
NOTE

The Young Offenders Act: Principles and Policy — The First Decade in Review*

It has been eleven years since the Parliament of Canada passed into law the *Young Offenders Act*, which serves today as Canada's guiding piece of juvenile justice legislation. When the legislation was first passed in 1982, it was received with substantial support from across the ideological spectrum. Today, however, that support has eroded considerably and a consensus has developed that reform to the legislation is necessary. In this note, the authors argue that the growing dissatisfaction with the *Act* can be traced in large part to two fundamental types of ambiguities contained within the *Act*. First, the *Act* as a whole represents a compromise between a variety of often contradictory philosophies. Second, the central and guiding principles contained within the *Act* lend themselves to a multiplicity of possible interpretations. These ambiguities, the authors argue, have resulted in an unacceptable level of judicial discretion and a lack of consistency in the law.

Building upon these criticisms, the authors propose that the general guiding principles contained in the *Act*'s "Declaration of Principle" should be removed and replaced with more specific and contextual principles. In the first part of the note, the authors examine the twenty-year political and philosophical process leading up to the passage of the *Act* in 1982. They argue that, while important and valid policy proposals were made during the 1960s and 1970s, many of the suggested reforms to juvenile justice were lost during the late 1970s when important philosophical and political compromises were made during the drafting process for the *Act*. In the second part of the paper, the authors demonstrate how these compromises resulted in philosophical and linguistic ambiguities in the legislation itself by analysing the central principles of "special needs," "protection of society" and "least possible interference with freedom" used throughout the *Act*.

Il y a maintenant onze ans, le Parlement du Canada adopta la *Loi sur les jeunes contrevenants*, qui demeure la principale loi régissant les rapports entre les jeunes et le système judiciaire. Lors de son adoption en 1982, la *Loi* fut accueillie avec enthousiasme par tous les courants idéologiques. Aujourd'hui, cet appui s'effrite, et un consensus s'est développé voulant que la *Loi* soit modifiée. Dans cette note, les auteurs prétendent que ce nouveau consensus s'explique par deux ambiguïtés fondamentales dans la *Loi*. Premièrement, la *Loi* est le fruit d'un compromis entre plusieurs philosophies contradictoires. Deuxièmement, les principes fondamentaux énoncés dans la *Loi* sont susceptibles d'une multiplicité d'interprétations différentes. Ces ambiguïtés, nous disent les auteurs, confèrent trop de discrétion aux juges et rendent la *Loi* incohérente.

Poursuivant leur analyse, les auteurs suggèrent que les principes généraux énoncés dans la « Déclaration de principes » de la *Loi* soient supprimés et remplacés par des principes plus limités et plus précis. Dans la première partie, ils examinent l'évolution politique et philosophique durant les vingt ans précédant l'adoption de la *Loi*. Les auteurs prétendent que bon nombre d'idées intéressantes proposées au cours des années 60 et 70 furent abandonnées dans d'importants compromis philosophiques et politiques à la fin des années 70 au moment de la rédaction de la *Loi*. Dans la deuxième partie, par le biais d'une analyse des principes de « besoins spécifiques », « la protection de la société » et « un minimum d'entraves », les auteurs démontrent que ces compromis ont donné lieu à des ambiguïtés philosophiques et linguistiques dans la *Loi* elle-même.

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Introduction

The *Young Offenders Act*¹ was passed into law on July 7, 1982, replacing the *Juvenile Delinquents Act*,² which had served for seventy-four years as the primary piece of juvenile justice legislation in Canada. There is little disagreement today that the changes introduced in the *YOA* were significant, constituting perhaps what some authors have characterized as a "revolution"³ or "paradigm-shift"⁴ in juvenile justice philosophy. However, the nature and success of this revolution is still in doubt. On the one hand, many academics have interpreted the *YOA* as a conservative retreat from the "rehabilitative ideal"⁵ under the *JDA* to a more punitive and legalistic approach.⁶ On the other hand, many in the media have characterized the *YOA* as overly liberal and unable to provide sufficient protection for the public from juvenile crime.⁷ Thus, eleven years after the *YOA* was passed, there appears to be a consensus that reform is necessary but great disagreement concerning the type of reform required.

Without question, part of the disagreement about the future of juvenile justice springs from fundamental philosophical differences within Canadian society. The problem of young people in conflict with the law has always been con-

¹*Young Offenders Act*, R.S.C. 1985, c. Y-1, enacted as S.C. 1980-81-82-83, c. 110, proclaimed in force 2 April 1984, SI 84-56, C. Gaz. 1984.II.1534 [hereinafter *YOA*].

²*Juvenile Delinquents Act*, R.S.C. 1970, c. J-3 [hereinafter *JDA*]. The *JDA* was first assented to 20 July 1908, S.C. 1908, c. 40.

³A.W. Leschied, P.G. Jaffe & W. Willis, eds., *The Young Offenders Act: A Revolution in Canadian Juvenile Justice* (Toronto: University of Toronto Press, 1991).

⁴M.G. Aultman & K.N. Wright, "The Fairness Paradigm: An Evaluation of Change in Juvenile Justice" (1982) 24 Can. J. Crim. 13.

⁵Under the *parens patriae* philosophy of the *JDA*, rehabilitation of children was the paramount goal. This was seen to distinguish the juvenile system from its adult counterpart which had punishment as a paramount goal. See *infra* notes 26-32 and accompanying text.

⁶For example, T.C. Caputo has argued that, in the late 1970s, high unemployment and rising crime rates produced a fertile environment for law and order campaigns in which calls for greater protections from crime were paramount. Caputo notes that "the proponents of the justice model have been able to exert a great deal of influence during this period of conservatism in Canada" (T.C. Caputo, "The Young Offenders Act: Children's Rights, Children's Wrongs" (1987) 13 Can. Pub. Pol. 125 at 138). Similarly, W. Wardell has observed in relation to the *YOA* that "[m]ore rights are granted but considerably more responsibilities are also imposed. Without sufficient resources the punishment aspect may be resorted to by courts by default of having few palatable alternatives" (W. Wardell, "The Young Offenders Act" (1983) 47 Sask. L. Rev. 381 at 388). P. Havemann has argued that the *YOA* constituted a shift in emphasis from "child saving" to "child blaming," pointing to the "co-optation of the justice model to legitimate the law and order concerns of the Right ..." (P. Havemann, "From Child Saving to Child Blaming: The Political Economy of the Young Offenders Act 1908-1984" in S. Brickey & E. Conack, eds., *The Social Basis of Law: Critical Readings in the Sociology of Law* (Toronto: Garamond Press, 1986) 225 at 225, 234-35).

⁷Since the *YOA* was enacted into force, there have been numerous complaints that the juvenile justice system is too lenient and that dangerous young offenders are profiting from the plethora of "loopholes" available under the *YOA*. E.g., "Young Offenders Act Overindulges Our Young" *Vancouver Sun* (25 May 1984) A5; "Youth Courts Too Soft, Provincial Report Says" *Winnipeg Free Press* (16 January 1986) 20; "Youths Sentenced to 'Pool, Cigarettes'" *Halifax Chronicle Herald* (12 February 1988) 1; "Canadians Want Gangs Tried in Adult Court: Poll" *Montreal Gazette* (2 April 1989) A8; "Teenage Violence National Disease" *Calgary Herald* (4 April 1991) A3; "Silence Cloaks Young Offenders: Expert Estimates Only a Few Youths Are Ever Charged" *Calgary Herald* (31 March 1993) B1.

roversial.⁸ However, it is our contention in this Note that much of the discontent with the YOA stems from the fact that the Act contains fundamental ambiguities. This ambiguity is manifested in two ways. First, the Act does not fully represent one philosophical position or another. Rather, it is an uncomfortable compromise between a variety of often contradictory philosophies. Second, the central and guiding concepts used throughout the Act lend themselves to a multiplicity of possible interpretations.

The ambiguity of the Act's guiding principles is reflected in particular in the section 3 "Declaration of Principle" which is intended to guide judicial interpretation of the Act.⁹ While paragraph 3(1)(a) states that "young persons should not in all instances be held accountable in the same manner or suffer the same consequences for their behaviour as adults," it also states that "young persons who commit offences should nonetheless bear responsibility for their contraventions." While paragraphs 3(1)(d) and (f) state that "the rights and freedoms of young persons include a right to the least possible interference with freedom" and that the court should consider "taking no measures or taking measures other than judicial proceedings," they also state that the court must balance this with the "protection of society." While paragraph 3(1)(c) states that young offenders require "supervision, discipline and control," it also states that they have "special needs and require guidance and assistance."

⁸See e.g. text accompanying *infra* notes 12-22.

⁹S. 3(1) reads as follows:

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;
- (b) society must, although it has the responsibility to take reasonable 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 in 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.

Section 3 states that the courts should "liberally constru[e]" the *YOA* in accordance with the Declaration of Principle. However, as each of the principles in section 3 triggers a number of considerations, the courts are not provided with clear guidance either as to the specific meaning of the applicable principles or as to their relative priority. This has resulted in a distressing lack of consistency and predictability in the law.

In this Note, we will seek to gain an understanding of the reasons for this lack of consistency and predictability and to suggest a solution. In the first part, we will examine the history of the process of reform to the *JDA* during the 1960s and 1970s which, we believe, helps to explain much of the ambiguity inherent in the Act. We will argue that important and valid criticisms were made during this period of the individualized, treatment-based approach to juvenile justice found under the *JDA*. Such criticisms led to widespread calls during the early 1970s for "decriminalization," "deinstitutionalization" and "diversion." Unfortunately, many of these suggested reforms were forgotten or ignored during the late 1970s as important philosophical and political compromises were made during the *YOA* drafting process.

In the second part of the Note, we will argue that the compromises made in the drafting of the *YOA* have produced substantial philosophical and linguistic ambiguities in the Act itself. By analyzing the application of the principles of "special needs," "protection of society" and "least possible interference with freedom" as basic interpretative guidelines in a variety of contexts under the *YOA*, we will show how each has led to confusion and inconsistency in the application of the Act. The ambiguous nature of these principles, we believe, has necessitated the exercise of an unacceptable level of judicial discretion under the *YOA*.

In this respect, a distinction must be made between two types of discretion. Often, legislators intend to confer a measure of discretion to the courts to ensure that the legislation is efficiently and flexibly applied. In such contexts, the judicial exercise of discretion is both necessary and desirable. However, this must be distinguished from the unintended conferral of discretion which arises when legislative language is drafted without sufficient precision. In such cases, the legislating is left by default to courts. And, in our opinion, this is exactly what has occurred under the *YOA*. Individual judges, faced with the wide array of goals or philosophical approaches contained in the Act, are often forced to apply their own personal juvenile justice philosophies or preferences because of a lack of guidance from the *YOA*.

Accordingly, we will suggest that the Declaration of Principle, and the ambiguous concepts used therein, should be removed or de-emphasized under the *YOA*. Rather than laying down broad and vague goals in a catch-all "Declaration of Principle," the legislators should be more concerned with establishing specific goals in relation to specific issues addressed by the Act. By taking a contextual look at sections relating, for example, to transfer, sentencing, or confessions, and determining for each which principles should be given priority, the Act would be more sensitive to the different considerations and different priorities brought into play in relation to each of these sections.

In employing this contextual approach, we believe that the legislators should look more carefully at the critiques made of the *JDA* by reformers during the 1960s and 1970s. For, while the *YOA* was clearly intended to revolutionize Canadian juvenile justice, many of the assumptions and principles which guided the *JDA* continue to have an influence under the *YOA*. Indeed, as we will show, issues relating to "rehabilitation," "criminalization" and "institutionalization" continue to play a significant and growing role in Canadian juvenile justice. This, we believe, is as much a mistake today as it was under the *JDA*.

I. The Juvenile Justice System: A Process of Reform

A. *The Juvenile Delinquents Act*

When the *YOA* was given Royal Assent in 1982, it marked the culmination of a twenty-year process of reform of its predecessor, the *JDA*. By the late 1970s, opposition to the *JDA* had become widespread and advocates across the ideological spectrum were agreed that fundamental changes had to be made to the juvenile justice system in Canada.¹⁰ In order to put the *YOA* in context, it is essential to understand why critics objected to the philosophy contained in the *JDA*. For much of the content of the *YOA* is best understood not as part of a comprehensive philosophy but as a response to specific criticisms made of the *JDA*.

The *JDA*, introduced as law in 1908, has often been characterized as being philosophically close to what Reid and Reitsma-Street call the "welfare" model of juvenile justice.¹¹ The welfare model, as they describe it, places a high priority on the court's role in assessing the child's history, and on treatment or rehabilitation in place of mere punishment. This, however, provides only an incomplete description of both the *JDA* and the concerns that led to its introduction. In fact, the concerns motivating legislators in 1908 were two-fold: helping to better the welfare of children and protecting society from juvenile crime and moral degradation.

