SEXUAL ABUSE AND THE RIGHTS OF CHILDREN, REFORMING CANADIAN LAW by Terrence Sullivan (Toronto: University of Toronto Press, 1992) 212 pp.

I.

Children you are very little,
And your bones are very brittle;
If you would grow great and stately,
You must try to walk sedately.

You must still be bright and quiet,
And content with simple diet;
And remain through all bewild'ring,
Innocent and honest children.[1]

Laws are inconvenient to adults. It is in the nature of law to limit, to intimidate, and to infringe. Laws also do not speak to adults clearly enough. Too often laws affecting adults are ambiguous, inconsistent, baffling or unpredictable. Beyond this, a reasoned argument can also be made that there is too much law. When it comes to children, however, laws both their absence and their application can be downright harmful, for all the earnest pieties that are said to be the driving force behind their advocates. All the more important it is, therefore, for laws relating to children to be guided by and apply an articulable, coherent, comprehensible and consistent system of legal theory, and, more important, that those authorized to apply such law to be genuinely sensitive and responsible to the position of children.

Unfortunately, about the only thing that is consistent about what the law has traditionally done with respect to children is to authorize some one or some group to have dominion over them. Terrence Sullivan bluntly states the awkward fact that, howsoever the law for children has been designed or used in bygone ways, the law creates a relationship of power that not merely governs the conduct, property or rights of children to some effect for the children, it invariably creates some form of gain or benefit for the power holders. Sullivan tells us adults, in impactive terms, that when we offer schemes for 'reforming' the law of children, we should stop pretending that our schemes are exclusively neutral, objective, generous and wise. The plans and programs put forward inevitably involve localizing power, and we ought to know where that power is going before we hook up the cord. All aspects of the law of children are important; designing and applying any parts of it should not be a matter of naivete or hypocrisy.

The failure of adults to compose and apply an articulable, coherent, comprehensible and consistent theory of law for children cannot but worsen the harmful effects that the law, or its absence, may already have the condition of children in Canadian society. Can anything be done about this? If so, what should the guiding principles be? These are two

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1. Robert Louis Stevenson, "Good and Bad Children", from *A Child's Garden of Verses and Underwood Ballads*, (New York: Charles Scribner's Sons, 1991) at 29.

of the important questions addressed by Terrence Sullivan in his studious book. For some, Sullivan's book will be quite an uncomfortable read; no persiflage here. However, for the beneficial objective of balancing the way we think about the important matter of law for children, the book is entirely necessary. It is a welcome contribution to the effort to develop a balanced perspective for the law.

II.

For every ailment under the sun,
There is a remedy or there is none;
If there be one, try to find it;
If there be none, never mind it.[2]

Usually when there is something wrong about the way law works in our modern televised society, there are many adults willing to elbow their way into the spotlight to claim the status of victim, so as to transform victimhood to victory through the inverted reasoning of the 'squeeky wheel'. When the law appears to work badly in relation to children nowadays, self-appointed surrogates aplenty come forward to speak for the little victims. Bear in mind that, in eras past, children in the source countries of our variegate Canadian polity were sometimes reduced to the status of draught animals employed to do dirty and dangerous work. It is plainly a beneficent progress than anyone is willing to speak for children, like the famous New York woman who sought to protect children under the rubric of the law dealing with the protection of animals from cruelty.

Nowadays, there are a lot more adults who are willing to see that societal conditions can affect our children adversely, unfairly, and, sometimes, brutally. However, the increase in this recognition has not necessarily improved our vision or comprehension level as to what to do about such societal conditions, or, more specifically, what to do about the realities for children arising from such conditions. Playing music does not necessarily make one rhapsodic. The recognition of a problem in society now frequently leads to demands that the "Government do something" about it. Despite some recent international demonstrations of the comparative ineffectiveness of governmental 'central command' in dealing with what are perceived to be societal problems, one Canadian attitude that often seems to overwhelm modern discourse remains that of creating some sort of law, be it constitutional or 'regular', but in either event backed by the might of the nation state, to deal with the situation.

