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STATE RESPONSES TO YOUTH CRIME: A CONSIDERATION OF PRINCIPLES

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INTRODUCTION

Currently, in Canada, there is a great deal of interest and controversy on how society should respond to children and youth who violate the criminal law. Concerns have been raised on a broad range of specific problems as well as more fundamental philosophical issues related to young people and crime. While the high level of public and media interest is a relatively recent phenomenon, Canadians have struggled with the issues of crime committed by youth for more than a century. There have been significant changes in how we deal with juveniles who commit crimes, in terms of the evolution of governing legal principles, reforms to specific statutory provisions and administrative policies.

This report is intended to facilitate informed discussion and debate about state intervention in the lives of young persons who violate the law by identifying and analyzing the principles that guide and constrain that intervention.

Objectives

To assess the adequacy of past and current efforts to deal with youth crime, and before considering the possibilities for future reforms, it is important to understand the fundamental principles that guide a state's response to youth crime. Such an understanding provides a rationale for state intervention, as well as an explanation of some of the limits placed on state action. The objective of this report is to provide the basis for understanding these basic principles and their relevance to some of the current controversies relating to the youth justice system in Canada. While many of the present controversies are discussed, there is no definitive analysis of any of the specific issues raised. Rather, the focus is on the fundamental principles that underlie the youth justice system.

Organization

Chapter 1.0 sets the context for the discussion that follows. It describes the constitutional framework that shapes the responses to youth crime in Canada and identifies the relevance of fundamental principles for shaping that response. It concludes with a brief discussion on the nature and causes of crime committed by youth.

Chapter 2.0 discusses the fundamental principles that structure state intervention in the lives of its citizens generally, and particularly those that have guided the responses to crimes committed by children and adolescents in Canada. The principles are analyzed; their implications for public policy are outlined; and within their context, the legal status of children, adolescents and adults, and the special responsibilities of parents are discussed. Following a discussion on the definition of crime, the chapter ends with a review of the general objectives of sentencing, with particular emphasis on how they apply to juveniles.

Chapter 3.0 discusses the history of Canadian legislative response to youth who commit crime. It describes how changing perceptions of the importance of different principles transformed societal responses to youth who committed crimes in the past century, with particular emphasis on the *Juvenile Delinquents Act* (*JDA*)[1] and the *Young Offenders Act* (*YOA*).[2]

Chapter 4.0 offers an analysis of the principles stated in the *YOA* and considers some additional principles implicit in the *Act*. There is also a discussion of some of the current controversies surrounding the *YOA*. The discussion of specific issues is intended to illustrate the relevance of different principles for particular issues and does not provide a complete treatment of any of the issues raised.

Chapter 5.0 discusses some newly emerging approaches to respond to the problem of youth crime, and briefly considers possible future directions for juvenile justice in Canada.

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[1] R.S.C. 1970, c.J-3.

[2] R.S.C. 1985, c.Y-1.

1.0 A CONTEXT FOR CONSIDERING PRINCIPLES

1.1 Constitutional Context of Juvenile Justice in Canada

As an analytical work, this report focusses on issues of concern and ideas that are relevant in Canada and throughout the world. However, in considering which principles might be the most appropriate for governing state intervention in the lives of a particular country's young people, it must be recognized that the organizational structure of the country places significant constraints on the discussion.

In a unitary state, such as England or France, only one level of government has ultimate responsibility for the broad range of issues in relation to youth. Consequently, a policy adopted by the national government can be applied consistently throughout the country and may combine juvenile justice policy with policies related to child protection, mental health, and education in any manner considered appropriate.

In federal states, such as Canada and the United States, responsibility for matters relating to children and adolescents can be divided between the national government and the member states or provinces in different ways. The division of responsibility will affect the way in which juvenile justice issues may be dealt with and may limit the principles that can be adopted to deal with these issues.

In the United States, for example, the state governments have primary responsibility for all aspects of juvenile justice, child protection, mental health services and education. While the United States federal government plays some role in setting minimum national standards that are controlled by providing funding incentives, the state governments have generally integrated their child protection and juvenile justice laws and service delivery systems to a greater extent than is constitutionally possible in Canada.

In Canada, the federal Parliament has responsibility under the *Constitution Act, 1867*,[3] for enacting criminal law which includes juvenile justice legislation, while the provinces and territories have primary jurisdiction over child welfare, health, and education, as well as responsibility for the administration of the justice system. Because of the extent of provincial and territorial jurisdiction, there are significant limitations on developing national policies for the administration of the juvenile justice system and on integrating that system with the child protection, education and mental health systems. Because the provinces and territories also

[3] *Constitution Act, 1867* (U.K.), 30 & 31 Vict., c.3.

have sole jurisdiction for developing responses to children under the minimum age for criminal responsibility who violate the law, there is some variation in how these children are dealt with.

As a result of the constitutional division of responsibilities, the Canadian juvenile justice system focusses on offending behaviour, rather than on some of the other problems facing the adolescent offender that may have contributed to the behaviour.[4] These constitutional constraints affect the types of principles that may be applied to the youth justice system in Canada, and in some ways shape the discussion in this report.

1.2 The Relevance of Principles

To understand the relevance of the principles for guiding state intervention in the lives of youth who commit crimes, it is necessary to know something about the development of legislation and how the criminal justice system operates in Canada. While a detailed discussion of these topics is beyond the scope of this paper, a brief description is warranted.

Principles are the goals or driving forces behind legislation. They reflect collective consensus about what is "right" and "good" for Canadian society as a whole, and are usually not specific to any given statute. One example is "the protection of society from illegal behaviour." Principles affect both the substantive aspects of laws, i.e., what acts are illegal, as well as procedural aspects of law, i.e., how laws should be implemented.

Principles alone do not determine the content of a statute. Inevitably, social, political, economic and constitutional factors influence how principles are reflected in statutes. Further, many principles are general or vague and may be reflected in laws in different ways. The reality of the political process affects the content of laws, as different political actors influence the legislative process. Most statutes reflect a compromise between the competing interpretations and the weighing of different principles. It is also important to note that, in practice, some of those involved in the legislative process may not be fully aware of the effect of underlying

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[4] In *Attorney General of British Columbia* v. *Smith*, [1967] S.C.R. 702, 65 D.L.R. (2d) 82, the Supreme Court of Canada upheld the constitutional validity of the *Juvenile Delinquents Act*, despite its child welfare-oriented philosophy, and the inclusion of provisions that were "primarily prospective in nature...and...intended to prevent these juveniles from becoming prospective criminals." The Supreme Court wrote that the Criminal Law power in section 91(27) of the *Constitution Act, 1867* should be interpreted "in its widest sense [and]...includes...the power to enact legislation designed for the prevention of crime."

principles on their views of the content of specific provisions of a proposed law. An appreciation of principles can nevertheless help in understanding the law.

Principles may also affect the implementation and judicial interpretation of a statute, as judges and other decisionmakers deal with statutory provisions that are unclear or vague, or with situations not explicitly governed by the legislation. They use principles to resolve ambiguities or deal with issues not directly covered by the statute.

It must be appreciated that societal views about what principles should govern the criminal justice system, or a portion of that system, like the youth justice system, are not constant. To the contrary, societal views are dynamic and develop over time, producing pressure for legislative change. To some extent, the process of interpreting and implementing legislation may cause societal views on appropriate principles to change.

In the *YOA*, some of the most important principles are acknowledged in the Declaration of Principle (section 3). It may also be argued, however, that principles not explicitly mentioned in the Declaration of Principle may affect the interpretation and implementation of specific provisions of the *Act*.

Once criminal laws are enacted and proclaimed by Parliament, provincial and territorial governments are responsible for implementing them. The implementation of these laws is still guided by the principles. Once a law is implemented and cases go to trial, judicial decisions may set precedents that affect the further implementation of the statute.[5]

If an accused pleads "guilty," the case proceeds directly to sentencing. If the accused pleads "not guilty," the case proceeds to trial. If the trial outcome is conviction, the case proceeds to sentencing. Sentencing is, in any given case, the final form of state intervention but, at the same time, it is generally the most intrusive intervention. Through sentencing the court gives effect to the general principles relevant for a particular case. In most criminal cases, the objective of any

[5] Only a relatively small proportion of cases raise important legal issues that establish "precedent" (or leading cases that other judges will follow). Judicial decisions that raise important interpretive issues, or deal with interesting or unique issues, are written and circulated among judges and lawyers. An excellent source of interpretive precedents for the *Young Offenders Act* in Canada is N. Bala and H. Lilles, *The Young Offenders Service*, ed., P. Platt, (Toronto: Butterworths, 1984). The most important criminal law precedents are reported in the *Canadian Criminal Cases*, and *Criminal Reports* law reports. There are also legal service texts that summarize and discuss precedents, including Peter Harris, *The Young Offenders Act Manual* (updated looseleaf, Canada Law book); and P. Platt, *Young Offenders Law in Canada* (Toronto, Butterworths, 1989). Precedents not available elsewhere may be on the Quicklaw computer data base.

sentence is some combination of retribution, deterrence, incapacitation, and/or rehabilitation. Because sentencing is the most intrusive form of state intervention, it is a major focus in this report.

In extreme situations, judicial decisions under the *Constitution Act* or the *Canadian Charter of Rights and Freedoms*[6] result in the need to amend, or change, the statute. More frequently, legal precedents serve to interpret and refine the implementation of the law rather than to change it. In fact, until the present time in Canada, no provision of the *YOA* has been ruled unconstitutional, although the *Charter of Rights* has influenced the implementation of the *YOA*. Parliament has responded to some developments, and amended the *YOA* in situations where politicians have not been satisfied with the interpretation or implementation of the *Act*, most notably with respect to transfer to adult court.

In this report, the focus is on the principles that guide the enactment and interpretation of laws. The implementation of statutes or actual intervention by the state, as well as the effect of cases, are also discussed.

1.3 The Nature and Causes of Crime Committed by Youth

While a detailed analysis of the nature and causes of youth crime in Canada is far beyond the scope of this paper, a brief description is useful to set the context for the discussion that follows.[7]

In 1992, over 600,000 charges were laid against Canadians under the *Criminal Code*; some 22 percent were laid against youths aged 12 to 17. In Canada, about 1 youth in 20, aged 12 to 17, faces charges under the *YOA* in each year. Males represent 80 to 93 percent of youths charged, although the proportion of charges against females has increased in recent years. The majority of youths were charged with property-related offences, such as theft or break and enter. Crimes of violence represent some 14 percent of charges against youths, though most involved relatively minor assaults. While the media focussed on charges of homicide between 1986 and 1992, the average number of young persons charged with homicide (murder, manslaughter and infanticide) was about 45, representing a very small fraction of all charges. The low number has been relatively constant over the past

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[6] Part I, *Constitution Act, 1982*, R.S.C. 1985. App.II, no 44, Sch.B.

[7] Statistical data from Department of Justice Canada, *Toward Safer Communities* (Sept. 1993). See also Statistics Canada, *Youth Court Statistics* (1991-1992).

few decades. While Canada's juvenile homicide rate is only 10 to 25 percent of that in the United States, it is, nevertheless, the second highest in the industrial world.[8]

Official statistics tell only a part of the story, however, as most offences involving juveniles are not reported to the police or other authorities. Studies based on interviews and anonymous surveys of adolescents suggest that the majority of adolescents commit some offences. However, most are relatively minor property-related offences.

Widespread offending behaviour by youths exists, to some extent, throughout the world. Adolescence and young adulthood is a time of testing limits and making mistakes. Although the nature and extent of youth crime varies among countries, and over time, the general universal pattern for criminal behaviour is that offending behaviour peaks from 16 to 20 years of age, and then falls off.[9]

In Canada, it is not clear from survey or other data that the actual rate of youthful offending or violence has increased in recent years, although official reports on the charging of youths have increased. Even if the level of youth crime is not rising, considering the extent of under-reporting, youth crime is clearly a serious problem. In addition, a disproportionate number of victims who fail to report are other adolescents who may be growing up as fearful victims of violence.[10]

There is no single theory to explain why young people commit crimes, or why some youths commit violent offences or repeatedly offend. There is no social model that can predict with certainty who will or will not commit a particular crime. There are, however, personal and social "risk factors" that are highly predictive of the types of youth who are likely to be involved in the youth justice system on a recurrent basis. The American Psychological Association Commission on Violence and Youth has observed:

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[8] W. Meloff and R.A. Silverman, "Canadian kids who kill," (1992) 34(3) *Canadian Journal of Criminology* 15. See also "Young Canadian deaths among highest in West," *Globe and Mail* [Toronto], Sept. 23, 1993, p.1, reporting on a UNICEF study of youth homicide and suicide.

[9] See, for example, T. Hirschi and M. Gottfredson, "Rethinking Juvenile Justice," *Crime and Delinquency*, 262 at pp. 264-265. The American Psychological Association (APA), *Violence and Youth: Psychology's Response* (1993) reports that in the United States "one half of *all* crime is committed by 5 to 7 percent of young people between the ages of 10 and 20."

[10] See, for example, C. Ryan, F. Matthews and J. Banner, *Student Perceptions of Violence* (Toronto: Central Toronto Youth Services, 1993).

> Although no definitive answer yet exists that would make it possible to predict exactly which individuals will become violent, many factors have been identified as contributing to a child's risk profile. Biological factors, childrearing conditions, ineffective parenting, emotional and cognitive development, gender differences, sex role socialization, relation to peers, cultural milieu, social factors such as economic inequality and lack of opportunity, and media influences, among others, all are thought to be factors that contribute to violent behaviour. Psychologists continue to search for a unified theoretical model that can account for these factors and assign them appropriate weight as risk factors for a child's or adolescent's involvement in violence as a perpetrator, victim, bystander, or witness.[11]

Among the risk factors associated with a high likelihood of repeated or more serious offending are:

- poor parenting behaviour including: child abuse or neglect; a cruel, passive or neglectful attitude; the use of harsh or erratic discipline; poor supervision; parental involvement in criminal activities; and high levels of parental conflict;

- school difficulties, which may be due to low intelligence, learning disabilities, and/or conduct disorders;

- economic deprivation, especially when associated with unemployment or receipt of social assistance; and

- drug or alcohol abuse.

While most serious or repeat offenders have one or more risk factors, it is important to note that not all young offenders share these characteristics, and that many youths from "deprived" backgrounds do not have serious difficulties with the law. The lack of understanding the causes of youthful criminality suggests this is a social problem that may never be totally "solved." While legal and social policies may reduce (or increase) levels of offending behaviour, they can never eliminate all youth crime. Indeed, as noted earlier, some offending behaviour is probably a "normal" part of adolescence. This does not mean that it should not be the subject of social (and parental) response, but it does emphasize the need to place such behaviour in its context.

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[11] APA, *Violence and Youth*, *supra*, note 9 at p. 17.

2.0 PRINCIPLES GOVERNING STATE INTERVENTION IN THE LIVES OF CHILDREN AND ADOLESCENTS

The task of articulating the principles that guide state response to crime is very complex. Explaining principles dealing specifically with criminal behaviour of youth is even more complex. Any discussion of the principles that should guide state intervention is grounded in value choices, and not everyone in society has the same set of values. People operate with different models of criminal justice, each model having its own set of guiding principles. Even within specific models, principles may conflict with one another, or may appear inconsistent. Further, there may not be consensus on how to modify the principles applied to adults to take account of the evolving intellectual, psychological and mental development of children and adolescents.

The discussion of principles in this chapter begins with a summary of some internationally accepted principles that guide state involvement in the lives of children and youth, as reflected in the *United Nations Convention on the Rights of the Child.*[12] Issues related to the legal status of children and adolescents, including how the courts and legislatures have recognized their unique status, are reviewed and analyzed. The discussion then focusses on some of the principles guiding the substantive aspects of the criminal justice system in Canada, with specific emphasis on how these concepts have been modified to reflect the needs and capacities of children and youth. To conclude, there is a discussion on the principles governing the procedural aspects of the criminal justice system, i.e., how the state intervenes in the lives of children and adolescents.

2.1 Principles of State Intervention: The *United Nations Convention on the Rights of the Child*

After more than a decade of discussion and debate, the international community agreed on a set of principles to guide policies on children, defined as persons under the age of 18. The *United Nations Convention on the Rights of the Child* has been ratified by more than 100 countries, and came into force in Canada on January 12, 1992. The Convention is premised on a recognition of the special needs of children, and of the obligation of governments to act to promote their "best interests." The Convention begins with a preamble that includes general statements about the importance and unique place of children in society:

> *Recalling* that, in the Universal Declaration of Human Rights, the United Nations has proclaimed that childhood is entitled to special care and assistance, *Convinced* that the family, as the fundamental group of society

[12] U.N. Document A/44/736 (1989).

and the natural environment for the growth and well-being of all its members and particularly children, should be afforded the necessary protection and assistance so that it can fully assume its responsibilities within the community,

Recognizing that the child, for the full and harmonious development of his or her personality, should grow up in a family environment, in an atmosphere of happiness, love and understanding,

Considering that the child should be fully prepared to live an individual life in society, and brought up in the spirit of the ideals proclaimed in the Charter of the United Nations, and in particular in the spirit of peace, dignity, tolerance, freedom, equality and solidarity,

...

Bearing in mind that, as indicated in the Declaration of the Rights of the Child, "the child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection...."

Article 3 provides that the "best interests" of the child shall be a primary consideration for all actions taken by the state regarding children:

Article 3

1. In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.

2. States Parties undertake to ensure the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his or her parents, legal guardians, or other individuals legally responsible for him or her, and, to this end, shall take all appropriate legislative and administrative measures.

3. States Parties shall ensure that the institutions, services and facilities responsible for the care or protection of children shall conform with the standards established by competent authorities, particularly in the areas of safety, health, in the number and suitability of their staff, as well as competent supervision.

The concept of "best interests" of the child is vague and a great deal of litigation and debate in Canada and elsewhere occurs when individuals disagree on

how it should be applied.[13] The Convention does, however, include specific provisions to guide the application of the best interests of the child approach in various contexts, some of which are relevant to juvenile justice issues.[14] For example, Article 12 deals with the right of children to be involved in decisionmaking that effects their future, recognizing that the capacity of a child for meaningful participation will increase as the child grows and matures:

> *Article 12*
>
> 1. States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.
>
> 2. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.

Article 37 is also relevant to the juvenile justice system because it restricts the ways in which the state can deprive children of their liberty:

> *Article 37*
>
> States Parties shall ensure that:
>
> (a) No child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment. Neither capital punishment nor life imprisonment without possibility of release shall be imposed for offences committed by persons below 18 years of age;
>
> *(b)* No child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in

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[13] For a discussion about the vagueness and value-laden nature of the concept of the best interests of the child in the context of parental custody and access disputes, see Department of Justice Canada, *Custody and Access: Public Discussion Paper* (1993); and N. Bala and S. Miklas, *Rethinking Decisions About Children: Is the Best Interest of the Child Approach Really in the Best Interests of the Children?* (Toronto: Policy Research Centre on Children, Youth and Families, 1993).

[14] *The United Nations Standard Minimum Rules for the Administration of Juvenile Justice* (The Beijing Rules, 1959) is a more detailed document on international standards for dealing with juvenile justice.

conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time;

(c) Every child deprived of liberty shall be treated with humanity and respect for the inherent dignity of the human person, and in a manner which takes into account the needs of persons of his or her age. In particular, every child deprived of liberty shall be separated from adults unless it is considered in the child's best interest not to do so and shall have the right to maintain contact with his or her family through correspondence and visits, save in exceptional circumstances;

(d) Every child deprived of his or her liberty shall have the right to prompt access to legal and other appropriate assistance, as well as the right to challenge the legality of the deprivation of his or her liberty before a court or other competent, independent and impartial authority, and to a prompt decision on any such action.

When Canada ratified the Convention, it filed a statement in regard to Article 37(c) accepting the general principle, but reserving the right to detain children in the same place as adults where keeping them separately is not appropriate or feasible.

Article 40 specifically deals with treatment of children in the juvenile justice system:

Article 40

1. States Parties recognize the right of every child alleged as, accused of, or recognized as having infringed the penal law to be treated in a manner consistent with the promotion of the child's sense of dignity and worth, which reinforces the child's respect for the human rights and fundamental freedoms of others and which takes into account the child's age and the desirability of promoting the child's reintegration and the child's assuming a constructive role in society.

2. To this end, and having regard to the relevant provisions of international instruments, States Parties shall, in particular, ensure that:

(a) No child shall be alleged as, be accused of, or recognized as having infringed the penal law by reason of acts or omissions that were not prohibited by national or international law at the time they were committed;

(b) Every child alleged as or accused of having infringed the penal law has at least the following guarantees:

(i) To be presumed innocent until proven guilty according to law;

(ii) To be informed promptly and directly of the charges against him or her, and, if appropriate, through his or her parents or legal guardians, and to have legal or other appropriate assistance in the preparation and presentation of his or her defence;

(iii) To have the matter determined without delay by a competent, independent and impartial authority or judicial body in a fair hearing according to law, in the presence of legal or other appropriate assistance and, unless it is considered not to be in the best interest of the child, in particular, taking into account his or her age or situation, his or her parents or legal guardians;

(iv) Not to be compelled to give testimony or to confess guilt; to examine or have examined adverse witnesses and to obtain the participation and examination of witnesses on his or her behalf under conditions of equality;

(v) If considered to have infringed the penal law, to have this decision and any measures imposed in consequence thereof reviewed by a higher competent, independent and impartial authority or judicial body according to law;

(vi) To have the free assistance of an interpreter if the child cannot understand or speak the language used;

(vii) To have his or her privacy fully respected at all stages of the proceedings.

3. States Parties shall seek to promote the establishment of laws, procedures, authorities and institutions specifically applicable to children alleged as, accused of, or recognized as having infringed the penal law, and, in particular:

(a) the establishment of a minimum age below which children shall be presumed not to have the capacity to infringe the penal law;

(b) whenever appropriate and desirable, measures for dealing with such children without resorting to judicial proceedings, providing that human rights and legal safeguards are fully respected.

4. A variety of dispositions, such as care, guidance and supervision orders; counselling; probation; foster care; education and vocational training programmes and other alternatives to institutional care shall be available to ensure that children are dealt with in a manner appropriate to their well-being and proportionate both to their circumstances and the offence.

Although Canada has ratified the *Convention on the Rights of the Child,* it does not have the same legal effect as if enacted in a statute. While the Convention can be used as an aid to the interpretation of the *Charter of Rights and Freedoms* or a statute, like the *Young Offenders Act,*[15] it does not have the force of law in Canada.

Canada, however, has committed itself in an international forum to the Convention; any failure to adhere to it would be reported through the Convention's monitoring process, and could be the source of considerable embarrassment and political criticism. Accordingly, the Convention should influence how Canada implements a youth justice policy even if it lacks direct legal effect.

Many provisions of the Convention are vague and provide only limited guidance for the development of policies and programs or for individual decisionmaking. This is not surprising as the Convention is intended to apply to so many countries with different resources and facilities and cultures.

2.2 Childhood, Adolescence and Adulthood

While childhood and adolescence as distinct stages of life are a physical, social and emotional reality; they are also to some degree, social constructs. As one historian observes:

> In medieval society, the idea of childhood did not exist.... The] awareness of the particular nature of childhood which distinguishes the child from the adult was lacking.[16]

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[15] See, for example, A. Bayefsky, *International Human Rights Law: Use in Canadian Charter of Rights and Freedoms Litigation* (Toronto: Butterworths, 1992), chapters 1 & 2, esp. at 94-103. For a young offenders case where the Convention was cited by the court but not used, see *R.* v. *Adam H.* (1993), 12 O.R.(2d) 634 (Ont. C.A.).

[16] P. Aries, *Centuries of Childhood: A Social History of Family Life* (1962), at p. 128.

In medieval society the limitations of very young children were acknowledged, but from about age seven, individuals, especially in lower social classes, began to fully participate in adult life.

By the end of the nineteenth century, developments in medicine and psychology led to an increased understanding of human development, and consequently differences between childhood and adolescence became apparent. This has been referred to as "The Invention of Adolescence" by some commentators who have noted that it coincided with and, in significant measure, produced the original juvenile courts.[17]

It is now recognized that adolescence is a distinctive period of life between childhood, with full dependency on adults, and adulthood, with its independence. For most individuals adolescence begins between 11 and 13 years of age, and ends between 16 and 19 years of age. It is a period of significant physical change and maturation. Youths begin to have sexual urges and they have the physical capacity to engage in sexual relations. Their bodies undergo changes; for boys, the penis grows in size, and girls begin to menstruate and grow breasts. There are also obvious changes in body shape and size, musculature and body hair.

More subtle, but equally important, are the growth in intellectual, emotional and moral development during childhood and adolescence. From the perspective of principles of juvenile justice, issues of moral development are extremely important since models of criminal justice are premised in significant measure on the capacity to distinguish right from wrong and exercise moral judgment.[18]

In this report, the meaning of the term "child" varies within the context, reflecting common usage (and perhaps common ambiguity). Developmentally, the terms "child," "adolescent" and "adult" are distinguished. In most legal contexts, there are two exclusive categories: childhood and adulthood. Adulthood generally begins at age 18 at present, in Canada. Thus, in legal discussions, the term child may be used to refer to someone under 18 years of age.

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[17] See, for example, J. Ainsworth, "Re-Imagining Childhood and Reconstructing the Legal Order: The Case for Abolishing Juvenile Court," (1991) 69 *North Canadian Law Review* 1083.

[18] In one famous Canadian example, a man who stabbed his mother-in-law while sleepwalking was acquitted on the defence of "automatism." *R.* v. *Parks* (1992), 15 C.R. (4th) 289, 75 C.C.C. (3d) 287, 95 D.L.R. (4th) 17 (S.C.C.). Similarly, adults who lack the mental capacity to "appreciate the nature and quality of an...act or...of knowing that an act...is wrong" will be acquitted on the ground of insanity. *Criminal Code*, section 16.

The *Young Offenders Act* (*YOA*), with jurisdiction over 12 to 17 year olds, is one of the few pieces of legislation that recognizes adolescence[19] as a distinct period, with rights and responsibilities falling between childhood and adulthood.

2.2.1 Moral Development

The inherent characteristics of an individual and the external agents or forces in society combine within a person to create mature moral judgment as well as the ability to accept full personal responsibility for behaviour. Characteristics important to moral development include age, the level of cognitive (intellectual) and emotional development, basic intellect, and the presence of learning disabilities, psychiatric disorders, or mental deficiencies due to such conditions as fetal alcohol syndrome. The agents and forces of socialization important to the development of morality include parents, siblings, peers, and teachers; cultural influences such as social class. race, heritage, and education; and external influences such as mass media. For each individual the progression to mature moral judgment is not simply age-related, but a complex interaction of many factors. William Damon sums up the complexity of this process:

> Children's morality, therefore, is a product of affective, cognitive, and social forces that converge to create a growing moral awareness. The child begins with some natural emotions to social events; these are supported, refined and enhanced through social experience. During this social experience, the child actively participates in relations with peers and adults, always observing and interpreting the resulting interactions. From this web of participation, observation and interpretation, the child develops enduring moral values.[20]

"Mature moral judgment" is a complex multi-dimensional concept. Its development in each child is often difficult to identify and trace, and in many adults

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[19] In this report, "adolescent" is generally used as a developmental term, and "youth" or "young person" as a legal term.

[20] W. Damon, *The Moral Child — Nurturing Children's Natural Moral Growth* (New York: The Free Press, 1988), at p. 119.

there may be gaps in its progression. It is significant in adolescence because individuals at that stage of life have the physical capacity to harm others.[21]

A number of psychologists have developed theories or models of moral development based on observations of many children and adolescents. There are many different models, but each describes, in varying levels of complexity and detail, a sequence of stages of development occurring at different ages. While many individuals do not exhibit all of the characteristics at exactly the ages specified, there is a broad similarity in the different models with each suggesting that moral development increases with age. In this report, the widely accepted model developed by the American psychologist H.D. Thornburg that reflects basic themes present in other more sophisticated models, is described.

Generally, the acquisition of morality follows a broadly predictable course. Table 1 outlines three major stages proposed by Thornburg:

- the social learning acquisition stage, which occurs in early and middle childhood (birth to 8 years);
- the social learning confirmation stage, which occurs in preadolescence (ages 9 to 12 years); and
- the social maturation stage, which occurs in adolescence (ages 13 to 18 years).[22]

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[21] *Ibid*, at p. 5, summarizes the seven important components of the definition of a mature morality:

1. Morality is an evaluative orientation towards actions and events that distinguishes the good from the bad and prescribes conduct consistent with the good;
2. Morality implies a sense of obligation towards standards shared by a social collective;
3. Morality includes a concern for the welfare of others. This means that moral obligations necessarily extend beyond the individual's unmitigated selfish desires. The moral concern for others has both cognitive and affective components, and bears implications for both judgement and conduct;
4. Morality includes a sense of responsibility for acting on one's concern for others. Such responsibility may be expressed through acts of caring, benevolence, kindness, and mercy;
5. Morality includes a sense of concern for the rights of others. This concern implies a sense of justice and a commitment to the fair resolution of conflicts;
6. Morality includes a commitment to honesty as a norm in interpersonal dealings; and
7. Morality, in its breach, provokes perturbing judgemental and emotional responses. Examples of such responses include shame, guilt, outrage, fear, and contempt.

[22] H.D. Thornburg, *Development in Adolescence* (Monterey: CA.: Brooks/Cole, 1975), at p. 83.

In the social learning acquisition phase, children begin to experience moral emotions in their social engagements with others. These include positive emotions such as empathy, sympathy, and admiration as well as negative emotions such as anger, outrage, shame, and guilt.[23]

Many psychologists believe that early development of positive emotions such as empathy and the cognitive ability to take on the perspective of another is critical in the development of mature moral judgment.[24] Research on children and adolescents who experience serious anti-social behaviour often shows they have "empathic dysfunction," i.e., they seem to lack the ability to recognize the victim's distress.[25]

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[23] Damon, *The Moral Child*, *supra*, note 20, at p. 119.