At the end of the nineteenth century, a movement of social reformers¹² and church workers was growing in response to two perceived and interrelated problems: a disturbing expansion in juvenile crime and vagrancy¹³ and the harsh and

¹⁰In the *House of Commons Debates* (15 April 1981) at 9307-28, (12 May 1981) at 9493-524, (15 May 1981) at 9643-61, (29 May 1981) at 10072-92, all three parties approved of the major changes introduced in the legislation. See *infra* notes 162-163.

¹¹S. Reid & M. Reitsma-Street, "Assumptions and Implications of New Canadian Legislation for Young Offenders" (1984) 7:1 *Can. Crim. Forum* 1 at 4.

¹²The "social work" profession emerged in the late nineteenth century. See generally G. Parker, "The Century of the Child" (1967) 45 *Can. Bar Rev.* 741 at 747.

¹³As early as 1857, for example, a trustee of the Toronto Board of Schools stated that "[t]he idleness and dissipation of a large number of children, who now loiter about the public streets or frequent the haunts of vice, creating the most painful emotions in every well-regulated mind; and in some degree involving the imputation, that the social condition of the body corporate of which they form a part, cannot be of the highest order" (The Hon. John Elmsley, Toronto Board of Trustees, *Minutes*, 6 December 1847, cited from S. Houston, "Victorian Origins of Juvenile Delinquency: A Canadian Experience" (1972) 12 *Hist. of Ed. Q.* 254 at 256-57).

inadequate treatment of children in reformatories and industrial schools.¹⁴ On the one hand, the reformers looked around and saw a disturbing number of destitute and aimless children causing trouble in the streets. On the other hand, they saw that the social facilities set up to deal with this growing problem were woefully inadequate. These concerns thus became linked in the minds of the reformers. As one judge observed: "an ulcer is eating into the vitals of our social system in the shape of crowds of people growing up in neglect and ignorance, rapidly ripening into crime, too many of them destined to form the chief population hereafter of our gaols and Penitentiaries."¹⁵

Seen in this way, the impulse to "save" children came hand-in-hand with the impulse to protect society, because those children who were not properly socialized could later grow up to be dangerous criminals. What the reformers wanted was a more adequate social and legal system for "the protection and reclaiming of destitute youths, exposed either by death or neglect of their parents to evil influences and the acquisition of evil habits, which in too many cases, lead to the commission of crime."¹⁶

While these concerns grew in the minds of social reformers, a possible response was developing in the form of the positivist revolution in criminological thought. Until the late 1880s, criminology had been dominated by the so-called "classical" school, which was based on a conception of "man" as a rational contractor whose liberty could be infringed by the state only to the extent that his crime violated the "social contract."¹⁷ The classical school stressed the importance of clear and precise laws, adjudications based on guilt with protections for the accused, and proportionality between the seriousness of offences and the punishments imposed for these offences.¹⁸

The positivists, however, rejected the classicist approach to crime because they believed that the criminal was propelled by forces over which he or she had no control. In contrast to the classicists, who constructed their approach to crime on the assumption that human beings were "rational," the positivists made it

¹⁴See generally J.S. Leon, "The Development Of Canadian Juvenile Justice: A Background For Reform" (1977) 15 Osgoode Hall L.J. 71 at 84-86.

¹⁵*Toronto Globe* (9 January 1857) 2.

¹⁶Preamble to *An Act to Incorporate the Boys' Industrial School of the Gore of Toronto*, S. Prov. C. 1862, c. 82.

¹⁷The definitive formulation of this view was Cesare Beccaria's *On Crimes and Punishments* (Indianapolis: Bobbs-Merrill, 1963), which was written in 1764. See also T. Hobbes, *Leviathan*, C.B. Macpherson, ed. (London: Penguin, 1981) at 189-90. See generally I.R. Taylor, P. Walton & J. Young, *The New Criminology: For a Social Theory of Deviance* (London: Routledge & Kegan Paul, 1973) at 1-7.

¹⁸These followed logically from the assumption that the basis for punishment is the necessity to restrain citizens from encroaching upon each other's freedom as defined by the terms of the social contract. The classicists stressed the need for predictable and consistent punishments, as this would enable the rational potential criminal to weigh the possible penal consequences of his or her criminal activity. Thus, for example, the classicists argued that the laws of society must apply equally to all members of society since all are considered to be equal contractors. Moreover, judges must ensure that the severity of punishment fits the severity of crime so as to ensure that the laws are seen as rational and certain. See generally H. Mannheim, *Pioneers in Criminology* (Montclair: Patterson Smith, 1973).

their goal to apply the scientific method to a study of the causes of human behaviour: "Positivism saw its role as the systematic elimination of the free will 'metaphysics' of the classical school — and its replacement by a science of society, taking on for itself the task of the eradication of crime."¹⁹

In the late nineteenth century, this rise to prominence of positivism as a criminological theory provided social reformers with a compelling solution to their concerns about the welfare of the young and the protection of society. For if, as the positivists claimed, crime and delinquency were to be understood as a "disease," a system which provided the proper treatment for deviants at a young age would "cure" delinquents and, at the same time, serve to protect society. Accordingly, it became popular to state that juvenile offenders should never, as a report at the time cautioned, "be treated or spoken of as criminals, but should be studied and dealt with in exactly the same way that a sick or defective child is handled."²⁰ If the children were wayward, argued the reformers, it was as a result of the evil influence of society or the neglect of parents.²¹ In the opinion of the reformers, then, there was little distinction between the neglected and delinquent child as this distinction related only to whether the child was potentially or actually criminal.²²

Ultimately, positivist principles proved highly influential in the drafting of the *JDA*. The combination of concerns about the welfare of children and the need for treatment formed the cornerstone for the philosophy of the legislation. In drafting the *JDA*, "the reformers undertook the delicate task of attempting to design new procedures which promoted simultaneously the welfare and best interests of children ... and controlled the misbehaviour of children ..."²³ This task was facilitated by the positivist-inspired belief that human beings were malleable products of their environment who could be "treated" and "cured."²⁴ Stating that the juvenile delinquent should be treated "not as an offender, but as one in a condition of delinquency and therefore requiring help and guidance and proper supervision,"²⁵ the *JDA* conceptualized the court's role as that of a surrogate parent, intervening if other institutions such as the family or the schools

¹⁹Taylor *et al.*, *supra* note 17 at 10.

²⁰Ontario, Legislative Assembly, "Fourteenth Annual Report of the Department of Neglected and Dependent Children of Ontario" in *Sessional Papers* (1907) 39(7), No. 35 at 15. See N. Boyd, "The Circularity of Punishment and Treatment: Some Notes on the Legal Response to Juvenile Delinquency" (1980) 3 *Can. J. Fam. L.* 419 at 427.

²¹ [Many were convinced] that a science of society existed and that the only way in which social problems could be solved was by a socialization of the sectors of society which produced or were the victims of most of the evils. ... Closely related was the idea that society had to be protected against the undesirable forces which could destroy it. Social hygiene or social defence demanded that the respectable middle class values of society be preserved by removing the cancer of poverty, misery and degradation of child life in the slums and streets of Britain, the United States and Canada (Parker, *supra* note 12 at 747).

²²Houston, *supra* note 13 at 263.

²³Leon, *supra* note 14 at 72.

²⁴N. Bala, "The Young Offenders Act: A New Era in Juvenile Justice?" in B. Landau, ed., *Children's Rights in the Practice of Family Law* (Toronto: Carswell, 1986) 238 at 239.

²⁵*JDA*, *supra* note 2, s. 3(2).

failed to socialize the child properly. Modelling their approach on the *parens patriæ* jurisdiction of the English Chancery Court,²⁶ the drafters of the Act intended the juvenile court to adopt the role of a "wise and kind, though firm and stern, father... [asking] not, 'What has the child done?' but 'How can this child be saved?'"²⁷ As the *JDA* stated:

This Act shall be liberally construed in order that its purpose may be carried out, namely, that the care and custody and discipline of a juvenile delinquent shall approximate as nearly as may be that which should be given by his parents...²⁸

In contrast to classicist limitations on the state's intervention in the life of the criminal, the *JDA* was based on the assumption that the intervention of the state in the life of the child was a good thing. While the classicists sought to limit the court's role by imposing procedural limitations and proportionality of sentencing, the *JDA* contained little in the way of procedural formality and proportionality. The treatment-based philosophy underlying the legislation necessitated a system based on both procedural and dispositional paternalism because the emphasis in the *JDA* was on helping the juvenile delinquent as quickly as possible. For this, an informal and highly discretionary system was necessary. Thus, subsection 17(1) of the *JDA* stated:

Proceedings under this Act with respect to a child, including the trial and disposition of the case, may be as informal as the circumstances will permit, consistent with a due regard for a proper administration of justice.

Children had no explicit right to counsel, appeals were only available by leave of the court, and trials were held in camera.²⁹ Dispositions under the *JDA* could be of indeterminate length and judges had a wide discretion in regard to the types of dispositions available.³⁰ No mention was made in the Act of the child's rights.³¹

In the *JDA*, the twin concern for the protection of society and the effective treatment of delinquent children were combined, under the influence of positivist criminology, to produce legislation giving judges almost unlimited discretion to convict deviant youths and place them into treatment programs. Delinquents were treated as patients and the *JDA* made it clear that they were not to be considered responsible for their actions.

²⁶*Parens patriæ* stands for "father of the country" and the principle was established in *Eyre v. Shafisbury* (1772), 24 E.R. 659. In *R. v. Gyngall* (1893), 2 Q.B. 232 at 248, the court ruled that "the jurisdiction ... is essentially a parental jurisdiction and that description of it involves that the main consideration to be acted upon in its exercise is the benefit or welfare of the child." See G. Côté-Harper, "Age, Delinquent Responsibility and Moral Judgment" (1970) 11 C. de D. 489 at 490 note 5.

²⁷W.L. Scott, "The Juvenile Delinquents Act" (1908) 28 Can. L. Times and Rev. 892 at 892, cited in Leon, *supra* note 14 at 73.

²⁸*JDA*, *supra* note 2, s. 38.

²⁹See *JDA*, *supra* note 2, ss. 37(2) and 12(1). No reference was made under the *JDA* to a right to counsel.

³⁰*JDA*, *ibid.*, s. 20.

³¹See L. Beaulieu, "A Comparison of Judicial Roles Under the *JDA* and *YOA*" in Leschied, Jaffe & Willis, eds., *supra* note 3, 128 at 131-33.

B. *The Origins of Reform*

The *parens patriæ* system of juvenile justice established under the *JDA* reigned supreme and virtually undisturbed in Canada for fifty-four years. While this may be explained in part by the smooth functioning of the juvenile system, a more compelling explanation is that the *JDA* operated in a critical vacuum. The positivist school, born at the turn of the century, blossomed in the early twentieth century. By the 1950s, the whole field of corrections was dominated by behaviourists studying treatment and rehabilitation.³² The early post-war period, according to Young, was the one in which rehabilitation "received its fullest and widest support"³³ and this support was strongest in academic circles where, in the 1950s and 1960s, criminology was being institutionalized at the universities. Fostered in the universities and by social workers up until the late 1960s, *parens patriæ* "remained unchallenged as the dominant correctional ideology."³⁴

In 1962, however, the *JDA* was placed quite suddenly on the political agenda when the federal government appointed a Committee of the Department of Justice to study the problem of juvenile delinquency. The Committee released what would prove to be a highly influential report in 1965.³⁵ This, in turn, formed the starting point for the reform process to follow. In 1967, the Government released a draft bill³⁶ designed to replace the *JDA* and this was followed in 1970 by Bill C-192.³⁷ The Bill died after second reading and, as a result, a Solicitor General's Committee was set up to re-evaluate the reforms contained

³²Professor J.A. Macdonald noted, in testimony at Senate hearings, that the "medical" or "psychiatric" model of delinquency and treatment reached its peak in the 1940s and 1950s. According to the "medical" approach, delinquents were seen to be "acting out emotional conflicts stemming largely from personal and family pathologies." To cure these pathologies, the intervention of highly trained experts in psychological therapies was seen to be required to make the child understand the source of his or her antisocial behaviour (*Proceedings of the Standing Committee on Justice and Legal Affairs*, Issue No. 32 (21 September 1971) at 4-5).

³³P. Young, "Sociology, the State and Penal Relations" in D. Garland & P. Young, eds., *The Power to Punish* (London: Heinemann, 1983) at 98. See also M.W. McMahon, *The Persistent Prison? Rethinking Decarceration and Penal Reform* (Toronto: University of Toronto Press, 1992) at 12.

³⁴F.T. Cullen & K. Gilbert, *Reaffirming Rehabilitation* (Cincinnati: Anderson, 1982) at 82. The dominance of rehabilitation as a philosophy in the universities and among social workers was reinforced by a lack of hard data in the field of juvenile justice. As West notes, prior to the 1960s, very little solid empirical information existed regarding the effectiveness of rehabilitation. The few available research reports often consisted of anecdotes and judges' reminiscences, and these reports were based on the sparse empirical evidence found in police or judicial reports. According to West, empirical criminological research was poorly funded in Canada until the founding of four or five academic centres in the 1960s. As a result, there were no grounds upon which to challenge the *parens patriæ* system. See W.G. West, "Juvenile Delinquency and Juvenile Justice in Canada" in J. Gladstone, R. Ericson & C. Shearing, eds., *Criminology: A Reader's Guide* (Toronto: University of Toronto Centre of Criminology, 1991) at 262.