Sullivan offers a warning about this:

> As a practitioner working with youths and families over several years, I came to see a clear relation between the professionals' construction or 'marketing' of social problems and the professionals' efforts to develop regulatory mechanisms in which they themselves lay central roles in the 'resolution' of social problems. In the case of children and families, their activity often results in securing them a role as the long arm of the state and in the complementary broadening of professional influence and dominance

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[2] The Nursery Rhymes of Mother Goose.

> through the regulatory intercession of the state. The execution of this role often turns out to be ambiguous with respect to the question of whose needs are actually being served 'in the interests of children'. The manufacture of modern social problems is an industry in which professionals play major roles. The professional marketing of social problems, however, cannot be cynically dismissed as pure economic self-interest or laughed off as bleeding-heart liberalism.[3]

Professionally-guided allocation of the items on the lengthening list of desires and entitlements in our increasingly complex Canadian society has characteristics of self-interest and welfarism. To Sullivan, the modern day "marketing of social problems" in relation to the law of children is a phenomenon of a continuing struggle between forces drawn from intellectual zones of the quaint and the crass. Sullivan seems to see the legal theories that have affected the law of children in a rather bipolar way: the law of children is affected, if not afflicted, by the changing fortunes of the aggressively competitive theories of "liberationist" and "protectionist" concepts of law. His historical analysis offers a theory of oscillation, over time, of the law, as first one, then the other, legal theory, holds sway.

Thus, and stripped of its often smug verbal filigree, our standard legal discourse devolves to a tournament between the "ayes" and the "nays". This way of talking (mostly about where the law is and where it ought to go, though there is the occasional deconstructionist complaining about where law has been) encourages the participants in the debate to handle the matter militarily. Law is not just a chain letter from our ancestors. It is an ongoing debate that is periodically won or lost. Since the participants in the debate are no longer children themselves, their perception of what is won or lost can be considerably distant from the realities of what children do need and should have.

So what Sullivan offers is what he himself concludes, in his book, to be a form of "counter-discourse" about the fundamental notions of law for children. He reminds us:

> The extremes of the liberationist position have been fodder for the media cannons of sensationalism and ridicule, particularly in the area of sexual freedom and consent.[4]

while as to the protectionist position

> More often, an altruistic naivety about the workings of power, coupled with professional blinkeredness, results in the hijacking of reform efforts by particular interests other than those of the children originally designed to benefit.[5]

He notes that those who extol either theory have come to see the advantages of manipulating the courts, legislatures and the media service of the various items that rest on their agendas of how to re-construct Canada into something closer to utopia. Like the

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3. Terrence Sullivan, *Sexual Abuse and the Rights of Children* (Toronto: University Press, 1992) at 4-5.
4. *Ibid.* at 11.
5. *Ibid.* at 10.

Canadian Charter of Rights and Freedoms[6] itself, the advocacy of either position is lumbered with talk of "rights" and "freedoms", and ultimately bends under the weight of claims by the speakers that they are only doing what is best for the children themselves. The reason for the parallel in methodology seems plain enough: for all the posturing, neither side genuinely represents a position which would remove children from the ministrations of some form of authority. Both theories pursue forms of power allocation amongst adults, for all the cliché assertions about direct empowerment of the young.

In other words, and despite the title of his book, the ramifications of Sullivan's book are not just in the manner that he speaks about "sex laws" and how they impact upon the position of children. Sullivan avows no aspiration to reform all the law of children, but his scholarly review of how our laws respond, or fail to respond, to the implications of the sexual personalities of young people provide a crisp, and almost dramatic example of how to think about the law of children.