[24] See, for example, *ibid*; and J. Kagan, *The Nature of the Child*, (New York: Basic Books, 1984).

[25] As APA, *Violence and Youth*, *supra*, note 9, at p. 21, notes:

Youth at greatest risk of becoming extremely aggressive and violent tend to share common experiences that appear to place them on a "trajectory toward violence." These youth tend to have experienced weak bonding to caretakers in infancy and ineffective parenting techniques, including lack of supervision, inconsistent discipline, highly punitive or abusive treatment, and failure to reinforce positive, prosocial behaviour. These developmental deficits, in turn, appear to lead to poor peer relations and high levels of aggressiveness. Additionally, these youth have learned attitudes accepting aggressive behaviour as normative and as an effective way to solve interpersonal problems. Aggressive children tend to be rejected by their more conforming peers and do poorly in school, including a history of problems such as poor school attendance and numerous suspensions. These children often band together with others like themselves, forming deviant peer groups that reinforce antisocial behaviours. The more such children are exposed to violence in their homes, in their neighbourhoods, and in the media, the greater their risk for aggressive and violent behaviours.

Table 1 Acquisition of Morality: A Developmental Socialization Model

	Social Learning Acquisition	Social Learning Confirmation	Social Maturation
Stage	Early and middle childhood	Preadolescence	Adolescence
Age Range	Birth to 8 years	9 to 12 years	13 to 18 years
Tasks	Acquisition of social behaviour	Learned behaviour is confirmed	Behaviour/value discrepancies and alternative social learning
	Acquisition of cognitive behaviour	Development of abstract cognitive thinking	Cognitive differentiation/egocentrism
	Acquisition of moral emotions	Further development of moral emotions	Maturation of moral emotions
Primary Influence	Parent	Parent/Peer	Peer

In the social learning acquisition phase, the child tends to judge the severity of misdeed with respect to its visible damage or harm. In addition, children at this phase, especially younger children, tend to judge the appropriateness of punishment by the severity rather than the relevance to the transgression.

The primary agent of socialization during the social learning acquisition phase is the parent. Damon states:

> The parent (or parent substitute) has a critical and irreplaceable role in the child's moral development. It is the parent who first introduces the child to the laws and logic of social order. In addition to informing children about sanctions within and

beyond the family, this means enforcing these sanctions and communicating to the child their social purpose.[26]

Introducing children to social order is more than just getting them to obey certain rules. It also means inculcating in children an abiding respect for the social order itself. Every social system has principles of hierarchy and regulation that are essential for the system's functioning as well as its cohesion.

There is now evidence in developmental research to suggest that "authoritarian" patterns of parenting in a child's early years may eventually decrease the child's tendency to follow parental standards. In general, the research literature indicates that the most successful induction of moral beliefs includes a style of parenting, often referred to as "authoritative," where minimum external force is used to control the child's behaviour and, while applying control, information is given to the child about the rationale for the particular standard that is being imposed.

Children in the social learning acquisition phase have a variety of important moral emotions, which together with their developing cognitive sophistication set the stage for more mature social judgments. The strong parental influence, as well as a limited concept of morality, often cause the child in this phase to be highly consistent in behaviour and values. The basic concepts of right and wrong will often seem quite simple to a child of this age. In general, the child during the earlier social learning acquisition phase interprets rules as having fixed and all encompassing legitimacy. It is only through repeated experience that the older child begins to realize that application of rules are largely established and maintained through consensual social agreements.[27]

The success of the early social learning and moral development sets the stage for continued growth in the preadolescent period. In this phase, there is a period of social learning confirmation, when social behaviours are further confirmed and, to a certain extent, tested. Thornburg states that in the social learning confirmation phase children are most concerned about finding out whether those things they have been taught are important.[28] As children gain more experience with peers in this phase, they begin to encounter some variance with the earlier teaching of their parents. Peers become increasingly important as the primary agents for socialization and development of values and patterns of behaviour.

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[26] Damon, *The Moral Child*, *supra*, note 20, at pp. 51-52.

[27] Thornburg, *Development*, *supra*, note 22, at p. 91.

[28] *Ibid*, at p. 94.

The confirmation and testing of moral and social behaviour are made possible by the further development of abstract cognitive thinking that occurs during preadolescence. While the main characteristic of this period is the ability to formulate propositions, theoretical ideas, and propose logical arguments, children may not necessarily have the capacity for fully abstract or formal operational thinking. This again may limit the ability of the preadolescent to effectively internalize social and moral values. Children in the social learning confirmation phase begin to develop a more conventional morality level. They become more capable of socially and morally conforming as they begin to conceptualize good behaviour that is helpful to others and approved by others. This process is further brought about by the preadolescent's general need for peer approval. At the beginning of this phase, children expect others to act towards them the way they have been taught to act. However, the consistency of moral values and behaviour begins to break down with increasing peer influence and greater individuality. The older child in the social learning confirmation phase is more likely to believe that the punishment should be tailored to the severity of the transgression.

In the social maturation phase, adolescents aged 13 to 18 may have abstract cognitive abilities, but they are particularly vulnerable to the discrepancies between moral values and behaviour. Thornburg points out that this period is characterized as one of inconsistency between what one does and what one believes.[29] This inconsistency is a natural outgrowth of adolescents' needs to emancipate themselves and to determine their own value systems. Even though an adolescent may have been taught by parents that certain behaviours such as premarital sex are inappropriate, the observation that this behaviour is common among peers, and perhaps continued engagement in the behaviour, allows for a gradual alignment of new values congruent with the repeated behaviour. In the same way, antisocial actions, which may have initially been negatively valued, gradually become more positively valued as the frequency of such behaviour increases.

There are two important cognitive characteristics of the adolescent period. First, as individuals, adolescents differ greatly with respect to their intellectual capabilities. Second, at about age 14, adolescents develop egocentrism.[30] Examples of adolescent egocentrism include the adolescent's sense of invulnerability — for instance, the belief of a female adolescent that she may have sexual intercourse but only others will get pregnant. The relatively low rate of condom use among sexually active adolescents reflects not only their lack of knowledge about the spread of sexually transmitted diseases, but also their sense of egocentrism and invulnerability.

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[29] *Ibid*, at p. 95.

[30] D. Elkind, "Egocentrism in Adolescence," *Child Development*, 38 (1977): 1025.

It is important to recognize that egocentrism is a natural phase of cognitive development in the adolescent, and is not abnormal. It seems to emerge as a result of an adolescent's ability to conceptualize the thoughts of others as well as his or her own thoughts. Egocentrism represents a period of preoccupation with one's own thoughts. Adolescents in this phase may engage in criminal behaviour, and they may believe that they will never be caught or cannot be held accountable for their actions.

In summary, developmental literature shows that morality is a complex multi-dimensional concept that develops as a person grows older, involving interplay between a child's individual characteristics with the agents and forces of socialization. Because of enormous individual differences in maturation, youths entering the juvenile justice system are in three potential stages of moral development: a social learning acquisition phase; a social learning confirmation phase; or a social maturation phase. Beyond the obvious differences in age and physical maturation, there may be differences according to the level of moral and social development, as well as previous family socialization experiences. Finally, factors such as the presence of a learning disability, which may increase social impulsiveness, or of developing psychiatric disorders, will further modify the individual's capacity to understand and accept responsibility.

2.2.2 Legal Status of Children, Parents and the State

The manner and extent to which rights and obligations are acquired as an individual grows older and matures raise complex practical and theoretical issues. At birth, children are not able to exercise any legal rights and have no obligations, although in some situations adult guardians may act on their behalf, such as in issues of property law. When adulthood is reached, generally at present at age 18 in Canada, an individual is presumed to have "full legal personality."

In some contexts, there is a single arbitrary age when an individual moves from no legal status to full legal personality. This, for example, occurs with voting rights, where all Canadians 18 years of age and older have the right to vote. Even a very intelligent and knowledgable 17-year-old is denied the opportunity of demonstrating the individual capacity to properly exercise this fundamental democratic right.

In other situations, rights and obligations are more complicated. For example, health care decisions may involve a complex scheme of different age requirements for the giving of consent depending on the nature of the service to be provided. In some medical situations, there is a legal requirement for an individualized determination of decisionmaking capacity. This usually involves an assessment of whether a particular child has the capacity to understand the nature and consequence of the proposed

treatment.[31] In other medical situations, for example, those related to admission to mental health facilities, some use is also made of fixed, arbitrary age limits.

In the criminal context, the Canadian legal system has long recognized different stages of development, although there has been variation in how these stages have been defined. Under the *Juvenile Delinquents Act* (*JDA*),[32] children under seven years of age did not have any criminal liability, while children between the ages of 7 and 14 were individually assessed to determine whether or not they were competent to "know the nature and consequences of his conduct and to know that it was wrong."[33] From the minimum age up to adulthood, which varied from 16 to 18 years of age in different provinces and territories, youth were subject to the special provisions of the *JDA*, which recognized that they were not fully adults.

Under the *YOA*, which replaced the *JDA* in 1984, the Canadian criminal justice system has uniform national age categories. In all provinces, children under 12 years of age are deemed incapable of having criminal responsibility though their problems may be addressed under child protection laws or in other ways. Adolescents between 12 and 17 years of age are regarded as having legal accountability, but not always to the same extent as adults, and, as well, this group has certain special legal protection. Adulthood for criminal law purposes begins at 18 years of age.

There are also provisions under the *YOA* for treating older adolescents, starting at the age of 14, as adults, if a judge views this as appropriate after an individual judicial assessment at a transfer hearing.[34]

Individuals who are not legally adults may be subject to certain restrictions on their freedom and rights. Because they are not considered adults, they are assumed to lack the capacity to protect themselves and therefore the state has the duty to take steps to promote their welfare. Child protection legislation, for example, is intended to promote the welfare of children. Adults who, because of mental disabilities or mental illness lack the capacity to look after themselves, also may have certain restrictions placed on their freedoms and rights. For example, their financial affairs

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[31] See, for example, B.M. Knoppers, ed., *Canadian Child Health Law* (Toronto: Thompson Educational Publishers, 1992), Chapters 3 and 5.

[32] First enacted in 1908, and repealed in 1984. A history of the *JDA* appears in Chapter 3 of this report.

[33] *Criminal Code*, sections 12 and 13, repealed by the *Young Offenders Act*.

[34] The *JDA* had a similar provision. For a fuller discussion on transfer under the *JDA* and *YOA*, see Chapters 3 and 4.

may be supervised by others or they may be involuntarily confined to a mental health facility "for their own good."

It must also be understood that the state and the public sometimes have an interest in controlling the behaviour of children and adolescents that is theoretically separate from the promotion of the welfare of children, though in practice the state's interest in controlling behaviour and promoting welfare frequently overlap. One example is legislation that sets the minimum age for driving. Such laws are based on the presumption of incapacity of those under a certain age. If younger adolescents were permitted to drive, they might pose a threat not only to themselves but to others as well. Similarly, in regard to compulsory education laws, the state has an interest in having its young citizens educated so that they may become productive workers and, at least to some extent, assimilate mainstream cultural values.

Even child protection laws may be viewed as serving objectives of the state. First, they attempt to ensure that the basic needs of children are met and that they mature into healthy adults who will not be a burden on the state. Second, they attempt to control adolescents who might otherwise leave home and live on the street where they may pose a threat to the public peace and safety.

As this discussion illustrates, there are both practical and theoretical linkages between laws restricting the freedom of youths because of the harm they may be doing others, and laws intended to promote the welfare of youth themselves.

It is generally accepted in Canadian society, and indeed reflected in the *United Nations Convention on the Rights of the Child*, that parents have a primary set of rights and obligations in regard to their children, and that the role of the state is secondary, albeit very important. Parents have the primary responsibility to provide financial support and to care for their children, as well as the right to make decisions about such matters as health care and education. The state will only interfere if parents fail to meet the minimum standards set out in child protection and education legislation, and "the level of care falls below that which no child in this country should be subjected to."[35] Parents generally know their children better than other adults like teachers, and are often best suited to provide emotional and moral support.

It is widely assumed that the underlying problems of young offenders are often most likely to be effectively resolved if parents are involved in the treatment or dispositional plan. Most young offenders remain with, or return to, their families after involvement with the justice system is completed.

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[35] *Re Brown* (1975), 9 O.R. (2d) 185, at 189 (Ont. Co. Ct.), per Stortini J.

It is, however, important not to romanticize the role of parents in the lives of their adolescent children. Criminal behaviour may reflect profound problems with the parent-child relationship. Some young offenders have been victims of physical, emotional and sexual abuse at the hands of their parents, and some have ceased to have meaningful relationships with their parents prior to their involvement with the youth court system. Some young offenders literally "live on the street." Further, the fact that a youth is charged with a criminal offence often strains the relationship with parents, and it is important for people dealing with young offenders to be realistic about the role that parents are likely to play in their children's lives. Despite these issues, juvenile justice systems generally recognize that parents should have a significant role in the legal and rehabilitative process.

The *JDA* provided that parents could be fined if their children committed criminal acts.[36] The *YOA* eliminated this, in part because it tended to exacerbate a difficult parent-child relationship at an already stressful time if parents were punished because of their child's wrongful acts. The *YOA* requires that young persons alone should be held criminally responsible for their illegal acts, but recognizes that in many cases parents can play an important role in their rehabilitation. In some situations, parents may also play a role under the *YOA* in the protection of the legal rights of their children.[37]

While parents have primary responsibility for raising their children in our society, there are several laws designed to promote the welfare of children and, at the same time, restrict their freedom. These laws also typically affect the rights of parents to make decisions on behalf of their children. The most obvious examples are child protection statutes that permit agents of the state to investigate whether or not a child is in need of protection. In order to protect children and promote their "best interests," a state agency may provide supervision and services in the home, or remove a child from parental care on a temporary or permanent basis. Such involuntary intervention is subject to court control.[38]

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[36] The *JDA* section 22(1) allowed a court to impose a "fine, damages or costs" if the court was satisfied that the parents "conduced to the commission of the offence by neglecting to exercise due care of the child." Establishing this type of parental responsibility may, in practice, be quite difficult.

[37] While parents do not have vicarious liability for their children, there may be some situations where parents may have civil liability in negligence if their failure to exercise reasonable supervision can be directly linked to injury to another person; for example, if a child is left access to a firearm and causes injury to another individual. See *Floyd* v. *Bowers* (1978), 106 D.L.R. (3d) 702 (Ont. C.A.).

[38] A detailed discussion of child protection legislation, including the variation in Canadian jurisdictions, is beyond the scope of this work. For a more complete discussion of Canada's child welfare laws, see N. Bala, J.P. Hornick and R. Vogl, eds., *Canadian Child Welfare Law* (Toronto: Thompson Educational Pub., 1991), esp. Chapter 2.

Compulsory school attendance statutes provide another example of legislation intended to promote the welfare of children. Such legislation requires children and adolescents to pursue an education. Adults, on the other hand, are entitled to make their own decisions about education. While compulsory education legislation gives parents the right to choose the type of education, they cannot decide that their children will not be educated.

2.3 The Basis for State Intervention

Before discussing the general principles that guide state intervention in response to the criminal behaviour of youth in Canada, it may be useful to briefly consider what is meant by "crime."

2.3.1 Defining Crime

Criminal laws in a fundamental sense reflect the morality and values of those who have the responsibility for formulating them. Some types of conduct are universally regarded as criminal. For example, the "unjustified" killing of another person is a universal crime. However, in different societies, legal systems may provide different definitions of "justification."

Beyond notions of morality, a particular definition of criminal conduct inevitably reflects the views of those with the political power to make the laws. Definitions of crime vary over time and place, in part reflecting changing moral views, but also possibly reflecting the influence of different power structures. There are many examples of conduct which were accepted at one time, but later defined as criminal behaviour. A good example of this is legislation recently enacted relating to pollution of the environment, where many activities that were once unregulated have, as a result of new laws, come to be defined as regulatory offences. Other conduct may be decriminalized, such as the removal from Canada's *Criminal Code* in 1968, of the offence of anal intercourse between consenting adults.

At one time judges had the authority to impose punishment for action which they regarded as "contrary to public morals" or "injurious to the public." However, it is now accepted in Canada that individuals are only committing crimes if they violate a specific statute, such as the *Code* or the *Narcotics Control Act*.[39] Elected politicians must define criminal conduct in Canada by enacting criminal laws, although some offences, like the distribution of "obscene material," have an element

[39] *Frey* v. *Fedoruk*, [1950] S.C.R. 517, 10 C.R. 26, 97 C.C.C. 1.

of vagueness or require individualized judicial application. On the other hand, under the *Charter of Rights and Freedoms*, Canadian judges may rule that specific criminal laws enacted by Parliament are unconstitutional, and hence refuse to give them effect. This, for example, occurred with the federal abortion law in 1988.[40]

At present, in Canada, the federal Parliament has constitutional authority to enact criminal laws dealing with such behaviour as violence, destruction of property, theft, and possession of illicit drugs. Provincial governments have limited jurisdiction to enact laws that deal with less serious "quasi-criminal" or "regulatory" conduct, such as highway traffic codes or laws prohibiting drinking under a specified age. In turn, municipalities are granted the authority by provincial and territorial governments to enact by-laws dealing with the least serious matters, such as parking and anti-noise by-laws.

In most countries there are laws prohibiting specific types of conduct by youths that are not defined as illegal for adults; such offences are commonly referred to as "status offence section". While some status offences, such as the prohibition on driving under a certain age, may in part be intended to prevent harm to others, many other status offences, such as the laws which make it an offence for persons under a specified age not to attend school, are primarily aimed at promoting the welfare of adolescents.

Under the *JDA*, status offences covered a broad range of activities. For example, juveniles were guilty of "delinquency" if they engaged in "sexual immorality or some similar form of vice." This provision was, in practice, often used to send sexually active adolescent girls to training school, while similar conduct was not generally treated as delinquent for boys.[41]

The *YOA* eliminated status offences at the federal level. Provincial and territorial governments still have status offences, such as those relating to drinking underage, or the prosecution of adolescents for the failure to attend school. This latter offence, called truancy, is quite varied and controversial. In some provinces, like Quebec, parents commit an offence if their children fail to attend school, but there is no criminal sanction for children who fail to attend school. In other provinces, like Alberta and Ontario, a child who fails to attend school may be brought

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[40] *R.* v. *Morgentaler*, [1988] 1 S.C.R. 30, 37 C.C.C.(3d) 449.

[41] See, for example, S. Barnhorst, "Female Delinquency and the Role of Women," (1978) 1 *Canadian Journal of Family Law* 254.

to youth court, charged with the offence of truancy, and punished for committing this "offence."

2.3.2 Objectives of State Intervention

There are a broad range of sanctions that can be imposed by the courts on youth who violate the criminal law. This discussion of this issue is not intended to describe in any detail the "dispositions" available for youths who violate the law. Rather, the objective is to consider the possible range of state responses to youth crime, the principles that underlie their use, and some of the implications of utilizing different forms of state action.

The objectives of state intervention for youth are related to, but distinct from, the traditional principles of criminal sentencing: deterrence, retribution, rehabilitation, and incapacitation. In considering different forms of state intervention, three objectives can be identified for adolescents: punishment; therapy; and incapacitation. While any state intervention may serve to achieve more than one objective in practice, it is useful to consider each one as distinct.

When state intervention is intended to serve a therapeutic objective, its aim is to "treat" youths in a way that their problems will be resolved and their needs met. Currently, the Canadian child welfare system has, in theory, a purely therapeutic objective. In the youth justice context, intervention with a therapeutic objective aims to treat offenders in a way that will lead to personality, value and behavioral changes that will deter further offences. Decisionmaking is focussed on the offender and looks toward future change. Therapeutic intervention is linked to the sentencing principle of rehabilitation and to the promotion of the "best interests" of children.

It is important to note, however, that youths subjected to therapeutic intervention rarely view the experience as positive or desirable. Indeed, to the extent that therapeutic state intervention is involuntary, it is coercive and imposed on unwilling subjects.[42]

State intervention with a punitive objective is intended to treat offenders in a way that causes some form of pain or suffering, which the offender and others will view as a negative experience not to be repeated. Decisionmaking based on concerns about punitive intervention tends to focus on punishment for a past offence and hence

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[42] B. Feld, "The Juvenile Court Meets the Principle of the Offense: Punishment, Treatment and the Difference It Makes," (1988) 68 *Boston Univiversity Law Review* 821, at 847 writes: "juvenile advocates return increasingly to punishment on the grounds that punishment is much less punishing than 'treatment'."

is retrospective. While the punitive objective is linked to notions of retribution (moral accountability) and deterrence, it can in some cases also serve to achieve rehabilitation of a young offender.[43]

Intervention with the objective of incapacitation aims to treat offenders in such a way that, while they are subject to state sanction, they do not pose a threat to society. The objective of incapacitation is the protection of society.

While some interventions by the state attempt to achieve more than one objective, conflict between different objectives and principles often arises when a decision is made about the kind of sanction to impose. For example, placing young offenders in custodial facilities may be seen by a judge as serving both therapeutic and punitive objectives. If a facility has a relatively humane environment, where young offenders are well-fed, receive counselling and educational services, and have access to recreation programs, the disposition may be therapeutic and serve to facilitate their rehabilitation, but it may be argued that to ameliorate conditions of custody is inconsistent with punitive objectives. Indeed, a strictly deterrent model of sentencing might suggest that the custodial experience should be as unpleasant as possible. This dilemma is particularly acute when youths who commit offences are from abusive or economically deprived backgrounds, or when they have been living on the street. These youths may view their time in custody as a positive experience, even better than the rest of their lives.

2.3.3 Types of State Sanctions

Certain types of punishment — i.e., exile, capital punishment, and corporal punishment — have been abandoned in Canada. These types of sanctions are no longer imposed for a number of moral and practical reasons.

Exile, i.e., sending a person out of a community, was once used quite extensively. For example, in England and Canada during the nineteenth century, convicts were exiled to Australia. This served to achieve the punitive and incapacitation objectives. In a practical sense, those who were exiled rarely returned and hence posed no future risk to society. It is also interesting to note that, historically, it was not uncommon for aboriginal societies to eject members from their communities for certain types of offensive behaviour. In practice, in the small,

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[43] The Washington Supreme Court in *State* v. *Lawley*, 591 P.2d 772, (Wash. 1979), at 773, recognized that: sometimes punishment is treatment...accountability for criminal behaviour, the prior criminal activity and punishment commensurate with age, crime and criminal history does as much to rehabilitate, correct and direct an errant youth as does the prior philosophy of focusing upon the particular characteristics of the individual juvenile.

highly interdependent aboriginal communities, ejection could result in death, since survival alone might be very difficult — but this was not the principal objective of this action.

Capital punishment is justified on the basis of retribution and deterrence, and serves the punitive and incapacitation objective. While there is considerable debate whether or not capital punishment is a deterrent to others, it clearly has the effect of ensuring that no further offences are committed by the offender. Canada has abolished capital punishment, but when it was in use, juveniles could be transferred to adult court and subsequently, executed. For the most part during the nineteenth century, being a youth at the time of committing an offence was grounds for commuting a death sentence, but some children in Canada were hanged for committing certain crimes.

The *United Nations Convention on the Rights of the Child* prohibits capital punishment for youths under 18 years of age at the time of committing the offence. In the United States, which is not a signatory of the Convention, there are a number of states that permit execution of juveniles.[44]

At one time, courts in Canada could impose such forms of corporal punishment as public flogging or the lash. Although early delinquency legislation did not permit courts to impose these punishments on delinquents, there is historical evidence that this form of punishment was imposed by courts on adolescents in the nineteenth century. Further, until quite recently, corporal punishment was often used by the staff of juvenile institutions as a means of "correction" for the youths confined there.

Currently, section 43 of the *Criminal Code* permits teachers, parents and correctional staff to use corporal punishment on children and adolescents for "correction." Although in many places in Canada regulations prohibit the use of corporal punishment by state employees supervising children, it is still used by many parents, and by some school teachers. The *YOA* does not permit a youth court to impose corporal punishment.

The dispositions that can be imposed on young offenders in Canada under section 20 of the *YOA* range from a judicial warning that future good behaviour is expected (an

[44] In 1988, the United States Supreme Court held in *Thompson* v. *Oklahoma* that execution of offenders who were under age 16 at the time of the offence was "cruel and unusual punishment" and violated the Constitution. The plurality of the Court concluded that "a young person is not capable of acting with the degree of culpability that can justify the ultimate penalty." [108 S. Ct. 2687 (1988), at 2692]. However, in *Stanford* v. *Kentucky* 109 S. Ct. 2980 (1989), the Supreme Court accepted the constitutional validity of capital punishment for juveniles who were 16 or 17 years of age at the time of the offence.

absolute discharge), to a maximum of three years in secure custody (or five years less a day for murder). More severe sentences may be imposed if a youth is transferred to adult court.

In youth court some of the sentences are clearly intended to serve an exclusively punitive objective, such as the imposition of a fine. Other sanctions are intended primarily to achieve a therapeutic objective, such as detention in a psychiatric hospital (which can only be imposed with the consent of the youth and the facilities). However, detention in a mental hospital is often viewed by youths as having a punitive element. Placement in a mental health facility also isolates the youth from the community, thus protecting the community from further offending behaviour while the youth is in the facility.

All sentencing legislation relevant to juveniles, including the *YOA*, has dispositions which may be categorized in one of two ways: those that allow a youth to remain in the community; and those that remove a youth from the community and require residence in some place other than his or her ordinary place of residence. Dispositions that require removal from the community all provide more immediate societal protection, by achieving a degree of incapacitation. It should be noted that the *YOA* also allows for a form of hybrid disposition, called open custody. Under open custody, a youth resides in a group home, wilderness camp or other similar facility, and will be under considerable supervision, but will also generally have some access to the community.

In practice, dispositions under the *YOA* are often intended to achieve both punitive and therapeutic objectives. For example, probation and community service orders restrict the freedom of offenders, at least to some extent, and hence have a punitive element, but the dispositions are also often intended to have a therapeutic effect. Sometimes probation sentences include the requirement for a youth to undergo treatment in a counselling or drug addiction rehabilitation program in the community. Another condition of probation may be that the youth attend school, which the youth may see as punitive, but it is generally hoped that school attendance will further the youth's ultimate employability and teach personal values, thus serving a broadly therapeutic objective.

Custodial dispositions are generally viewed as more punitive than community dispositions. For youths with extensive problems, however, custody may offer a better range of educational, counselling and rehabilitative services than those available in the community. The services and environment of Canadian youth custody facilities vary greatly; some provide little in the way of services, while others have quite

elaborate service programs and are clearly intended to create a therapeutic environment.

2.4 Sentencing of Young Offenders: Modifying the Adult Model

From both practical and theoretical perspectives, sentencing is the most important stage of the youth justice system for most adolescents charged with offences. In practice, the majority of youths plead guilty, and judicial decisionmaking centres on the issue of sentencing. Many of those who go to trial are convicted, and for them the most significant decision, except for the finding of guilt, is sentencing. It is at the sentencing stage that the state imposes a sanction and formalizes intervention. Sentencing is generally the stage where the juvenile justice system is most clearly different from the adult system, and where the principles governing adult offenders are most obviously modified for young offenders.

As noted above, the traditional principles governing adult criminal sentencing in Canada are retribution, deterrence, incapacitation, and rehabilitation.[45] These objectives are not discrete, and they often over-lap. They may also be in conflict with one another, depending on the particular circumstances. While all of these principles have some relevance for youths, how they are modified for application in the juvenile justice system is discussed below.

2.4.1 Retribution (or Accountability)

The basic philosophy that supports retribution is a moral one. Retribution is based on notions of moral accountability and social denunciation. Justice demands that a person who intentionally harms another person should in turn suffer some negative consequences. Arguably, retribution was the most basic objective of earlier justice systems, as is reflected in the Biblical injunction — "An eye for an eye; a tooth for a tooth" — which rests on retribution as the way of righting the wrong.

Canadian society has moved away from a notion of directly equivalent retribution or vengeance. We no longer execute a person who has killed another, nor do we physically beat or mutilate those who have caused physical harm to others.

The Canadian criminal justice system, and particularly the concept of retribution, is premised on the belief that offenders know what they are doing and have the intent to effect certain wrongful consequences. Thus, in our society a person

[45] See, for example, *R.* v. *Sweeney* (1992), 11 C.R. (4th) 1, 71 C.C.C. (3d) 82 (B.C.C.A.).

who accidentally kills another is not criminally liable for murder, because there is a lack of intent to commit the wrongful act. Nor can individuals who are insane at the time of an offence be convicted; their lack of capacity absolves them of legal responsibility, although they may be committed to mental health facilities, both for the protection of society and for treatment until they are cured of their mental illness.

Even intoxicated individuals may have a partial defence to criminal charges, and can claim a lack of specific intent for certain offences. For example, a person who may be so intoxicated that he or she is incapable of having the mental intent to commit murder, may be convicted of the lesser offence of manslaughter,[46] which carries a lower penalty. In some sense, a youth may also be considered in a state of limited intellectual and emotional capacity, and this may justify a less severe retributive response than would be appropriate for an adult. Young people tend to lack judgment and are not considered capable of making many decisions about their own lives.

Some argue, therefore, that there is a moral justification for lesser accountability for adolescents than for adults. As adolescents lack the moral development and judgment of adults, it is inappropriate to hold them as fully accountable and the retributive aspect of the criminal justice system should be modified when applied to them. Historically, it was this notion of lack of capacity that was the basis of the *doli incapax* defence for children. This concept gave immunity from punishment to children under the age of 14 who lacked the capacity to know the nature and consequences of their conduct, and to appreciate that it was wrong.