³⁵Department of Justice, *Report of the Department of Justice Committee on Juvenile Delinquency* (Ottawa: Queen's Printer, 1965) [hereinafter *Report*].

³⁶Ministry of the Solicitor General, *First Discussion Draft: An Act Respecting Children and Young Persons* (Ottawa: Queen's Printer, 1967).

³⁷Bill C-192, *An Act Respecting Young Offenders and to Repeal the Juvenile Delinquents Act*, 3d Sess., 28th Parl., 1970.

in Bill C-192. The Solicitor General released his report in 1975³⁸ and this was followed by draft legislative proposals in 1977 and 1979.³⁹ In slightly altered form, these proposals were introduced in 1981 as Bill C-61⁴⁰ and passed in 1982 as the *YOA*. Ultimately, the process of reform to the *JDA*, which began in 1962, took a full twenty years to complete.

It is clear, in looking back at the process of reform, that the "revolution" in juvenile justice beginning in 1962 was initiated, carried through and funded by the governments of the day. However, the revolution in the content of juvenile justice was in fact led by social scientists, psychologists and social workers. While different governments in the 1960s, 1970s and 1980s were instrumental in funding studies and drafting legislation, the major changes in juvenile justice can be traced to recommendations made by academics in a variety of conferences and consultations.

Why, after fifty years of critical silence, did ideas about juvenile justice begin to change? Most likely, the broadening in thinking concerning juvenile justice occurred as a result of a sudden and substantial growth in the 1960s in socio-scientific information concerning the functioning of juvenile courts and treatment centres. With the institutionalization of criminology as a science at universities and the vast growth of academic work being done in the social sciences, the number of studies relating to juvenile justice increased markedly.⁴¹ The growth in the numbers of academics in the field naturally led to an increase in, and diversification of, the ideas being proposed. Moreover, the range of people writing on juvenile justice in the 1960s became more varied. They were not "insiders" in the juvenile system such as judges, police and social workers but, rather, outsiders with a more dispassionate and critical eye. These new researchers, according to West, "did not subscribe to traditional and conservative assumptions about controlling the young."⁴² They began to criticize both the fundamental philosophical assumptions underlying the *JDA* and the specific practical applications of that philosophy in the courts.

While the criticisms brought against the *JDA* in the 1960s and 1970s were numerous and varied, there were four main developments which proved to be the most influential in the policy process. The first of these was scientific in origin. Early calls for the decriminalization and deinstitutionalization of the juvenile system were inspired by the development of symbolic interactionism, "labelling theory," and developmental psychology as socio-scientific theories. The second was the growth in the numbers of academics and professionals in the 1960s and 1970s who advocated due process rights for children. This "chil-

³⁸Ministry of the Solicitor General, *Young Persons in Conflict with the Law* (Ottawa: Communication Division, 1975) [hereinafter *YPICL*].

³⁹Ministry of the Solicitor General, *Highlights of the Proposed New Legislation for Young Offenders* (Ottawa: Ministry of Supply & Services, 1977) [hereinafter *Highlights*]; Ministry of the Solicitor General, *Legislative Proposals to Replace the Juvenile Delinquents Act* (Ottawa: Solicitor General, 1979).

⁴⁰Bill C-61, *Young Offenders Act*, 1st sess., 32d Parl., 1981.

⁴¹See text accompanying notes 50-63 and notes 69-70.

⁴²West, *supra* note 34 at 262.

dren's rights" movement coincided with, and gained strength from, the larger North American movements for civil and human rights. The third was the growing empirical consensus in the early 1970s that rehabilitation, the cornerstone of the *parens patriæ* system, had not been effective in preventing recidivism. The fourth was the development in the late 1960s and early 1970s of community-based alternatives to prosecution and incarceration known as "diversion."

By describing the criticisms made against the *JDA* in terms of four main developments we do not suggest that there was unanimity of thought within each of these developing "schools" or that there was no overlap between them. However, as it is our intention to trace the policy process, it is fair in this context to describe the criticisms in these terms. While such themes as decriminalization, deinstitutionalization, due process and diversion are representative of clusters of ideas, they were nonetheless adopted as catchwords and used with influential effect by academics and politicians alike throughout the reform process. These themes, taken together and understood as expressions of more complex work being done in academia, formed the basis both for a devastating critique of the *JDA* and for a new approach to juvenile justice.

C. *The Process of Reform*

1. The Justice Committee

In 1962, a five-person committee of the Department of Justice was set up to make recommendations concerning steps that could be taken by the "Parliament and Government of Canada" to address the problem of juvenile delinquency.⁴³ This was the first major study of the *JDA* undertaken by the Canadian government and it was extensive. The preparation of the *Report* took three years and involved consultation with numerous academics, judges, lawyers, social workers and community workers.

At the time, Canada was not alone in launching a full-scale evaluation of its juvenile justice system. The government was perhaps influenced in its appointment of a committee by the appointment of similar committees in the United Kingdom and the United States.⁴⁴ Interestingly, while these various foreign reports were uniformly critical of the juvenile systems in their respective countries, the recommendations in the different reports varied radically. In England and Scotland, the Ingleby and Kilbrandon Committees recommended the abolition of the juvenile courts and the transfer of the juvenile court function to a welfare agency.⁴⁵ By contrast, in the United States, a national study, which

⁴³*Report, supra* note 35.

⁴⁴U.K., *Report of the Committee on Children and Young Persons* (Ingleby Committee) (London: H.M.S.O., 1960) [hereinafter Ingleby Report]; U.K., *Children and Young Persons: Scotland* (Kilbrandon Committee) (Edinburgh: H.M.S.O., 1964) [hereinafter Kilbrandon Committee]; President's Commission on Law Enforcement and Administration of Justice, *Juvenile Delinquency and Youth Crime* (Washington: U.S.P.O., 1967) [hereinafter President's Commission].

⁴⁵See e.g. A.E. Bottoms, "On the Decriminalization of English Juvenile Courts" in R. Hood, ed., *Crime, Criminology and Public Policy: Essays in Honour of Sir Leon Radzinowicz* (London: Heinemann, 1974) 319.

referred to the administration of juvenile justice in many states as a "nightmare," recommended a tightening of procedural safeguards and a greater concern for the protection of the public.⁴⁶

The Canadian committee rejected the English move to a more welfare-based approach to juvenile justice and adopted, to a large extent, a more legalistic, due process-based approach similar to that taken in the United States.⁴⁷ While it may be tempting to conclude that the findings in the Report stemmed from a desire to "get tough" on juvenile crime, a more accurate explanation is that, by 1965, academics and professionals in the United States and Canada had become extremely critical of the *parens patriae* approach to juvenile justice.

There is no question that reports of rising juvenile crime in the 1960s were a source of concern both in the community and in government. When the Report was commissioned in 1962, it is clear that Canadians were aware of what they perceived as a sharp rise in the rates of juvenile delinquency. In a 1961 article, for example, Stitt referred to an increase of 142% in the number of juvenile offences and a 79% increase in the number of offenders from 1959-61 and referred with concern to two headlines he had read recently in newspapers ("Juvenile Delinquency Is On The Rise" and "More Juveniles Than Adults Arrested Today").⁴⁸ However, as we will show, a look at the literature of the period reveals that academics and professionals in the field were far more concerned about the negative effects of the *JDA* than they were about the negative effects of juvenile crime. Thus, it is doubtful that this growing awareness about a rise in crime was in itself the real impetus for reform.⁴⁹ To the contrary, the real impetus for reform was a rising concern about the *JDA* itself.

⁴⁶President's Commission, *supra* note 44 at 31-40.

⁴⁷This can be explained in part as a matter of constitutional reality. While the English unitary state allows the government to combine criminal and welfare functions in one system, the federal division of powers makes this impossible in the Canadian context. Instead, the federal government and the provinces must share jurisdiction over the Canadian juvenile justice system. Thus, while the *JDA*, from its inception, was a piece of federal criminal legislation falling under s. 91(27) of the *Constitution Act, 1867* (U.K.), 30 & 31 Vict., c. 3, the welfare aspects of the juvenile system fell under provincial jurisdiction (ss. 92(13), (14), (16)). If, as in England and Scotland, the federal government were to have abolished the juvenile courts, they would, paradoxically, have lost jurisdiction and control over juvenile justice. This explains why the drafters of the *JDA* felt it necessary to extend the scope of the criminal law by making violations of municipal by-laws and such status offences as "sexual immorality" criminal offences. See R. Fox, "Young Persons in Conflict with the Law in Canada" (1977) 26 I.C.L.Q. 445 at 450-51. The offence of "delinquency" created under the *JDA* was upheld on constitutional grounds in *B.C. (A.G.) v. Smith*, [1967] S.C.R. 702, 65 D.L.R. (2d) 82.

⁴⁸J.M. Stitt, "Corr ection Facilities for the Juvenile Offender — A Comparison of Ontario and the U.K." (1962) 2 Osgoode Hall L.J. 356.

⁴⁹Indeed, the feeling among citizens that juvenile crime was "on the rise" was not unique either to Canadians or to Canadians in the 1960s. Concern with the growing numbers of unruly youth has been a part of society for as long as societies have existed. Indeed, one of the motivating factors in the drafting of the *JDA* was precisely a feeling that juvenile crime was on the rise and that a solution was required. For example, Dr. Charles Duncombe expressed a concern in 1836 about the number of Toronto children with a "ragged and uncleanly appearance" who were using "vile language" and displaying "idle and miserable habits" (cited in L. Johnson, *History of the County of Ontario, 1615-1875* (Whitby, Ont.: Corp. of the County of Whitby, 1973) at 158). See Leon, *supra* note 14 at 76.

Perhaps the most influential of the critiques brought against the *JDA* in the 1960s stemmed from the development of "symbolic interactionism" as a socio-scientific theory.⁵⁰ According to this theory, cognitive development occurs as an "interplay between the active internal forces and the environment in which the individual lives."⁵¹ Symbolic interactionists view both human nature and the social order as malleable and subject to change. This change is manifested in two different ways. On the one hand, they argue, individuals are constantly being modified by taking on the expectations and points of view of the people with whom they interact in intimate small groups. On the other hand, these individuals also contribute to the process of change by helping to shape the groups of which they form a part.

According to symbolic interactionists, then, concepts of self are not biologically determined but, rather, change and develop by way of an individual's relations with parents and society. These concepts are initially based on interactions with family, but as the child begins to interact with new people and groups, the concepts change.⁵² The child's moral development thus takes the form of an evolutionary interaction with social institutions, authority figures and other children. In this sense, the assumptions of symbolic interactionists intersected in broad terms with the positivist assumptions held by many of the reformers in the late 1800s. Both saw human nature as malleable and both saw the moral and cognitive development of youth as being tied to the kind of environment in which a child develops. However, the symbolic interactionists drew a radically different conclusion about possible solutions to the problem of delinquency than the positivists.

As we have seen, the drafters of the *JDA* felt that juvenile delinquents should be treated as a doctor might treat someone who was ill and in need of treatment. This flowed naturally from their assumption that the malleability of juvenile personalities left them open to the reforming influences of a rehabilitation-based juvenile justice system. Just as poor parenting and evil societal influences had "caused" the child's delinquent personality, the positivists believed that experts could "uncause" the evil influences by giving delinquents proper care. Symbolic interactionists, however, turned this conclusion on its head. In contrast to the positivists, symbolic interactionists began to argue that the malleability of juvenile personalities might make them particularly vulnerable to psychological harm under a paternalistic juvenile justice system. In fact, they argued, such a system could have the perverse effect of reinforcing deviance in the very children it was designed to "cure."

⁵⁰Interactionism was first conceived by Charles H. Cooley in 1902 (C.H. Cooley, *Human Nature and the Social Order* (New York: Schocken Books, 1964)) and the symbolic element was developed by George Mead in 1934 (G.H. Mead, *Mind, Self and Society* (Chicago: University of Chicago, 1934)). It was first applied to delinquency by Edwin H. Sutherland in 1939 (E.H. Sutherland, *Principles of Criminology* (Chicago: Lippincott, 1939)). For a general description see L.T. Empey, *American Delinquency: Its Meaning and Construction* (Illinois: Dorsey Press, 1978) c. 13.

⁵¹J.T. Dalby, "Criminal Liability in Children" (1985) 27 *Can. J. Crim.* 137 at 139-40.

⁵²See B. Dickens, "Legal Representation and Due Process in Delinquency Proceedings" (1978) 9 *R.D.U.S.* 201 at 214-16.