Sullivan's discussion of "sex laws," examined by him in their historical contexts, contributes usefully to our understanding of how reform of the law of children can properly occur. It does not merely rattle a few branches; it shakes the very trunk of the conceptual tree of the modern law of children. For instance, he sees the decline, over the centuries, of *patria potestas*, and the rise of the executive or the judicial *parens patriae* jurisdictions, as largely involving a shifting of the parental role to the state apparatus. This has what seems to Sullivan to be the disheartening consequences that:

> ... individual and public concern for improving children's rights and needs seems to have devolved to impersonal, and often poorly executed, professional controls in the place of families, neighbours and community. These controls often develop as a costly and questionable alternative to the original condition of families yet become quickly embedded in the market functions of the welfare state.[7]

Sullivan tells us to examine more honestly the very basis of how we think and what we do, legally speaking, about such matters. In effect, he tells us to 'fess up' to the less than altruistic motives which may actuate reform of such law. Moreover, he proposes that, for all their earnestness and difference of perspective, the legal theory combatants employ comparable methodologies which deflect their effectiveness in actually achieving benefits for children, and contribute to a drift toward benefitting what amount to the leftist or welfarist agendas of the proponents themselves. His is not, however, a quasi-Marxist diatribe against subjectivist and corrupt law and legal institutions.

Sullivan does not appear to see law as quite the sublime expression of human intellect that its more romantic adherents find it. Nonetheless, he evidently shares with law's many true believers something of the belief that law, if wisely written, clearly expressed, widely understood, and continuously monitored and influence by public discourse most importantly involving the "unmodified conversations of young people,"[8] can help to

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6. Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act, 1982* (U.K.), 1982, c. 11 [hereinafter *Charter*].
7. Sullivan, *supra* note 3 at 7.
8. *Ibid.* at 160.

genuinely reform society. He does not express profound disapproval of the idea that the concept of the Rule of Law, for all the power of law itself to conceal "shams and inequities" and to preserve the status of oligarchs, is a concept genuinely intended to inhibit power's all-intrusive claims.[9] Nonetheless, Sullivan expresses, in frank terms, some skepticism about whether the law and the court systems which are called upon (ultimately) to enforce it, can completely shed the traditions and shibboleths which, to his mind, compromise their efficacy and validity as instruments of either protection or liberation of children.

Resort to the fine points of law for remedy of any social problem (once such a problem is identified) means reliance on some form of legal theory and, ultimately (unless there is conciliation and compromise between the parties affected), recourse to the courts. Such a process, however, is not a perfect answer by itself, for two reasons: the courts and legislatures, as practical instrumentalities of law, and the law itself as a theoretical means, are not perfect.

III.

> *A Chancery Judge once had the kindness to inform me, as one of the company of some hundred and fifty men and women not laboring under any suspicion of lunacy, that the Court of Chancery, though the shining subject of much popular prejudice (at which point I thought the Judge's eye had a case in my direction), was almost immaculate. There had been, he admitted, a trivial blemish or so in its rate of progress, but this was exaggerated, and had been entirely owing to "parsimony of the public;": which guilty public, it appeared, had been until lately bent in the most determined manner on by no means enlarging the number of Chancery judges appointed I believe by Richard the Second, but any other King will do as well.*[10]

Courts in Canada have fewer problems of legitimacy than in other places and times, and rightly so. Moreover, the amplitude of the value expressions filling our current written constitution are such that courts can usually find, without too much exploration, some broad platitude on which to rest a conclusion which, if liberating for one, will probably be confiscatory for someone else. We are favoured with, by an large, an excellent, able, and well-intentioned judiciary in this country. Nonetheless doubts about using our win/loss court systems as resolvers betimes involving protests about the rules of standing and order or bewilderment about the juristic writings which are most of Canadian common law remain.

One concern resembles that of Dickens' Chancery judge: it is that the arteries of the court systems can become swollen with litigants whose new knowledge of their "rights" has become self-righteousness. As has been elsewhere said, exercises in Constitutional

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9. *Ibid.* at 157.
10. Charles Dickens, in his preface to *Bleak House* (New York, The Kelmscott Society Publishers, 1910) at iii.