2.4.2 Deterrence — Specific and General

The theory of deterrence is based on the assumption that if individuals realize there are negative sanctions for wrongful conduct, they will not engage in such conduct since the consequences are worse than any possible gain from the conduct. Deterrence may be specific — i.e., with the intent of deterring the individual before the court from future wrongful conduct by imposing a specific sanction. Deterrence may also be general — i.e., aimed at a larger audience. The punishment imposed on one individual may cause others to refrain from that type of conduct. Historically, it was believed that general deterrence was most likely to be effective if punishments were highly publicized, therefore hangings and floggings were public.

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[46] See, for example, *R.* v. *MacKinlay* (1986), 53 C.R. (3d) 105, 28 C.C.C. (3d) 306 (Ont. C.A.).

Some Canadian judges have concluded that general deterrence should not be a factor in dealing with juveniles since the situation of a youth before the court should be the sole focus of judicial concern. In a New Brunswick Court of Appeal decision rendered under the *JDA*, it was pointed out that it would not be in the "best interests" of a child before the juvenile court to be used as an example for others.[47] In 1985, in *R.* v. *G.K.*, decided under the *YOA*, Justice Stevenson, then of the Alberta Court of Appeal, wrote:

> *In any event, deterrence to others does not, in my view, have any place in the sentencing of youth offenders*. It is not one of the principles enumerated in the catalogue in section 3 of the *Act* which declares the policy for young offenders in Canada. Indeed, I note that in regard to secure custody, section 24(5) prohibits committal unless necessary for the protection of society (having regard, also, to the needs and circumstances of the young person).[48]

This view was rejected by other judges, as is reflected in the decision of Justice Brooke of the Ontario Court of Appeal in 1986, in *R.* v. *O.*, who commented on the preceding quotation:

> With the greatest deference, we do not agree with that statement. We think it is too broad. The principles under section 3 of the *Young Offenders Act* do not sweep away the principle of general deterrence. The principles under that section enshrine the principle of the protection of society and this subsumes general and specific deterrence. It is perhaps sufficient to say that in our opinion the principle of general deterrence must be considered but it has diminished importance in determining the appropriate disposition in the case of a youthful offender.[49]

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[47] *R.* v. *S.* (1948), 6 C.R. 292 (N.B.C.A.).

[48] *R.* v. *G.K.* (1985), 21 C.C.C. (3d) 558 (Alta. C.A.). Emphasis added.

[49] *R.* v. *O.* (1986), 27 C.C.C. (3d) 376 (Ont. C.A.).

In its 1993 judgment in *R.* v. *J.J.M.*, the Supreme Court of Canada accepted the view that general deterrence may be a factor in dealing with young persons, though it should not be as significant a factor as for adults. Justice Cory wrote:

> *R.* v. *O.*...expressed the opinion that although the principle of general deterrence must be considered, it had diminished importance in determining the appropriate disposition in the case of a youthful offender. This, I believe, is the correct approach.
>
> There is reason to believe that *Young Offenders Act* dispositions can have a deterrent effect. The crimes committed by the young tend to be a group activity. The group lends support and assistance to the prime offenders. The criminological literature is clear that about 80 percent of juvenile delinquency is a group activity, whether as part of an organized gang or with an informal group of accomplices....If the activity of the group is criminal then the disposition imposed on an individual member of the group should be such that it will deter other members of the group....
>
> Having said that, I would underline that general deterrence should not, through undue emphasis, have the same importance in fashioning the disposition for a youthful offender as it would in the case of an adult. One youthful offender should not be obliged to accept the responsibility for all the young offenders of his or her generation.[50]

While the Supreme Court judgment resolves an abstract judicial disagreement about whether or not general deterrence should be a factor in youth court sentencing, it leaves other important issues unexplored. Ironically, and perhaps as an illustration of the limited relevance of this type of abstract judicial disagreement, when these cases were decided the rate of custody sentencing for young offenders was lower in Ontario than in Alberta, despite the fact that the highest court in the latter province appeared to adopt a less retributive approach by indicating that deterrence was not to be a factor in youth court sentencing.[51]

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[50] *R.* v. *J.J.M.* (1993), 20 C.R. (4th) 295, at 304-305.

[51] J. Kenewell, N. Bala and P. Colfer, "Young Offenders," in R. Barnhorst and L.C. Johnson, eds., *The State of the Child in Ontario* (Toronto: Oxford University Press, 1991), at p. 172. By 1991-1992, the rate of custody use was slightly higher in Ontario than in Alberta, Statistics Canada, *Young Offender Key, Indirect Report* (Ottawa, 1993).

Notwithstanding the comments of Justice Cory about general deterrence and youth court sentencing, there is significant empirical research showing that longer sentences for youths before the courts have no deterrent effect on other youths, and only a limited effect on the youth sentenced. In a dissenting opinion on the sentencing of a youth who was 16 years old at the time of an offence and was transferred into adult court and convicted there, Chief Justice MacEachen of the British Columbia Court of Appeal observed:

> If I thought for a moment that there was any real possibility that a four-year sentence for this youth would deter some other youth from committing the same or any other offence, then I would naturally balance that against the advantages of trying to rehabilitate this offender. I believe sending this youth to prison may possibly deter some other youth from offending, but none of the scientific material I have read, including various reports of the Canadian Law Reform Commission and the Canadian Sentencing Commission persuade me that a long sentence is any more useful for this purpose than a moderate sentence.[52]

The unfortunate reality is that many youths who are committing offences lack judgment. Further, they do not appreciate the consequences of their actions for themselves and others, and therefore, general deterrence is not as critical a factor in dealing with youths as it is for adults. Lengthening the sentences for youths who are apprehended will not likely have any appreciable effect on the behaviour of other youths. Improved policing and increasing the chances of apprehension will likely have a greater deterrent effect on youth criminality than lengthening sentences.[53]

2.4.3 Incapacitation

One way the youth justice system protects society is to remove serious offenders from the community, and place them where they will not pose a direct threat, at least as long as they are in custody. The objective of incapacitation, or

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[52] *R.* v. *E.L.D.* (1992), 17 W.C.B. (2d) 88 (B.C.C.A.).

[53] See, for example, A.W. Leschied and L. Vark, *Assessing Outcomes and Special Needs Young Offenders Under New Canadian Juvenile Justice Legislation* (London Family Court Clinic, 1989); and A.W. Leschied, P.G. Jaffe, D. Andrews, and P. Gendreau "Treatment Issues and Young Offenders: An Empirically Derived Vision of Juvenile Justice Policy" in R.R. Corrado, N. Bala, R. Linden, and M. LeBlanc, eds., *Juvenile Justice in Canada* (Toronto: Butterworths, 1992). They point out that there is some evidence that increasing sanctions may actually increase the incidence of reoffending, especially if it involves longer periods of time in custody, away from family and community supports.

isolation, may be especially relevant for young offenders, since 16- and 17-year-old youths have a relatively high incidence of reoffending. Further, the incidence of criminal behaviour in individuals in nearly all societies tends to peak in late adolescence and early adulthood (between the ages of 16 and 22). The testing of social limits is more characteristic of the growing up or rebellion of youth, and as individuals mature they tend to commit fewer crimes. It can be argued, therefore, that placing a young offender in custody, especially during the "high risk" period, may achieve a significant degree of community protection.

It is important to note that placing a youth in custody does not eliminate the risk of reoffending. First, while young offenders are in custody they may still be committing offences, although their opportunities will be limited and their victims generally will be other convicted offenders in the custodial facility. Second, some youths are not rehabilitated while in custody; to the contrary, the effects of institutionalizing them and their association with other offenders in custody may increase the risk they pose to society upon release. This "training for deviance" effect is increased if a young offender is transferred to adult court and placed in adult correctional facilities. This problem was recognized by Chief Judge Lilles of the Yukon Territorial Court in a recent transfer decision:

> Affording protection to the public is not synonymous with incarceration. In the long term, society is best protected by the successful rehabilitation of the offender. Society is not protected if a youth emerges institutionalized from a federal penitentiary, or having learned additional criminal skills that would make him more dangerous. Unnecessary or unproductive incarceration of a youth or young adult in the federal system will rarely be in the interests of society.[54]

2.4.4 Rehabilitation

Rehabilitating an offender generally involves dealing successfully with the underlying problems that led to the criminal behaviour, and thereby achieving reintegration of the offender into society as a productive citizen. There is a large body of clinical literature on different types of rehabilitative programs and their effectiveness with different types of offenders.[55] It is not the intent here to review

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[54] *R.* v. *M.T.*, as yet unreported, April 15, 1993 (Yukon Territorial Court); aff'd. June 3, 1993 (Yukon C.A.).

[55] For literature reviews, see, for example, Leschied et al., *Assessing Outcomes*; and A.W. Leschied and P.G. Jaffe, eds., *The Young Offenders Act: A Revolution in Canadian Juvenile Justice* (Toronto: University of Toronto Press, 1991), Chapters 9-11.

those programs here, but rather to discuss the concept of rehabilitation more generally.

Rehabilitation programs include community and custody-based services that employ such techniques as individual and group therapy, behaviour modification, educational programs (especially those aimed at offenders with literacy limitations and learning disabilities), drug and alcohol abuse programs, and various employment-related programs. Some critics question if any type of rehabilitative efforts associated with the juvenile justice system has an effect on recidivism. However, it is widely believed that some programs are effective with some types of offenders.[56]

Rehabilitation is particularly relevant to young offenders because their personalities, characters and values are not fully developed and thus it is assumed they will be more amenable to rehabilitation than adults. As the youth justice system is premised on the greater amenability of adolescents to rehabilitation, there is much more emphasis on providing a broad range of rehabilitative services for younger offenders. However, the topic remains controversial, with some critics challenging the premise that rehabilitation efforts are effective in reducing recidivism.[57] Even the strongest proponents of rehabilitation for adolescents recognize that no program can rehabilitate all young offenders and that some youths, who may not be readily identifiable, will reoffend despite any rehabilitative efforts.[58]

When courts consider rehabilitation for adult offenders, it is usually to impose a less severe disposition than the circumstances of the case might otherwise warrant. Rehabilitation in such cases may involve a community-based sentence like probation, or a short custodial sentence, because these dispositions will maximize possibilities for maintaining contact with supports in the community and minimize the risks of confinement in custody.

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[56] See, for example, S.J. Shamsie, "Anti-Social Adolescents: Our Treatment Does Not Work — Where Do We Go From Here?" *Canadian Journal of Psychology*, 26 (1981), at p. 357. Even a rehabilitation critic like Dr. Shamsie believes that for many young offenders educational and employment-based rehabilitative efforts hold significant promise of reducing recidivism.

[57] See, for example, Hirschi and Gottfredson, "Rethinking," *supra*, note 9, at p. 266, who question if adolescents are more amenable to treatment than adults, noting that this challenges the very basis for a separate juvenile justice system. "No one appears to have shown that age is a predictor of treatment success, a finding that would seem to be required by the juvenile court hypothesis."

[58] Some of the strongest public advocates of rehabilitation for young offenders in Canada, Leschied et al., *Assessing Outcomes*, *supra*, note 53, at p. 64, who write that "the delivery of clinically relevant treatment service is a promising route to reduced recidivism," though recognizing that "the average effect of 'treatment' is the reduction of recidivism [only] to at least a mild degree."

The way courts account for rehabilitation as a factor in dealing with young offenders is more controversial. It is sometimes argued that a longer custodial sentence is required if the youth comes from a troubled family background, because the youth would benefit from the rehabilitative and social resources available in a custodial setting. Many Canadian judges reject this approach, however, suggesting it is inappropriate to use criminal legislation to deal with social problems that should be dealt with by the child protection or mental health systems.

In *R.* v. *Richard I.*,[59] the Ontario Court of Appeal reduced the sentence for a 14-year-old boy from two years secure custody to 18 months, and rejected the prosecutor's argument that the longer sentence was needed to allow the staff at the youth custody facility sufficient time to effect some improvement in his behaviour:

> The fact that this young offender may require some long-term form of social or institutional care or guidance if there is to be any real prospect of his rehabilitation does not mean that the vehicle of the *Young Offenders Act* can be employed for that purpose. Here, as under the *Criminal Code*, it is a cardinal principle of our law that, within the limits prescribed by Parliament, the punishment should fit the crime but should not be stretched so that it exceeds it, even where that might be thought desirable by some in the interest of providing some extra protection for the public.[60]

Similarly, in *Teresa C.* v. *The Queen*,[61] an appeal court reduced a sentence imposed on a 13-year-old girl for a breach of probation from six months secure custody to 30 days open custody. The court rejected the argument that the longer sentence was needed to provide counselling for the girl, who was "out of control" of her parents and occasionally solicited for the purpose of prostitution. The court went on to say:

> I am of the view that the learned sentencing judge was not entitled to impose a sentence of six months closed custody...notwithstanding his lofty motives....He should have left it up to the child welfare authorities to intervene and take proceedings for wardship if they felt that the appellant was in need of protection. His concern that the relevant provincial

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[59] *R.* v. *Richard I.* (1985), 17 C.C.C. (3d) 523, 44 C.R. (3d) 168 (Ont. C.A.).

[60] *Ibid.*

[61] *Teresa C.* v. *The Queen*, [1988] W.D.F.L. 723, 4 W.C.B. (2d) 203 (Ont. Dist. Ct.).

> legislation may not be adequate to enable a judge hearing that application to make a wardship order should not affect what would otherwise be the proper sentence for this offence. The lack of enabling legislation is something that should be addressed to the provincial legislature in order to ensure that all young persons in this situation are adequately protected rather than to use the processes of the criminal court which are not intended for that purpose.

A 1993 decision of the Supreme Court of Canada rejected this approach. In *R.* v. *J.J.M.*,[62] the Supreme Court upheld a two-year, open custody sentence for a youth convicted of several property offences, rejecting the opinion of one dissenting judge in the Manitoba Court of Appeal that a sentence of one year was more proportionate to the offence. The Supreme Court was clearly influenced by its view of the "depressing home conditions" faced by the boy, and by child welfare concerns. Justice Cory wrote about the significance of serving the sentence in open custody:

> Yet those facilities are not simply to be jails for young people. Rather they are facilities dedicated to the long term welfare and reformation of the young offender. Open custody facilities do not and should not resemble penitentiaries.

The judge then assessed the significance of rehabilitation as a factor in dealing with young offenders:

> It is true that for both adults and minors the sentence must be proportional to the offence committed. But in the sentencing of adult offenders, the principle of proportionality will have a greater significance than it will in the disposition of young offenders. For the young, a proper disposition must take into account not only the seriousness of the crime but also all the other relevant factors.
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> For example, two years of closed custody could never be imposed on a young offender with no prior record who had stolen a pair of gloves, no matter how intolerable or how unsavoury the conditions were in the offender's home. Nonetheless the home situation is a factor that should always be taken into account in fashioning the appropriate disposition....Intolerable conditions in the home indicate both a

[62] *R.* v. *J.J.M.*, [1993] C.S.J. 14.

special need for care and the absence of any guidance within the home.

> The situation in the home of a young offender should neither be ignored nor made the predominant factor in sentencing. Nonetheless, it is a factor that can properly be taken into account in fashioning the disposition.
>
> ...
>
> The aim must be both to protect society and at the same time to provide the young offender with the necessary guidance and assistance that he or she may not be getting at home. Those goals are not necessarily mutually exclusive. In the long run, society is best protected by the reformation and rehabilitation of a young offender. In turn, the young offenders are best served when they are provided with the necessary guidance and assistance to enable them to learn the skills required to become fully integrated, useful members of society.

From the viewpoint of the youth facing sentencing, this decision may have seemed unfair, since he may legitimately have felt he was "punished" (i.e., received a longer sentence) because his parents were alcoholics and abusive towards him. This may appear particularly unfair if youths receive different sentences for the same offence because of differences in "family backgrounds." The potential for unconscious class or racial bias could become a factor in assessing family backgrounds, and hence the length of sentence received.

If a youth needs help, the important question is why is it not provided voluntarily or under child protection legislation? If it were provided under this legislative mandate, the focus would be on providing assistance, and questions of helping and punishing would not be as confused. The legal position of a youth in residential care voluntarily or under child protection legislation is quite different from one in custody under the *YOA*. Significantly, in *J.J.M.*, the youth had contacted child welfare authorities for help before he committed the offences in question, but they failed to assist him.[63] One of the unfortunate realities of Canadian society is that as child protection authorities face increasingly heavy child abuse caseloads and shrinking budgets, they tend to shift resources away from assisting adolescents with behavioral problems and those experiencing difficulty with parental relationships. It is a common expectation that youths with behavioral problems will be dealt with in the young offenders system.

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[63] 75 Man. R. (2d) 197.

Another important concern is whether or not the rehabilitation sought through a longer custodial sentence is likely to be effective in helping youth. One might expect that if the state seeks a longer custodial disposition for rehabilitative purposes, it should produce evidence to establish that this objective is more likely to be achieved by the longer sentence, rather than simply asserting the proposition.

In affirming the two-year custodial sentence in *J.J.M.*, the Supreme Court strongly emphasized that it was to be served in an open custody facility, a place that is "not simply a jail." While it is true that some open custody facilities have a strong rehabilitative approach, there is great variation among open custody facilities, both in terms of the access to treatment and educational resources and in the degree of security and confinement.

2.5 The Limits of State Intervention

There are many important practical and philosophical constraints on the types of intervention the state may impose on young people who violate the law. Limitations of knowledge and difficulties in predicting human behaviour limit the effectiveness of state intervention, especially when issues of rehabilitation or deterrence are raised. In reality, even the best- trained mental health professional cannot be certain whether or not a particular program or facility will rehabilitate a young offender. At best, most dispositional decisions about youths are based on educated guesses. Even after a youth has completed a disposition, trained professionals have great difficulty in accurately predicting whether or not the youth will reoffend.[64]

Another issue affecting those decisionmakers on an appropriate response to a young offender is the realization that some youths may be harmed by state intervention. For example, first- time offenders may be more likely to reoffend if there is inappropriate intrusion in their lives than if they are simply apprehended and warned not to reoffend.

Concerns about the deleterious effects of state intervention can take several forms. One is based on the recognition that there is a potential for physical, emotional or sexual abuse when a young offender is placed in the care of the state. In some cases in Canada, juveniles placed in custody for minor offences became adults who engaged in criminal activities, prostitution and substance abuse, partly because of institutional abuse.

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[64] There are, however, statistical predictors based on such factors as a youth's prior record and family supports, that may be useful in making an assessment on the likelihood of recidivism.

Today, there is more awareness of the problems of institutional abuse, and there is certainly less occurring than in the past. However, the recent Canadian history of children in state care may make some decisionmakers more cautious when considering whether or not to remove children from their homes and communities.

Even if the problem of abuse by adults responsible for the care of youths in state facilities is completely resolved, there is a significant potential for harm from custodial placement. Removal from familiar community supports can be upsetting and even traumatic for some youths. A number of adolescents attempt suicide soon after placement in youth custody; a few succeed.

The residents in a young offenders' facility may have antisocial values as well as emotional problems. While the incidents may not be as brutal as an adult jail, physical intimidation and sexual exploitation by other inmates do occur in youth custody facilities.

Some juvenile justice experts are concerned that even the process of sending youths to court and labelling them as offenders may be harmful to their self-image, and may also result in others in the community viewing the adolescents as offenders, thereby contributing to a cycle of reoffending behaviour.[65] Those who hold this view tend to be advocates of minimal intervention.

Another constraint is that the state has increasingly limited resources. Thus, there may be situations where a decisionmaker in the juvenile justice system believes a particular type or duration of placement would best meet the needs of a young offender, but it is not available. This is a reality that judges must be aware of when considering the suitability of a particular disposition. Such limitations are especially relevant in a legal regime such as we have in Canada where judges decide only the duration of a custodial disposition and the level of security (open or secure), but not the specific facility.

In the United States there have been situations where resource limitations have forced correctional officials to release offenders from jail early because of overcrowding resulting from insufficient correctional facility resources. While early release due to overcrowding has not been reported in Canada, the space limitations in our youth justice system have undoubtably caused shifting of youths from one facility or level of security to another, and may, at least subtly, affect some decisions about the release of young offenders into the community.

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[65] E.M. LeMert, *Instead of Court: Diversion in Juvenile Justice* (Chevy Chase, Maryland: National Institute of Mental Health, 1971).

Decisionmakers in the juvenile justice system, police, prosecutors, probation officers, and judges, are at least intuitively aware of the limitations of state response to young offenders. While their views on the application of the factors discussed here vary, they are understandably cautious about intervening in the lives of youth. There is an awareness that intervention will not always reduce the likelihood of the youth reoffending, or protect society from future criminal acts.

2.6 Principles that Govern Intervention: Due Process for Juveniles

As indicated above, Canadian society is concerned with responding to juvenile crime, protecting society and promoting the welfare of children. However, Canadians also have a fundamental belief that individuals are entitled to "due process," i.e., they have the right to be treated in accordance with the principles of fundamental justice.[66] At times, concerns about responding to juvenile crime and protection of due process rights are in conflict in public and political discourse in Canada. While the importance of due process is now accepted in most situations where individuals are affected by state action, this has not always been true, especially with respect to cases involving children and young offenders.

When the juvenile courts were first established in Canada in 1908, they were informal institutions that did not emphasize due process or the protection of legal rights. Many of the judges lacked legal training, and lawyers rarely appeared. Juvenile court judges had substantial discretion, which they exercised in accordance with their views of the "best interests" of the juvenile before the court. While in theory the court could act only if a juvenile was found guilty of a criminal offence, at times there was a tendency to deal informally with issues related to the "technicalities" of the legal process, so that "treatment" could be expeditiously commenced.

In one Manitoba case in 1957, a lawyer appeared in juvenile court with a youth charged with indecent assault. The judge commented that the lawyer's involvement was "very unusual," rebuked the lawyer for not having "asked

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[66] "Due process" is a broad legal concept. It is premised on the notion that an individual facing state intervention is entitled to be treated fairly and in accordance with known legal standards. In the context of criminal law in Canada, many of the aspects of "due process" are embodied in the *Charter of Rights and Freedoms*. The *Charter* has a general statement in section 7 that no individual shall be deprived of "life, liberty or security of the person...except in accordance with the principles of fundamental justice." This constitutes a constitutional guarantee to due process for criminal proceedings, including youth court proceedings. Some of the more specific elements of due process, and the *Charter*, include the right to be advised and represented by a lawyer, the right to be present throughout one's trial, the right to hear evidence against one and challenge that evidence, and the presumption of innocence.

permission to be here," and suggested that the lawyer's presence was "gumming up the works."[67] While the appeal court in this case later questioned the approach of the trial judge, the comments of the lower court illustrate an attitude that may not have been uncommon among juvenile court judges at the time.

By the early 1960s, there were concerns expressed by many critics about the lack of protection for individual legal rights, including the actual and potential abuses of the juvenile justice system. The increased attention to the rights of individuals was a result, in part, of the American civil rights movement and the enactment of the *Canadian Bill of Rights* in 1960.[68] Soon concern also focussed on the situation of children and adolescents. These concerns grew as reports of abusive treatment of youth in training schools and other state care facilities began to emerge.[69] As a result of the controversy in Canada, in 1965, a Department of Justice Canada committee recommended major changes to the way youth were processed in the juvenile justice system. One major recommendation was for greater emphasis on the legal rights of youth.

There were also concerns about the differential treatment of juvenile delinquents and adult offenders. For even a minor offence, a juvenile offender could receive an indefinite sentence not required to end until the 21st birthday, while an adult convicted of the same offence might pay a fine or go to jail for a very short time. Conversely, some critics charged that, with the *JDA* emphasis on the "best interests" of delinquents and no mention of punishment or "protection of society," some adolescent offenders were receiving sanctions that were too lenient.

The trend towards increased recognition of legal rights for juveniles was reinforced in 1967, when the United States Supreme Court rendered its landmark decision in *Re Gault*, holding that juveniles charged with criminal offences are entitled to the same constitutional protection of due process as are afforded adults charged with criminal offences. The American Supreme Court states that:

> 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

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[67] (1958), 121 C.C.C. 103 (Man. C.A.), [1959] S.C.R. 638 (S.C.C.).

[68] S.C. 1960, c.44.

[69] It is disturbing to note that it was not until the 1990s that Canadian society began to learn the full extent of physical, emotional, and sexual abuse in juvenile institutions during the 1950s, 1960s and 1970s, as the former "delinquents" disclosed their stories in a more receptive social climate.

absence of procedural rules based upon constitutional principle has not always produced fair, efficient, and effective procedures. Departures from established principles of due process have frequently resulted not in enlightened procedure, but in arbitrariness....It is important, we think, that the claimed benefits of the juvenile process should be candidly appraised....The high crime rates among juveniles... could not lead us to conclude that the absence of constitutional protections reduce crime, or that the juvenile system, functioning free of constitutional inhibitions as it has largely done, is effective to reduce crime or rehabilitate offenders. We do not mean by this to denigrate the juvenile court process or to suggest that there are not aspects of the juvenile system relating to offenders which are valuable. But the features of the juvenile system which its proponents have asserted are of unique benefit will not be impaired by constitutional domestication....

Ultimately...we confront the reality of that portion of the Juvenile Court process with which we deal in this case. A boy is charged with misconduct. The boy is committed to an institution where he may be restrained of liberty for years. It is of no constitutional consequence — and of limited practical meaning — that the institution to which he is committed is called an Industrial School. The fact of the matter is that, however euphemistic the title, a "receiving home" or an "industrial school" for juveniles is an institution of confinement in which the child is incarcerated for a greater or lesser time. His world becomes "a building with whitewashed walls, regimented routine and institutional hours"....Instead of mother and father and sisters and brothers and friends and classmates, his world is peopled by guards, custodians, state employees, and "delinquents" confined with him for anything from waywardness to rape and homicide.[70]

By the early 1980s, the importance of due process was accepted in Canadian society, a development that was reflected in and reinforced by the constitutional entrenchment of the *Canadian Charter of Rights and Freedoms* in 1982.[71] It is not coincidental that this was the same year that Parliament enacted the *YOA* (though it

[70] 387 United States 1(1967).

[71] *Constitution Act, 1982*, enacted by the *Canada Act,* 1982 (U.K.), c.11.

did not come into force until 1984). The *JDA* did not recognize the legal rights for youth and was inconsistent in certain critical respects with the Charter.

The emphasis on due process is reflected in several provisions of the *YOA*, such as section 11 which guarantees youths full access to legal services. Perhaps the most controversial is section 56, which stipulates that a statement made by a youth to a police officer is only admissible if the officer gives a full legal caution to the youth, and the youth signs a written waiver of any rights that are not being exercised, such as the right to remain silent and the right to consult with a parent or lawyer before making a statement. Some critics are quite concerned about the message that this provision sends to a youth, since it is possible that a youth may actually admit guilt to a police officer, but nevertheless be acquitted in youth court because the officer made a relatively minor error in cautioning the youth.

Some have questioned if it is appropriate to grant adolescents such a full range of legal rights. They argue that youths may not be able to fully appreciate and exercise these rights. More fundamentally, the exercise of these rights may not be consistent with the promotion of the best interests of youth, or the protection of the public.

This debate is not new to criminal justice, and certainly is not restricted to juvenile justice. However, in the context of youth court proceedings, the debate takes on an added poignancy as it is sometimes argued that the exercise of legal rights may serve to defeat the needs of a young person.

The prominent Canadian defence lawyer, Edward Greenspan, acknowledged the "dilemma of due process," especially in the context of dealing with young offenders:

> Due process is a costly, time consuming process and the procedural safeguards which make up "due process" are not always self-evident .... In ordinary circumstances, the child is urged to tell the truth and confess; under due process, the young person may be acquitted even though he has acknowledged responsibility to his lawyer. The dilemma of due process results in "some young people receiving the wrong message as to the appropriateness of their behaviour and the values underlying our system of justice."
>
> Due process has undoubted benefits for the child, who is now "entitled to protection from arbitrary or well meaning but mistaken government." The young person can no longer be removed from his/her home unless there has been "a scrupulous

determination of the facts." At the same time, the "costs" of due process suggest the need to devise ways of avoiding the formal system.[72]

Despite concerns about the costs of due process for young persons, Canada has in many respects become a "rights-based" society, and it seems unlikely that this basic trend will be easily reversed. Further, the *United Nations Convention on the Rights of the Child*, in Articles 37 and 40, explicitly recognizes the importance of the legal process and access to "legal assistance" for juveniles alleged to have violated criminal laws.

The type of rights-based developments that have occurred in the juvenile justice system in Canada have also been adopted in other areas of law that involve children, adolescents, and parents. Child welfare laws have been evolving during this century and many of the debates which took place concerning juvenile justice have been reflected in similar debates in that arena. Early in the century, legislation delegated enormous discretion to child protection agencies. While judges (in many cases, the same judges responsible for the juvenile court) exercised a supervisory function, decisions about how to respond to children's needs were made primarily by child protection workers. As discussed above, proceedings in court were informal, most judges had no legal training and few lawyers ever appeared in the family courts.[73] Decisions were to be made in the "best interests" of children, a concept which was not defined. Proceedings were not seen to be adversarial and there was, consequently, little need to be concerned with the rights of children or their parents. The lack of guidelines for the exercise of discretion and the broad definitions in early legislation left open the possibility of arbitrary or idiosyncratic decisionmaking.[74] Once a child was in the care of the child welfare authorities, the determination of what was in the child's best interests became a largely bureaucratic, administrative function, rather than one based on personal knowledge of the child in care.[75]

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[72] Quoted in Ontario Social Development Council, *Y.O.A. Dispositions: Challenges and Choices* (1988), at p. 14.

[73] N. Bala, "An Introduction to Child Protection Problems," in N. Bala, J.P. Hornick and R. Vogl, eds., *Canadian Child Welfare Law* (Toronto: Thompson Educational Publishing, 1991).