On the basis of these assumptions, the symbolic interactionists made two related but different arguments about juvenile delinquency. A first argument was made by Sutherland⁵³ and developed by Cressey.⁵⁴ If it is true, they argued, that delinquent behaviour is the result of deviant motives, values and rationalizations acquired in intimate groups, then the practice of keeping delinquents separate from non-delinquents in detention centres and correctional institutions may do more to encourage than discourage delinquent behaviour. When delinquent juveniles are isolated from law-abiding juveniles and locked up only with each other, the strength of delinquent norms, rationalizations and identities can only increase:⁵⁵ the training schools become a sort of "crime school" for juveniles.

A second argument was made by a sub-school of symbolic interactionism called "labelling theory."⁵⁶ Noting the relation between the development of conceptions of the self and societal interaction, theorists such as Tannenbaum pointed to the enormous symbolic importance of a youth's entry into the juvenile justice system. These theorists believed that many otherwise "normal" children were in fact rendered deviant by the interactive process which followed a charge and conviction of delinquency. By "labelling" certain, often minor, acts as "delinquent," the juvenile justice system produced two related effects. First, the attitude of the community toward the youth charged would harden: "the individual who used to do bad and mischievous things [would] now become a bad and unredeemable human being."⁵⁷ Second, the community's view of the child would have a serious impact on the child's own self-image: "The young delinquent becomes bad because he is defined as bad and because he is not believed if he is good."⁵⁸

This "dramatization of evil," Tannenbaum argued, sets up a self-fulfilling prophecy in which the juvenile justice system serves to foster the very behaviour it was designed to prevent.⁵⁹ Society's wide definition of "juvenile delin-

⁵³E.H. Sutherland & D.R. Cressey, *Criminology*, 10th ed. (Philadelphia: Lippincott, 1978) at 80-83.

⁵⁴D.R. Cressey, "Changing Criminals: The Application of the Theory of Differential Association" (1955) 61 *Am. J. Soc.* 116.

⁵⁵Empey, *supra* note 50 at 321.

⁵⁶Some of the labelling theorists include H.S. Becker, *Outsiders: Studies in the Sociology of Deviance* (New York: Free Press of Glencoe, 1963); J.I. Kituse, "Societal Reaction to Deviant Behaviour: Problems in Theory and Method" in H.S. Becker, ed., *The Other Side: Perspectives on Deviance* (New York: Free Press of Glencoe, 1964) 87; E.M. Lemert, *Social Pathology: A Systematic Approach to the Theory of Sociopathic Behavior* (New York: McGraw-Hill, 1951). Its influence on Canadian juvenile delinquency studies could be detected as early as 1961. See W.T. McGrath, "Some Suggested Amendments to Canada's Juvenile Delinquents Act" (1962) 4 *Crim. L.Q.* 259 at 263, where the author expressed concern that under the *JDA*, a "relatively inconsequential action can bring a child before the court and cause him to be branded a juvenile delinquent ... with all the subsequent danger that he will live up to the new role assigned him."

⁵⁷F. Tannenbaum, *Crime and the Community* (New York: Ginn & Company, 1938) at 17.

⁵⁸*Ibid.* at 17-18.

⁵⁹As Tannenbaum puts it

The process of making the criminal ... is a process of tagging, defining, identifying, segregating, describing, emphasizing, making conscious and self-conscious; it becomes a way of stimulating, suggesting, emphasizing, and evoking the very traits that are

quency" has the effect of "stigmatizing" non-conforming young persons who, under a different societal definition of "delinquency," might otherwise be considered normal.⁶⁰ The stigma of "juvenile delinquency" serves only to emphasize the difference between the child and other "normal" children: "this tagging by society and the ensuing self-branding by the juvenile — is the circle that isolates, tightens and hardens the subculture and ultimately signs it with the Mark of Cain of crime, delinquency or social deviation."⁶¹

Thus, for the labelling theorists, delinquency appears not merely as a pathological or clinical "condition" but as a societal definition of deviant behaviour.⁶² Seen in this way, the positivist pretense to scientific status becomes suspect. Are these experts really "curing" juvenile delinquents of a condition or are they using the coercive power of the criminal law to socialize children according to their own values?⁶³

Symbolic interactionism and labelling theory translated quite easily into the specific criticisms of the *JDA* which were found in the *Report* and elsewhere.⁶⁴ In particular, the Committee in the *Report* placed emphasis on the problem of "stigma." As the Committee noted:

The method of criminal law, at least when employed in relation to any sensitive area of activity, involves an implied characterization of conduct as anti-social. The effect of this is to stigmatize the person of whom the criminal process is invoked and to subject him to the disabilities that are alien to, or subversive of, any protective purpose that might in fact be the subject of the proceeding.⁶⁵

complained of ... [T]he person becomes the thing he is described as being (*ibid.* at 19-20).

⁶⁰For a good summary of work done in relation to labelling and stigma, see P. Walker, "The Law and the Young: Some Necessary Extra-Legal Considerations" (1971) 29 U.T. Fac. L. Rev. 54 at 60-67.

⁶¹S. Shoham & G. Rahav, "Social Stigma and Prostitution" [1967] *Ann. Internat. Crim.* 479 at 492. See also S. Shoham, *The Mark of Cain: The Stigma Theory of Crime and Social Deviation* (Dobbs Ferry, N.Y.: Oceana, 1970).

⁶²As W.R. Delagran put it, "people [do] not become delinquent or criminal merely by their acts, but by the way society [treats] those acts" (W.R. Delagran, "Juvenile Delinquency" (1965) 7 *Can. J. Corr.* 117). Delagran noted that the assumption current in the research of the time was that delinquency has a local character and that a correlation exists between the values and norms of the people in a community and the nature of delinquent behaviour (*ibid.* at 118). In this regard, Delagran was influenced by A.K. Cohen's thesis concerning delinquency among poor children. Cohen hypothesized that delinquency is caused in large part by the lower class boy having to live up to middle class values and standards without the benefit of the educational skills necessary for rewards under that system. Rather than admit failure, he develops his own system with like-minded peers. In this setting, he can achieve recognition for the anti-social things he has learned and make middle class values the target of his anger. See A.K. Cohen, *Delinquent Boys* (New York: Glencoe Press, 1955).

⁶³As K.T. Erikson puts it: "Each time the group censures some act of deviation, ... it sharpens the authority of the violated norm and declares again where the boundaries of the group are located ... Thus deviance cannot be dismissed simply as behaviour which disrupts stability in society, but may itself be, in controlled quantities, an important condition for preserving stability" (K.T. Erikson, "Notes on the Sociology of Deviance" in Becker, ed., *supra* note 56 at 14-15).

⁶⁴Indeed, the influence of labelling theory was recognized explicitly in the *Report*, *supra* note 35 at 36-40.

⁶⁵*Report*, *ibid.* at 51.

The logical response to the stigmatizing effect of the juvenile system was, of course, to reduce the scope of the juvenile justice system. In particular, critics of the *JDA* objected to the fact that the definition of "juvenile delinquency" under the *JDA* encompassed breaches of provincial and municipal laws and such offences as "sexual immorality."⁶⁶ As early as 1963, the Canadian Corrections Association argued in a brief to the Justice Committee that the broad scope of juvenile delinquency legislation made the problem of juvenile delinquency a self-fulfilling process.⁶⁷ The Association noted that the wide wording of "delinquency" did not allow for a distinction between offences in violation of the *Criminal Code* and violations of municipal by-laws. Each child found "delinquent" was liable to the same range of dispositions, although the particular acts for which they were responsible may have differed greatly in seriousness. By grouping together youths who had committed serious crimes and those who had committed minor delinquent acts, the legislation cast a very wide and indiscriminate label over all forms of deviant youth behaviour. The Association suggested, and the Committee agreed,⁶⁸ that the generic term of "juvenile delinquency" had to be replaced with specific criminal offences in order to reduce the *JDA*'s damaging stigmatizing effect.

While work being carried on in symbolic interactionism led to calls for the narrowing of the definition of juvenile delinquency, parallel work in the field of developmental psychology led to calls for redefinition of the age groups over which the juvenile courts had jurisdiction. Of particular interest to juvenile justice theorists during the 1960s was the work by psychologists such as Piaget and Kohlberg pointing to a moral and cognitive differentiation between stages of youth development.⁶⁹ The key to the work of these psychologists was the belief that moral development is a progression "towards basing moral judgments on concepts of justice."⁷⁰ They observed that as the sense of justice grows in the

⁶⁶Section 2(1) of the *JDA*, *supra* note 2, defined a "juvenile delinquent" as any child who violated any provision of the *Criminal Code* or any provincial statute, municipal by-law or was guilty of any "sexual immorality or any similar form of vice" or who was uncontrollable, incorrigible or unmanageable.

⁶⁷Canadian Corrections Association, *The Child Offender and the Law* (Ottawa: Canadian Welfare Council, 1963) at 5-7.

⁶⁸*Report*, *supra* note 35 at 40, 68.

⁶⁹J. Piaget, *The Moral Judgment of the Child* (New York: Free Press, 1965); L. Kohlberg, "Moral Development" in *International Encyclopedia of Social Sciences*, vol. 10 (New York: MacMillan, 1968) 483 at 490.

⁷⁰Kohlberg, *ibid.* at 489. According to Kohlberg, there is, among children, a "culturally universal age development of a sense of justice, involving progressive concern for the needs and feelings of others and elaborated conceptions of reciprocity and equality. As this sense of justice develops, however, it reinforces respect for authority and for the rules of adult society ..." (*ibid.*).

Piaget, for example, described 3 broad stages of development in relation to distributive justice. During the first stage, and lasting in the average child up to the age of 7 or 8, the child's sense of justice is based entirely on the authority of law: "just" is what is commanded by the adult. During the second stage, from the ages of 8 to 11, the child begins to develop a sense of individual responsibility and autonomy, and begins to see his or her acts as distinct from family or social norms. In the third stage the child develops a sense of "equity" which consists in determining what are the attenuating circumstances in moral situations based on an account of the way in which each individual is situated. See Piaget, *ibid.* at 284-85.

child, so does the respect for authority and for the rules of adult society. While theorists disagreed about the specific borderline ages at which children developed a "sense of justice," they all concurred in the conclusion that general categories of development could be described.

The work done by Piaget and Kohlberg, among others, had an effect both on Canadian psychologists⁷¹ and on Canadian juvenile justice policy.⁷² In particular the work of developmental psychologists had a direct significance in relation to both the minimum and maximum ages for juvenile court jurisdiction. In relation to the minimum age, this work forced policy makers to reconsider grouping seven and eight-year-olds in the same category as fifteen-year-olds. For how can a child justifiably be charged with a criminal offence if that child does not even understand basic adult concepts of justice? Children of seven years simply do not have sufficiently developed cognitive and moral skills to be subjected to criminal charges. Moreover, this is compounded by the danger that younger children are particularly susceptible to stigma. In this sense, calls for raising the minimum age coincided with calls for narrowing the range of offences, as both pointed to the need for decriminalization and deinstitutionalization. Following this reasoning, the Committee recommended a raising of the minimum age to ten years old.⁷³

The work of psychologists was less effective in helping to set a specific maximum age. However, it did force policy makers to consider the fact that more subtle distinctions had to be made between different stages of development.⁷⁴ The argument for increasing the maximum age was based on the idea that adolescents between fourteen and eighteen form a distinct phase in moral and cognitive development and that the protections of the juvenile system should be extended to shield a wider group of these adolescents from the adult system.⁷⁵ Following this reasoning, the Committee suggested that a maximum

Kohlberg built on Piaget's work by defining 6 different stages of moral development, although he disagreed with Piaget in relation to the age span of each stage and the degree of overlap between the stages. See Kohlberg, *ibid.* at 489.

⁷¹See e.g. F. Belpaire, "Réactions de transfert et perception de la société chez le jeune délinquant" (1964) 6 Can. J. Corr. 58; Côté-Harper, *supra* note 26.

⁷²The steps taken by the Committee to raise the minimum and maximum ages were part of an increasingly popular international trend. The Ingleby Report, *supra* note 44 at 1191, recommended a raise of the minimum age from 10 to 12. The Prévost Commission recommended raising the minimum age to 15 (see Quebec, Commission d'enquête sur l'administration de la justice en matière criminelle et pénale au Québec, *La société face au crime*, vol. 1, t. 1 (Quebec City: Government of Québec, 1970) (Commissaire: Y. Prévost) at 106-09 [hereinafter Prévost Commission]). The Report, *supra* note 35 at 284, recommended that the minimum age be raised to 10 with an option for the provinces to raise it to 12. In other countries, as well, the lower limit was higher than in Canada. In England it was 10, in France and Poland 13, in Germany, Austria, Czechoslovakia, and Norway 14 and in Denmark and Sweden 15. See Côté-Harper, *ibid.* at 494.

⁷³Report, *ibid.* at 284.

⁷⁴Although the ultimate decision on the issue of maximum age was made on political and economic grounds and not on the basis of psychological research. See text accompanying notes 113-15.