Haddockry simply push other *bona fide* issues, including criminal prosecutions or private grievances further back in the queue. Recognition of status for surrogate litigants for children would not relieve such a curial sclerosis nor avoid its negative *sequelae*.

Exacerbating this situation, is a concern asserted by Sullivan thus:

> We can try to improve the position of young persons through advocacy and litigation, but it will be at our peril since we will be doing so through an adversarial process which, grounded in liberal tradition, will want to fix the adversaries as the private family and the child, and occasionally the state and the family. In this adversarial field, legal and medical professionals will silently advance their respective interests up the middle.[11]

The risk of manipulation of the courts by experts and professional helpers is posited by Sullivan in harsher terms elsewhere in his book, where he says that although:

> ...professional interest in adolescent and child sexual activity is not guided by some conspiratorial deception of the average citizen ... [H]elping professionals stand to gain in this round of youthful sexual reforms. The reforms have created a group of new specialty knowledges and of roles for professionals in the development and practise of these knowledges.[12] ...
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> ... The base of economic interest in an professional activity is to drive social and health problems in the interests of long-term growth in these particular economic sectors.[13]
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> ... [And moreover] Professional functionaries operating through legislative commissions, committees, and special inquiries such as the Badgeley Committee play an important legitimate on role for the state and for existing social arrangements and inequalities. Official discourse seeks to dispel arbitrary actions, excesses and lapses, to contribute to the maintenance of the passive social control of democratic dominance and legal calculation ... They are discourses of confidence in which the intellectual celebration of the state's rationality is reaffirmed after problematic interludes (Burton and Carlen, 1979, 51).[14]

Sullivan seems to envision the trend towards a *parens patriae* jurisdiction of the courts as not being all that welfarists might assert that it is. He seems to find it in conflict with notions of communitarianism, which, when all is said and done, seem genuinely to be part of what it is to be Canadian, irrespective of the culture, race, religion or nationality of the Canadian residents involved. Accordingly, to speak of "empowerment" of children by means of the empowerment of surrogates or representatives of children who have no familial connection with the children is not necessarily rational. The young are just as blocked from speaking as they were before, only this time their voices are muffled by strangers. Sullivan says this about what he seems to feel is a corrosive effect of state substitution for the moral obligation of proper parenting:

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11. Sullivan, *supra* note 3 at 149.
12. *Ibid.* at 114.
13. *Ibid.* at 115.
14. *Ibid.* at 116.

... Professionals are working to serve the child's interests. In doing so, they are directed by their own interests, which must be to advance a safer and healthier child, that is, to describe the child in the family as in an ever more fragile arrangement, in order to trade on the family problems market.[15]

To Sullivan, there:

...may be a modest but defensible case to be made for trying to advance, cautiously, the sexual status of young persons through advocacy litigation. We should recognize the clear limits of engaging in doctrinaire legal arguments advanced by uncontrolled advocates who pay little attention to the consequences of adolescent reproductive choices, to adolescents' interdependence, or to the character of modern family life. ... A collection of independent autonomous individuals translates into Ignatieff's crowd of strangers.[16]

IV.

If Congress were to bring in a law that a man's life was not to extend over a hundred and sixty years, somebody would laugh. That law wouldn't concern anybody.[17]

Turning his attention to the legislative branch of government due to the "poverty of litigation", Sullivan continues his search for ways to

...humanize the law, so that it better reflects the notion of family life and the socially embedded context of adolescence that we wish to advance.[18]

Sullivan finds that the "paradox of liberal reform approaches" that he mentioned at the outset of his book[19] is reflected in delicate and eloquent writings aimed at enriching not merely the statutory expressions of our legal *sophia* as to the rights of children as individuals free from invidious interference, but also aimed at laws which actually "promote their [children's] abilities to form relationships of trust, meaning and affection with people in their daily lives and their broader communities."[20] The problem with these possibly oxymoronic ideals, at least to Sullivan, is this:

It seems difficult, however, to conceive of broad public responses to economic inequities in the context of an individualistic legal tradition which privatizes economic inequities to families while publicizing and regulating family failures. How do we avoid a sophomoric leftism and proceed with an action-based reform agenda for policy and law?[21]

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15. *Ibid.* at 117-118.
16. *Ibid.* at 148.
17. Mark Twain, quoted by Rudyard Kipling, in "An Interview with Mark Twain," being Ch. 37 of *The Writings in Prose and Verse of Rudyard Kipling From Sea to Sea Letters of Travel, Part II*, (New York: Charles Scribner's Sons, 1906) at 272.
18. Sullivan, *supra* note 3 at 150.
19. *Ibid.* at 7.
20. *Ibid.* at 150-151 quoting Martha Minow, "Rights for the Next Generation: A Feminist Approach to Children's Rights" (1986) 9 Harvard Women's Law Journal 1 at 24.
21. Sullivan, *supra* note 3 at 151.

> ... Liberal policy and legal reform efforts in the area of adolescent sexuality walk a thin line between an idealized liberal isocracy of autonomous bodies floating in relation to the just state and the more immediate human world with its multiple hierarchies of familial and interpersonal dependencies and frailties.[22]

As with the judicial branch of government, Sullivan does not, however, discard as fundamentally flawed the legislative branch of government either. To him, Canadian statute laws and regulations are not beyond redemption, and the main thing is to make sure that such laws, and the processes for creating them, recognize that children are both autonomous and dependent, and that government itself can threaten both:

> And as we take this variable approach to affiliation and autonomy, we need to wrestle, cautiously, some territory for families from the front benches currently occupied by professionals. ...
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> ... all arguments advanced 'in the interests' of children by professionals and the court as the state need to be carefully examined for the degree to which they coincidentally (and silently) represent maximum utility positions for professionals. Furthermore, they should be subject to a rigorous scrutiny of how the claims for intervention will do more good than harm.[23]

In other words, Sullivan does not despair about the value of our central democratic institution the legislative branch of government. He merely finds it to be as potentially subject to excesses of zeal as the other branches of government are. Sullivan does not isolate, in his work, a discussion of legal theories in general, but this is no flaw to his book, because discussion of legal theory is pervasive in the text.

V.

> *Law and order you say? Twenty years ago we had 'em here. We only had two or three laws, such as against murder before witnesses, and being caught stealing horses, and voting the Republican ticket. But how is it now? All we get is orders; and the laws go out of the state. Them legislators set up there at Austin and don't do nothing but make laws against kerosene oil and schoolbooks being brought into the state. I reckon they was afraid some man would go to work and make laws to repeal aforesaid laws. Me, I'm for the old days when law and order meant what they said. A law was a law, and a order was a order.*[24]

The disrepute of much of legal theory is much like this quote says. Legal theorists have themselves to blame. Nobody but legal theorists talk about legal theory that much. The average person outside the realm of legal theory, and, for that matter, probably most of the people inside the realm of legal theory, if they really think about it, would wonder if legal theory is really relevant to anything. Ironically legal theory is very important to how

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22. *Ibid.* at 152.
23. *Ibid.* at 153.
24. O. Henry, "Law and Order," in *The Complete Works of O. Henry*, (New York: Doubleday, Doran & Company Inc., 1928) at 711.

society functions, and it is involved in everything significant in society, though few people are allowed to appreciate this.

Sadly, there seems about as much chance of a consensus legal theory emerging as there is of achieving world peace, and probably for similar reasons. Law theories are as corruptible as the politics that they spawn. The cynicism of many about politics is analogous to their cynicism about lawyers. Since many legal theorists seem to be engaged either in supporting aggressive and acquisitive enterprises, or in generously insulting one another, or both, some cynicism is justified. If battles on ground high theory and philosophy are the means for confirmed as the permanent peaceable replacement for old-fashioned wars as societal structuring and re-structuring, maybe we would be better off, but it must not be forgotten that such discussion is not a debate in a theoretical dimension. Both the prevailing or dominant theories, and the very combat itself, hit and hit hard, the real and practical world. Legal theory of some sort is carried forward through legislative, executive or judicial officers of government.