[74] R.F. Barnhorst, "Child Protection Legislation in Canada: Recent Canadian Reform," in B. Landau, ed., *Children's Rights in the Practice of Family Law* (Toronto: Carswell, 1986), at p. 255; and B. Walter, "Best Interests in the Context of Child Protection Proceedings and Service Provision," unpublished paper, Calgary: Canadian Research Institute for Law and the Family, 1991.

[75] Walter, *ibid.*

Beginning in the 1960s and continuing to the present, concerns about the lack of procedural safeguards for children and parents have been debated both with respect to child welfare and in the juvenile justice context. Questions have been raised about whether or not the system as a whole was biased because of the disproportionate numbers of poor, aboriginal and visible minority children who were taken into care by child welfare authorities.[76] The idea that there was one right and proper way to raise children has been challenged[77] as was the presumption that largely unfettered discretion in state intervention was necessarily beneficial. As a result, a number of Canadian jurisdictions enacted legislation to narrow the broad basis for state intervention and granted parents and children more extensive legal rights.

The increased recognition of rights of due process for children and their parents has been controversial. Granting rights to individuals always has costs, both to a society and for its members. Tension continues in the public discourse between working to protect the rights of those faced with state intervention in their lives, and the desire to protect society and promote the well-being of its members. There is ongoing debate in Canada that too many rights have been afforded to those charged or convicted with criminal wrongdoing, whether adults or adolescents. While the balance that is struck in regard to specific issues may change, it seems that the present recognition of the importance of individual legal rights and due process is unlikely to disappear.

2.7 Balancing Principles and Objectives

Most Canadians would probably agree that all the principles and objectives raised in this chapter are legitimate concerns when dealing with youths who commit crimes, at least in some cases or to some extent. The difficult problem is how to weigh and balance them all. In some situations, this may not be difficult, while in others, the tension between the different factors may be very strong, and decisionmaking can become complex. The next chapter explores how the Canadian juvenile justice system originally dealt with these issues and how that system was transformed by the *YOA*.

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[76] Barnhorst, "Child Protection Legislation", *supra*, note 74.

[77] *Ibid.*

3.0 TRANSFORMATION OF YOUTH JUSTICE IN CANADA

The manner in which the Canadian legal system responds to crimes committed by children and adolescents has changed significantly in less than a century. It was only in the latter part of the nineteenth century that tentative steps were taken to establish a separate justice system for children and youth. The *Juvenile Delinquents Act* (*JDA*) created a full statutory model for responding to youthful criminality, based, at least in theory, solely on the promotion of the "best interests" of delinquent youth. The *Young Offenders Act* (*YOA*) provides a more complex balancing of principles and approaches.

This chapter describes the transformation in the societal response, with particular emphasis on how the changes in legal approach reflect fundamental shifts in how society views the nature of youthful criminality. This transformation clearly reflects a change in the principles guiding the legal response to crimes committed by children and youth.

3.1 Treating Adolescents Like Adults: The Nineteenth Century and Earlier

A separate justice system for children and adolescents who violate the criminal law has existed in Canada for less than a century. Until the end of the nineteenth century, children and adolescents who violated the criminal law were treated the same as adults, and subjected to hanging or confinement in adult penitentiaries. There was, however, a special rule of law known as *doli incapax*, that provided younger children with a limited immunity from legal punishment.[78] Children under the age of seven could not be held criminally accountable under any circumstance because they had not yet reached the "age of reason." Between the ages of 7 and 14 children were to be held accountable only if it could be shown that they "understood the nature and consequences of their actions." There was, therefore, a presumption of incapacity for children under age 14, and for the purposes of the criminal law, adulthood began at age 14. In practice, it appears that the presumption of incapacity was sometimes easily rebutted, especially as a child approached the age of 14. The age of seven generally was accepted as the minimum age at which criminal responsibility could be imposed, though children under 14 years of age were able to raise this defence, even for murder charges.[79]

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[78] This rule initially developed as part of the English common law and reflected principles found in ancient Roman law. See *Marsh* v. *Loader* (1863), 143 E.R. 55 (C.P.).

[79] In 1893, it was codified in Canada's *Criminal Code*, sections 12 & 13. It was, for example, used by a 12-year-old boy in 1977 to obtain an acquittal on a charge of murdering his stepmother; *R.* v. *B.C.* (1977), 39 C.C.C. (2d) 469 (Ont. Prov. Ct.).

3.2 The Juvenile Court Model: 1908-1984

What has come to be called "the child-saving movement" grew out of late nineteenth century concerns about the treatment and welfare of children. This movement was linked to broader social reform efforts in Canada, the United States, and England, and was for example, loosely related to the women's suffrage movement.[80]

As a consequence of the growing industrialization in the second half of the nineteenth century and the demand for factory workers, populations in urban areas grew rapidly as people moved from rural areas. There was also extensive immigration to Canada. Wages were not high, population density increased, and many children were abandoned or neglected. Some of these children resorted to criminal activity to survive.

The child savers sought to keep poor and immigrant children from lives of crime and engaged in "rescuing" children from their unsavoury environments.[81] Other children were exploited as cheap labour and the reformers were active in the move to enact laws prohibiting the employment of young children and regulating the employment of older children. The child savers were also instrumental in the establishment of orphanages and other institutions designed for children,[82] as well as calling for publicly funded schools, compulsory education, and the establishment of children protection agencies.

A primary objective of the child savers was to establish juvenile court and corrections systems separate from the adult systems. A major rationale for the creation of a separate juvenile justice system was to protect youthful offenders from association with adult criminals, and to help them develop into responsible adults.

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[80] See, for example, B. Feld, "The Transformation of the Juvenile Court," (1991) 75 *Minnesota Law Review* 691, at p. 693.

[81] R.R. Corrado and A.W. Markwart, "The Evolution and Implementation of a New Era of Juvenile Justice in Canada," in R.R. Corrado, N. Bala, R. Linden and M. Le Blanc, eds., *Juvenile Justice in Canada: A Theoretical and Analytical Assessment* (Toronto: Butterworths, 1992), at p. 137; A. Platt., *The Child Savers: The Invention of Delinquency* (Chicago: The University of Chicago Press, 1969); A. Platt, "The Rise of the Child-Saving Movement: A Study in Social Policy and Correctional Reform," in F.L. Faust and P.J. Brantingham, eds., *Juvenile Justice Philosophy: Readings, Cases and Comments* (St. Paul, Minn.: West Publishing Co., 1974), at p. 118; and W.G. West, *Young Offenders and the State: A Canadian Perspective on Delinquency* (Toronto: Butterworths, 1984).

[82] T. Caputo and D.C. Bracken, "Custodial Disputes and the Young Offenders Act," in J. Hudson, J.P. Hornick, and B.A. Burrows, eds., *Justice and the Young Offender in Canada* (Toronto: Thompson Educational Publishing, Inc., 1991), at p. 123.

Their efforts were based on the belief that children and adolescents are highly impressionable and therefore should be protected from the corrupting influences of adult offenders. At the same time, this impressionability was believed to make the goal of rehabilitation through training and treatment more attainable for youths than it was for adults.[83] Institutional facilities in this new system were called training schools or reformatories, with the names signifying distinct objectives from adult penitentiaries. As early as 1857, legislation was enacted to set up separate reformatories for juvenile offenders, so that they would not be placed in custody with adult criminals.[84] Late in the nineteenth century, reformers also established Children's Aid Societies in various Canadian cities to help orphaned, homeless and abandoned children.

Reformers in Britain, the United States and Canada also worked to establish juvenile courts, which were intended to deal with young offenders differently from adults. The philosophy was to emphasize rehabilitation and save youths from a life of crime. The first juvenile court was established in Chicago in 1899.

Canada's *JDA*, with its distinctive welfare-oriented philosophy and separate courts for juvenile offenders, was enacted by Parliament in 1908. These courts are sometimes characterized as having been based on a *parens patriae* philosophy,[85] where the state acted in the role of parent toward children in need of help, in order to both help them and also to protect society from their future criminal acts.

The *JDA* applied to children and young people from seven years of age. The upper age limit could be set by each province and territory, and most chose 16 years of age. Juveniles between ages 7 and 14 could still rely on the *doli incapax* defence, and the onus was placed on the Crown to prove that children under age 14 had sufficient capacity to appreciate the "nature and consequences" of their conduct. In practice, few children under the age 12 were charged under the *JDA*.

Although the generalization is broad, it can be argued that the shift in the minimum age for adult criminal responsibility from seven years in the nineteenth

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[83] West, *Young Offenders*, *supra*, note 81.

[84] *Ibid*, at pp. 31-32.

[85] The term *parens patriae* (Latin for "parent of the country") originally referred to the power of the King of England to protect the property of children and mental incompetents. This power was later transferred to the Court of Equity, which gradually began to exercise protective jurisdiction in various legal contexts. The term *parens patriae* is now frequently used to refer to a philosophy of state intervention to protect the interests of children. It also is still used to refer to a court jurisdiction that continues to rest with superior courts in Canada, to protect children and others in situations where there is no explicit legislation.

century to a minimum of 16 years in the twentieth century reflects changing economic and social developments. Early in the nineteenth century, children could, starting at about age seven, meaningfully participate in economic life. By the twentieth century, industrialization, mechanization and urbanization meant that more children became economically dependent until a much older age, and society began to view adolescence as a distinct stage of life. Some scholars have argued that the "invention of adolescence" was linked to the creation of the first juvenile courts.[86]

As originally enacted, the *JDA* provided that any contravention of federal or provincial laws or municipal bylaws constituted a single offence, known as "juvenile delinquency." In 1924, the Act was amended to add to the definition of juvenile delinquent a youth "guilty of sexual immorality or any similar form of vice, or who is liable by reason of any other act to be committed to an industrial school or juvenile reformatory under any federal or provincial statute." A wide range of behaviour considered inappropriate for young people was thus added as grounds for the intervention of the juvenile court. The most typical activities of young people falling into this category were "promiscuous" sexual activity, truancy, "incorrigibility," and running away from parental care. There was no equivalent offence provision applied to adults; consequently, behaviour falling under this broad definition came to be referred to as "status offences." There is significant evidence that this type of vague status offence was applied in a discriminatory fashion. For example, female adolescents were much more likely than male adolescents to be found guilty of "sexual immorality."[87]

Any child adjudged delinquent was to be treated, according to subsection 3(2), "not as an offender, but as one in a condition of delinquency and therefore requiring help and guidance and proper supervision." The welfare-oriented philosophy reflected in the *JDA*, was stated in section 38, which provided 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 a criminal, but as a misdirected and misguided child, and one needing aid, encouragement, help and assistance.

Judges had wide discretion under the *JDA* to determine how a delinquent child should be treated. The juvenile court was to sentence delinquents in accordance with a "child's own good and the best interests of the community," with

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[86] Ainsworth, "Re-Imaging Childhood," *supra*, note 17 at p. 1096.

[87] Barnhorst, "Female Delinquency" *supra*, note 41.

the objective of effecting rehabilitation. If a judge considered that a juvenile from a troubled background required intervention, there might be committal to a training school for a minor offence, such as truancy or even purchasing tobacco under age. The committal would be for an indefinite period, ending when juvenile correctional officials felt that the youth was rehabilitated. Conversely, youths convicted of serious offences might be released to parental care if the judge felt that this was in their best interests.

In comparison with the adversarial nature of proceedings in the adult criminal courts, proceedings in the juvenile courts were informal. Section 17 of the *JDA* specified that any proceeding under the Act could be "as informal as the circumstances will permit, consistent with a due regard for the proper administration of justice." Further, an appeal court could not set aside a juvenile court decision "because of any informality or irregularity where it appears that the disposition of the case was in the best interests of the child." Since the state, through the juvenile courts, was acting in the "best interests" of the child, it was believed that there was little need for procedural safeguards, legal representation, or the assertion of rights on behalf of the child.[88]

The operation of the juvenile justice system under the *JDA* has been summarized by West:

> Judges and probation officers were given special investigatory powers, including access to hearsay evidence and no necessity to reveal confidential information to defendants; procedural rules were minimal. No automatic right to appeal was present, and dispositions ranged from warning and release to indeterminate sentences with the guilty remaining under the courts' jurisdiction until age twenty-one. Dispositions were not linked to the gravity of an offence, but were tailored to the child's needs. The vagueness of this legislation, its lack of due process, the inclusion of a wide range of juvenile status offences (for example, truancy), and wide dispositional powers left the treatment of juveniles open to administrative arbitrariness, and subsequently allowed much of its humanitarian potential to be undermined in its implementation.[89]

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[88] N. Bala, "The Young Offenders Act: The Legal Structure," in R.R. Corrado, N. Bala, R. Linden and M. LeBlanc, eds., *Juvenile Justice in Canada: A Theoretical and Analytical Assessment* (Toronto: Butterworths, 1992); and West, *Young Offenders*, supra, note 81.

[89] West, *Young Offenders*, *supra*, note 81, at p. 33.

Prior to the enactment of the *YOA*, there was considerable overlap between the child welfare and the juvenile justice systems, both in their areas of substantive jurisdiction and in the options available for handling children. In most provinces, the same judges had the jurisdiction to order state intervention under both the *JDA* and child protection statutes. In many situations, the same behaviour by a child (such as incorrigibility or truancy) could trigger intervention by either system.

The *JDA* provision declaring children guilty of "sexual immorality or other vice" and the child protection definitions of unmanageable or living in unfit or improper circumstances were equally broad and, in many circumstances, overlapping. Even if a case came first through the juvenile court process, section 39 of the *JDA* allowed the juvenile to be dealt with by whichever legislation would be in the "best interests" of the child. Juvenile court judges were also permitted to commit a delinquent child to a child welfare facility as a sentence under the *JDA*. Child welfare agencies were generally authorized to place their charges in the same training schools, reformatories, and foster homes to which delinquents could be sent.

3.3 The Process of Reform: Enacting The *Young Offenders Act*

The enactment of the *YOA* in 1982, represented the first major reform of juvenile delinquency legislation since the passage of the *JDA* in 1908. Whereas the *JDA* can be described as legislation primarily oriented to child welfare with some attention to issues of criminal law, the *YOA* attempted to clearly separate the youth justice and child welfare systems, and is primarily criminal legislation, with some attention to child welfare issues. The enactment of the *YOA* was preceded by more than 25 years of discussion, debate and a series of legislative proposals. Some statutory changes in the *YOA* reflected changes that had already occurred in practice in the preceding ten years.

Some of the impetus for reform came as questions were raised concerning the attention paid in the juvenile court process on whether or not the young person was, in law, guilty of the offence charged. Critics pointed out that many juvenile court judges lacked legal training, and that lawyers rarely appeared to represent juveniles. Some commentators concluded that juvenile court personnel (judges, social workers and probation officers) seemed to operate on the assumption that any young person brought before the court required treatment and assistance. For example, in 1974, one Manitoba juvenile court judge commented:

> As I have said, a lawyer is the representative of his client, but the servant of the law. A lawyer who represents a juvenile may find that he best represents his client and best serves the law if he ensures that his client gets the help and guidance and

> proper supervision that he may obviously need. For a lawyer to offer a technical defense which leads to a finding of not delinquent may be in the very worst interest of his client. To beat the rap is an invitation to a juvenile to try it again. If he follows this course he may become beyond all help and guidance and proper supervision. He may become confirmed in the habit of law-breaking.
>
> The juvenile court is a special kind of court and needs a special kind of lawyer.[90]

Questions on the effectiveness of treatment were also being raised. Studies of both adult and juvenile offenders suggested that the rehabilitation programs provided in correctional institutions did little to prevent recidivism. One Canadian psychiatrist, after reviewing studies of treatment of juvenile offenders, concluded that "the treatments available to help antisocial adolescents are remarkably unsuccessful."[91] Others stated that:

> Treatment programs for delinquents have been notoriously unsuccessful, as indicated by the high recidivism rates usually reported....Even those treatments which are successful on a short-term basis have usually failed to document any long-term difference over similar non-treated youth in such variables as number of offences.[92]

Further, concerns raised centred on the interference with the rights of the parents, who might be required to take part in family counselling with a probation officer, or to pay a fine under the *JDA* for failing to adequately supervise their children. Such questions and challenges were reviewed and considered in a series of reports and proposals, beginning in 1960, with the report of the Correctional Planning Committee, which recommended an integrated approach to the prevention of delinquency as the best way to stop an increase in crime by young adult offenders. In 1961, the Department of Justice Canada established an Advisory Committee which issued its report, *Juvenile Delinquency in Canada*, in 1965. This report criticized the *JDA*, and recommended the abolition of status offences, the

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[90] Roy St. George Stubbs, "The Role of the Lawyer in Juvenile Court," (1974) 6 *Manitoba Law Journal* 65, at pp. 70-71.

[91] Shamsie, "Anti-social Adolescents", *supra*, note 56.

[92] K.D. O'Leary and G.T. Wilson, *Behavioral Therapy: Application and Outcome* (Englewood Cliffs, N.J.: Prentice Hall, 1975), at p. 196.

introduction of determinate sentencing and due process safeguards, and more consistency throughout the country in the operation of the system. The report also found that the resources available for the rehabilitation of juvenile delinquents were inadequate.[93]

A draft *Children's and Young Persons Act* incorporating many of these recommendations was introduced in 1967, but did not proceed, largely because of provincial objections to the continuation of federal jurisdiction over provincial and municipal offences and cost-sharing concerns.[94]

A new draft *Young Offenders Act*, Bill C-192, was introduced in 1970. It applied only to federally enacted offences and incorporated due process provisions, while maintaining some rehabilitative features. The minimum age of criminal responsibility was to be raised from seven to ten years. Mental health and social work professionals, as well as juvenile court staff, objected that this proposed legislation was too punitive and legalistic. There was also resistance from the provinces, in part because of possible funding changes, as well as from the federal opposition political parties.[95]

In 1973, the Department of the Solicitor General Canada set up a committee to examine the work of the Federal-Provincial Joint Review Group. Its report, *Young Persons in Conflict with the Law*, issued in 1975, emphasized the legal rights of juveniles and introduced the concept of responsibility, as well as a lower level of accountability for juveniles than for adults. In addition, the committee proposed extending the age jurisdiction to 18 years and creating a screening agency to examine all cases and decide if diversion or court charges were most appropriate. Some provinces objected to the change in the maximum age because of the associated increased costs, and to the screening agency as an interference with provincial jurisdiction over the administration of justice.[96]

Taking into consideration the response to the 1975 report, a proposal for a *Young Offenders Act* was issued in 1977, by the Solicitor General of Canada. This proposal incorporated many of the earlier recommendations concerning the rights and responsibilities of young people, but there were a number of important differences. The most substantive difference was the inclusion of the principle of

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[93] Corrado and Markwart, "The Evolution", *supra*, note 81.

[94] *Ibid*, at p. 148.

[95] Corrado and Markwart, "The Evolution", *supra*, note 81.

[96] *Ibid.*

the protection of society as a primary focus. There was no provision for a screening agency; instead a statement of the purpose of diversion was included in the preamble to the draft Act with provisions outlining the factors to be considered in deciding whether or not a particular young person should be diverted. The maximum age was set at 18 years, although there was provision for provinces to apply to set the upper limit at 16 or 17 years. The minimum age was set at 12 years, although the 1975 committee recommendation had been 14 years. Before legislation based on this proposal could be voted on, the government was defeated and an election was called.[97]

In 1979, the new government issued a *Legislative Proposal to Replace the Juvenile Delinquents Act*.[98] In this proposal, the protection of society was a key consideration in a statement of principles. Some of the provincial concerns with the 1975 report were also addressed: there was no mention of a screening agency; and provinces could determine the maximum age. Again, an election led to a change of government before this proposal could become law.

Bill C-61, the current *YOA*, was introduced by the federal government in 1981, and enacted in 1982 with the support of all political parties.[99] Solicitor General Robert Kaplan stated that the "responsibility and accountability" of young persons was to be considered the most important of the principles, although the *YOA* also explicitly recognized the "special needs" of young offenders. The *YOA* set an age jurisdiction of 12 to 18 years and established the right to legal counsel at all stages of proceedings. The practice of diverting young offenders from the court process was formalized by authorizing the establishment of programs of alternative measures, but provinces and territories had discretion in establishing such programs. Judges, rather than correctional officials, were to determine the level of custody for convicted offenders to serve their sentences and the length of the dispositions, a move which was viewed by some as an encroachment on the powers of provincial correctional authorities.

While the federal government agreed to provide some shared-cost funding for the implementation of certain parts of the *YOA*, some provinces were concerned about the increased costs associated with some provisions especially those relating to

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[97] *Ibid.*

[98] Department of Solicitor General, *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* (Ottawa: Minister of the Solicitor General, 1979).

[99] In 1982, only the Liberals, the Progressive Conservatives, and the New Democratic Party had representatives in Parliament.

access to legal counsel and the raising of the maximum age. Other provinces, like Quebec, where there was no change in the maximum age, were much more supportive of the new law. Provincial opposition continued after the Bill was enacted in 1982, first seeking to prevent its proclamation and then to have the legislation amended after it came into effect on April 2, 1984.[100]

In 1986, several technical amendments were enacted to deal with some areas of difficulty in the implementation of the Act. Matters such as record keeping, breach of probation orders, and the publication of identifying information about dangerous young persons at large were covered in the amendments.[101] They did not alter the philosophy or basic provisions of the Act, but did facilitate the implementation of the Act by police and correctional officials.

In the late 1980s, the *YOA* became the focus of considerable public criticism, directed particularly at the perceived inadequacy of a maximum three-year sentence for dealing with violent offenders, especially those convicted of murder, and at the difficulty in transferring youths into the adult system where they could face the same sentences as adults. This led to the enactment of Bill C-12 amendments in 1992, that changed the test for transfer to the adult court to one that placed the "protection of the public" in the paramount position, and altered the provisions for sentencing for murder.[102] Some of the key provisions of the *YOA* and the 1992 amendments are discussed more fully in the next chapter.

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[100] Corrado and Markwart, "The Evolution", *supra*, note 81, at p. 152.

[101] S.C. 1986, c.32.

[102] S.C. 1992, c.11.

4.0 PRINCIPLES IN PRACTICE: CANADA'S *YOUNG OFFENDERS ACT*

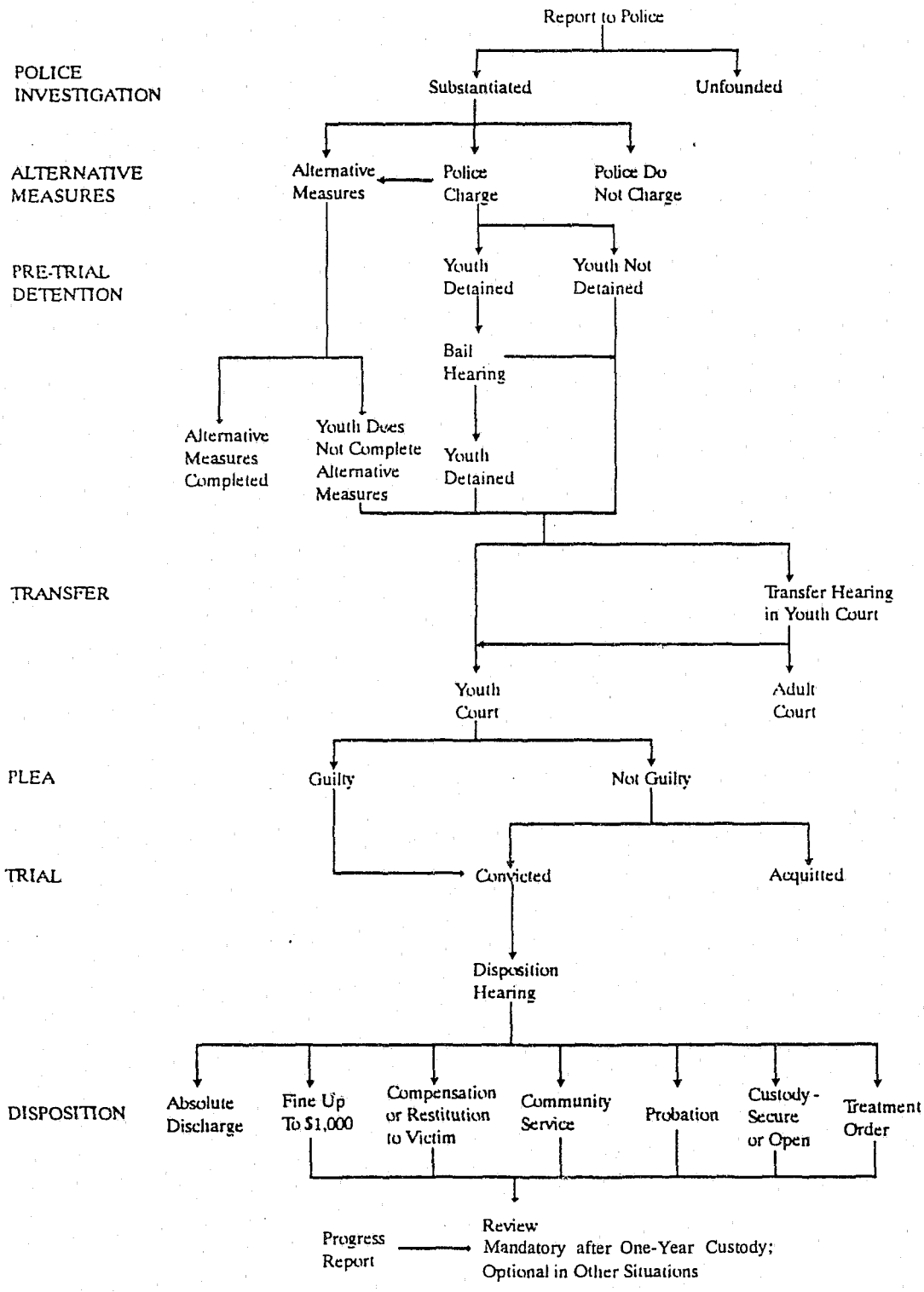
This chapter explores how the competing principles that determine the societal response to youth criminality are balanced in different contexts in Canada by the decisionmakers who shape our youth justice system. These decisionmakers include the politicians and policy makers who are responsible for legislation and establishing programs; the judges who handle the juvenile cases brought before them, and resolve constitutional and legal issues relating to the interpretation of juvenile justice legislation; and the police, prosecutors, youth workers, and probation officers who make many of the initial decisions on how to deal with young people who violate the law. The way competing factors are balanced has changed over time, and is resolved differently according to the nature of the issue being dealt with. Decisionmaking inevitably reflects the values, beliefs and experience of individuals, and different individuals do not always deal with similar situations in the same manner.

4.1 The Youth Court Process

Before considering the Declaration of Principle in the *Young Offenders Act* (*YOA*) and some of its most salient provisions, a brief description of how young offenders' cases are typically dealt with is offered (see Figure 1). A large number of offences committed by adolescents, especially minor ones, are dealt with informally, or are not detected. Many, however, are reported by victims or witnesses to the police for investigation. When police are not able to discover who committed the offence, there may be no further action. The police investigation may involve questioning suspects, witnesses and victims. Questioning of suspected young offenders is governed by special provisions of the *YOA*. Sometimes the police believe a particular youth committed an offence, but decide not to take any official action, and only warn the youth, and perhaps the parents as well. The youth, and possibly the parents, may be referred to a social agency for assistance on a voluntary basis. This is generally only done when the offence is minor.

If the police have reasonable grounds to believe that an offence occurred, charges may be laid and the youth court process is formally commenced. A referral may be made, before or after a charge is laid, to an "alternative measures" or diversion program. These programs are intended to provide relatively informal expeditious resolution for less serious cases. In more serious cases, the crown prosecutor, in consultation with the police, may suggest that pre-trial detention in a youth facility is appropriate. The decision about such detention must be made by a judge.

Figure 1 Young Offender Case Process Model



As soon as a youth is arrested, the police must inform the youth of the right to have a lawyer. In proceedings under the *YOA*, there is an extensive right to legal services paid by the government. A lawyer may provide assistance at the time of police questioning, at a pre-trial detention hearing, and at trial.

After an initial appearance before a judge, the youth, usually acting on the advice of a lawyer, will decide whether to plead guilty or to plead not guilty and proceed to trial. In practice, most youths plead guilty. After a trial, many youths are convicted, but some are found not guilty (acquitted). If there is a finding of guilt, the youth is sentenced. In some cases this may occur immediately after a finding of guilt; in more serious situations the case is adjourned so that a pre-disposition report may be prepared or a medical or psychological assessment may be carried out before the disposition (sentencing) hearing is held.

There is no parole or remission for young offenders, but any youth court disposition is subject to review by the court. It is, for example, possible for a youth to be released from custody by a judge if there has been sufficient progress. In very serious cases, the crown prosecutor may apply to have a youth "transferred" to adult court, for trial and possible sentencing. A transfer can occur only before a plea is entered and after a transfer hearing in youth court. The main purpose of transfer is for an adult court to order the youth to serve a longer sentence, often in the adult correctional system, than can be imposed in youth court.

4.2 The Declaration of Principle

The *YOA* adopted an approach that has been used for a number of provincial child welfare laws in Canada and included a Declaration of Principle as part of the statute. There is specific provision that the *Act* is to be construed "liberally...in accordance with the principles."[103] The Declaration of Principle states:

> 3(1) It is hereby recognized and declared that
>
> (a) while young persons should not in all instances be held accountable in the same manner or suffer the same consequences for their behaviour as adults, young persons who commit offences should nonetheless bear responsibility for their contraventions;

[103] *Young Offenders Act* [Bill C-61], S.C. 1980-81-82-83, c. 110; R.S.C. 1985, c. Y-1, section 3(2).