⁷⁵Furthermore, the recognition of disparities in maximum ages between provinces served to highlight the argument that labelling theorists were making about the social nature of "delinquency." For, surely, as MacLeod pointed out at the time, it is absurd to have one province declar-

age of 17 be uniformly applied across all provinces.⁷⁶

These socio-scientific developments were not the only factors impacting upon the reform process. Beginning in the early 1960s and continuing on into the 1970s, a movement among lawyers and social workers to give juveniles the same due process rights as adults was growing in strength. This movement, which had as its goal increased protection for juveniles in the courts, intersected in many ways with developments in psychology. Both pointed to the need to reduce the power, discretion and scope of the juvenile court.

Given the social and political climate of the 1960s,⁷⁷ it was not surprising that a growing number of academics and interest groups began to call for rights-based reforms in juvenile justice.⁷⁸ Prior to 1960, the legal profession had, in many respects, forgotten about juvenile justice. The dominant *parens patriæ* philosophy brought with it the idea that juvenile justice was best left to the "experts" and that lawyers would only interfere with and delay the rehabilitation process. As Ketchum notes in reference to the United States:

The model for the juvenile justice system was the social science or medical model — something with which the legal profession was not familiar. So, almost as quickly and effortlessly as it was found to be constitutional, the juvenile court was forgotten by lawyers and judges. Most juvenile courts in the 1930s and 1940s became the province of social workers and often were listed in the telephone directory in columns reserved for social agencies.⁷⁹

It was not until the 1950s that a series of articles in American law journals began to raise questions about the lack of procedural rights for juveniles in the name of benevolent care, the informality of judicial proceedings and the virtual abandonment of the court by the law profession in favour of social workers.⁸⁰

ing a given 17-year-old to be "delinquent" while an equivalent 17-year-old in an adjacent province is considered to be merely "neglected." A.J. MacLeod, "The Juvenile Delinquency Committee" (1964) 6 Can. J. Corr. 43 at 48.

⁷⁶Report, *supra* note 35 at 284.

⁷⁷The rise of rights discourse in juvenile justice circles during the 1960s came at the same time as the rise of rights discourse in many other social movements. Since the end of World War II and the establishment of the United Nations, the use of rights language in academic, legal and political discourse as a whole had expanded rapidly. However, it was in the 1960s that this discourse blossomed as an integral part of the dramatic social movements of the decade. The symbolic importance of rights language as a means for progressive change was greatly strengthened by its application in the civil rights movement, the women's movement and various other reformist movements. Indeed, the growth in rights discourse was such that, in 1968, Maxwell Cohen observed that international and domestic beliefs had "altered totally beyond anything that could have been imagined two decades before." See M. Cohen, "Human Rights: Programme or Catchall? A Canadian Rationale" (1968) 46 Can. Bar Rev. 554. He argued that "[h]uman rights became ... within the past twenty years, an important piece of 'debating' language ... part of the political dialogue, part of the debating experience, of peoples in all parts of the world, even those in affluent societies" (*ibid.* at 557).

⁷⁸See *e.g.* Report, *supra* note 35 at 138-55.

⁷⁹O.W. Ketchum, "The Development of Juvenile Justice in the United States" in V.L. Stewart, ed., *The Changing Faces of Juvenile Justice* (New York: New York University Press, 1978) at 14.

⁸⁰See *e.g.* M.J. Beemsterboer, "The Juvenile Court — Benevolence in the Star Chamber" (1960) 50 J. Crim. L., Crim. & Pol. Sci. 464; P.W. Tappan, "Treatment without Trial" in S. Glueck, ed., *The Problem of Delinquency* (Boston: Houghton Mifflin, 1959) 290. See generally A. Binder, "The Juvenile Justice System" (1979) 22 Am. Behav. Sci. 621.

However, the real explosion in juvenile rights discourse did not occur until two critical United States Supreme Court decisions, *Kent v. U.S.*⁸¹ and *In Re Gault*.⁸²

In *Kent*, the trial judge failed to hold a hearing and did not confer with the child, his parents or his lawyer before transferring him to adult court. In making his ruling, the trial judge made no findings and gave no reasons. On appeal to the Supreme Court, Fortas J. overturned the trial court decision on the grounds that the judge had not accorded the child due process. Although Fortas J. did not grant the juvenile all the due process rights that would be accorded an adult, he decided that the juvenile was entitled to a hearing and access by his counsel to his social service record, probation report, and other material on which the judge relied.

A year later, in *Gault*, the Court extended the principles discussed in *Kent*. In this case, a boy had been arrested for making obscene phone calls. A hearing was held in the judge's chambers without the boy's parents, who had not been contacted. There were no witnesses and there was no direct transcript or record of the hearing. The Supreme Court decided that the boy had been denied his rights to counsel, notice, confrontation, cross-examination and denied the privilege against self-incrimination.⁸³ These decisions were in turn followed by a flood of articles in the United States which brought the question of juvenile rights to the forefront.

In Canada, a parallel movement for the introduction of due process rights in the juvenile courts was growing in the 1960s,⁸⁴ but this movement was not spearheaded by the courts. In contrast to the activism of the American Supreme Court, there were no Supreme Court decisions in Canada clarifying the rights of juvenile delinquents. Furthermore, due process principles were inconsistently applied by the lower courts. For example, while some courts decided that accused juveniles had a right to be heard and make a full defence,⁸⁵ a right to cross-examine and bring witnesses,⁸⁶ and a right to proof beyond a reasonable doubt,⁸⁷ in other cases the courts came to the opposite conclusion.⁸⁸ In contrast

⁸¹383 U.S. 541 (1966) [hereinafter *Kent*].

⁸²387 U.S. 1 (1967) [hereinafter *Gault*].

⁸³Following up on *Kent*, *supra* note 81, and *Gault*, *ibid.*, in *In Re Winship*, 397 U.S. 358 (1970), the Supreme Court decided that the need for proof beyond a reasonable doubt was required in juvenile as well as adult cases.

⁸⁴For example, the Canadian Corrections Association came out in favour of due process guarantees, including a right to legal aid. See "Official Statement of Policy of the Canadian Corrections Association" (1968) 10 Can. J. Corr. 480 at 482. The due process movement became even stronger in the 1970s. See *e.g.* D.M. Steinberg, "Children's Rights" (1974) 22 Chitty's L.J. 238; H. Dumont, "Le jeune contrevenant" (1978) 9 R.D.U.S. 115; K. Catton, "Models of Procedure and the Juvenile Courts" (1975-76) 18 Crim. L.Q. 181; M. Rivet & B. Marceau, "Le tribunal pour jeunes délinquants: sa juridiction et sa procédure" (1975) 53 Can. Bar Rev. 302.

⁸⁵*R. v. B.* (1956), 19 W.W.R. 651, 116 C.C.C. 382 (B.C.S.C.); *R. v. H. & H.* (1946), [1947] 1 W.W.R. 49, 88 C.C.C. 8 (B.C.S.C.).

⁸⁶*R. v. Tillitson*, [1947] 2 W.W.R. 232, 89 C.C.C. 389 (B.C.S.C.); *R. v. Pepin* (1974), 20 C.C.C. (2d) 531 (Que. Sup. Ct.).

⁸⁷*R. v. Moore* (1975), 22 C.C.C. (2d) 189 (B.C.S.C.); *R. v. Mitchell* (1975), 16 N.S.R. (2d) 206 (S.C.T.D.).

⁸⁸In *R. v. Gerald X* (1958), 24 W.W.R. 310 (Man. Q.B.), *aff'd* (1958), 25 W.W.R. 97 (Man. C.A.)

with the United States, the Canadian due process movement was headed by academics, interest groups and policy makers who were influenced by the American jurisprudence and the vast American literature on the topic.⁸⁹ These due process advocates sought to implement reforms through legislative change rather than through the courts.

The main argument made by due process activists was that a child's young age should not in itself justify a reduction in protections against the criminal power of the state. In fact, they argued that the child's particular vulnerability should justify according more protections because children are less able to defend themselves than adults. Under the *JDA*, however, virtually no due process guarantees were given to juveniles accused of delinquency. For example, the juvenile had a right to representation by a probation officer but not by a lawyer. Moreover, the probation officer's primary responsibility was to the court and not to the child. In contrast to the adversarial relationship between a defence lawyer and the court, the judge and probation officer had a cooperative relationship.⁹⁰ When this fact was combined with a heavy probation officer workload,

[hereinafter *Gerald X*], for example, the court held, despite a strong dissent, that a juvenile's confession of having committed the offence following a judge's question of "What did you do?" was a plea of guilty. In many other decisions, courts decided that the absence of counsel did not affect the validity of proceedings. See *e.g. Re P*, [1973] 2 O.R. 818, 12 C.C.C. (2d) 62 (H.C.); *R. v. C.M.* (1975), 14 N.B.R. (2d) 43, 2 C.R. (3d) S-29 (Sup. Ct.). One judge has said:

I would, however, like to qualify the statement that the presence of lawyers in juvenile courts will provide better justice by adding the rider that these lawyers should be lawyers who understand what the juvenile court is trying to do, who are in harmony with its basic philosophy, who take a socio-legal, and not a strict legal, approach to the children. When a lawyer comes into a juvenile court, throws his briefcase on the counsel table and announces to the court: "I represent this accused. He is pleading not guilty," the presiding judge knows at once that the lawyer thinks that he is in criminal court for children, that he does not know what it is all about, that he has never understood, if indeed, he has read Section 3 of the Juvenile Delinquents Act ... (R. St. George Stubbs, "The Role of the Lawyer in Juvenile Court" (1974) 6 Man. L.J. 65 at 70).

The uncertainty of the due process guarantees in the Canadian juvenile courts led many judges to transfer serious cases to adult court as a protection for juveniles. For instance, in *R. v. P.M.W.* (1955), 16 W.W.R. 650 (B.C. Juv. Ct.), a B.C. juvenile court stated that the procedures of the court for children were very flexible and that the court was not meant for punishment. The court doubted its ability to give a fair trial, reduced the charge to manslaughter and waived jurisdiction to adult court. See also *Re Cline* (1964), 45 W.W.R. 184 at 189, 2 C.C.C. 38 (B.C.S.C.), where the court stated that a juvenile court could not appreciate the "fine points of the defences available to persons accused of manslaughter" and transferred the youth to adult court in order to give him a fair trial; *Re L.Y. (no. 1)*, [1944] 2 W.W.R. 36, 3 D.L.R. 796 (Man. C.A.). Such cases, Jane Morley argues, amounted to a vote of judicial non-confidence in the juvenile system. See J. Morley, "Transfer of Children to the Ordinary Criminal Courts: A Case of Legislative Limbo" (1979) 5 Queen's L.J. 288 at 300.

⁸⁹The influence was sufficiently strong that it prompted T. Grygier to comment in 1968 that "it is distressing to see that Canada, which is in the best position in the world to take advantage of both Common Law and Civil Law practice is as much guided by American law and jurisprudence as if no other system of law existed" (T. Grygier, "Juvenile Delinquents or Child Offenders: Some Comments on the First Discussion Draft of an Act Respecting Children and Young Persons" (1968) 10 Can. J. Corr. 458 at 460).

⁹⁰A good example of the irritation that counsel could cause under a *parens patriae* system can be seen in the transcript of the *Gerald X* case, *supra* note 88 at 107-08 (C.A.). When the child's father hired counsel to contest his son's earlier informal "plea," the judge confronted the counsel

it made adequate representation a rare commodity.⁹¹ This lack of representation violated the most basic of due process guarantees because representation by a lawyer is necessary for the enforcement of all other rights. In Fortas J.'s words, "the right to representation by counsel is not a formality. It is not a grudging gesture to ritualistic requirement. It is of the essence of justice."⁹² As one author argued:

the "hearing" is essentially a trial ... and, in virtually all cases, the "treatment" is punishment inasmuch as it is a restriction on liberty. Couching the proceeding in nice terms does not alter the fact. This is a process with all the degrading elements ... With this in mind, the lawyer must not submit blindly to the will of the prosecution or court. Rather, within the bounds of sound reasoning he must function as an adversary in order to insure that the very basic elements of justice and fair play are introduced.⁹³

The lack of a right to counsel was not the only omission of due process rights in the *JDA*. Indeed, subsection 5(2) and section 17 of the *JDA* stated explicitly that informality of procedures was the rule. Subsection 5(1) provided that trials under the *JDA* would be summary in nature. However, subsection 5(1) was limited by section 17, which stated that proceedings under the Act, including the trial and disposition of the case, could be "as informal as the circumstances will permit, consistent with a due regard for a proper administration of justice." Moreover, subsection 5(2) continued, "no adjudication or other action of a juvenile court with respect to a child shall be quashed or set aside because of any informality or irregularity where it appeared that the disposition of the case was in the best interests of the child."

The procedural protections accorded to the child were thus left almost entirely to the discretion of the judge. While some judges decided that juveniles should be accorded the same rights as adults,⁹⁴ others did not.⁹⁵ As a result, it was not unusual in 1969 for a Canadian court to decide:

In my view, the appellant had a fair trial which was consistent with the proper administration of justice. That the proceedings were conducted with an informality which would perhaps be unacceptable in a formal court of law is true. However, such informality is covered by s. 17 of the *JDA*. The record shows that the judge's greatest concern was to protect the rights of the appellant and the other accused and not to treat them as criminals but as misdirected and misguided children.⁹⁶

in his first appearance by stating: "you haven't as yet asked permission to represent this boy" and then continued by telling the lawyer that he was "gumming the works up," finishing by threatening to transfer the case to adult court if the counsel did not retire.

