistics on Delinquents and Delinquency (Springfield, Ill.).

Studies such as Consultative Study on Youth Services For Crime Prevention, (A Project of the Consultation Centre, Department of the Solicitor General, 1973) indicate that lack of funds and resources have thwarted the development of effective prevention programmes; the focus and funding remain crisis-oriented. The crucial issue in the development of any pre-delinquency programme is at what stage and to what extent the professional should intervene in the life of a child and his family: "Interventive action should interfere with rights and responsibilities of parents only to the extent necessary to protect or help the child. Parental responsibility is not developed or acquired by responsibility being removed." Canadian Association of Social Workers, Brief on Bill C-192, The Young Offenders Act, (Ottawa, 1971), p. 2.