(b) society must, although it has the responsibility to take responsible measures to prevent criminal conduct by young persons, be afforded the necessary protection from illegal behaviour;

(c) young persons who commit offences require supervision, discipline and control, but, because of their state of dependency and level of development and maturity, they also have special needs and require guidance and assistance;

(d) where it is not inconsistent with the protection of society, taking no measures or taking measures other than judicial proceedings under this *Act* should be considered for dealing with young persons who have committed offences;

(e) young persons have rights and freedoms in their own right, including those stated in the *Canadian Charter of Rights and Freedoms* or the *Canadian Bill of Rights*, and in particular a right to be heard in the course of, and to participate in, the processes that lead to decisions that affect them, and young persons should have special guarantees of their rights and freedoms;

(f) in the application of this *Act*, the rights and freedoms of young persons include a right to the least possible interference with freedom that is consistent with the protection of society, having regard to the needs of young persons and the interests of their families;

(g) young persons have the right, in every instance where they have rights or freedoms that may be affected by this *Act*, to be informed as to what those rights and freedoms are; and

(h) parents have responsibility for the care and supervision of their children, and, for that reason, young persons should be removed from parental supervision either partly or entirely only when measures that provide for continuing parental supervision are inappropriate.

4.2.1 Accountability — Subsection 3(1)(a)

The principle of accountability is related to the retributive, moral aspects of criminal law. Adolescents are considered capable of independent thought and judgment, and are responsible for their wrongful acts. In most cases, it is intended to be a limited accountability, reflecting the immaturity and lack of judgment of youth, and the view that they are therefore not as fully responsible as adults.

The notion of limited accountability is reflected in the more limited maximum sanctions that can be imposed under the *YOA* than in adult court — three years in custody and five years less a day for murder for youths and life in prison for adults — though in appropriate cases involving very serious offences a youth may be transferred to adult court where there may be greater accountability. The alternative measures provisions, allowing diversion from the youth court, also reflect limited accountability.

4.2.2 Protection of Society — Subsection 3(1)(b)

The importance of protecting society is explicitly recognized in subsection 3(1)(b), but it is not clear from the provision how this objective is to be attained. Some argue that protection is best achieved through the incapacitation of offenders by long sentences or by imposing relatively severe dispositions in the hope that they have a deterrent effect. Others argue that the prevention of the recurrence of criminal conduct will most likely be achieved by dispositions and programs emphasizing the rehabilitation of young offenders.

4.2.3 Special Needs of Youth — Subsection 3(1)(c)

Although the *YOA* is clearly criminal legislation, it continues to have welfare-oriented elements, as is expressly recognized in the principle related to the "special needs" of youth. For example, subsection 3(1)(c) requires decisionmakers to balance concerns about "discipline and control" with concerns about "guidance and assistance."

Some sections of the *YOA* reflecting concerns about "special needs" include provisions that allow for the ordering of psychological or psychiatric assessments before a disposition is made (section 13), including the possibility that the report may be withheld from the youth if its release is considered "prejudicial" to the youth (subsection 13[7]); permit a judge to order that a youth be placed with a responsible adult rather than detained in custody pending trial (section 7.1); and permit an order that a youth be "detained for treatment in a hospital or other place," though out of

concern for the legal rights of youth this is only to occur if the youth consents (subsections 20[1][i] and 22).

Other provisions that recognize the vulnerability of youth include those that restrict use of records (sections 40-46) and the publication of identifying information (section 38), as it is believed that rehabilitation and reintegration into the community may be prejudiced if youths are widely known to be "offenders."

Perhaps the most important recognition of special needs is the provision for establishing separate correctional facilities for youths from those where adults are detained (section 24.2). In Canada, most youth in custody and detention facilities receive better rehabilitative and educational services than those provided adults; youth probation officers typically have smaller caseloads than their adult counterparts and can devote more attention to offenders. However, there is no statutory requirement that young offenders receive any particular level or type of services, and in some places in Canada some youth custody facilities are attached to adult jails.

4.2.4 Alternative Measures and No Measures — Subsection 3(1)(d)

The *YOA* recognizes that for some youths, especially those who commit less serious offences or do not have a previous record, it may be unnecessary and perhaps even counter-productive to have a formal legal response, especially given scarce judicial resources and court overcrowding. Subsection 3(1)(d) acknowledges what has long been a common practice among police officers, i.e., deciding to take "no measures," which is to caution the youth and perhaps talk to the parents, but take no formal action. This is often referred to as "police screening," and most commonly occurs when there is a first contact with the police for a relatively minor offence.

Section 4 of the *YOA* also provides for establishing formal "alternative measures" programs, and this has been done in all jurisdictions in Canada. These programs allow for a non-court response to cases, generally minor in nature. In some places, however, especially in the province of Quebec and in some aboriginal communities, alternative measures programs are used for more serious cases as well.

Subsection 3(1)(d) also recognizes that in some situations young offenders should be dealt with by means other than the youth justice system, for example by referral to child protection or mental health services. According to subsection 3(1)(d), any decision not to invoke the formal *YOA* response must take account of the "protection of society," although the *Act* does not specify what this means. It could be argued that sending an emotionally disturbed youth who has committed a

violent act to a mental health facility for treatment is the best way to achieve the protection of society. However, in practice, there has been a clear tendency to use alternative measures and diversion only in less serious cases, and in particular to use the youth justice system in cases involving violence.

4.2.5 Rights of Young Persons — Subsections 3(1)(e) and (g)

The *YOA* clearly adopts a "due process" model of youth justice. This is related to the imposition of criminal accountability; if youths are charged with criminal offences, they are entitled to due process of law. It also reflects broader societal concerns about the protection of legal rights.

Not only are young persons granted almost all the rights afforded adults, but in view of their special vulnerability they are also given special additional protection. Section 11, for example, gives young persons who are unable to obtain legal aid the right to counsel appointed and paid for by the state. This is broader than the rights afforded adults; while an adult has the right to retain, and pay for, counsel or to apply for legal aid, the adult who is unable to obtain legal aid and who cannot afford counsel has no statutory right to legal representation.

Similarly, section 56 of the *YOA* stipulates that the police must provide a special cautionary warning, in "language appropriate" to a youth's "age and understanding," for a statement given to the police to be admissible in court. The youth has the right to consult with a parent or lawyer before making a statement, and to have such a person present while a statement is made. These rights can only be waived in writing.

4.2.6 Least Possible Interference — Subsection 3(1)(f)

The principle of least possible interference reflects the limitations on state resources as well as the recognition that it is not always known what is best for adolescents and there is concern that, at times, state intervention may produce unintended harm. It also reflects the fundamental belief that all individuals and families in a democratic society should be free from unjustified state interference.

It is important to note that the principle of least possible interference found in this section is qualified within the paragraph by balancing the principles of protection of society with the needs of youths and the interests of their families. It can be argued that imposing a custodial sentence that not only responds to the offence, but is longer in order to rehabilitate the youth, violates a strict view of the

principle of "minimal interference."[104] However, the qualifications in subsection 3(1)(f), for the "protection of society" and "needs of the youth," could justify such action.

4.2.7 Parental Involvement — Subsection 3(1)(h)

The *YOA* recognizes that parents generally have a special role in the lives of their children and that whenever possible the legal system should attempt to support them rather than undermine their authority. While the *Juvenile Delinquents Act* (*JDA*) allowed for the fining of parents whose children violated the law, the *YOA* provides for the involvement of parents. A parent is to be notified "as soon as possible" if a child is arrested and detained pending trial (section 9), as well as to receive written notice of the youth court hearing. Parents may be ordered to attend court if their presence is considered by the judge to be in the "best interests" of the youth (section 10). In addition, parents have the right to make representation to the court before a decision is made about transfer (section 16) or a sentence is imposed (section 20).

Most parents play an important role in the lives of their adolescent children, and effective intervention may involve parents. However, it is important to note that many young offenders do not have good relations with their families. Some have left home because of abuse or neglect; many youths in conflict with the law are estranged from one or both parents. Even a good relationship may be strained if a youth is charged with a criminal offence, and parents may not always be in the position to be the best judges of what is in their child's best interests.

4.3 The Declaration of Principle: An Assessment

While the *YOA* includes a Declaration of Principle to assist in the interpretation of the legislation, the amount of assistance to be provided has been the subject of considerable judicial and academic debate. The Supreme Court of Canada reflected on this debate in *R.* v. *V.T.*,[105] where Madam Justice L'Heureux-Dubé wrote:

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[104] See, for example, *R.* v. *J.J.M.* (1993), 20 C.R. (4th) 295 (S.C.C.).

[105] *R.* v. *V.T.* (1992), 71 C.C.C. (3d) 32, at pp. 44-45. Emphasis added.

Some commentators have been critical of the drafting of the Declaration of Principle as it appears in section 3(1). Platt, in *Young Offenders Law in Canada* (1989), at 2.18, has said:

> In many respects, the policies are an articulation of the principles of criminal law in the context of young persons. The difficulty is that they are not coherent and, in some instances, are positively inconsistent. It is because of this that section 3(1) is such a fertile ground for both the defence and the prosecution in searching out Parliament's legislative intention.

However, while I am not unmindful of the apparent inconsistencies of the stated goals of the *Act* as contained in section 3(1), *in my opinion the better view* is that advocated by Bala and Kirvan in Chapter 4 of *The Young Offenders Act: A Revolution in Canadian Juvenile Justice* (1991), at pp. 80-81:

> It is apparent that there is a level of societal ambivalence in Canada about the appropriate response to young offenders. On the one hand, there is a feeling that adolescents who violate the criminal law need help to enable them to grow into productive, law-abiding citizens; this view is frequently reflected in media stories about inadequate facilities for treating young offenders. On the other hand, there is a widespread public concern about the need to control youthful criminality and protect society. This view is reflected in media stories and editorials commenting on the alleged inadequacy of the three-year maximum disposition that can be applied to young offenders, a particular public concern in regard to those youths who commit very serious, violent offences.
>
> While it may not be inaccurate to suggest that the Declaration of Principle reflects a certain social ambivalence about young offenders, it is also important to appreciate that it represents an honest attempt to achieve an appropriate balance for dealing with a very complex social problem.

> The YOA does not have a single, simple underlying philosophy, for there is no single, simple philosophy that can deal with all situations in which young persons violate the criminal law. While the declaration as a whole defines the parameters for juvenile justice in Canada, each principle is not necessarily relevant to every situation. The weight to be attached to a particular principle will be determined in large measure by the nature of the decision being made and the specific provisions of the YOA that govern the situation. There are situations in which there is a need to balance competing principles, but this is a challenge in cases in the adult as well as the juvenile system.
>
> ...
>
> There is a fundamental tension in the YOA between such competing ideals as due process and treatment; in some situations, the act gives precedence to due process, though in exceptional circumstances treatment may be emphasized at the expense of due process. The underlying philosophical tensions in the YOA reflect the very complex nature of youthful criminality. There is no single, simple philosophy and no single type of program that will "solve" the problem of youthful criminality. Judges and the other professionals who work with young persons who violate the criminal law require a complex and balanced set of principles like those found in the YOA.

In *R.* v. *J.J.M.*, Justice Cory wrote:

> A quick reading of that section indicates that there is a marked ambivalence in this approach...that ambivalence should not be surprising when it is remembered that the *Act* reflects a courageous attempt to balance concepts and interests that are frequently conflicting.[106]

[106] *R.* v. *J.J.M.* (1993), 20 C.R. (4th) 295, at p. 299 (S.C.C.).

Others have been less sanguine in their assessments of the Declaration of Principle. For example, Doob and Beaulieu[107] report on a study of 43 youth court judges across Canada who were asked what kind of disposition they would impose in four different hypothetical cases. There was substantial variation in the nature and severity of the sentences, leading the authors to conclude:

> The difference occurs not because of the diversity of judges, but rather because judges weigh the different goals of sentencing differently and go about attempting to achieve these goals in different ways....
>
> The *YOA* lists a number of different principles that are to guide decisions under the *Act*, but does not give precedence to any single principle, nor does it indicate how much weight should be given to any one principle. Thus one should not be surprised to find that the relative importance of the different principles or purposes guiding dispositions differed across judges and across cases.[108]

Soon after the *YOA* was passed, Reid and Reitsma-Street[109] analyzed the statements in section 3 to learn to what extent the Declaration of Principle incorporated elements of different views of the purpose of criminal justice systems. They concluded that the *YOA* presents a mixed model, giving equal weight to elements of welfare-oriented, due process, and crime control approaches to responding to crime.[110] The authors suggested that the tension between these types of principles may be inevitable, given the lack of consensus in society on the purpose of the criminal law, and even desirable:

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[107] A.A. Doob and L. Beaulieu, "Variation in the Exercise of Judicial Discretion with Young Offenders," (1992) 34 *Canadian Journal Criminology* 35.

[108] *Ibid*, at p. 38 and p. 42.

[109] S. Reid and M. Reitsma-Street, "Assumptions and Implementations of New Canadian Legislation for Young Offenders," *Canadian Criminology Forum* 7,1 (1984): 1.

[110] Criminologists have developed different models to capture the features of different juvenile justice systems. The *JDA*, at least in theory, represented a "welfare-oriented" model, with its statutory emphasis on the best-interests of juveniles. "Due process" models of juvenile justice emphasize the protection of legal rights, to ensure that youths are only subject to state intervention if guilt is legally proven. With the "crime control" model, the central defining value is that criminal conduct must be repressed in order to preserve public order "...to accomplish this, the process must be fast, final and efficient." Katherine Catton, "Models of Procedure and the Juvenile Courts," (1975-1976) 18 *Criminal Law Quarterly* 181, at p. 183.

> The inclusion of the assumptions of three models of juvenile justice in the *YOA* may avoid the unintended consequences of the extremes of any one model and provide something for everyone and for all occasions. Moreover, the flexibility of several sets of assumptions may be useful in developing a creative response to individual cases which come before the youth courts.[111]

Reid and Reitsma-Street praise the Declaration for the flexibility it allows in responding to individual cases and, at the same time, they criticize it for not providing guidance in deciding what priority should be given to each of the principles listed. They argue that since the Declaration may provide a rationale for almost any action, extrinsic factors (such as budgetary constraints or the personal beliefs of those responsible for the implementation of the *Act*) may affect the youth justice system response to any particular case.

With the implementation of the *YOA* taking place at a time of fiscal constraint and of growing public demands for a stronger response to crime, the lack of a statement of priority in the *Act* may mean that "the mandatory Justice provisions may be honoured at least in form, but the crime control provisions will be stressed in practice."[112]

Despite the controversy over the utility of the principles, some have advocated adding further principles. For example, the national advocacy group, the Canadian Council on Children and Youth,[113] proposed that the Declaration should be amended to explicitly acknowledge that the long-term protection of society is best achieved through the rehabilitation of young offenders, and that correctional services should be provided to youths in a fashion that recognizes their cultural diversity and,

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[111] Reid and Reitsma-Street, "Assumptions", *supra*, note 109 at p. 12.

[112] *Ibid*, at p. 13.

[113] Canadian Council on Children and Youth, *Brief in Response to Federal Consultation Document on Young Offenders Act Amendments* (Ottawa: Canadian Council on Children and Youth, 1990).

in particular, aboriginal youth should be treated in a fashion that is sensitive to their backgrounds.

4.4 Age Jurisdiction

The *JDA* introduced a separate system for dealing with violations by those under 16 to 18 years of age (depending on the province). While the *JDA* did not set a minimum age, the *Criminal Code* continued to apply and children under age seven were not held criminally responsible.[114] Children between the ages of 7 and 14 were subject to prosecution only if it could be proven that they had the mental capacity to appreciate wrong. The 7 to 16 age limits roughly coincided with the ages of compulsory school attendance across Canada. Youths adjudged delinquent could remain under the jurisdiction of the juvenile court until they reached the age of majority, which was 21 years of age in 1908.

In 1984, the *YOA* established 18 years of age as the uniform maximum age for the juvenile justice system, an age which by the 1980s was compatible with the age of majority in most Canadian provinces and typically about the age when secondary education is completed. Twelve was chosen as the minimum age at which criminal responsibility could be imposed. This age jurisdiction has proven controversial.

Twelve is the age when most children move from primary to secondary school, and is the beginning of the period of physical and psychological development known as adolescence. The rationale for raising the minimum age to 12 years is based on beliefs that children under that age lack the moral and mental capacity to be held criminally responsible and to participate in criminal proceedings; that children under that age should be protected from being labelled delinquent or criminal; and that their violation of the law would be better dealt with by their parents, or in more serious cases by child protection proceedings. In practical terms, relatively few charges were ever laid under the *JDA* against children under age 12 and an even smaller number of children under 12 received dispositions not available through the child welfare system.[115]

There has been considerable opposition to the higher minimum age, particularly from police, who believe they are unable to deal adequately with serious

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[114] In the *Youth Protection Act*, 1977, Quebec decided not to exercise juvenile court jurisdiction over children under the age of 14, preferring to deal with children under that age in the child welfare system.

[115] L. Wilson, "Changes to Federal Jurisdiction over Young Offenders: The Provincial Response," (1990) 8 *Canadian Journal of Family Law* 303, at p. 307.

acts by younger children. Raising the minimum age jurisdiction is also challenged on the basis that it is contrary to the research on child development that supports the view that younger children know when they are committing acts that are wrong.[116] Even among adolescents, age 12 may be perceived as too high; a majority of young respondents to one survey favoured ten as the minimum age.[117]

Under the *YOA*, children under 12 years of age who commit offences are to be dealt with either by their parents or by the child welfare system of the province or territory. The circumstances under which such intervention is permitted vary considerably.[118] Apparent commission of an offence is not always sufficient to trigger child welfare intervention.[119] In Ontario, Nova Scotia, Manitoba and Saskatchewan, child welfare action is not authorized unless the child does not have proper parental supervision or is beyond the control of the parents.

While some jurisdictions have established programs to deal with children under age 12 who commit offences, in many localities in Canada these types of cases are a low priority for over-burdened child welfare agencies facing fiscal constraints and rising child abuse caseloads. Police and victims complain that many children under age 12 have an appreciation that they are committing crimes, but know that they can "get away with it." There are even suggestions that children under age 12 are sometimes used by older youths and adults to commit offences. While relatively few children under age 12 were prosecuted under the *JDA*, the absolute prohibition on a criminal prosecution for this age group under the *YOA* raises legitimate concerns about the absence of any deterrent sanction. The sense that young children may never be held accountable also raises concerns about fairness and social protection, although rehabilitative services can be accessed through child protection legislation.

The *JDA* applied to all children under the age of 16, though provinces and territories could choose 17 or 18 years of age as the beginning of adulthood for criminal law purposes. Eight jurisdictions adopted age 16, while British Columbia

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[116] *Ibid.*

[117] P. Jaffe, A. Leschied and P. Farthing, "Youth's Knowledge and Attitudes About the Young Offenders Act: Does Anyone Care What They Think?" (1987) 29 *Canadian Journal of Corrections* 309. Britain has adopted 10 as the minimum age for criminal responsibility.

[118] Wilson, "Changes to Federal", *supra*, note 115, at pp. 315-317.

[119] Wilson, "Changes to Federal", *supra*, note 115.

and Newfoundland chose age 17 and Manitoba and Quebec opted for age 18.[120] The federal government's choice of age 18 as a uniform upper limit for the *YOA* was opposed by some of the provinces, including Ontario, where there was concern about the financial implications of raising the age limit as well as doubts about the wisdom of not holding 16- and 17-year-old youths fully accountable.[121] Partly in response to this reaction, a provision was included in section 2 of the *YOA* allowing the new maximum age to be delayed for one year to permit time for transitional implementation in provinces like Ontario.[122]

Some critics of the *YOA* have argued that by the age of 16 or 17, youths have the physical size and maturity to be held as fully accountable as adults. Some youths in this age group have left their families and are living independently. It is, however, worth observing that there is little demand for lowering the age for voting, drinking, welfare eligibility or full civil status below 18. In other words, 16 and 17 is regarded as a transitional age in our society. Although youths of this age are generally not legally required to attend school, they are not really regarded as fully adult either.

While the choice of one age over another is an arbitrary decision, choosing standard ages across a variety of human activities has the merit of providing a predictable method of assigning rights and responsibilities. The age 18 also has the advantage of being consistent with the *United Nations Convention on the Rights of the Child* and various international standards.

Such fixed age limits may seem arbitrary and inappropriate, exposing some youth to responsibilities they are unable to handle, while denying responsibilities to others who may be capable of accepting them before they reach the "magic" age. However, requiring individualized decisionmaking to determine status may not be administratively feasible, especially for purposes of enforcing criminal laws. The choice of ages roughly matching stages in levels of education and the period of adolescence may be viewed as a pragmatic way of assessing the level of maturity. Further, with older youths, there is still the possibility of transfer into adult court

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[120] Alberta originally chose age 18 for girls, while leaving the age for boys at 16. The age for girls was dropped to 16 in 1978 (Wilson, "Changes to Federal", at p. 31). See *R.* v. *McKay* (1977), 36 C.C.C. 349 (Alta., California) upholding the validity of this gender-based age difference in a challenge under the *Canadian Bill of Rights*. It is doubtful that this type of gender-based differential treatment would have withstood challenge under the *Charter of Rights*, which came into effect in 1982.

[121] Wilson, "Changes to Federal", *supra*, note 115.

[122] Corrado and Markwart, "The Evolution", *supra*, note 81.

based on individual assessment. Transfer does not occur frequently, but it is much more common for 17-year-olds than for younger age groups.[123]

4.5 Administrative Structures

Under the *JDA*, there was considerable integration of services for juvenile delinquents and for neglected or abused children, as well as significant overlap between the juvenile justice and child protection laws. As noted earlier, each system was authorized to use the institutional facilities of the other. Even where separate facilities were maintained, juvenile authorities could use child welfare services for individual youths.

Before the enactment of the *YOA*, both the juvenile delinquent and child welfare systems had jurisdiction over children at least up to the age of 16. In some areas, child welfare jurisdiction extended beyond that age for juvenile court jurisdiction. Now, however, in four provinces and one territory, the child welfare age limit is lower than the young offenders age limit.[124] In seven jurisdictions, the maximum age is the same as the age of majority: 19 in British Columbia and New Brunswick; and 18 in Alberta, Quebec, Manitoba, Prince Edward Island, and Yukon. In Ontario, Nova Scotia, Newfoundland, Saskatchewan, and Northwest Territories, child welfare jurisdiction for making an initial child welfare order ends at the 16th birthday. In these provinces, the only source of involuntary treatment or assistance for 16- and 17-year-olds is through the young offenders system, or under mental health legislation, which generally has a narrow basis for intervention.

Under the *JDA*, there were more direct links between the systems; judges could commit juvenile delinquents to the child welfare authorities, while child welfare authorities had the option of sending children in their care to training schools. The *YOA* has severed these links. Child welfare authorities are less likely to provide services to adolescents involved with the young offenders system, and the removal of the direct committal disposition option may have resulted in youth court

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[123] Under section 16, transfer is only possible for youths 14 years of age and over (as of the date of the alleged offence) and charged with a serious crime. Statistics Canada, *Youth Court Statistics*, reported transfer in 1991-1992 of one fourteen-year-old; five fifteen-year-olds; 13 sixteen-year-olds; and 46 seventeen-year-olds.

[124] R. Vogl, "Initial Involvement," in N. Bala, J.P. Hornick and R. Vogl, eds., *Canadian Child Welfare Law. Children, Families and the State* (Toronto: Thompson Educational Publishing, Inc., 1991), at p. 33.

judges committing some young offenders to open custody in order to receive child welfare-type services.[125]

At the time of enactment of the *YOA*, several provinces transferred administrative responsibility for the provision of services for youthful offenders from social services to the adult corrections ministry. This was viewed as consistent with the "offence-based" orientation of the *YOA*. This can be seen as relieving the child welfare authorities of responsibility for providing services to young offenders, including their own wards. This is especially problematic for those adolescents placed in a group home or other facility under child welfare legislation who then commit a minor assault or cause property damage. In these cases, it is common for charges to be laid; the youth who was initially taken into state care as a child in need of protection is then treated as a young offender.[126]

The *YOA* did not require the provinces and territories to change their administrative structures, yet all but British Columbia and Quebec did so when the *Act* came into effect. The nature of these organizational changes provides some indication of how those responsible for implementing the *YOA* perceived the intention of the *Act*. In general, the changes reflect a shift towards concerns about crime control, separating the child welfare and young offender populations, and treating young offenders more like adult criminals.[127]

The amount of reorganization required to implement the *YOA* varied considerably across the country. Under the *JDA*, probation and custody were administered by social services departments everywhere except in British Columbia and New Brunswick, where they fell under the mandate of the adult correctional services.[128] Prince Edward Island had previously used the same services and facilities for delinquents and neglected children[129] and, once the *YOA* came into effect, along with Alberta, transferred all responsibility for young offenders to the

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[125] Corrado and Markwart, "The Evolution"; P. Gabor, I. Greene and P. McCormick, "The Young Offenders Act: Alberta Experiences in Year 1," (1986) 5 *Canadian Journal of Family Law* 301.

[126] See, for example, *R.* v. *V.T.*, [1992] 1 S.C.R. 749, 12 C.R. (4th) 133, 71 C.C.C. (3d) 327 where a 14-year-old girl resident in a group home, apparently pursuant to child protection legislation, was charged with three minor offences arising out of an altercation with group home staff. The Supreme Court of Canada held that even though a parent might not have resorted to the youth justice system to deal with this situation, the judge had no discretion to stay the charges.

[127] Corrado and Markwart, "The Evolution", *supra*, note 81 at p. 173.

[128] Corrado and Markwart, "The Evolution", *supra*, note 81.

[129] Wilson, "Changes to Federal", *supra*, note 115.

adult correctional services department.[130] In those jurisdictions which still have social services involvement, separate young offenders divisions have been established.

As a result of these changes, the practice of using the same facilities for child welfare and young offender populations has decreased substantially.[131] Quebec and Ontario continue to mix child welfare and open custody populations in group homes, but only Quebec uses the same secure facilities for both groups.[132]

Ontario and Nova Scotia developed a two-tiered system in which adolescents aged 12 to 15 continue to remain under the mandate of the social services ministry, while 16- and 17-year-olds are dealt with by the adult correctional ministry.[133] This age division extends to the courts, with family courts (with their jurisdiction over child protection and other domestic matters) dealing with 12- to 15-year-olds and the criminal courts (with their jurisdiction over adult criminal offences) dealing with 16- and 17-year-olds. In Ontario, the government has announced plans to gradually transfer all court jurisdiction for *YOA* cases to the family courts, but the administrative split for service and correctional facilities will continue.

While the two-tier implementation schemes allow for the development of age-targeted programs, they have been criticized for maintaining different philosophies for the two age groups of young offenders, with treatment the primary focus for the younger age group, and corrections the primary focus for the older group.[134] There has also been criticism on the basis that the duplication of facilities and services is wasteful and inefficient, and Ontario has been criticized for not providing adequate open custody facilities for 16- and 17-year-olds[135] because of the correctional emphasis for that age group.

In general, the transfer of responsibility facilities and services for young offenders from social services ministries to corrections ministries has been

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[130] Corrado and Markwart, "The Evolution", *supra*, note 81.

[131] *Ibid.*

[132] *Ibid.*

[133] *Ibid.*

[134] Wilson, "Changes to Federal", *supra*, note 115, at pp. 325-326.

[135] *Ibid.*

criticized.[136] Young offenders represent a small proportion of the total correctional population. Corrections systems tend to have much lower staff to population ratios and fewer rehabilitative resources than social service-based systems, and the emphasis is on containment and control. Practices and policies adopted for adult offenders are, it is argued, likely to be extended to the juvenile population, or at least may influence how the younger age group is approached.

4.6 Alternative Measures

Under the *JDA*, many children and adolescents were kept out of the court process through the exercise of police or prosecutorial discretion in deciding not to lay charges. This type of "screening" usually occurred with less serious charges, where the threat to the public was limited, and the youth was not likely to reoffend. To respond to the need of some young people for assistance or direction to avoid further contact with the law, various "diversion programs" were developed in Canada and other countries. Although there was no explicit provision in the *JDA* for such programs, they filled a gap between the options of charging or not taking any action.

The creation of diversion programs was influenced by the sociological labelling theory which suggests the court process may lead to stigmatization in that a formal court identification of an adolescent as "delinquent" could increase the likelihood of future delinquent acts being committed. Diverting young people from the formal prosecution and court system, therefore, might avoid this labelling effect and could reduce recidivism.[137] Diversion was also philosophically compatible with the deinstitutionalization movement underway[138] in the 1970s.[139] In

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[136] Corrado and Markwart, "The Evolution", *supra*, note 125.

[137] A.R. Roberts, *Juvenile Justice: Policies, Programs and Services* (Chicago: The Corsey Press, 1989). It should be noted that "labelling" is a sociological theory and there is some controversy as to whether or not the process of identifying an adolescent as "delinquent" actually results in further offending behaviour. See, for example, S. Moyer, *Diversions from the Juvenile Justice System and its Impact on Children: A Review of the Literature*, prepared for the Solicitor General Canada (Ottawa: Minister of Supply & Services, 1980), at p. 73.

[138] I. Rappaport, "Public Policy and the Dimensions of Diversion," in R.R. Corrado, M. Le Blanc and J. Trepanier, eds., *Current Issues in Juvenile Justice* (Toronto: Butterworths, 1983), at p. 169.

[139] While primarily focussed on bringing the mentally ill and the mentally handicapped people into the community, the deinstitutionalization movement also contributed to the closing of large training schools for juvenile delinquents. In the United States, the 1974 federal *Juvenile Justice and Delinquency Prevention Act* provided financial incentives to states to remove status offenders and neglected children from institutional

addition, diversion programs were considerably less expensive than more formal intervention programs.[140] The availability of diversion programs to catch adolescent offenders before they became seriously enmeshed in criminal activity was expected to reduce the size of the institutional population.