⁹¹See *e.g.* Report, *supra* note 35 at 142-45.

⁹²*Kent*, *supra* note 81 at 561.

⁹³Comment, "The Role of the Lawyer in Preparation For a Delinquency Hearing in Juvenile Court" (1960) 12 St. Louis U. L.J. 631 at 637.

⁹⁴For example in *Re Miller* (1962), 37 W.W.R. 571 at 573 (Sask. Q.B.), the court stated that "it is essential for the due administration of justice that an accused be tried according to law, and that he should have a fair trial and not be deprived of any of his rights." Similar decisions followed in the 1970s. See also *Kroh v. R.* (1975), 24 Chitty's L.J. 345 (Ont. Prov. Ct.); *R. v. Nicholson*, [1950] 2 W.W.R. 308, 98 C.C.C. 291 (B.C.S.C.). See also *supra* notes 85-87.

⁹⁵See *supra* note 88.

⁹⁶*R. v. Snarch*, [1969] 4 C.C.C. 284 (Que. Sup. Ct.).

The procedural informality under subsection 5(2) and section 17 was further encouraged by restricted rights of appeal under section 34 and the lack of a time limit in the *Criminal Code* on instituting summary proceedings. No rules of court existed governing procedure or dispositions and the hearings depended heavily on guilty pleas and admissions. As explained by Fox and Spencer, this led courts to confuse the adjudicative and dispositional stages of the process and to blur the distinction between the different evidentiary standards applicable to each.⁹⁷ Often, the court would use a plea or a finding of guilt as merely a means by which to implement the proper rehabilitative measures.

As a reaction to this type of procedural informality, the influence of the due process movement in Canada was felt as early as 1963 when the Canadian Corrections Association recommended that youths should have the same legal protections as adults and a right to appeal from juvenile court decisions.⁹⁸ This recommendation, among others, was adopted by the Justice Committee in 1965.⁹⁹

2. Bill C-192

As we have seen, the criticisms made of the *JDA* by the labelling theorists, the behavioural psychologists and the due process advocates were reflected in the *Report* in 1965. This *Report*, in turn, played a key part in the legislative process to follow. In 1967, the Government circulated a draft bill to academics and the provinces, and a federal-provincial conference was held in 1968. After the conference, the drafting process continued and on November 16, 1970, Bill C-192 was introduced in the House of Commons.¹⁰⁰

Three main policy objectives were sought in Bill C-192, and these each reflected criticisms which had been made of the *JDA*.¹⁰¹ The first was the redefinition of the grounds upon which a child could be tried in juvenile court. The second was the modification of the age group over which the juvenile court had jurisdiction. The third was the introduction of due process protections in juvenile courts.

The first of these changes was the redefinition of the grounds upon which a child could be tried in juvenile court. As we have seen, subsection 2(1) of the *JDA* defined "juvenile delinquency" to encompass violations of the *Criminal Code* or provincial statutes, municipal by-laws or "sexual immorality or any similar form of vice." This provision was criticized by labelling theorists who argued that it cast too wide a net and resulted in unnecessary and stigmatizing convictions for otherwise normal children.¹⁰² The new legislation narrowed sig-

⁹⁷R.G. Fox & M.J. Spencer, "The Young Offenders Bill: Destigmatizing Juvenile Delinquency?" (1972) 14 *Crim. L.Q.* 172 at 200.

⁹⁸Canadian Corrections Association, *supra* note 67 at 9.

⁹⁹*Report*, *supra* note 35 at 292.

¹⁰⁰*Supra* note 37.

¹⁰¹See generally Fox & Spencer, *supra* note 97.

¹⁰²For example, Parker referred to a juvenile court decision in which the judge held that a glue sniffer was delinquent in that he had engaged, according to s. 2(h) of the *JDA*, in "sexual immorality or any similar form of vice" (G. Parker, "Glue Sniffing" (1968) 10 *Crim. L.Q.* 365). In total, 14.1% of all the juveniles charged in 1968 were charged under provincial statutes or municipal

nificantly the range of available offences by eliminating provincial and municipal offences and restricting the federal offences to those contained in the *Criminal Code*.¹⁰³ The reasoning for this reform was that by decriminalizing many forms of behaviour, such as sexual immorality or incorrigibility, the government could "cease stigmatizing deviant but non-criminal behaviour in young persons and recognize only offences for which penalties are imposed when committed by adults."¹⁰⁴

A second change was the modification of the age group over which the juvenile court had jurisdiction. As we have seen, the maximum and minimum ages under the *JDA* fell prey to criticisms from both the behavioural psychologists and the labelling theorists. Following these criticisms, the government suggested changes in the age jurisdiction of the juvenile court. First, they proposed that the minimum age under Bill C-192 be raised from seven years to ten years.¹⁰⁵ Although Solicitor General Goyer made no reference to the reasoning behind this change, it was clearly an implementation of the recommendation contained in the 1965 *Report* which was, in turn, a response in part to the increasing psychological evidence of a distinction between children and youth.¹⁰⁶ Second, the government proposed under Bill C-192 a raising of the maximum age from sixteen to seventeen, with an option for any individual province to raise their age to eighteen.¹⁰⁷ Again, this was an implementation, albeit incomplete, of the *Report*, which recommended a uniform maximum age of eighteen. The raising of the minimum and maximum ages was consistent with similar trends in other countries,¹⁰⁸ and with some influential suggestions in the Canadian context.¹⁰⁹

The third change under Bill C-192 was the introduction of due process protections in juvenile courts. As has been discussed previously, the *JDA* specified very few due process rights for juvenile courts. Under Bill C-192, the government introduced more formal procedural guarantees for young offenders. The Solicitor General stated: "Unlike the Juvenile Delinquents Act, the proposed legislation offers a procedural framework with clearly defined limits. It is a

by-laws. See Ministry of the Solicitor General, *Report of the Federal-Provincial Joint Review* (Ottawa: Solicitor General, 1974) at 17.

¹⁰³There was general approval for this change at the time. See Ministry of the Solicitor General, *Discussion Papers for the Federal-Provincial Conferences on Young Persons in Conflict with the Law (Joint Review Group)* (Ottawa: Solicitor General, 1974) at 6.

¹⁰⁴Solicitor General Goyer, *House of Commons Debates* (13 January 1971) at 2373.

¹⁰⁵Bill C-192, *supra* note 37, s. 12.

¹⁰⁶See Report, *supra* note 35 at 40-54.

¹⁰⁷Bill C-192, *supra* note 37, ss. 2(c), 3.

¹⁰⁸At the time of the proposed legislation, minimum ages in England, Sweden and Scotland had been raised to fourteen. See Côté-Harper, *supra* note 26 at 494. A 1955 United Nations Report reported that a maximum age of eighteen was "most preferred in Europe, North America and Latin America." The Report noted that this maximum had been recommended in two previous seminars and that "[t]he recommendation has been based on the proposition that adult ways of thought and behaviour are not usually attained before this age, and that juveniles before could profit by measures of protection and guidance" (U.N. Secretariat, "The Prevention of Juvenile Delinquency" (1955) 7 Int'l Rev. Crim. Pol'y 1 at 13-15).

¹⁰⁹The Prévost Commission, for example, recommended special legislation and correctional services for those falling in the 18 to 21 age group (*supra* note 72 at 108).

question of protecting the interests of the young person and at the same time of providing him with all necessary legal safeguards."¹¹⁰ With this in mind, Bill C-192 introduced many more legal safeguards than existed previously under the *JDA*.¹¹¹

It is clear, in light of the three major reforms introduced in Bill C-192, that the proposed legislation represented a dramatic move away from the *parens patriæ* model. It is also clear that Canadians were not ready in 1970 to accept the reforms contained in Bill C-192. The Bill, after passing first reading, was referred to the Standing Committee on Justice and Legal Affairs and then left to die on the order paper. The government abandoned the Bill in response to substantial opposition from interest groups, Parliamentarians and the media. Opposition to the Bill was hardened by the general impression that the government had not consulted sufficiently with experts and interest groups in the field after the 1967 federal-provincial conference.¹¹² The two principal bases for this opposition were, first, provincial complaints about the potential cost of raising the maximum age, and, second, a philosophical reluctance to abandon *parens patriæ*.

The provincial concerns about raising the maximum age were related largely to the cost of implementing the new legislation. The major source of federal funding for the juvenile justice system was the *Canada Assistance Plan*,¹¹³ under which the federal government paid fifty per cent of the provincial costs

¹¹⁰*House of Commons Debates* (13 January 1971) at 2372.

¹¹¹For example, it abolished s. 17(1) of the *JDA*, which permitted informality both at trial and at the disposition stage. S. 57(1) of Bill C-192, *supra* note 37, stated that the provisions of the *Criminal Code* dealing with summary convictions would apply to juvenile proceedings. Rights of appeal were allowed to the Court of Appeal and Supreme Court (ss. 51-56). Bill C-192 also imposed the same time limits that applied to adults on the adjudication of juvenile proceedings (s. 5(2)) and specific practices were established for warrants (ss. 7 and 10(1)), summons (s. 9) and the laying of informations (s. 8(1)). Moreover, a new provision in Bill C-192 stated that predisposition reports could not be disclosed to, or received by, a judge until after he or she had made a finding that the young person had committed an offence, and no statements made by the young person in that report would be admissible against him or her in an adjudication over guilt (s. 35). As Fox and Spencer noted, this was perhaps the clearest attempt to remedy the blurring of adjudicative and dispositional functions under the *JDA* as it would have forced the court to make a finding of guilt before the process of rehabilitation could begin (Fox & Spencer, *supra* note 97 at 202). Perhaps most importantly, however, Bill C-192 contained a provision which stated that the young person had the right at all stages of the proceedings to be assisted by "counsel, a parent or some adult who in the opinion of the judge is capable of advising the young person" (s. 26(2)). While under s. 31 of the *JDA*, the youth had the right only to be accompanied in juvenile court by a probation officer, this reform essentially guaranteed the youth independent representation (s. 16(1) specified that a notice to parents and accused had to specify that the child had the right to be represented by a lawyer; s. 26(2) stated that at the appearance of the adolescent, the court could not accept a confession without the child being represented by a lawyer, father or mother or a capable adult).

¹¹²For example, the Anglican Bishop of Toronto, in Standing Committee hearings, noted that there had been insufficient consultation during the process with provincial and federal governments as well as experts. House of Commons, *Minutes of Proceedings and Evidence of the Standing Committee on Justice and Legal Affairs* (16 September 1971) at 31:6 [hereinafter *Standing Committee*]. Eldon Woolliams made the same complaint in the *House of Commons Debates* (13 January 1971) at 2375.

¹¹³R.S.C. 1970, c. C-1, s. 5(1).

relating to "welfare services." Unfortunately, "welfare services" did not include any service relating wholly or mainly to corrections or to provincial capital costs.¹¹⁴ As a result, this excluded from federal support the extra correctional facilities which would have been required for those young offenders who would be brought under the *aegis* of the new legislation by the raising of the maximum age. This was not a problem for those provinces which already had maximum ages of eighteen (British Columbia, Alberta, Manitoba, Quebec), but was a major financial blow to those with maximum ages of sixteen years (Ontario, Saskatchewan, New Brunswick, Nova Scotia, Prince Edward Island). Ontario, in particular, expressed its displeasure, complaining that the reforms would cost its Ministry for Correctional Development \$20 million in new accommodation.¹¹⁵ Of equal importance in 1970 were the philosophical concerns that the modifications to *parens patriæ* were too radical. The Canadian Mental Health Association led the opposition to Bill C-192, claiming that it was too legalistic and retrogressive, and terming it a "Criminal Code for children which is distasteful in its terminology, legalistic in its approach, and punitive in its effect."¹¹⁶ The *Globe & Mail* followed suit by calling the Bill "retrogressive."¹¹⁷ In the House of Commons, opposition to the Bill was also strong and many members of the House expressed regret that the government had not followed the English, Scottish or Swedish moves to more rehabilitative approaches.¹¹⁸ John Gilbert, for example, stated that "every time I read Bill C-192, I wonder who is responsible for this criminal law monstrosity, this caveman's approach to young people, this bill of legal rights for social wrongs."¹¹⁹ As if to confirm these doubts about the Bill, the Solicitor General himself admitted during second reading that "[u]nanimity could not be achieved on all the proposed reforms, and some compromise solutions had to be adopted in order to win approval by a majority of the delegates. Consequently ... the bill which I am submitting to you today for second reading is certainly not perfect."¹²⁰

¹¹⁴*Ibid.*, s. 2.