Law has often treated children as things, not as people. Even where children are said to have 'rights' in some sense associated with their humanity, recognition of such rights seems, under legal theories as applied to practical situations, to be primarily a part of the apparatus of legal theories which exist to serve the benefit of those adults who subscribe to such theories. Ideologies for human government invariably involve a fixed purpose that the ideology become dominant as soon as possible and/or remain so. In that sense, all legal ideologies are both 'conservative' and 'reformative'. Setting aside the pejoratives about words like 'conservative' or 'reformative' as appear in ordinary or legal conversation, the words fit, simultaneously, to any legal theory.

All legal ideologies, *when put into practise*, seek ultimately to confirm any hegemonic gains made in the social, economic and political spheres made at the expense of other legal ideologies, and to expand upon those gains. Theories tend to vary between holding a strong bias in favour of law's autonomy from human factors, and holding a strong bias in favour of law's inextricability from human factors. Ironically, confidence in the 'value' of law in human society is not proportional to its actual or apparent autonomy. Some assert that the state's role in human society should be 'minimal,' while others assert that the state's role should be more pervasive. Some assert that the law can and should be unalloyed with non-legal ideas, while others assert that the law neither can nor should be so 'purified.'

Ironically, it seems to be rare that legal theorists actually seek to persuade those who stand to be *prejudiced* under implementation of their theory. To those, the propositions are often delivered as simply Olympian wisdom. Some theorists seem to assume, wrongly, that the actual application of their theory will hurt no one by which they may mean that it will hurt no one 'important,' or, perhaps, that will hurt no one sufficiently to dejustify it, as other theories hurt 'more.' Legal theory is incapable of benefitting everyone and tends to be indifferent to losers if the losers are future people.

Legal theory aims at deciding how the law manages and distributes resources and power presently, though with a view to keeping the desired system in place. On the other

hand, and whether admitted or not, any legal theory is based upon normative aspirations while recognizing the flawed nature of humankind. There will be flavours of positivism and realism, but ultimately there will also be some sort of normative presumptions even by the post-modernists, for all the debunking of the capacity of law to be neutral or the capacity to rest law on indisputable first principles. With all this cacophony, is it any wonder that the law's authority may currently draw more from the mystique of law as a perceived combination of human intellect and power, than it does from any widespread understanding of what the heck it is all about.

> Given the uncontrolled effects of the law, its value in moderating domination notwithstanding, it behooves us to make concerted and innovative efforts outside the law to advance the position of young persons within the family and the human community. In this project, the current crises in public spending, real or ideological, will provide some tactical opportunities to advance vernacular community approaches. We cannot recover from the impersonality of the welfare state, but perhaps we can take small steps to reduce the further professionalization and commodification of care by engaging and involving our neighbours and the members of our local community more actively in decision making on the sexual seatus of young people.[25]

The *cri de coeur* of Sullivan ends with series of proposals whereby to bring our legalistic and welfaristic thinking as to children round to a less impersonal and more genuinely sensitive law of children respecting the implications of their sexual personality. Some of his reasoning may well be controversial to people both of the 'left' and of the 'right' as he draws from the statements and writings of transformatives and conservatives, feminists and traditionalists, 'straights' and 'gays', as well as boosters, skeptics and cynics of all sorts. Nonetheless, his book is not a recital or inclusive litany of the diverse sources from which he draws ideas; though the critical fervour somewhat weakens at its end, and there is a tendency on the part of Sullivan to overuse his capacious knowledge of English, the book still casts its gauntlet down with a flourish. In an era of heightened awareness that children are people too, it is a challenge to many of the self-appointed spokespeople for children. It is a good thing that he wrote it for them and for us.

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[25] Terrence Sullivan, *supra* note 3 at 160.