Quebec's *Youth Protection Act* of 1977, which dealt with both juvenile delinquents and child welfare cases, has been described as "institutionalized diversion."[141] The integration of services for all troubled youth and the intensive use of diversion for young offenders were key elements of this legislation. Police referred children and adolescents to an intake officer at a social service centre where an assessment team decided to take no further action, divert the young person, or refer the case to court.[142] In this system, the court process was used only when it was essential to protect the child or the public.[143]

The *YOA* recognizes the value of diversion, and both the Declaration of Principle and the alternative measures provision (section 4) are intended to encourage responses outside youth court. The Declaration of Principle states that "where it is not inconsistent with the protection of the public, taking no measures or taking measures other than judicial proceedings...should be considered for dealing with young persons who have committed offences." The inclusion of the phrase "measures other than judicial proceedings" was intended to encourage the extension of the diversion programs established in some communities under the *JDA*. The

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settings and/or developed community correctional programs for non-violent offenders. See R.R. Corrado and S. Turnbull, "A Comparative Examination of the Modified Justice Model in the United Kingdom and the United States," in R.R. Corrado, N. Bala, R. Linden and M. LeBlanc, eds., *Juvenile Justice in Canada: A Theoretical and Analytical Assessment* (Toronto: Butterworths, 1992), at p. 75.

[140] Moyer, Diversions, *supra*, note 137.

[141] J. Trépanier, "Trends in Juvenile Justice: Washington State," in R.R. Corrado, M. Le Blanc and J. Trépanier, eds., *Current Issues in Juvenile Justice* (Toronto: Butterworths, 1983), at p. 89.

[142] R.R. Corrado, "Introduction," in R.R. Corrado, M. Le Blanc and J. Trépanier, eds., *Current Issues in Juvenile Justice* (Toronto: Butterworths, 1983), at p. 1.

[143] M. Le Blanc and H. Beaumont, "The Effectiveness of Juvenile Justice in Quebec: A Natural Experiment in Implementing Formal Diversion and a Justice Model," in R.R. Corrado, N. Bala, R. Linden and M. LeBlanc, *Juvenile Justice in Canada: A Theoretical and Analytical Assessment* (Toronto: Butterworths, 1992), at p. 283.

phrase "taking no measures" recognized police discretion not to lay a charge and the crown prosecutor's discretion not to proceed with a charge.[144]

Section 4 provides for establishing alternative measures programs to divert young people from the formal youth court system, and is based on the premise that it may be less intrusive and expensive and more consistent with the objective of rehabilitation to deal with some young people in a manner less formal and less intimidating than court proceedings. These "alternative measures" programs are typically used for relatively minor first offenders, though some programs, notably those in the province of Quebec and in some aboriginal communities, can be used with more serious or repeat offenders.

An initial decision on whether or not to send a youth to an alternative measures program is made by the police or prosecutor, sometimes acting on the advice of a probation officer who may have met with the youth to investigate the case. The case should be referred to alternative measures only if there is "sufficient evidence to proceed with the prosecution" (subsection 4[1][f]). These programs should not be used as a way of dealing with situations where the prosecution has a weak case.

The decisionmaker must also be satisfied that use of alternative measures "would be appropriate, having regard to the needs of the young person and the interests of society." All jurisdictions have guidelines for police and prosecutors to direct the exercise of the discretionary power, though the guidelines vary from one province to another.

Alternative measures are to be used only if the young person "accepts responsibility" for the offence charged (subsection 4[1][e]); otherwise, the case must be referred to youth court. The youth must also consent to the imposition of the specific alternative measures proposed (subsection 4[1][c]); if not, the case will proceed to court. The specific measures might be an apology or restitution to a victim, community service work, or writing an essay. Many programs make an effort to involve victims, where appropriate. Some programs make referrals to counselling or other therapeutic services.

Subsection 4(1)(a) of the *YOA* gives the provinces and territories the jurisdiction to "authorize" the type of alternative measures programs they consider appropriate. This allows for flexible implementation and local experimentation. In

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[144] As *R.* v. *V.T.*, [1992] 1 S.C.R. 749, 12 C.R. (4th) 133, 71 C.C.C. (3d) 327 makes clear, once the police and prosecutor decide to proceed with charges in youth court, the judge has no discretion to stay the proceedings based on a judicial view that it would be appropriate to take no measures. The judge can, however, take account of such circumstances to impose an absolute discharge after a finding of guilt.

many places in Canada, alternative measures programs funded by the government are operated by community groups, sometimes with volunteers. In some provinces, the programs are administered by youth probation officers.

After the *YOA* came into force, alternative measures programs were established in every jurisdiction in Canada except Ontario, where the position was that the provision of alternative measures was optional at the discretion of the province.[145] The Ontario Attorney General questioned the appropriateness of alternative measures on the basis of whether or not there would be adequate protection of young persons' rights. As well, alternative measures were not considered to have the same deterrent effect as an appearance in court.[146] Some of the programs operating in Ontario under the *JDA* ceased to operate after the *YOA* was enacted.

The decision of the Ontario government not to authorize any alternative measures programs was challenged under the *Charter of Rights and Freedoms*. In 1988, the Ontario Court of Appeal in *R.* v. *Sheldon S.*[147] ruled that the province was obliged to establish alternative measures programs. Following the Court of Appeal decision, and while the ruling was being appealed to the Supreme Court of Canada, "interim" programs were established.[148] The Ontario criteria were narrower than the offence eligibility criteria in other jurisdictions.

Although the Supreme Court of Canada reversed the Ontario Court of Appeal in 1990,[149] the government of Ontario decided to continue to use alternative measures, partly because of growing concerns about overcrowding in the courts. The Ontario programs, however, operate only on a post-charge basis, and usually require a young person to appear in court before entering an alternative measures program. In most other jurisdictions, alternative measures programs generally

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[145] Wilson, "Changes to Federal", *supra*, note 115.

[146] A.W. Leschied and P.G. Jaffe, "Implementing the Young Offenders *Act* in Ontario: Critical Issues and Challenges for the Future," in J. Hudson, J.P. Hornick and B.A. Burrows, eds., *Justice and the Young Offender in Canada* (Toronto: Wall & Thompson, 1988) 65, at p. 70.

[147] *R.* v. *Sheldon S.* (1988), 26 O.A.C. 185, 42 C.C.C. (3d) 41.

[148] Wilson, "Changes to Federal", *supra*, note 115.

[149] [1990] 2 S.C.R. 254, 77 C.R. (3d) 273, 57 C.C.C. (3d) 115.

operate on a pre-charge basis and are available for a much broader range of offences.[150]

Diversion has been challenged as potentially infringing the rights of young people because the procedural safeguards found in a court proceeding are not available.[151] The possibility of young people being coerced into accepting the provision of voluntary services has been raised. These concerns have been addressed in part in subsection 4(1)(c) of the *YOA*, which requires a young person's consent to participate in alternative measures, and provides that a youth who does not agree with the proposed measure has the right to have the case heard in court. However, it is still possible that young persons may agree to participate only because they believe they might receive more severe punishments from the court. Others may agree to participate without first obtaining legal advice.

A young person appearing in youth court is entitled to the services of a lawyer paid by the government. This entitlement does not extend to young people referred directly to alternative measures; it is only necessary to advise them of their right to consult a lawyer and then give them an opportunity to do so (subsection 4[1][d]). In some places, arrangements have been made with legal aid authorities to provide access to legal advice for youths referred to alternative measures, but this is far from universal.

Another criticism of diversion and alternative measures is the potential for "net-widening."[152] The existence of diversion programs may increase the number of youths brought into the juvenile justice system. This extension occurs when young people who previously would have been warned and released without charges by police are instead referred to diversion programs.[153] It has been suggested that

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[150] Wilson, "Changes to Federal", *supra*, 115. While the Ontario Court of Appeal decision was under appeal to the Supreme Court of Canada, the "interim" program was challenged on the basis that programs in other jurisdictions were open to youths charged with more serious offences. In *R.* v. *Gregory S.*, [1990], 2 S.C.R. 294, 57 C.C.C. (3d) 92, the Supreme Court of Canada upheld the Ontario Court of Appeal ruling that variations between provinces in the eligibility criteria for entry into alternatives were allowable.

[151] In this regard, L.A. Beaulieu, "A Comparison of Judicial Roles under the *JDA* and the *YOA*." In A.W. Leschied, P.G. Jaffe and W. Willis, eds., *The Young Offenders Act: A Revolution in Canadian Juvenile Justice* (Toronto: University of Toronto Press 1991) 128, at p. 138, notes that the appearance of diversion programs "coincided with the adoption of due-process safeguards by the juvenile court."

[152] Law Reform Commission of Canada, "Working Paper [No. 7], in *Studies on Diversion* (Ottawa: Law Reform Commission of Canada, 1975); and J. Pratt, "Diversion from the Juvenile Court: A History of Inflation and a Critique of Progress," (1986) 26(3) *British Journal of Criminology* 212.

[153] Pratt, *Ibid*; and Rappaport, "Public Policy", *supra*, note 138.

the existence of diversion schemes has moved the exercise of discretion from the police to the prosecutorial level of the system.[154] A number of critics have recommended that the aim of diversion (i.e., keeping minor offenders from getting enmeshed in the juvenile court system in the first place) would be better achieved by expanding informal police discretion,[155] although others warn that police may be too quick to identify and bring "pre-delinquents" into the system or be subject to unconscious class or race bias.[156]

Despite these criticisms of alternative measures, the programs have considerable support, and governments are experimenting with extending them to adults charged with minor offences.

4.7 Due Process Rights: Access to Counsel and Police Interrogation

In recognition of their limited intellectual capacities and their lack of sophistication, the *YOA* provides youths with "special guarantees of their rights and freedoms" (subsection 3[1][e]). Two of the most important legal protections for young people are the right of access to legal services and the special provisions regarding police interrogation of youths. Both provisions are intended to ensure that adolescents receive due process, and both have proven controversial.

The *Charter of Rights and Freedoms* guarantees that everyone charged with an offence has the right to retain and instruct counsel without delay, and to be informed of that right at the time of arrest. As discussed above, section 11 of the *YOA* goes beyond the protection of the Charter, in that if a young person "wishes to obtain counsel but is unable to do so," the youth court "shall direct" that counsel be provided, and paid by the state. While adults have the right to retain counsel, in practice they will have a lawyer only if they can afford to pay for one or are eligible for legal aid. In general, legal aid is available only for those adults with low incomes who are charged with relatively serious offences.

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[154] T. Caputo, "The Young Offenders Act: Children's Rights, Children's Wrongs," (1987) 13(2) *Canadian Public Policy* 125; W.J. Wardell, "The Young Offenders Act: A Report Card 1984-1986," (1987) 2 *Journal of Law and Social Policy* 39; and A.A. Doob and J.M. Meen, "An Exploration of Changes in Dispositions for Young Offenders in Toronto," (1993) 35 *Canadian Journal of Criminology* 15.

[155] M.E. Morton and W.G. West, "An Experiment in Diversion by a Citizen Committee," in R.R. Corrado, M. Le Blanc and J. Trepanier, eds., *Current Issues in Juvenile Justice* (Toronto: Butterworths, 1983), at p. 203; Corrado and Markwart, "The Evolution", *supra*, note 133; and *ibid*, Wardell, at p. 39.

[156] K. Polk, "When Less Means More: An Analysis of Destructuring in Criminal Justice," (1987) 33 *Crime and Del.* 358; and Pratt, "Diversion from the Juvenile Court", *supra*, note 152.

Further, the courts have ruled that youths who indicate they are unable to obtain or afford a lawyer and have been rejected by legal aid may obtain a government paid lawyer without a judicial inquiry into whether or not they or their parents are able to pay for one.[157] The rationale for this provision is that the vast majority of youths lack the resources to pay a lawyer on their own, and it is considered inappropriate to hold youths personally "accountable," but expect their parents to pay for counsel. Also, if a parent pays for a lawyer, there is an inevitable conflict over who will give the lawyer directions — the parent or the youth. The *YOA* is clearly premised on youths exercising the right to retain and instruct counsel personally (subsection 11[1]).

There is considerable disagreement about the appropriate role for a lawyer representing a youth charged under the *YOA*. Ontario's professional governing body, the Law Society of Upper Canada, has advised lawyers representing juveniles charged with offences that:

> there is no place...for counsel representing a child to argue what is in his opinion in the best interests of the child. Counsel should not be deciding whether training school would be 'good' for the child...it is advice with respect to the legal rights of the child which is being provided, and that advice is being provided to the child, not to the parents, not to the court, and not to society, but to the child.[158]

A Manitoba study indicates that many lawyers who represent youths charged under the *YOA* take this position, and adopt an "advocate" role, taking their instructions from their young clients.[159] Lawyers adopting this role generally emphasize the right to remain silent and advise against cooperation with the police. They will raise any legal defence (provided the client does not wish to plead guilty), for example, seeking the exclusion of inadmissible evidence, even if the youth is in fact guilty. The emphasis at disposition is on seeking the least severe disposition.

Some lawyers, however, take more of a "guardian" role, preferring to take account of the views of parents, social workers and probation officers, as well as the

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[157] *S.T.C.* v. *Alberta*, [1993] A.J. 350 (Alta. Q.B.).

[158] Law Society of Upper Canada, *Report of the Subcommittee on the Legal Representation of Children* (1981).

[159] H.A. Milne, R. Linden and R. Kueneman, "Advocate or Guardian: The Role of Defence Counsel in Youth Justice," Chapter 7, in R.R. Corrado, N. Bala, R. Linden and M. Le Blanc eds., *Juvenile Justice in Canada: A Theoretical and Analytical Assessment* (Toronto: Butterworths, 1992).

youth, in formulating a position based on counsel's perception of the "best interests" of the young person. As one Manitoba lawyer with experience in representing youths stated:

> My attitude to the practice of law is not adversarial. I am aware of the legal issues and the fact that I am a lawyer, but I am concerned with rehabilitation. I do take the role of a stern parent.[160]

Lawyers taking this approach attempt to achieve an acquittal if the youth denies guilt, but they may not be as aggressive in pursuing more technical or evidentiary lines of defence; at the dispositional stage, they tend to seek sentences promoting rehabilitation, even if they are not the least intrusive dispositions.

Many lawyers are not purely "advocates" or "guardians," but adopt an approach that has elements of both and may vary with the nature of the case and the attitude of the young person. It is apparent that members of the defence bar are not in complete agreement on whether or not due process is always to be a preeminent guiding principle for their actions, or for the entire youth justice system. It may well be that lawyers' uncertainty about their role in the youth justice system reflects a broader conflict among many professionals and in the legislation itself on how to balance concerns with due process against the special needs of youth.

In a few localities in Canada, in particular in Quebec, there are specialized legal clinics for the representation of children and adolescents charged under the *YOA*. However, most defence counsel representing youths are lawyers in private practice, who typically have a general practice, or one that specializes in criminal or family law. Some lawyers have extensive knowledge of the legal and social issues involved, familiarity with relevant facilities and programs, and sensitivity in dealing with adolescents. There is generally no requirement that lawyers have any specialized knowledge, training or sensitivity before representing youths. Since this work is often poorly paid compared to other types of legal work, there is a tendency for less experienced members of the bar to appear in youth court.[161]

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[160] *Ibid*, at p. 333.

[161] Manitoba has recently adopted a scheme of "tendering" for "blocks" of young offenders' cases, by private law firms. This has led some lawyers to question whether this will compromise the quality of representation. See "Legal Aid Manitoba to seek bids from lawyers for blocks of *Y.O.A.*'s. 11 cases," *Lawyers Weekly*, April 23, 1993.

Some studies have suggested that many defence counsel do not communicate effectively with their adolescent clients,[162] and may not be thorough in bringing relevant information before the courts, especially with respect to issues of disposition. While defence counsel are generally effective in dealing with legal issues related to guilt or innocence, observers have argued they sometimes are unaware of the backgrounds of their clients and various dispositional resources may contribute to increased custodial sentences.[163]

These concerns have led some to argue that provincial law societies should take a stronger role in supervising the quality of representation for young people. Adolescents are not sophisticated consumers of legal services, may not be as discerning as adult clients, and are less able to recognize or react to inadequate representation. This could support the need for special provisions to ensure that they are adequately represented.[164] Some critics even question the social value of the extensive public expenditures required to provide legal representation to all young persons, and suggest that some of these funds might be redirected to provide rehabilitative services to meet their "special needs."[165]

As well as providing access to legal representation, the *YOA* offers special protection to youths facing questioning by the police. In addition to the provisions of section 10 of the Charter, requiring that police advise any arrested person of the right to retain and instruct counsel without delay, section 56 of the *YOA* requires further cautions to be given. A statement given by a youth to a police officer during an investigation will be admissible only if the youth is advised "in language appropriate to his age and understanding" of:

- the right to remain silent;
- that any statement given the police may be used in later court proceedings; and
- that he/she can consult a parent or other adult before making a statement, and may choose to have that person present while a statement is being made.

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[162] K. Catton and P. Erickson, *The Juvenile's Perception of the Role of Defence Counsel* (Ottawa: Ministry of Solicitor General of Canada, August 1973).

[163] D.K. Hanscomb, "The Dynamics of Disposition in Youth Court: A Report on the Survey of Youth Court Matters Affecting Disposition," LL.M. Thesis, University of Toronto, 1988.

[164] Ontario Social Development Council, *Y.O.A. Dispositions*, *supra*, note 72 at p. 129.

[165] See, for example, "Judge's comments bring 'slap on wrist,'" *Globe and Mail* [Toronto], Feb. 15, 1986.

This special protection is afforded to youths based on the assumption that they may be easily coerced by authority figures such as police officers, and may not fully appreciate the nature of their rights or the consequences of making a statement, even if they have a police caution.[166] Youths are also more susceptible to pressure and suggestions than adults, and there have been cases in which youths have been coerced into making "confessions" to the police that later proved false. The courts have generally interpreted section 56 in a very strict fashion, striving to protect the legal rights of youths.

In *R.* v. *J.T.J.*, the Supreme Court of Canada dealt with a case where a 17-year-old youth confessed to the police about his brutal sexual assault and killing of a 3-year-old girl. The police properly advised him of his rights under the Charter, but did not fully comply with the requirements of section 56 of the *YOA*. The Supreme Court ruled that the statement was inadmissible, and under the circumstances of the case, without the confession, the youth could only be convicted of manslaughter and not murder. Mr. Justice Cory wrote:

> Section 56 itself exists to protect all young people, particularly the shy and the frightened, the nervous and the naive. Yet justice demands that the law be applied uniformly in all cases. The requirements of section 56 must be complied with whether the authorities are dealing with the nervous and naive or the street-smart and worldly wise. The statutory pre-conditions for the admission of a statement made by a young person cannot be bent or relaxed because the authorities are convinced, on the basis of what they believe to be cogent evidence, of the guilt of the suspect. As soon as the requirements are relaxed because of a belief in the almost certain guilt of a young person, they will next be relaxed in the case of those who the authorities believe are probably guilty, and thereafter in the case of a suspect who might possibly be guilty but whose past conduct, in the opinion of those in authority, is such that he or she should be found guilty of something for the general protection of society. Principles of fairness require that the section be

[166] S.A. Burr, "Now My Son, You Are a Man: The Judicial Response to Uncounseled Waivers of Miranda Rights by Juveniles in Pennsylvania," (1987) 92 *Dick. Law Review* 153; and R. Abramovitch, K.L. Higgins-Biss and S. Biss, "Young Person's Comprehension of Waivers in Criminal Proceedings," (1993) 35 *Canadian Journal of Criminology* 309.

applied uniformly to all without regard to the characteristics of the particular young person.[167]

Section 56 of the *YOA* and the *Charter* require that youths be given the right to consult a lawyer or parent before being questioned by the police, and to have such a person present during questioning. The provisions in section 56 that relate to parents are premised on the notion that parents are "natural guardians" of their children, but it is not clear in this context if this means that should protect their children's strict legal rights or encourage compliance with the law, even if it means sacrificing some due process rights and facilitating a conviction. A lawyer consulted by the youth will generally advise against making a statement to the police but parents may have a different approach. In general, parents are not aware of the legal consequences of making a statement, and they may have their own concerns about their child's behaviour. Many parents will encourage, or even pressure, their children into making a confession. Such concerns have led some advocates for children to argue that no statement should be admissible unless the youth consults a lawyer before the statement is made.

Police and crown prosecutors complain that even a minor error in giving a caution can result in the automatic exclusion of a statement. Concerns are also expressed about judicial inconsistency in terms of expectations for compliance with subsection 56(2), especially since a police officer is required to give an explanation of fairly abstract, complex legal concepts in language "appropriate to the age and understanding" of an adolescent, whom the officer may never have met before.[168] Police and prosecutors have suggested various proposals to amend section 56. For example, at first reading of the 1986 amendments to the *YOA*, it was proposed that an oral waiver should suffice. This proposal, however, was vigorously opposed by groups like the Canadian Bar Association, and not enacted.

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[167] *R.* v. *J.T.J.* (1990), 79 C.R. (ed) 219, at pp. 242-243 (S.C.C.). This report was written prior to the Supreme Court of Canada decision in *R.* v. *L.R.T. and E.T.*, [1993] S.C.J, 132 where it was held that police must also warn a young person of the possibility of transfer prior to taking a statement.

[168] In *R.* v. *M.V.*, [1993] O.J. 1533 (Ontario Provincial Court), Wolder Prov. J. stated section 56(2):

> puts a responsibility upon the officer to conduct an inquiry into what the age and level of understanding of the young person before him actually is in order to determine the extent of the explanation that is going to be required in order to make sure that the young person does, in fact understand those rights.

The judge also acknowledged:

> Subsection 56(2) creates an obvious tension for the police. On the one hand they wish to encourage a young person to give an inculpatory statement but on the other hand they are obligated...to clearly explain the young person's rights which, if properly explained to and understood by the young person, may result in the police being frustrated in their ability to obtain such an inculpatory statement...

Section 56 remains controversial and difficult questions persist: Does it place too much emphasis on legal rights and result in the acquittal of youths who may in fact be guilty, thereby sacrificing the protection of society and the interests of young people? Or conversely, is not enough attention paid to truly protecting the rights of those who have the most difficulty in understanding and exercising these rights?

4.8 Pre-trial Protection For Youth

Because they are less mature than adults, there are a number of special protections in the *YOA* for young persons before trial. A youth who is detained prior to trial must be kept apart from adults (section 7) and the parents of a person who is arrested or detained must be notified (section 9). As discussed above, a young person must also be informed of the right to counsel at the time of arrest (section 11) and special rules apply to police questioning (section 56).

In most cases, arrested youths are released by the police and directed to appear in court at a later date. However, if a more serious charge is involved or the police have concerns, for example, that the youth will not attend court or will get into further trouble before the trial, steps to detain the youth may be taken. If the police wish to have the young person detained until trial, a judicial interim release hearing, i.e., a "bail hearing" must be held to determine if the young person should be released or held in custody until the trial. The *Criminal Code* provisions governing judicial interim release apply to hearings in youth court.

A young person who is not released by the police must be brought before a youth court judge or a justice of the peace within 24 hours or as soon as possible thereafter for a bail hearing. In most cases, the *Code* requires that the prosecutor show why the accused person should be held in custody. A judge can order the young person to be detained if it is likely he or she would not appear in court when required. If detention is not justified on this basis, the prosecution can try to show that detention is necessary "in the public interest or for the protection or safety of the public," including the likelihood that the young person would commit another offence.[169] If the young person has been charged with violating the conditions of an earlier release or committing another offence while on bail, the young person must show why he or she should be released, creating a "reverse onus" situation.

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[169] In *R.* v. *Morales* (1992), 17 C.R. (4th) 74 (S.C.C.), the Supreme Court of Canada ruled that the "public interest" was an unconstitutionally vague basis for detention of accused adults, supporting the view that youth courts should be very cautious about inappropriately detaining youths.

In all provinces and territories, young persons in detention or custody are separated from adults; however, as noted above, the type of pre-trial facility where young persons may be held can vary considerably. In some locales, youths are placed in group homes and other facilities where they have access to educational and recreational programs, as well as psychological counselling. In other places, facilities for pre-trial detention have few or no programs, and only assure that a youth will attend court. Young persons on remand may be placed in the same facilities as young persons serving custodial dispositions,[170] as well as with adolescents in the care of child welfare authorities.

Pre-trial detention is a very intrusive measure; a youth is removed suddenly from familiar surroundings in the community and placed in an unfamiliar, institutional setting, often at a time of great personal and familial stress. At this point, there has been no finding of guilt. While those who favour "swift justice" and the deterrence of a legal response point to the value of immediate detention, a punitive pre-trial response cannot be justified in a legal system based on the presumption of innocence.[171]

In a recent study of bail hearings in three Ontario cities, J. Gandy found that a few young people were detained a week or more before their first appearance in court for a bail hearing. This is an apparent contravention of the *Criminal Code* provisions respecting judicial interim release.[172]

The study also found that the majority of youths detained were in "reverse onus" situations where they had to satisfy the court they should be released, due to the failure to comply with conditions of a prior release. This breach of prior release conditions was a major reason for not releasing the youth. Judges appeared reluctant to again release youths into parental care since the parents had shown they were unable to enforce the conditions of earlier releases. Further, judges viewed non-compliance with the conditions as a serious challenge to the authority of the courts. However, often the conditions of the original release imposed highly significant restrictions on a youth in terms of school attendance, observing a curfew and so on. In effect, once a youth is charged with an offence and released on conditions, a strict code of conduct involving the re-creation of status offences may occur, and the youth may be brought into custody not because of a threat to society or new

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[170] West, *Young Offenders, supra*, note 84.

[171] Both the *Canadian Charter of Rights*, section 11(d) and the *United Nations Convention on the Rights of the Child*, Article 40(2)(b)(i) recognize the importance of the presumption of innocence.

[172] J. Gandy, *Judicial Interim Release (Bail) Hearings* (Toronto: The Policy Research Centre on Children, Youth and Families, 1992).

offences, but because of the failure to follow the new code of conduct. For example, a court may release a youth on condition that the youth attend school. If the youth fails to attend school, this will constitute a criminal offence, a breach of condition of release that may seem quite serious to a judge since it is defiance of a court order, and may result in a custodial sentence. In general, however, failure to attend school would not result in this type of criminal charge.

Gandy also reported that a substantial proportion of the young people detained under the *YOA* were already under child welfare guardianship. In a number of cases, the child welfare authorities informed the youth court that the youths were too aggressive or non-compliant for their facilities. Attempts by judges (many of whom are also family court judges with child protection jurisdiction) to obtain the assistance of child welfare authorities for young persons with no previous history of child protection involvement were generally resisted. Although, in theory, concern for a young person's welfare is not a proper basis to order a remand in custody under the *YOA*,[173] it appears this may be the result in some cases, especially if the young person has nowhere to reside pending trial.

The number of young persons detained pending trial has increased substantially in recent years in Canada.[174] This is a potentially disturbing trend. Despite the requirements of the *Criminal Code*, some judges may use pre-trial detention as a form of punishment with the aim of specific deterrence, or to deal with such problems as homelessness or other child welfare concerns. If the ultimate disposition is non-custodial, or the young person is acquitted, pre-trial detention is a more severe limitation on the freedom of the young person than was justified by the particular offence. Additionally, pre-trial detention has been shown to be significantly correlated with the imposition of custodial dispositions, independent of the seriousness of the charge,[175] raising concerns that inappropriate use of detention may seriously affect the liberty of young persons.

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[173] *Ibid.*

[174] J. Kenewell, N. Bala, and P. Colfer, "Young Offenders", R. Barnhorst and L.C. Johnson, eds., *The State of the Child in Ontario* (Toronto: Oxford University Press, 1991) at p. 160.

[175] Gandy, *Judicial Interim Release, supra*, note 172.

4.9 Disposition

If there is a finding of guilt in youth court, any one or more of a number of dispositions described in section 20 of the *YOA* may be imposed on a young person, including:

- an absolute discharge (i.e., an official warning);
- a fine of up to $1,000;
- restitution to victim, or up to 240 hours of community service work;
- probation, subject to reasonable conditions that may be imposed by a judge such as reporting to a probation officer, attending school or living at home;
- open or secure custody for up to three years (or five years less a day for murder); and
- detention for treatment in a hospital, but only if the youth consents.

The majority of young offenders receive non-custodial dispositions, with probation accounting for up to one-half of all dispositions.[176] All probation orders require the young person to keep the peace and be of good behaviour, appear in youth court if required, and notify the youth court or a probation officer of any change of address or work/school status. Additional conditions that may be imposed include requirements to report to a probation officer; stay within the city or province; make efforts to find or keep a job, attend school or a training program; receive counselling or participate in a substance abuse program; reside with a parent or other appropriate adult; reside in a place specified by probation authorities (i.e., a group home); or comply with any other reasonable conditions that may be attached to the order. Since 1986, the wilful breach of a condition of probation constitutes an offence that is potentially punishable by a term of up to six months in secure custody. Some 15 percent of young persons in custody for committing an offence are there because of breach of probation or of another condition (such as a condition of pre-trial release) imposed under the *YOA*.

The range of sentencing options available to judges, particularly the ability to impose conditions on the behaviour of a young person, either independently or as terms of probation, appears to provide some of the flexibility formerly available to

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[176] Statistics Canada, *Youth Court Statistics, supra*, note 7.

judges under the *JDA* to address the needs of the young person, while limiting the possibility of the arbitrary exercise of sentencing authority.[177] Notwithstanding this statutory ability to tailor the disposition to the individual offender, predictions were made when the *YOA* was enacted that the rights and responsibility focus of the *Act* would result in increased numbers of young people being committed to custody.[178]

These predictions appear to have come true, at least to some extent. Analysis of dispositions under the *YOA* in several provinces suggests there has been a substantial increase in the number of custodial dispositions and a reduction in the number of probation orders and other community dispositions compared with the situation under the *JDA*.[179] For example, in British Columbia, from the last year of the *JDA* to the end of fiscal year 1990-1991, the ratio of custody to probation dispositions decreased from 1:8.3 to 1:4.1.[180]

The increase in the use of custodial dispositions occurred despite the existence of a number of conditions placed on the use of custodial dispositions in the *YOA*. Before imposing a term of custody on a young offender, the judge must normally receive a pre-disposition report (section 14), and may also request a medical, psychological or other assessment (section 13) to ascertain whether or not a young person has special needs.