¹¹⁵In the 1968 *Proceedings of the Federal-Provincial Conference on Juvenile Delinquency* (Ottawa: Solicitor General, 1968) at 9-10, the representative for Ontario stated:

may I express what has been our very great concern in my own province, which is that by raising the age to include the 16-year old we are thereby bringing into this area of responsibility one of perhaps the most difficult age groups with which we have to deal, and that we are increasing our responsibility to an extent that again in my own province raises serious questions about facilities and the financial responsibility for those facilities ... [W]e would immediately be faced with the problem of providing training school facilities, with all that involves, for something ranging between 400 and 500 persons in this age bracket.

At the conference, those provinces supporting the maximum 17 or 18 age were Quebec, Manitoba, British Columbia, Newfoundland, Alberta, New Brunswick, Prince Edward Island. Those against were Nova Scotia, Saskatchewan, Ontario.

¹¹⁶Cited from *House of Commons Debates* (13 January 1971) at 2375. See also *Standing Committee* (17 June 1971), *supra* note 112 at 28:5-13.

¹¹⁷See *House of Commons Debates* (13 January 1971) at 2433.

¹¹⁸See e.g. *Standing Committee* (17 June 1971), *supra* note 112 at 28:34 and *House of Commons Debates* (13 January 1971) at 2432. See also J.A. MacDonald, "A Critique of Bill C-192: The Young Offenders Act" (1971) 13 *Can. J. Crim. & Corr.* 166 at 176-79.

¹¹⁹*House of Commons Debates* (13 January 1971) at 2381.

¹²⁰*House of Commons Debates* (13 January 1971) at 2370.

There were several provisions of Bill C-192 that critics found particularly objectionable.¹²¹ But, perhaps most importantly, many critics denied that the *parens patriae* approach had failed.¹²² Instead, they maintained that the system had not been given sufficient resources to work as it could. As John Gilbert put it: "The difficulty is not in the basic philosophy of the Juvenile Delinquents Act, but in the failure of society to give to the juvenile court adequate resources to fulfil the aims of the philosophy, the philosophy of wanting young persons to become law-abiding citizens and directing treatment with regard to their rehabilitation."¹²³

In 1970, many adherents to the rehabilitative approach still believed strongly in the philosophy underlying the *JDA*.¹²⁴ This was reflected in the work of such authors as Brian Grosman who, in a critique of Bill C-192, stated that "[p]rocedural protections... will seriously damage any attempt to reintegrate the juvenile and treat him within the community" and that "[e]very effort should be directed to oppose the advent of rigid adversary procedures that will bring hostility and social ostracism to the juvenile."¹²⁵

Looking at the death of Bill C-192, it is our opinion that the proposed reforms were misunderstood by many of the politicians and interest groups who opposed the Bill. The critics of the Bill were correct in pointing out that the reforms introduced in Bill C-192 were in conflict with the rehabilitative philosophy of the *JDA*. However, the fact that the Bill was an attempt to move away from *parens patriae* did not in itself render it "retrogressive" or "punitive."

¹²¹The provisions drawing the most criticism were ss. 30(1) and (4) (*supra* note 37), which allowed for a young offender committing an offence meriting life imprisonment or the death penalty in the adult system to be placed in training school and then retried at the age of 21 in adult court. The combined effect of these provisions, critics noted, was to make possible the life imprisonment of a 10-year-old child committing murder. See M. Tadman, "A Critical Analysis of Bill C-192: The Young Offenders Act" (1970) 4 Man. L.J. 371 at 378-79; MacDonald, *supra* note 118; *Standing Committee*, *supra* note 112 at 32:26. Critics also objected to the rules in C-192 regarding fingerprinting. Under s. 74(1) of Bill C-192, the police could ask a judge for the issuing of an order with a view to taking the fingerprints of a child accused of an offence of which the equivalent is an offence under the *Criminal Code*. Moreover, under s. 72 of Bill C-192, records could be kept and the young offender as well as his or her lawyer, the Attorney-General, judges or children's aid societies would have access to these records. The chorus of criticism was heightened by the due process activists who also found reason to criticize the Bill. In particular, they felt that the rules regarding legal representation did not go far enough because they did not guarantee the young person counsel or legal aid. The Canadian Mental Health Association, for example, suggested legal aid as a right in cases involving young offenders (*Standing Committee*, *supra* note 112 at 28:7-8). Lack of a right to legal aid, they argued, would make due process illusory for children without the resources to pay for a lawyer.

¹²²The most influential critic was the Canadian Mental Health Association, which stated in the Senate hearings that "our general philosophy has been that in dealing with children there must continue to be a wide discretion in the hands of the wise judge to do what is just and proper and that the juvenile court proceedings must not be dominated by cumbersome rules and procedures" (*Standing Committee*, *ibid.* at 28:6).

¹²³*House of Commons Debates* (13 January 1971) at 2382.

¹²⁴The Canadian Psychiatric Association, for example, objected to the imposition of limited dispositions as they felt that this would impede rehabilitation. See *Standing Committee*, *supra* note 112 (16 September 1971) at 31:23. See also Tadman, *supra* note 121 at 380.

¹²⁵B.A. Grosman, "Young Offenders Before the Courts" (1971) 2:2 Can. Bar Assoc. J. 6 at 7.

Indeed, the due process and symbolic interactionist reformers of the 1960s saw decriminalization and due process as means to curtail aspects of *parens patriae* which they saw as retrogressive and overly punitive.¹²⁶ As Francis Allen put it: "Measures which subject individuals to the substantial and involuntary deprivation of liberty are essentially punitive in character, and this reality is not altered by the fact that the motivations that prompt incarceration are to provide therapy or otherwise contribute to the person's well-being or reform."¹²⁷

By implementing due process measures and circumscribing the punitive power of the juvenile court, the reformers believed that they were, in fact, promoting the "welfare" of children. For example, Grygier found that children under the *JDA* felt that they were treated as "lesser" human beings precisely because the procedures used under the *JDA* were informal and arbitrary.¹²⁸ According to this study, in treating these children with a lack of respect, the courts under the *JDA* served to lower their sense of self-worth and to reinforce their perceptions of themselves as deviant members of society. A similar view was taken by Matza in his influential book *Delinquency and Drift*.¹²⁹ The juvenile's standards of justice, he observed, are highly legalistic.¹³⁰ When these standards come into conflict with the individualized justice of the *parens patriae* system, delinquents feel a sense of resentment about the injustice inherent in the system:

How do the workings of this arrangement appear to juvenile delinquents? The answer may be simply stated. It appears unjust — rampantly so. Few delinquents can do more than express a simmering sense of injustice. They cannot explain why they sense injustice ... mainly because they, like everyone else, are mystified by what goes on in court.¹³¹

¹²⁶In the United States there was great concern about the abuses and cruelties being imposed on juveniles in training schools. Rector and Gilman, for example, in a survey of training school abuses, cited reports in Texas, Illinois and Pennsylvania, which described beatings, chemical controls and mental abuse. A Pennsylvania report concerning juvenile detention facilities stated that, in these institutions, there were "young persons thrown into dark cells for trivial reasons; personal dignity assaulted; basic safety rules ignored — one may begin to wonder whether there is a special breed of monsters which operates in training schools" (Pennsylvania Program for Women and Girl Offenders, *Child Abuse at Taxpayers' Expense: A Citizens' Report on Training Schools in South-eastern Pennsylvania* (Media, Pa.: Friends Suburban Project and Youth Advocate, Inc., 1974) at 43, cited in M. Rector & D. Gilman, "How Did We Get There and Where Are We Going? The Future of the Juvenile Justice Courts" at 85 [unpublished]). Moreover, the article noted that many of the juveniles subjected to these brutal conditions were guilty of such minor offences as running away and truancy (*ibid.* at 84). While evidence of abuse came mainly from the United States, concern was nonetheless growing in the Canadian context. W.T. Outerbridge, for example, referred in an article to the "tyranny of treatment" in the Canadian context (W.T. Outerbridge, "The Tyranny of Treatment ...?" (1968) 10 Can. J. Corr. 378).

¹²⁷F.A. Allen, "Criminal Justice and the Rehabilitative Ideal" in W. Petersen & D. Matza, eds., *Social Controversy* (Belmont: Wadsworth, 1963) 114 at 120.

¹²⁸T. Grygier, "The Concept of the 'State of Delinquency': An Obituary" (1966) 18 J. Leg. Ed. 131; T. Grygier, "Social Adjustment, Personality and Behaviour in Training Schools in Ontario: A Research Report" (Toronto: Department of Reform Institutions and the University of Toronto, 1966). See also B. Maher & E. Stein, "The Delinquent's Perception of the Law and the Community" in S. Wheeler, ed., *Controlling Delinquents* (New York: Wiley, 1968) 187.

¹²⁹D. Matza, *Delinquency and Drift* (New York: Wiley, 1964).

¹³⁰*Ibid.* at 103.

¹³¹*Ibid.* at 132. In a later study by J.A. MacDonald of training schools in B.C., MacDonald made

Given these arguments, it seems that some critics of Bill C-192 were trading unjustifiably on a semantic ambiguity in the term "legalistic." For, while the reforms were "legalistic" in the sense that they offered youths accused of offences a legal shield, they were not legalistic in the sense of an attempt to apply more legal sanctions to juveniles. The reforms in Bill C-192 may have been "legalistic" but this did not in itself make them "punitive."

3. The Renewed Process of Reform

The demise of Bill C-192 did not spell the end for the process of juvenile justice reform in Canada. Shortly after the Bill died on the order paper, a Solicitor General's special committee was established to reassess the nature of the reforms required to the *JDA*. Four years later, the Solicitor General released a report entitled *Young Persons in Conflict with the Law*.¹³² This report was highly influential and laid the fundamental philosophical foundations for draft legislation in 1977 and 1979 and for the *YOA* eight years later. Significantly, in the renewed period of reform following the death of Bill C-192, many of the proposals which were so forcefully rejected in 1971 were reintroduced in *YPICL* and ultimately incorporated, with substantial consensus, into the *YOA* in 1982. The opposition to Bill C-192, so strong in 1970, had virtually evaporated by 1982.

How is this change in the reaction to the proposed legislation to be explained? In our opinion, the change in the 1970s and early 1980s can be attributed in large part to three important developments. The first two of these developments were philosophical and the last was political. First, in the early 1970s, criminologists began to establish that the rehabilitative techniques employed under the *parens patriae* system had been ineffective in preventing recidivism. Second, also in the early 1970s, many academics and professionals began to stress the virtues of community-based or "diversionary" alternatives to incarceration. The force of these developments was such that, by the late 1970s, a substantial consensus had developed in academia that *parens patriae* had to be replaced. Third, by the early 1980s, Canadians on the whole were becoming more conservative in outlook and concern was growing about a substantial growth in juvenile crime. The introduction of new juvenile justice legislation was a way for governments to convince Canadians that they were acting to reduce the juvenile crime problem.

The first, and perhaps the most influential, of these developments was the growing belief among academics in the early 1970s that rehabilitation had been ineffective in preventing recidivism. Interestingly, studies demonstrating the

a similar finding. He found that many of the inmates perceived their committal as unfair precisely because they were committed for behaviour that would not be an offence for adults. These youths were unresponsive to treatment and saw treatment as nothing more than punishment. See J.A. MacDonald, "Juvenile Training Schools and Juvenile Justice Policy in British Columbia" (1978) 20 Can. J. Crim. 418 at 426-27. See also K. Catton, "Children in the Courts: A Selected Empirical Review" (1978) 1 Can. J. Fam. L. 329 at 345, who argued that a lack of understanding of the legal process can lead to negative attitudes toward the law as a whole.

¹³²*YPICL*, *supra* note 38.

ineffectiveness of rehabilitative programs existed well before the 1970s. Dating back to the 1930s, a number of studies had demonstrated that rehabilitation programs did not work any better than simple incarceration.¹³³ At the time, however, authors in the field were either unable or unwilling to draw the conclusion that the available evidence might throw rehabilitative penal philosophy into doubt. Indeed, as McMahon points out, the recurrently negative findings concerning the effectiveness of rehabilitation were often interpreted in the literature not as throwing rehabilitation into doubt but, ironically, as a justification for more intensive rehabilitative treatment.¹³⁴

The important change in the early 1970s, then, came not from the data available but from how that data was interpreted. In this respect, the work of American writers, particularly that of Martinson, was highly influential in Canada. In 1974, Martinson published an article¹³⁵ in which he analyzed 231 studies concerning the effectiveness of rehabilitation in different countries from 1945 through 1967. He concluded:

I am bound to say that these data ... are the best available and give us very little reason to hope that we have in fact found a sure way or reducing recidivism through rehabilitation. This is not to say that we have found no instances of success or partial success; it is only to say that these instances have been isolated, producing no clear pattern to indicate the efficacy of any particular method of treatment.¹³⁶

In coming to this conclusion, Martinson also cast doubt on the whole idea of "treatment" as a philosophy:

our present treatment programs are based on a theory of crime as a "disease" — that is to say, as something foreign and abnormal in the individual which can presumably be cured. This theory may well be flawed, in that it overlooks — indeed, denies — both the normality of crime in society and the personal normality of a very large proportion of offenders, criminals who are merely responding to the facts and conditions of our society.¹³⁷

Martinson's conclusion that "nothing works" in rehabilitative practice became a catchword in criminology and had an enormous effect. In the wake of Martinson's study, other authors began to reach similar conclusions.¹³⁸ For

¹³³See e.g. S. Glueck & T. Eleanor, *Five Hundred Criminal Careers* (New York: Alfred Knopf, 1939); E. Powers & H. Witmer, *An Experiment in the Prevention of Delinquency: The Cambridge-Somerville Youth Study* (New York: Columbia University Press, 1951); A.N. Weeks, "The Highlights Project and Its Success" in N. Johnston, L. Savitz & M.E. Wolfgang, eds., *The Sociology of Punishment and Correction* (New York: John Wiley & Son, 1962); and, generally, Outerbridge, *supra* note 126 at 386.