As originally enacted, section 24 of the *YOA* required that secure custody orders were only to be made if they were necessary for the protection of society. This legislative direction was expanded to apply to open custody orders by amendments to the *YOA* in 1986. These limits on the imposition of custodial orders, in conjunction with the principle in subsection 3(f) of the least interference with a young person's freedom could lead one to expect that custody would be ordered only in cases involving serious offences or where the young person was a repeat

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[177] These limitations are significant. Judges can no longer impose indeterminate sentences and cannot order that a young person be confined in a specific custodial or treatment facility.

[178] Reid and Reitsma-Street, "Assumptions", *supra*, note 109.

[179] A.N. Doob, "Trends in the Use of Custodial Dispositions for Young Offenders," (1992) 34 *Canadian Journal of Criminology* 75; A. Leschied & P.G. Jaffe, "Impact of the Young Offenders Act on Court Dispositions: A Comparative Analysis," (1987) 29 *Canadian Journal of Criminology* 421; and A. Markwart, "Custodial Sanctions under the Young Offenders Act" in R.R. Corrado, N. Bala, R. Linden and M. Le Blanc, eds., *Juvenile Justice in Canada: A Theoretical and Analytical Assessment* (Toronto: Butterworths, 1992), at p. 229.

[180] Markwart, *ibid.*

offender. If these restrictions were intended to limit or reduce the number of young offenders in custody, they do not appear to have been effective.[181]

The *YOA* has had little effect on dispositional trends in some jurisdictions, but in others, there has been a substantial increase in the use of custody. In the first six years, incarceration rates in British Columbia more than doubled from levels under the *JDA* for the same age groups.[182] In Saskatchewan, however, the use of custodial dispositions was fairly stable during the same period. In Quebec, the total use of custody increased a limited amount, but the proportion of secure custody dispositions to open custody increased substantially.

It appears the increase in custodial dispositions was not related to an increase in the number of violent offences committed by young people,[183] but rather, to an increase in the use of short sentences of less than three months.[184] In 1987 and 1988, fewer than 25 percent of young people in secure custody and 20 percent of those in open custody had been sentenced for violent offences, while almost 60 percent had been incarcerated for property offences.[185]

The short custodial sentences are often referred to as "short, sharp shocks" and, especially where secure custody is ordered, are intended to provide a taste of imprisoned life with a view to persuading the young offender against further criminal involvement.[186] The expectation is that these sentences will serve as a deterrent effect. Notions of accountability may also require that if a youth continues to commit offences after being placed on probation, at least a short period of custody is appropriate. However, those concerned with rehabilitation point out the difficulties of successful treatment in a relatively short time period. Further, removal from the community can be destabilizing for a youth's development and education.

Some observers argue that the ambiguity and lack of priorization in the Declaration of Principle has given judges wide discretion respecting the type of

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[181] West, "Young Offenders", *supra*, note 84; Corrado and Markwart, "The Evolution", *supra*, note 81; and Doob, "Trends", *supra*, note 179.

[182] Markwart, "Custodial Sanctions", *supra*, note 179.

[183] Corrado and Markwart, "The Evolution", *supra*, note 181; and J. Frank, "Violent Youth Crime," *Canadian Social Trends* (Autumn 1992): 2.

[184] Doob, "Trends", *supra*, note 179.

[185] Corrado and Markwart, "The Evolution", *supra*, note 81.

[186] *Supra*, note 88.

dispositions to impose.[187] This results in great variation in the application of the *Act*, and in some contexts may contribute to an increase in the use of custody.

A survey of Alberta youth court judges was conducted after the *YOA* had been in effect for one year, when the maximum age was still 16 years.[188] The majority of judges viewed the imposition of a custodial disposition as more treatment than punishment. Some judges expressed concern that they could not match the young offender with a particular program, since they were not allowed to specify the facility where the offender would be placed, but only the level of custody. A number of judges were concerned that some young offenders would not receive help, even though they recognized that open custody dispositions should not be used as substitutes for child welfare services. Despite this, 75 percent of the judges said they dealt with homeless youth differently than other youth, often at the urging of both prosecution and defence. The judges also expressed concern that their ability to involve the child welfare authorities was substantially lessened, since their social workers no longer attended court on a regular basis, as they had done under the *JDA*.

Different judicial interpretations of the dispositional philosophy of the *YOA* have been given. For example, the Alberta Court of Appeal held that general deterrence should not have a role in the sentencing of young offenders, since it was not explicitly mentioned in section 3 of the *Act*.[189] On the other hand, the Quebec Court of Appeal held that general deterrence was an appropriate factor to consider, as an aspect of protection of society.[190]

Another controversial interpretative issue has been the manner and extent to which rehabilitation should be taken into account in dealing with young offenders. The Nova Scotia Court of Appeal suggested that the special needs of youths could be taken into account to impose long custodial disposition, especially in open custody, for adolescents requiring "strict controls and constant supervision."[191] The Ontario Court of Appeal, however, rejected this approach, stating that the "sentence must be responsive to the crime," and that a long custody sentence should not be imposed on a youth who committed a minor offence but "had a personality

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[187] Doob and Beaulieu, "Variation", *supra*, note 107.

[188] Gabor et al., "The Young Offenders Act", *supra*, note 125.

[189] *R.* v. *G.K.* (1988), 31 C.C.C. (3d) 81 (Alta. C.A.).

[190] *R.* v. *S.L.* (1990), 75 C.R. (3d) 94 (Que. C.A.).

[191] *R.* v. *R.* (1986), 17 W.C.B. 109 (N.S.C.A.).

problem and no place to go."[192] Rather, such a youth should be dealt with through the child protection or mental health systems.

The Supreme Court of Canada dealt with some of the controversies on *YOA* dispositions in its 1993 decision in *R.* v. *J.J.M.*, where it affirmed a two-year open custody sentence for a youth convicted of three counts of break and enter and one of breach of probation. The youth came from an abusive home environment, which the court characterized as "intolerable," and therefore "child welfare considerations" justified a longer sentence. Justice Cory stated that:

> ...there must be some flexibility in the dispositions imposed on young offenders. It is not unreasonable to expect that in many cases carefully crafted dispositions will result in the reform and rehabilitation of the young person. That must be the ultimate aim of all dispositions. They may often achieve this goal if the disposition is carefully tailored to meet both the need to protect society and to reform the offender.
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> ...
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> Section 3(1) attempted to balance the young offenders' responsibility for their crimes while recognizing their vulnerability and special needs. It seeks to chart a course that avoids both the harshness of a pure criminal law approach applied to minors and the paternalistic welfare approach that was emphasized in the old *Juvenile Delinquents Act* ...there should be a departure from the strict criminal justice model in imposing penalties on young offenders.[193]

The court specifically accepted the "proportionality principle" for sentencing young offenders, but indicated that it was less important than for adults, and had to be weighed against child welfare concerns:

> It is true that for both adults and minors the sentence must be proportional to the offence committed. But in the sentencing of adult offenders, the principle of proportionality will have a greater significance than it will in the disposition of young offenders. For the young, a proper disposition must take into

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[192] *R.* v. *B.M.* (1987), 36 C.C.C. (3d) 573 (Ont. C.A.).

[193] *R.* v. *J.J.M.* (1993), 20 C.R. (4th) 295. This approach is broadly consistent with the *United Nations Convention on the Rights of the Child*, Article 40(4), which requires dispositions that are "proportionate both to their circumstances and the offence."

account not only the seriousness of the crime but also all the other relevant factors.

For example, two years of closed custody could never be imposed on a young offender with no prior record who had stolen a pair of gloves, no matter how intolerable or how unsavoury the conditions were in the offender's home. Nonetheless the home situation is a factor that should always be taken into account in fashioning the appropriate disposition. It is relevant in complying with the *Act*'s requirement that an assessment must be made of the special needs and requirements for guidance of the young offender. Intolerable conditions in the home indicate both a special need for care and the absence of any guidance within the home.

The situation in the home of a young offender should neither be ignored nor made the predominant factor in sentencing.[194]

The Supreme Court also resolved the debate about the role of general deterrence:

... although the principle of general deterrence must be considered, it [has] diminished importance in determining the appropriate disposition in the case of a youthful offender.

...

I would underline that general deterrence should not, through undue emphasis, have the same importance in fashioning the disposition for a youthful offender as it would in the case of an adult. One youthful offender should not be obliged to accept the responsibility for all the young offenders of his or her generation.[195]

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[194] *R.* v. *J.J.M.* (1993), 20 C.R. (4th) 295, at p. 303.

[195] *Ibid*, 20 C.R. (4th) 295, at pp. 304-305.

The primary aim the court emphasized was rehabilitation:

> The aim must be both to protect society and at the same time to provide the young offender with the necessary guidance and assistance that he or she may not be getting at home. Those goals are not necessarily mutually exclusive. In the long run, society is best protected by the reformation and rehabilitation of a young offender. In turn, the young offenders are best served when they are provided with the necessary guidance and assistance to enable them to learn the skills required to become fully integrated, useful members of society.[196]

While *J.J.M.* resolves the abstract controversies about the legitimacy of considering a general deterrence and child welfare concerns when sentencing a young offender, it gives judges little specific direction. The Supreme Court emphasizes individualized decisionmaking and judicial discretion, and gives little sense of priority for different factors.

For some, the decision in *J.J.M.* also raises concerns that youths may perceive themselves as receiving more severe dispositions because of their difficult family backgrounds. Indeed, in a dissenting opinion in the Manitoba Court of Appeal, Madam Justice Helper felt that a sentence of one year was appropriate as a "fit sentence" for the offences, arguing that the "criminal justice system ought not to be used to supplement the lack of resources in the child welfare system." In *J.J.M.*, the youth had sought assistance from child protection workers before the offences, but failed to receive it.[197]

The *YOA* has two levels of custody: open and secure. Provincial correctional authorities designate specific facilities (or portions of facilities) as open or secure, and there is significant variation in the characteristics of facilities within each category.[198] Open custody facilities generally include group homes and wilderness

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[196] *Ibid*, at p. 304.

[197] (1991), 75 Man. R. (2d) 296 (C.A.).

[198] Caputo and Bracken, "Custodial Disputes", *supra*, note 82. Part of the variation in how different jurisdictions designate facilities may relate to the statutory definitions. The definition of secure custody is purposive; section 24.1(1) provides that secure custody means custody in a place...*designated* by the...province for the secure containment or restraint of young persons." On the other hand open custody is defined only by example: "open custody means custody in a community residential centre, group home, child care institution, or forest or wilderness camp, or any other like place of facility *designated* by the...province." Designation is thus a crucial element of the operationalizing of these definitions which, apart from designation, do not create two mutually exclusive categories.

camps. Youths sent to open custody facilities may have a great deal of freedom of movement, and may for example, attend schools in the community. Secure custody facilities typically impose much greater constraints on the freedom of youths and involve isolation from the community. While some of these facilities are, for example, secure group homes, they are generally larger and more like institutions than open custody facilities; in some instances they are sections of adult correctional institutions.

The *YOA* gave the authority for determining the level of custody to the youth court judge, who specifies if a disposition is to be served in open or secure custody. Correctional authorities then decide on the specific facility where a youth will be placed and they may move the youth from one facility to another within the level specified by the judge.

Corrections officials are authorized under subsection 24.2(9) to transfer a young person from open to secure custody for a maximum of 15 days under limited circumstances. Such temporary transfers are only permissible to ensure the safety of the young person or the safety of others at the open custody facility from which the young person is being transferred, or to deal with an escape from open custody.

Custodial dispositions must be reviewed by a youth court judge at least annually and earlier reviews can be requested by the young offender or the parents (section 28). At a review hearing, the judge can authorize a transfer from secure to open custody, or release from custody to probation; the judge can also reduce, but not increase, the length of the sentence. An escape or an attempted escape from custody or the commission of an offence, like an assault against a staff member or another youth, however, may involve laying new charges that lead to a more severe sentence.

There is no equivalent to the system of parole or earned remission available to adult offenders; early release for a young offender is only available if a judge reduces the length of the sentence. Correctional authorities can, at any time, request judicial approval for transfer from secure to open custody, or for release on probation, with no necessity for a hearing to be held (section 29). These provisions place the ultimate authority for determining the type and length of custodial sentence in the hands of judges. It is also possible, however, for youth corrections officials to "temporarily" release young offenders from custody facilities without judicial authorization.[199]

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[199] In theory, under section 35 of the *YOA*, the maximum period of release on a "temporary absence pass" is 15 days. However, in practice some correctional officials issue "back-to-back" passes that allow longer periods of release.

The *YOA* system of judicially controlled placement in different levels of custody and judicially supervised release is intended to ensure that the decisions are made in accordance with due process, in hearings where the youth, parents and the prosecutor may participate. This is premised on the notion that judges are the best decisionmakers to balance the "needs of the young person and the interests of society" (subsection 28[17]). Concerns have been raised, however, about whether or not judicial control of placement decisions has contributed to an increase in the use of custody.[200] There is also concern about the effectiveness of the review process since any delay in obtaining a hearing may defeat the purpose,[201] and young offenders are more likely to serve the full sentence imposed by a court than are adult offenders. Some observers question if judges are more reluctant than parole authorities to reduce sentences imposed in court. Do judges send youths to "open custody" who would be placed on probation if the only alternative were "custody?"

One possible disposition rarely used but greatly debated is the power to order that a young person be "detained for treatment in a hospital or other place of treatment" under subsection 20(1)(i). This disposition is subject to the requirements in subsection 22(1) that the young person consent to being detained, and that the treatment facility consent to accept the young person. The consent of the young person's parent or guardian is also required by subsection 22(1), but can be dispensed with by the court. Another precondition to making such an order is a section 13 assessment by a medical doctor or a psychologist recommending treatment.

The requirement that the young person consent to this order has been criticized, especially by those in the mental health field. One child psychiatrist has gone so far as to call the consent requirement "stupidity."[202] The basis of much of the criticism is that adolescents whose problems are sufficiently serious to require institutional treatment are, as a consequence of those problems, unlikely to recognize their need for help and will therefore refuse their consent.[203] The argument is made that the youth's legal right to refuse treatment is placed ahead of efforts to

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[200] Department of Justice Canada, *Consultation Document on the Custody and Review Provisions of the Young Offenders Act*, (Ottawa, 1991).

[201] S.C. 1960, c. 44.

[202] P.G.R. Patterson, "A Development Perspective on Antisocial Adolescents," in A.W. Lescheid, P.G. Jaffe and W.Willis, eds., *The Young Offenders Act: A Revolution in Canadian Juvenile Justice* (Toronto: University of Toronto Press, 1991), at p. 186; and A.W. Leschied and C.W. Hyatt, "Perspective: Section 22(1), Consent to Treatment Order Under the Young Offenders Act," (1986) 28 *Canadian Journal of Criminology* 69.

[203] Patterson, *ibid*; Leschied and Hyatt, *ibid.*

meet special needs, or achieve the long-term protection of society through rehabilitation.

It should be noted, however, that the history of involuntary treatment of adolescents in Canada has not been without problems. There may, for example, be a tendency to resort to drug treatments to sedate adolescents with behavioral problems. One can also question how effective involuntary treatment is likely to be.[204]

Some of the criticism appears to be premised on the belief that there are no treatment or rehabilitative services provided in any other setting. While subsection 22(1) requires that the young person consent to being detained for treatment, it does not require that consent be provided in advance of other types of treatment. The structure and programs of open and secure custody facilities may be able to achieve some of the ends of a hospital order, although the availability of treatment resources varies greatly among custody facilities.[205] In most communities, non-residential treatment services are also available and youth courts frequently require attendance for out-patient treatment as a condition of probation. A probation order with a condition to reside in a place directed by correctional officials may provide another avenue to providing treatment for a young offender.[206]

Undoubtedly, the most publicly contentious aspect of the *YOA* is the maximum available sentence: three years in custody. There has been a great deal of criticism of the *YOA* for not providing sufficient deterrence or accountability, especially with respect to the three-year maximum sentence when the offence charged is murder,[207] although youths can be transferred to adult court and face longer sentences there. The 1992 amendments increasing the maximum sentence for

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[204] N. Bala and M. Kirvan, "The Statute: Its Principles and Provisions and their Interpretation by the Courts," in A.W. Leschied, P.G. Jaffe and W. Willis, eds., *The Young Offenders Act: A Revolution in Canadian Juvenile Justice* (Toronto: University of Toronto Press, 1991), at p. 71.

[205] *Ibid.*

[206] Since probation services do not usually operate group homes or other residential facilities, using this method to achieve the desired result generally requires the probation service to purchase a bed in an existing facility, such as a child welfare group home. This provision cannot, however, be used to involuntarily place a young offender in a custody facility or hospital.

[207] R.W. Besta and P.J. Wintemute, "Young Offenders in Adult Court: Are We Moving in the Right Direction," (1988) 30 *Criminology Law Quarterly* 476.

murder to five years less a day represented a partial response to some of the criticism.[208]

4.10 Transfer to the Adult System

There has been substantial public and professional debate about the appropriate rule for transfer of youths to adult court. Section 16 of the *YOA* allows a youth court judge to transfer a young person (aged 14 or older at the time of the alleged offence) facing a serious charge to adult court for trial and, if convicted there, to a possible sentence of incarceration in an adult correctional facility. In 1992, there were important amendments to the transfer provisions of the *YOA*, marking the only major changes to the *Act* since its enactment.

While few youths have been transferred to the adult system – fewer than one in one thousand of those charged under the *YOA* — transfer remains a highly significant practical and symbolic concern. In general, only the most serious offences are considered for transfer; inevitably they are the focus of public attention. For the young person, the decision on transfer may be the most important judicial judgment made. For the youth system as a whole, transfer decisions are extremely important, as they indicate the appropriateness of a case for handling by it and may be viewed as defining the outer boundary of the youth justice system.

Under the *JDA*, while a judge could only order transfer for a juvenile if satisfied that "the good of the child and the interest of the community *demand it*" (section 9), in reality, many more youths were transferred than under the *YOA* and it is apparent that juvenile court judges had an expansive notion of the "good of the child."[209] The greater emphasis on due process and increased access to legal services has almost certainly contributed to decreased use of transfer.

Under the *YOA*, as originally enacted, transfer was to occur if the judge believed that "in the interest of society and having regard to the needs of the young person," it was appropriate. This broadly worded test was subject to different judicial interpretations. In provinces like Manitoba and Alberta, there was a great emphasis placed on the "interest of society" and the transfer rate was relatively high.

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[208] The maximum term of five years less a day was chosen because, under the section 11(1)(f) of the *Charter of Rights*, any offence which carries a maximum sentence of five years or more also carries with it the constitutional right of the accused to elect a trial by jury, which includes the right under the *Criminal Code* to a preliminary hearing. These two features were seen as incompatible with the youth court system, which is intended to be expeditious.

[209] Bala, *The Young Offenders Act*, *supra*, note 88.

In other provinces, like Ontario, Quebec and Saskatchewan, the transfer rate was lower, and more emphasis was placed on the "needs of the young person."[210]

The 1992 amendments redefined the test for determining whether or not to transfer a youth to adult court, providing that transfer must be in the "interest of society, which includes the objectives of affording protection to the public and rehabilitation of the young person." If these objectives cannot be reconciled in the youth system, the "protection of the public shall be paramount and the youth shall be transferred."

The 1992 amendments continue to give youth court judges significant discretion since the primary test is still "the interest of society," which includes the "protection of the public" and "the rehabilitation of the young person." Although subsection 16(1.1) now specifies that if these latter two objectives cannot be reconciled by the youth remaining in the youth court system, then "the protection of the public shall be paramount," it does not explicitly state what is to occur if they can be reconciled. Further the *YOA* does not define what the "interest of society" means, although it indicates that it includes the protection of the public and the rehabilitation of the youth.

While some judges may consider there is a strong public interest in having public trials in adult court for murder charges, simply because of the nature of the charges, others may disagree. Further, the concept of the protection of the public may be regarded as resting on notions of deterrence and incapacitation, which would favour the long sentences only available in adult court, or alternatively premised on the view that the protection of society is most likely to be achieved if a youth is rehabilitated, which often means keeping the young person in the more resource intensive youth system.

To date, the courts have given conflicting interpretations of the new law. In *R.* v. *D.M.S.*,[211] the Alberta Court of Appeal transferred a 17-year-old youth, without a prior criminal record, charged with the murder of his step-father. The court held that general deterrence was a relevant consideration in making this type of decision. This approach has not yet been adopted by other courts. If it is accepted that the transfer of youths does have a deterrent effect on other potential offenders, this would support transfer for the most serious offenders because it would increase protection of society. However, as discussed in Chapter 2, this issue remains controversial.

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[210] Bala and Lilles, *The Young Offenders Service*, *supra*, note 5; and Wardell, "The Young Offenders Act: A Report", *supra*, note 154.

[211] *R.* v. *D.M.S.*, [1993] A.J. 717 (C.A.).

In *R.* v. *G.J.M.*,[212] the Alberta Court of Appeal ordered transfers in two unrelated cases involving 15-year-old youths, one charged with attempted murder and the other with four homicides in his family. The court wrote:

> The public mood, increasingly sullen and suspicious about the *Young Offenders Act* and its application, will not be steadied by anything less than an unrestricted trial, a hearing where the causes and likelihood of repetition of this tragedy can be openly reviewed and reported....It is about waning confidence in the ability of this important arm of the criminal justice to do what Parliament asked of it.

By way of contrast, in *R.* v. *I.D.*,[213] a 16-year-old charged with second degree murder was not transferred, with the judge focussing on the amenability of the youth to rehabilitation within five years, and noting that the "case attracted considerable public attention," but observing:

> Whether the trial takes place in youth or the adult court, it will be open to the public and reported in the press.

Subsection 16(2) directs youth court judges, when deciding whether or not a case should be transferred, to consider the seriousness and circumstances of the offence; the age, character and previous record of the young person; whether the case can be more adequately dealt with under the *YOA* or the *Code*; and the availability of appropriate treatment or correctional resources in each system. A predisposition report (section 14) must be presented to the court, and psychiatric or other assessments (section 13) are often prepared. A major issue at transfer hearings is if, upon conviction, the young person would be likely to be rehabilitated within the maximum duration of a youth court disposition.[214]

In the context of transfer decisions, if the court is satisfied that the rehabilitation or treatment of a youth who poses a threat to society will take longer than five years, the youth must be transferred. This decision may be seen as satisfying both rehabilitative and punitive objectives,[215] though whether or not rehabilitation will actually occur in the adult system is sometimes questionable.

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[212] *R.* v. *G.J.M.*, [1993] A.J. 169 (C.A.).

[213] *R.* v. *I.D.*, [1993] B.C.J. 513 (Youth. Ct.).

[214] Bala and Lilles, The Young Offenders Service, *supra*, note 5.

[215] See, for example, *R.* v. *D.C.*, [1993] O.J. 1975 (Ont. C.A.).

Under the original provisions of the *YOA*, youth court judges dealing with transfer faced a very difficult choice. When the offence charged was first-degree murder, the choice was between the possibility of a life sentence in an adult penitentiary with a minimum of 25 years before parole eligibility or a maximum of three years in a youth facility. The enormous disparity between these choices was reduced significantly by the 1992 amendments.

The maximum sentence a youth court can impose for murder was extended to five years less a day. Young persons transferred to and convicted of murder in adult court are sentenced to life imprisonment, but are now eligible for parole after 5 to 10 years, rather than 25 years. Further, adult courts have the authority to determine the type of facility — an adult penitentiary, an adult provincial correctional facility, or youth custody facility — in which to place a transferred youth. The nature of this placement decision can vary, so that an adolescent may start a sentence in a secure youth custody facility and later be transferred to an adult correctional facility.

It seems likely that transfer and sentencing for murder will remain contentious. While only a small fraction of youth crime involves these situations, such cases are the focus of media and public attention. Further, in a real sense, transfer marks the outer boundary of the youth justice system and it is difficult to determine the circumstances in which a youth should be held accountable as an adult. In the 1980s, a number of American states took steps to facilitate the transfer, and many more juveniles there are now dealt with as adult offenders.[216] The 1992 amendments will likely result in some increase in the number of transfers in Canada, but some argue that these changes do not go far enough and the boundaries of the youth justice system should be further reduced.

4.11 Publicity and Privacy

Consistent in its emphasis on the interests of children, the *JDA* specified that "trials of children" were to take place "without publicity and separately" from adult trials, and publishing any information that would identify a child, unless specifically permitted by the court, was prohibited. This provision was interpreted to create a presumption that such hearings would be conducted in the absence of members of the public.[217] They were premised on the notion that the rehabilitation of delinquents could be jeopardized if their identities became widely known in the community and they became stigmatized.

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[216] Feld, "The Juvenile Court Meets", *supra*, note 42.

[217] See *C.B.* v. *R.*, [1981] 6 W.W.R. 701, 24 R.F.L. (2d) 225 (S.C.C.).

While there is a common misperception that youth court is closed to the public, the *YOA* creates a presumption that proceedings are to be open, giving a judge discretion to exclude members of the public only if their presence "would be seriously injurious or prejudicial" to a youth (section 39). A number of provisions of the *YOA* govern records of young offenders, and are intended to protect privacy and restrict dissemination of potentially stigmatizing information (sections 40-46).

As originally enacted, the *YOA* prohibited all publication of identifying information about young persons involved in the youth justice system, but allowed news stories of a non-identifying nature. The 1986 amendments allow a youth court judge to permit publication of identifying information if a young person involved in a serious offence escapes and is a potential danger to others (subsection 38[1.2]). This relatively narrower amendment was intended to strike a better balance between protecting the public from immediate danger and facilitating the rehabilitation of young offenders.

There continues to be criticism of these provisions of the *YOA*. Some argue that these sections reduce the deterrent effect of the *YOA*, and inadequately protect the public. In particular, it is suggested that members of the community have a right to know the identity of offenders in their midst, especially those released after committing serious crimes, so that appropriate precautions can be taken. Similar controversies are arising in Canada about whether or not the public has the right to know the identities of violent offenders or pedophiles released into their communities on parole or after completion of their sentences. However, one can ask if members of the public will be able to protect themselves if they know the identify of released offenders in their communities. There are also concerns that rehabilitation efforts will be undermined if former offenders are widely known.

The provisions of the *YOA* restricting public access to youth courts are consistent with the rehabilitative philosophy of the *United Nations Convention on the Rights of the Child.* Article 40(2)(iv) of the Convention specifies that a young offender has the right "to have his or her privacy respected at all stages of the proceedings."

5.0 RESPONDING TO YOUTH CRIME: TOWARDS NEW SOLUTIONS

5.1 Demand for New Approaches

Since the late 1980s, there have been growing demands for changes to Canada's response to youth who commit crime. By far, the loudest cries are to "get tough" with young offenders, by requiring longer sentences and more transfers to the adult system. Other approaches however, are also advocated, including placing greater emphasis on victims' rights, crime prevention, and community involvement. The 1992 amendments to the transfer and murder sentencing provisions of the *Young Offenders Act* (*YOA*) represent a partial response to some of these pressures.

The pressure for change is not unique to Canada. Starting in the late 1970s, a number of American states changed their juvenile justice statutes to facilitate transfer to adult court and they introduced longer juvenile sentences. Some states have also taken steps to structure the discretion of juvenile court judges, with presumptive sentences based on the nature of the offence and prior record.[218]

To this point, this report has focussed on the principles and approaches that have shaped the evolution of Canada's present youth justice system. In this chapter, some of the emerging concerns that are causing some rethinking of how Canada should respond to crime in general, and youth crime in particular, in the coming years, are explored. As with the preceding discussion, the focus is not on the details of various proposals; it is an attempt to understand underlying principles and approaches.

Before considering some of the possibilities for change, it is useful to summarize the current perceptions in Canada about youth crime, because these perceptions are driving many of the demands for change. The Canadian public

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[218] Barnhorst, "Female Delinquency", *supra*, note 41.

clearly perceives crime as a serious social problem, and there is concern not only about crime committed by youth, but also about the *YOA*.[219] In the 1993 election, perhaps for the first time in Canadian history, juvenile justice became a major election issue, with the four national parties all pledging to reform the *YOA* by providing for tougher penalties.[220]

It is not clear from national statistics, however, whether youth crime is increasing or more violent. Reports to police and courts of youth crime have increased in recent years, but it is impossible to determine if this reflects actual increases in youth crime, or if it is due to changes in reporting. There is considerable evidence suggesting that part of the reported increase is because of changing attitudes in reporting to the police and in police charging practices, rather than an increase in levels of crime.[221]

The increased reporting and public awareness of youth crime may reflect a greater social sensitivity to problems of crime and violence. Recent concerns about wife assault and child abuse demonstrate an unwillingness to accept violence and abuse that were hidden in the past, but were a terrible social reality in Canada. To the extent that Canadians are prepared to recognize and deal more effectively with long-standing social problems and achieve a greater degree of protection for society, it is a welcome trend. On the other hand, the increased concern about youth crime

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[219] It is difficult to know how strongly citizens feel about specific issues, but one Reform Party candidate in Ontario remarked in the middle of the 1993 campaign:

> Taxes is the first issue. But after they get done talking about taxes at 75 percent of the doors they talk about the *Young Offenders Act*. It is a big, big issue. People feel that civil libertarian lawyers and busybody social workers are getting between them and their children.

"Touchy topic: City traumatized by teen's killing epitomizes justice debate," *Globe and Mail* [Toronto], Oct. 5, 1993, pp. A1 and A9.

[220] In this context, the term "national" political parties refers to parties that elected members in more than one province. Interestingly in the 1993 election campaign, while the Liberals, Conservatives, NDP and Reform all adopted at least some aspects of a "get tough" approach, the Bloc Québécois "spoke out against law and order rhetoric." "A voters' guide to the issues," *Globe and Mail* [Toronto], Oct. 2, 1993, p. A7. As this report points out, Quebec has taken a distinctive approach to youth crime in its legislation, social policy and programs. This may reflect public opinion. A January 1992 Gallup Poll reported that only 47 percent of the Canadian public favoured having special provisions and sentencing for accused young offenders, with by far the highest support, 71 percent, in Quebec. See "Try young offenders like adults, 48 percent say," *Toronto Star*, Jan. 2, 1992.

[221] See, for example, Department of Justice Canada, *Toward Safer Communities*, *supra*, note 7 at 3: "The crime rate among Canadian youths today is about the same as it was five or ten years ago." See also "Shedding Light on Canadian crime," *Globe and Mail* [Toronto], Sept. 27, 1993; and P.J. Carrington and S. Moyer, "Trends in Youth Crime and Police Responses, Pre- and Post-*YOA*," in press (1994) 36 *Canadian Journal of Criminology*, 1-28.

may only be a symptom of other concerns about social change. It may be that one or more of the following issues contribute to the concern about youth crime:

- many adolescents do not seem to display the same degree of "respect" (or submissiveness) towards authority figures and adults as they did a generation ago;
- youth in Canada currently face significant unemployment problems; and
- there is a growing population of visible minority youth, especially in urban areas.

In addition, there is some evidence suggesting there is a growing misperception among youth that the *YOA* protects them as opposed to prosecuting them. These trends raise a number of questions: Do these social changes affect attitudes towards youth crime, as well as youth in general? Does some of the anti-youth crime rhetoric reflect deeper concerns about youth and the future?

It is possible that some of the public anger towards youth crime and the *YOA* is only a reflection of a much deeper anger towards politicians in general, especially those in the nation's capital.[222] A caricature of public concern might be: "If only you politicians in Ottawa enacted a better law, we in our communities wouldn't have youth crime problems." This approach, unfortunately, ignores the highly complex social nature of youth crime, and the fact that action at the local, national and provincial levels is necessary to reduce the incidence of youth crime.

Another problem with public perceptions on the extent and nature of youth crime is that there is sometimes confusion in Canada because the public tends to rely on American media for information about social problems. Despite laws that are generally "tougher" on sentencing and transfer to the adult system, the levels of youth crime, especially violent crimes like homicide, are much higher in the United States.[223] The more serious American adolescent crime problem may be attributable in part to laxer gun controls, a large drug problem, and lower funding for public schools, health care and social services. There may also be different cultural attitudes on violence, as well as differences in social and family structures in the United States.

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[222] This anger in some segments of the Canadian population, was most apparent in the debates about the 1992 Charlottetown Accord, but was also evident in the 1993 election campaign.

[223] See, for example, Meloff and Silverman, "Canadians kids who kill", *supra*, note 8 at 15.

5.2 New Approaches

As shown in the discussion above, the reason for the current public concern about youth crime is not known, but it is a political reality and warrants a response. Four new approaches for responding to youthful criminality are discussed below: victims' rights; getting tough; crime prevention; and community responsibility. While there are some common themes, there are also significant disparities and divergences in these approaches. The discussion here focusses on broad themes, and does not purport to fully analyze any one of the new approaches. However, it must also be recognized that most advocates of change in Canada tend to make specific recommendations without articulating the theoretical bases for their proposals. As a result, attempts to identify underlying principles are, to a certain extent, speculative and sometimes fruitless exercises.

5.2.1 Victims' Rights

Traditionally, victims of crime had no formal role in Canada's criminal justice system, and their needs and interests were too often ignored in practice. This situation is changing rapidly, as victims, their relatives and their supporters are seeking more and more political and legal recognition.

Historically, the Canadian criminal justice system was premised on the notion that crimes were wrongs not against individuals, but against the state, as reflected in the names of cases: "The Queen against...." While in theory, a victim can initiate a "private prosecution" if the state chooses not to proceed, it is still technically in the name of the Crown, and in law the crown prosecutor has the right to intervene in any prosecution and may even discontinue it.[224] The limited status of an (alleged) victim is also reflected in the legal terminology, where he or she is referred to by the slightly pejorative-sounding term "complainant."

While the police and crown prosecutor in many ways attempt to protect the interests of victims, too often they have been mistreated in the justice system. Frequently, victims are not informed of how their cases will be dealt with by the courts, are not adequately prepared for testifying, are not treated with respect while testifying, and are not consulted on how their cases should be resolved. In sexual assault or domestic violence cases, the situations for the victims are sometimes worsened by cynical and insensitive police investigations. Further, in theft cases, the police may recover the property, but it could be kept tied up in the courts for years.

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[224] *Criminal Code of Canada*, section 574(3) and section 2.

A number of recent changes in the administration of justice are intended to provide victims with better treatment. Police and prosecutors are now trained to be more sensitive to the needs of victims, and in many places, victim/witness programs assist victims in dealing with their court experiences. Victim-impact statements are regularly given at the time of sentencing of offenders, and criminal courts may now order monetary compensation for victims of certain offences. Measures are now in place to return stolen property more quickly.

Changes in Canada's criminal laws have also resulted from the advocacy of victims and their supporters, in particular with respect to sexual offences, domestic violence cases, and child abuse cases. The *YOA* specifically provides for compensation or restitution to the victim as a possible disposition, and pre-disposition reports in youth court are expected to include a section on the effect of the crime on the victim. However, there still are demands to make the criminal justice system more responsive to victims, both in terms of their experience in the justice system and in the types of sanctions imposed on offenders.

5.2.2 "Getting Tough" with Young Offenders

Currently, the loudest demands to change how Canada deals with young offenders are heard from those who want a "get tough" approach. This approach overlaps with concerns for victims, in that it is intended to reduce crime and provide greater protection to individuals in society. However, the get tough approach focusses on how offenders are dealt with, and at times, places more emphasis on increased accountability for offenders than compensation for victims. For some, the approach is based on a strongly retributive model of justice, i.e., an offender has caused harm and should accordingly suffer harm. Some of the measures advocated by different proponents of a "get tough" approach include:

- lower minimum and maximum ages for youth court jurisdiction;
- more transfers to adult court, perhaps automatic for certain offences;
- longer sentences for young offenders, especially those who commit violent offences;
- longer sentences for young offenders who are repeat offenders (implicit in this type of proposal is a desire to restrict judicial discretion in the sentencing of young offenders, and to place the emphasis solely on current offence and prior record);
- publicly identifying youths charged (and/or convicted) of offences;

- curtailment of some legal rights for young persons who commit crimes; and

- increased parental responsibility for crimes committed by their offspring.

While the principles behind these proposals are not always articulated by their proponents, it is not difficult to discern the ideas underlying them. Clearly, a major objective is to increase societal protection. These proposals are premised to a major extent on the view that increasing the "toughness" of the response will increase the deterrent effect of the youth justice system and decrease the levels of adolescent crime. Unfortunately, as discussed in Chapter 2, deterrence is a theory of sentencing, and in practice increased sanctions for young offenders did not reduce crime rates. For the most part, a deterrent-based approach to crime is premised on rationality and judgment. Adolescents, especially those prone to committing more serious or repeat offences, invariably lack judgment and self-control, and a more punitive response will not likely affect their behaviour.

While "get tough" advocates rely heavily on deterrence, they place little faith in rehabilitation. Further, their approach often emphasizes notions of accountability, especially for violent offences, as reflected in the slogan: "Adult Time for Adult Crime." To some extent, there is some question as to whether or not adolescence is a distinct stage of life in terms of criminal responsibility, and some critics in the United States have gone so far as to advocate abolition of the juvenile court.[225]

Advocates of these positions generally tend to recognize some value in separating offenders in custody facilities, at least for the majority of adolescents, mainly because of concern about exploitation, different security requirements and programming. For those holding more extreme positions, however, there is little discussion of whether or not immaturity or youth should be a mitigating factor with regard to the length of sentences imposed.

Seldom, if ever, are any of the possible negative effects of longer sentences mentioned by proponents of the "get tough" approach. For some adolescents, the probability for reoffending may increase as a result of longer sentences, especially in more brutal adult correctional environments where they may be revictimized and/or "trained" to commit more serious crimes. Budgetary implications are also rarely discussed by those advocating increased use of custody. If the get tough policy were fully implemented without increased resources, the results would be

[225] See, for example, Regnery, "Getting Away With Murder: Why the Juvenile Justice System Needs an Overhaul," 34 *Policy Review* (Fall 1985): 65; and Ainsworth, "Re-Imagining Childhood", *supra*, note 17 at 1083. In the United States, critics on the left criticize the juvenile justice system for its lack of legal protection, while those on the right disparage its leniency. The more extreme on both ends of the political spectrum drift toward the abolitionist position.

overcrowding and more hostile custodial environments, which would increase the probability of reoffending.

5.2.3 Crime Prevention

Some of the principal elements of the traditional model of criminal sanctioning are directed at the prevention of crime, i.e., deterrence, incapacitation, and rehabilitation. Increasingly, however, there is recognition that the criminal justice system is not the only societal institution that affects the nature and extent of crime, and it may not even be the most important one. A variety of social, educational, economic and policing policies may affect public safety and crime prevention.

The importance of putting crime prevention in a broader social context was endorsed by the Report of the Standing Committee on Justice and the Solicitor General of Canada's House of Commons:

> The Committee accepts that crime will always be with us in one form or another, and will require police, court, and correctional interventions. At the same time, it believes that our collective response to crime must shift to crime prevention efforts that reduce opportunities for crime and focus increasingly on at-risk young people and on the underlying social and economic factors associated with crime and criminality. This comprehensive approach involves partnerships between governments, criminal justice organizations, and community agencies and groups. And it situates the crime problem in a community context and sees its solution as a social question.[226]

The Report covers a number of measures that can be taken to prevent crime by changing community environments, such as improving lighting, and increasing the effectiveness of policing. The Committee recognized the importance of "social development" to deal with such problems as domestic violence, child abuse and poverty, which contribute greatly to the incidence of crime, and emphasized that crime prevention programs should be targeted at youth. For example, the Report recommended the introduction of "violence-prevention education as an integral part of the curriculum in schools across Canada." As well, it recognized the long-term

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[226] *Crime Prevention in Canada: Toward a National Strategy [the Horner Committee Report]*, Standing Committee on Justice and the Solicitor General of Canada's House of Commons (February 1993), at p. 2.

value of reducing crime in the future through programs that provide more adequate and accessible pre-school child care for children from deprived families.

The focus on social development aimed at youth as a means for reducing the level of crime in society was apparent in the Report:

> Crime prevention through social development involves positive interventions in the lives of the disadvantaged and neglected in order to bring about a reduction in deviant tendencies. In other words, reducing crime and creating safer communities involves addressing the social and economic conditions which breed crime. Waller and Weiler define crime prevention through social development in the following way:
>
> [It]...refers to interventions targeted to certain Canadians who are not only socio-economically disadvantaged but are also living through experiences that make a career of persistent crime a probability. Their predisposition to crime starts with their early childhood upbringing and is enhanced by frustration in school, employment and the community.

If childhood neglect and disadvantage are not altered or interrupted, there is a strong likelihood that delinquency and crime will develop in a sequence over time. Waller and Weiler describe this process:

> A history of parental mishandling, family crime, school failure and economic deprivation makes delinquency...probable. Truancy, economic deprivation, and delinquent friends in the early teenage years combine to make delinquency from ages 17 to 20 more likely. Any unstable job record and anti-establishment attitudes, combined with delinquency by age 20, makes criminal behaviour from ages 21 to 24 more likely.[227]

Witnesses from across Canada told the Committee that if it was serious about reducing fear and enhancing public safety, youths at-risk of offending must be identified and they must be given opportunities and environments to reduce their motivation to become offenders, particularly repeat offenders.

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[227] *Ibid*, at 16, quoting I. Waller and R. Weiler, *Crime Prevention Through Social Development*, Canadian Council on Social Development (1985). See also D. Farrington, "Deviance and Implications of Longitudinal Studies for Social Prevention," (1989) 31 *Canadian Journal of Criminology* 453.

Most of the report deals with issues of social policy, community development and law enforcement, but there is some focus on statutory law, with a specific recommendation that the *YOA* and the federal legislation should be amended to give "clear expression" to "Parliament's commitment to crime prevention."

> The Committee agrees that the various actors within the criminal justice system should be offered guidance in the exercise of their respective roles and responsibilities and that such guidance can best be provided in the form of appropriate statements of legislative intention. The Committee also believes that official recognition of the importance of crime prevention will serve as a useful reminder to those responsible for policy development and the administration of programs within the criminal justice system.[228]

While the report does not spell out how youth court judges should take crime prevention into account, it is apparent that this should occur by imposing dispositions that are likely to rehabilitate young offenders.

5.2.4 Community Responsibility

The concept of community responsibility for responding to the problem of youth crime has various meanings. While it may mean more involvement by local communities in establishing police priorities and practices to some, for most the concept is much broader, and refers to involvement by members of the community, as opposed to justice system professionals, in making some of the decisions or providing some of the services for young offenders.

Community responsibility has been an element of the response to juvenile crime in many places throughout history, and to some extent the original Canadian juvenile courts, with their lay judges, may be seen as a community response approach. More recently, some countries have adopted systems of juvenile justice based on community decisionmakers, most notably in the Scottish Children's Panels, where lay volunteers deal with most offences by youth as well as many parental neglect cases.[229]

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[228] *Crime Prevention in Canada*, Standing Committee on Justice, *supra*, note 226 at 27.

[229] See, for example, W.S. Geimo, "Ready to Take the High Road: The Case for Importing Scotland's Juvenile Justice System," (1986) 35 *Catholic University Law Review*: 385.

In Canada, a number of communities have alternative measures programs (section 4 of the *YOA*) and youth justice committees (section 69 of *YOA*) that incorporate elements of community involvement. However, at present, the strongest support for greater community responsibility for youth justice issues is in aboriginal communities. This is reflected in the *Report of the Aboriginal Justice Inquiry of Manitoba*:

> We cannot imagine an effective youth justice system for Aboriginal youth without a substantial measure of control of this system being vested in Aboriginal communities.
>
> In both Aboriginal and non-Aboriginal communities, the intent and purpose of the *Young Offenders Act* are not being realized. This will continue as long as the system ignores the principles of the *Act* and, instead, blindly adopts the processes and procedures that have come to characterize the adult system. The youth justice system must be different. It must truly seek to provide minimal interference to the lives of youth by developing alternatives to...charges and to formal court processing. We believe much could be achieved with a strong determination to implement the *YOA*'s philosophy.
>
> We believe the answer to dealing with the problems of young offenders is to provide services that take into account the culture, background and needs of an Aboriginal young person. The services must be supportive, rather than punitive. Finally, they must be provided by Aboriginal people where possible and, if that is not possible, by individuals educated to work with Aboriginal people and to apply culturally appropriate solutions.[230]

[230] A.C. Hamilton and C.M. Sinclair, *Report of the Aboriginal Justice Inquiry of Manitoba* (1991), at p. 589.

In many places in Canada, significant steps have been taken for increased involvement by Aboriginals in their own communities to deal with those, both adults and adolescents, who violate the criminal law.

5.3 An Agenda for Reform

While each of the approaches discussed in this chapter is distinctive, there are also significant similarities. All advocates of change believe that youth crime is a serious social problem in Canada, with costs for victims, offenders and society as a whole. Further, there is a widespread belief that Canada is not responding as effectively as it could to the problem of youth crime, and some new actions should be taken. It is also important to note that almost all proponents of change in Canada seem to recognize the need for a youth justice system that is separate and distinct from the adult system.

While the primary focus of this report has been on principles governing the state response to youth crime, a few comments are offered about some of the specific measures that could be undertaken to reshape Canadian society's response to youth crime.

First, it must be recognized that there is a lack of knowledge about many issues related to youth crime and Canada's youth justice system. Thus, there is a strong need to understand how the youth justice system currently functions. Basic statistics on the number of youths in custody at any one time, or the number referred to alternative measures in one year should be more readily available in order to assess how different programs affect youths. More information on recidivism is also needed.

It is also important to learn more about rehabilitation and deterrence. Some of the questions that must be answered are: Can any types of youth crime be effectively reduced through more secure sentencing practices? What types of offenders are amenable to rehabilitation and through which types of programs? What role can improved policing have in reducing levels of youth crime?

As changes are made in our youth justice system, it will be important to study their effects to learn if societal responses are having expected effects, or unintended negative effects.

Despite our lack of knowledge, it seems clear that the best hope for reducing the incidence of youth crime in Canada is based on the crime prevention strategies in the 1993 House of Commons Committee report. The limits of laws must be recognized. Unless there are changes in how society treats young people and their

families, changes in the behaviour of youth are not likely to occur. To have an effect on behaviour, it is necessary to have appropriate programs and policies in place for education; pre-school child care; child and adolescent mental health; labour force integration for youth; the special problems for visible minority and aboriginal youth; and substance abuse by youth. Greater involvement by educators, police, and social service providers in crime prevention may be the best way to reduce adolescent criminality.

While the most effective measures to reduce youth crime must involve broad crime prevention strategies, changes to the youth justice system should also be considered. There are many problems in the administration of the system which, in Canada, is the primary responsibility of provincial and territorial governments. Delay in the court system, for example, is a serious problem affecting community and victim perceptions, and can undermine any possible deterrent effect of court sanctions.

Governments, in conjunction with law societies, could take steps to ensure that all lawyers who represent adolescents have adequate training and knowledge. Even though this would not directly reduce crime, it would ensure that financial resources for protecting due process rights are well spent, and would enhance the understanding youths have of their court experience. It could also lead to better decisions, as fuller information may be brought to the attention of judges.

It is important for young offenders programs, such as those providing alternative measures and youth custody, to be monitored and assessed to ensure they provide appropriate services, particularly when they involve rehabilitation. It is also essential to ensure that youth corrections programs are adequate, and in particular that there are adequate community-based programs and facilities with sufficient rehabilitation and educational resources. Finally, there should be better training for those who work with youth offenders to ensure they are familiar with laws and services. This is especially true for crown prosecutors and police officers, who must deal with a broad range of criminal cases, not just cases involving adolescents, and who may sometimes view youth cases as less important than those involving adults.

From the foregoing discussion, it is evident that changing the *YOA* alone will not have a major impact on the levels of youth crime. It is important for Parliament to review this legislation, however, to ensure that it does provide an appropriate balancing of societal objectives.

Any age-based jurisdiction has an element of arbitrariness, and the present *YOA* jurisdiction has the clear advantage of roughly conforming to the age range of adolescence and secondary schooling. However, some reconsideration of age jurisdiction may be appropriate, particularly at the lower end.

It was widely accepted when the *YOA* was enacted that uniform national age jurisdiction was constitutionally required. In provinces like Ontario, there was opposition to raising the minimum age of adult court jurisdiction from 16 to 18 years, though other provinces, like Quebec and Manitoba, already had the higher age and were supportive. Some of the opposition reflected financial concerns, as 16- and 17-year-olds were shifted to a more resource-intensive, rehabilitative system, but there was a common feeling that some 16- and 17-year-olds have the physical size and behaviour patterns of young adults. However, in light of Canada's international commitments through the *United Nations Convention on the Rights of the Child*, and its general approach to the legal, social and economic achievement of "adulthood," there seems to be little justification for lowering the maximum age of *YOA* jurisdiction.[231] Despite their physical appearance, most 16- and 17-year-olds lack the psychological, emotional, economic, and physical maturity of adults, as is reflected in laws governing citizenship, voting, and welfare eligibility. Placing large numbers of 16- and 17-year-olds in adult correctional facilities would have only negative effects on their possible rehabilitation.

While relatively few crimes are committed by children under 12 years of age, in too many jurisdictions in Canada there is little effective intervention for children in that age group who commit crimes. In theory, child protection services should deal with this problem. The reality is that all too frequently child protection agencies have heavy caseloads and place a low priority on children whose actions may be considered criminal. There is significant evidence to indicate that, for those youth most prone to violence or to reoffending, early intervention in their lives would help to reduce the prospects of further criminal behaviour. Lowering the minimum age of the jurisdiction of the *YOA* might facilitate the introduction of appropriate programming. In general, increasing the severity of sanctions may not have any deterrent effect on youth crime, but the absence of any effective legal intervention for children under 12 years can only serve to encourage criminal activity in this impressionable age group, especially since current policing strategies for them are limited.

As discussed in Chapter 2, for most individuals age 12 marks the beginning of adolescence, which justifies treating those under 12 years differently. Pre-adolescents are at different physical, emotional, intellectual, and moral stages of development, and they have little comprehension of the court process and their involvement in it. A preferable response to their offending behaviour would be one that provides for some long-term involuntary intervention in their lives, but more

[231] In *R.* v. *D.O.L.*, [1993] S.C.J. 72, the Supreme Court of Canada cited the Convention as justifying a provision of the *Criminal Code* allowing all "children" under age 18 to give videotaped testimony in child sexual abuse trials. The court observed that this "international convention...demands that Canadian children under the age of 18 be protected as a class."

clearly focusses on their welfare than the present *YOA*. If appropriate provincial action is not forthcoming, serious consideration should be given to lowering the age jurisdiction, perhaps to 10 years old.[232] Most 10-year-olds understand the basic concepts of right and wrong, with limited judgment and moral development, and this could justify some form of criminal law response. If the age is lowered, there should be some restrictions on the types of dispositions that can be imposed, with the criminal law response as a last resort for this younger age group.

Currently, most public controversy surrounding the *YOA* relates to sentencing, especially for violent and repeat offenders. It must be acknowledged that the *YOA* through its Declaration of Principle and sentencing provisions, provides little real guidance to youth court judges.[233] It is not surprising then that there is wide variation in sentencing patterns for young offenders, and misconceptions and misapprehension by the public. There are also widespread concerns among youth justice professionals that custody is being used too extensively for non-violent offenders, who form the majority of youth placed in these facilities.

Serious consideration must be given to presenting clear guidelines for youth court sentencing.[234] Some American states have adopted presumptive sentencing ranges for juvenile offenders, based on current offence and prior record.[235] Other states have enacted laws that require judges to consider only specified factors.[236]

Adopting presumptive sentencing grids would mark a clear philosophical shift, placing greater emphasis on accountability, and arguably deterrence, and less emphasis on rehabilitation, although rehabilitative concerns might still be taken into account to vary sentences from those on the grid. While a sentencing grid for young offenders in Canada would be the most effective manner of reducing disparities in sentencing, one major problem is that it would ignore geographical variation in availability of different types of correctional resources, as well as interprovincial

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[232] Ten is the minimum age in Britain, with a requirement that the Crown prove that children have the necessary mental capacity to be held accountable.

[233] Subsections 24.1(3) and (4) do impose some limited restrictions on the use of secure custody.

[234] This has, for example, been advocated by J.P. Brodeur, "Some Comments on Sentencing Guidelines", in L.A. Beaulieu, ed., *Young Offenders Dispositions: Perspectives on Principles and Practice* (Toronto, Wall & Thompson, 1989).

[235] Washington is a prime example. See, for example, T.C. Castellano, "The Justice Model in the Juvenile Justice System: Washington State's Experience," (1986) 8 *Law and Policy* 479.

[236] Iowa, Oklahoma and North Carolina for example; see Feld, "The Juvenile Court Meets", *supra*, note 42 at 850.

variation in youth policy and philosophy. It would also be much more difficult to take account of personal circumstances, gender, and race.

While sentencing grids may not be appropriate, there should be few objections to having a clearer statement of sentencing objectives in the *YOA*. There could, for example, be a direction that youth court judges should only consider such factors as the seriousness of the offence, the degree of violence involved, the culpability of the juvenile, and the prior record and age of the youth. Such an articulation of principles could preclude the use of rehabilitative concerns as the basis for imposing longer sentences on youth, though these concerns might justify a less restrictive, more treatment-oriented disposition than the offence would otherwise warrant.

Clearer guidelines emphasizing accountability may help to restore public confidence in the youth justice system, and could give youths a greater sense of being dealt with fairly. There could also be more specific provisions for violent offences, that might mean longer incarceration for the offenders, ensuring protection for society, at least for the period in custody. Rehabilitative concerns could continue to be a factor in sentencing, and should be especially important as a youth corrections philosophy. Further, it should be clear that to the greatest extent possible, non-violent youths should be subject to community-based dispositions, which appear to have the greatest rehabilitative prospects.[237]

There are other changes that could be considered for youth court sentencing provisions, for example, to increase the maximum sentence for murder from five years less a day to seven or ten years. There would, however, be constitutional difficulties with this proposal. Youths facing the possibility of a sentence of five years or more would be entitled to a jury trial under the *Charter of Rights*, and such trials could not be held in the youth courts as presently constituted.[238] Further, if young offenders were to receive long sentences they would inevitably be transferred to adult correctional facilities when they reached adulthood.[239] Situations requiring

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[237] See, for example, P. Gendreau, "Does 'punishing smarter' work? An assessment of the new generation of alternative sanctions" (1993). Ottawa, Corrections Research, Ministry Secretariat, Solicitor General; and D.H. Antoniwicz and Robert R. Ross, "Essential components of successful rehabilitation programs for offenders" (in press 1994), *International Journal of Offender Therapy and Comparative Criminology*.

[238] Section 11(f) of the *Charter of Rights* requires jury trials if the maximum possible sentence is more than five years. Almost all youth courts in Canada are at present Provincial Courts, which under section 96 of the *Constitution Act* probably cannot conduct jury trials.

[239] See section 24.5 of the *YOA*.

such long sentences can be dealt with adequately under the present transfer provisions.

Closely related to public concerns about sentencing are issues involving transfer to adult court. The transfer provisions of the *YOA* were amended in 1992. While there are disparities in how the courts are applying these new provisions, it is apparent that some youths accused of very violent crimes, who might not have been transferred under the old provisions, will now be transferred.[240]. Until it is clear how the courts will interpret the new transfer sections, which will probably require a Supreme Court of Canada decision, further amendments might seem premature.

Since the present transfer provisions already place the "protection of the public" in a paramount position, there is a concern that further amendments could involve automatic transfer for certain offences, presumably based on the view that social accountability, deterrence and incapacitation are the sole considerations, and individual concerns about possible rehabilitation or even diminished accountability due to immaturity are to be ignored. Unfortunately, such an approach would ignore the long-term risks to society from transferring of adolescents into adult prisons where they may become more dangerous — and from which they ultimately will be released.[241]

Police and prosecutors have expressed concerns about some of the "due process" provisions of the *YOA*, most notably section 56 dealing with the admissibility of statements. Most of the due process provisions of the *Act* seem to be working reasonably well, and fundamental changes would be contrary to the *Charter*. However, section 56, which has been strictly interpreted by the courts, might be amended. While this provision encourages police respect for the legal rights of youths, there may be cases where its application has been unduly technical and served to undermine respect for the administration of justice. A strong argument can be made for a provision that would allow some form of residual judicial discretion to admit statements where there has been a technical violation of section 56, but which would require exclusion if the court is satisfied that "having

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[240] See, for example, *R.* v. *D.C.*, [1993] O.J. 1975 (C.A.). A 15-year-old charged with first-degree murder was transferred. The court discussed the impact of the 1992 amendments.

[241] For example, in *R.* v. *M.K.*, [1993] O.J. 1400 (Ontario Provincial Court), affd. [1993] O.J. 2301 (Ontario, California) Judge Weisman decided not to transfer a youth 14 years of age at the time he was charged with first-degree murder, because the judge felt that he was amenable to treatment in the youth system, and would not pose a significant risk after release. The judge remarked:

> this youth...will, in all probability, be back in the community for many years whatever the term of incarceration imposed....Clearly where the offender is treatable, the public is less protected [if he is transferred].

regard to all of the circumstances the admission of it...would bring the administration of justice into disrepute." This is the approach to the exclusion of evidence obtained in the violation of the *Charter of Rights* that sets the standard Canadian police generally strive for. It may be difficult to justify a higher standard for exclusion of the evidence, in addition to the greater protection for legal rights.

One situation where the rights of youths are not fully respected at present is in pre-trial detention. As discussed in Chapter 4, there is significant evidence that social welfare or punitive considerations may be influencing some judges at this stage of proceedings. Not only is this inconsistent with the presumption of innocence and the due process rights of youths, it can also be highly disruptive to their lives, as well being costly to society. Consideration might be given to statutory reaffirmation of the limited grounds for pre-trial intervention in the lives of alleged young offenders, as well as extension of programs to provide adequate non-custodial care or supervision for adolescents.

Another issue that must be considered is the restrictions on information sharing imposed by the *YOA*. In general, the protection of privacy provisions in the *Act* are consistent with the principle of limited accountability, and serve to promote the rehabilitation of young offenders. They reflect the reality that adolescence is a time of limit testing; in general, individuals should not face life with records of the mistakes of their youth. Some of the demands for more publicity probably reflect a thirst for sensationalism, and should be ignored. There may, however, be some provisions of the *YOA* that are being interpreted to unduly restrict information sharing between professionals, such as police, teachers and therapists. These provisions should be carefully studied to ensure that those who work with youths and young adults have sufficient information to do their jobs effectively.

5.4 Conclusion

The legal responses Canada has adopted to deal with youth crime have changed greatly in the past century, and even in the past decade. There is every reason to expect these responses will continue to evolve in the future. The attempt in this report has been to provide a background and framework for the discussion and debate now being carried on about the future of Canada's youth justice system, and this chapter has offered some comments about some of the more specific issues of controversy.

By understanding the principles and concerns that led to the development of the law as it now exists, and being aware of the relationships between different issues, it is easier to appreciate specific issues. Any process of reforming of our present youth justice system will be enhanced only if those involved appreciate the

complex balancing of often competing principles and interests that has shaped our present laws, and are aware of the difficulties that will confront those seeking meaningful change.

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