¹³⁴McMahon, *supra* note 33 at 14-15.

¹³⁵R. Martinson, "What Works? — Questions and Answers About Prison Reform" (1974) 35 *The Public Interest* 22.

¹³⁶*Ibid.* at 49.

¹³⁷*Ibid.*

¹³⁸L.C. Wilson noted that "[t]he difference in rates of prevention or rehabilitation among groups receiving no treatment, those receiving casual counselling and those receiving intensive care is not significant" (L.C. Wilson, "Parens Patriæ: The Unfulfilled Promise" (1976) 24 *Chitty's L.J.* 325 at 327-30). Similarly, in 1977, J. Laplante concluded that "the view that training schools have failed in rehabilitating young offenders is increasingly prevalent ..." (J. Laplante, "Training Schools — What Do They Accomplish?" (1977) 5 *Crim. and/or Just.* 110 at 110, 114). See also

example, after a review of the research on delinquency treatment programs, O'Leary and Wilson concluded that these programs did not with any consistency achieve their goals of rehabilitation and crime prevention.¹³⁹ Similar conclusions were reached by several authors in Canada.¹⁴⁰ Outerbridge, for example, examined a number of studies and concluded that "even if we cannot accept [the ineffectiveness of rehabilitation] as a reality today, we must be ready to face the probability that it will be proven as valid tomorrow."¹⁴¹ He then proceeded to criticize the "sinister" school of thought which he said took the position that "In The Face Of Failure, We Must Redouble Our Efforts."¹⁴² He feared that demands by proponents of this view for more aggressive employment of coercive psychological techniques and more authority over the people treated would pose serious dangers to those being treated.

The findings about the ineffectiveness of rehabilitation fueled concerns expressed by the due process reformers. For, when rehabilitative effectiveness is cast into doubt, it calls into question the whole *parens patriæ* project. The essence of the *parens patriæ* approach is that certain adult procedural safeguards can be forsaken in the juvenile process precisely because this allows the courts and treatment facilities to help children. However, if the effectiveness of this treatment is not evidenced, the result is a system which favours incarceration of children without at the same time serving to help them. We are left with a system where "individual liberty may be imperiled by claims to knowledge and therapeutic techniques that we, in fact, do not possess and by failure to concede candidly what we do not know."¹⁴³

G. Johnston, "The Function of Counsel in Juvenile Court" (1969) 7 Osgoode Hall L.J. 199 at 201 and a 16-part series by M. Valpy concerning training schools in *The [Toronto] Globe & Mail* (10 February — 23 April 1973) for concerns expressed about rehabilitation prior to Martinson's work.

¹³⁹K.D. O'Leary & G.T. Wilson, *Behavioral Therapy: Application and Outcome* (Englewood Cliffs, N.J.: Prentice-Hall, 1975). They concluded: "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 nontreated youth in such variables as number of offences" (*ibid.* at 196).

¹⁴⁰R. Steinberg, for example, argued that

in a significant number of protection or delinquency cases, the result of making the material finding of fact is the removal of a child from his home to either an industrial home, training school, or foster home — all institutions which have been established presumably for the betterment of the child. One must then ask, are these resources capable of achieving the goals which legislation has dictated? It is my view that if these resources are inadequate or if a child is wrongly placed in a resource, the placement is not protection but a cruel punishment (Steinberg, *supra* note 84 at 241).

See also L. Kupperstein, "Treatment and Rehabilitation of Delinquent Youth: Some Sociocultural Considerations" (1971) 4 Acta Crim. 11 at 16, 98, where she argues that the mere imposition of rehabilitation programs does not guarantee their effectiveness. Indeed, a poor program can have "unintended consequences" of "frustration, hostility, alienation and deviance" (*ibid.* at 16). Too much emphasis, she claimed, was placed on traditional clinical or psychogenic approaches and not enough on innovative treatment alternatives.

¹⁴¹Outerbridge, *supra* note 126 at 378-79.

¹⁴²*Ibid.* at 383.

¹⁴³F.A. Allen, "Criminal Justice, Legal Values and the Rehabilitative Ideal" (1959) 50 J. Crim. L. Crim. & Police Sci. 226 at 230.

One of the original motivations behind the institution of the *JDA* was to alleviate the harshness of the criminal law as applied to juveniles by developing a separate system of juvenile justice. The problem by the 1970s was that the juvenile delinquency system had imported many of the harsh aspects of the criminal law system without having tempered these with any of the vaunted advantages of a separate system of justice. As Fortas J. observed in *Kent*:

While there can be no doubt of the original laudable purpose of juvenile courts, studies and critiques in recent years raise serious questions as to whether actual performance measures well enough against theoretical purpose to make tolerable the immunity of the process from the reach of constitutional guaranties applicable to adults ... There is evidence, in fact, that there may be grounds for concern that the child receives the worst of two worlds: that he gets neither the protections accorded to adults nor the solicitous care and regenerative treatment postulated for children.¹⁴⁴

While the work being done in the 1970s on rehabilitation was reinforcing claims about the need for greater due process, a number of theorists were also beginning to question the need for institutional treatment of juvenile delinquents. Many authors took the "nothing works" conclusion to point to a need to reduce the number of juveniles entering the juvenile justice system. In the early 1970s, the concern about the effectiveness of incarceration led to an attempt to develop alternatives to prosecution and incarceration known under the term of "diversion."

"Diversion" is a broad term used to encompass community absorption plans, police screening, pre-trial diversion and alternatives in sentencing, including restitution, fines and probation.¹⁴⁵ As noted by Osborne, "[d]iversion has two aspects: keeping the offender out of the criminal justice system altogether or keeping him [or her] out of the *formal* criminal justice system but redirecting him [or her] into an informal system."¹⁴⁶ Both of these approaches relate to the concerns expressed by the labelling theorists that the juvenile process is stigmatizing and that non-judicial community alternatives would prove to be less harmful for the juvenile offender. The idea underlying diversion, then, was that the court is "properly an agency of last resort for children, holding to a doctrine of appeals courts which require that all other remedies be exhausted before a case will be heard."¹⁴⁷ The motto adopted by theorists such as Schur, who advocated "radical non-intervention," was to "leave kids alone whenever possible."¹⁴⁸

¹⁴⁴*Kent*, *supra* note 81 at 555-56.

¹⁴⁵Law Reform Commission of Canada, *Diversion* (Working Paper No. 7) (Ottawa: Queen's Printer, 1975) at 1.

¹⁴⁶J.A. Osborne, "Juvenile Justice Policy in Canada: The Transfer of the Initiative" (1979) 2 *Can. J. Fam. L.* 7 at 23.

¹⁴⁷President's Commission, *supra* note 44 at 96.

¹⁴⁸E. Schur, *Radical Nonintervention: Rethinking the Delinquency Problem* (Englewood Cliffs, N.J.: Prentice-Hall, 1973) at 155. A similar point was made by J. Thomson in "The Child in Conflict with Society" (1973) 11 *R.F.L.* 257 at 262:

the vision of reality which continually attracts new disciples is the following: that, apart from a relatively small number of cases, it is probably better for all concerned if the young offenders were not detected, processed, treated or institutionalized. Too many

The concept of diversion played only a minor role in the 1965 *Report*,¹⁴⁹ but it was more forcefully endorsed in the 1969 report of the Canadian Committee on Corrections¹⁵⁰ and the 1975 Law Reform Commission's Working Paper on Diversion.¹⁵¹ At the same time, similar concepts were evolving in England, Scotland and the United States. For example, in the United States, many informal pre-trial screening programs were developed after the President's Commission on Law Enforcement and the Administration of Justice strongly advocated the concept in 1967.¹⁵² These programs were observed carefully in Canada¹⁵³ and, by the early 1970s, diversion had gained substantial credibility.¹⁵⁴

With the growth of diversion as a concept and the increasing evidence pointing to the ineffectiveness of rehabilitation in preventing recidivism, the steadfast adherence of many academics and social workers to *parens patriæ* began to crumble. By the mid-1970s, four reform-based themes began to gain increasing popularity in criminology: decriminalization, diversion, due process and deinstitutionalization.¹⁵⁵ This ideological shift led Leblanc to state in 1978 that "decriminalisation, diversion and deinstitutionalization" were "la doctrine dominante à la criminologie contemporaine."¹⁵⁶

These academic arguments were not, however, the only reason for the move away from *parens patriæ*. While the theoretical foundations for the *JDA* were crumbling in the mid-1970s, there was at the same time a growing fear in the population about rising juvenile crime. This corresponded with a general move to the right in Canada during the late 1970s, as the liberal idealism of the early 1970s gave way to a more conservative mood which, in turn, had an effect on juvenile justice policy. MacDonald, for example, noted that while British Columbia policy from 1969-1975 was unique in its "progressive, enlightened

children deteriorate while in care. Furthermore, the problem would remain even if we had unlimited resources at our disposal.

¹⁴⁹*Report, supra* note 35 at 88.

¹⁵⁰"Unless there are valid reasons to the contrary the correction of the offender should take place in the community" (Canadian Committee on Corrections, *Toward Unity: Criminal Justice and Corrections* (Ottawa: Queen's Printer, 1969) at 277).

¹⁵¹*Supra* note 145.

¹⁵²*Supra* note 44.

¹⁵³For example, in a 1971 article, J.M. Gandy noted that "in recent years one aspect of the control and prevention of juvenile delinquency that has received considerable attention is the development of alternatives to formal adjudication" and referred in particular to "the use of community agencies outside the formal juvenile justice system" as an "attractive" option. He exclaimed optimistically that "today, for the first time in forty years, prospects for far-reaching reforms are distinctly favourable" (J.M. Gandy, "Rehabilitation and Treatment Programs in the Juvenile Court: Opportunities for Change and Innovation" (1971) 13 Can. J. Crim. & Corr. 9 at 12, 14, 21).

¹⁵⁴For example, as early as 1970, Dr. M.Q. Warren was able to state that "the operational feasibility of treating a large proportion of the delinquent population in the community, without prior institutionalization, has been clearly demonstrated" (M.Q. Warren, "The Case for Differential Treatment of Delinquents" (1970) 12 Can. J. Corr. 451 at 459).

¹⁵⁵Empey, *supra* note 50 at 532.

¹⁵⁶M. LeBlanc in 1978 called "decriminalisation, diversion and due process" "les trois dés" and stated that "le vent des trois dés souffle partout" (M. Leblanc, "Décriminalisation, déjudiciarisation, déinstitutionnalisation: De la doctrine, de la science et de l'application" (1979-80) 7/8 *Crime and Justice* 48). According to B. Dickens, the ideas of decriminalization, due process and diversion had, by 1975, become "mainstream" (Dickens, *supra* note 52 at 217).

and humane" emphasis on deinstitutionalization and community-based resources, after 1975 "as social and economic problems grew more pressing, the outlook of the average citizen became more conservative."¹⁵⁷ The result was a subsequent de-emphasizing of the progressive trends manifested earlier in the decade. By the late 1970s there were increasing calls in the media for the government to "crack down" on juvenile crime which many citizens felt was becoming intolerable.¹⁵⁸

The shift in public mood was also reflected in academic literature, where some authors began to stress the virtues of a "just deserts" juvenile system based on responsibility and accountability.¹⁵⁹ In response to the *parens patriæ* system, which was based on the assumption that the causes for juvenile delinquency were environmental and pathological, these authors pointed to the fact that juvenile delinquents make a choice when they commit crimes. The fact that the young have diminished moral and cognitive skills, they argued, should not lead us to believe that juveniles have no free will. Rather, as with adults, we should approach the degree of free will exercised by a youth on a case-by-case basis.

Interestingly, this response to *parens patriæ* was a reassertion of the classicist view of criminology as against the positivist view which replaced it close to a century before.¹⁶⁰ Furthermore, the "just deserts" school of thinking about juvenile justice thus tied in comfortably with the due process school. Since both schools assumed that coercive treatment by the state was essentially punishment, both concluded that state intervention should be strictly limited to cases where guilt could be established beyond a reasonable doubt. According to both schools, then, the advantage of "punishment" over "treatment" was two-fold.¹⁶¹ First, punishment clearly implies limits, whereas treatment does not. Since treatment is for the benefit of the child, the length of treatment is logically irrelevant. By contrast, punishment is limited by a certain, albeit imperfect, proportionality between offence and desert. Second, punishment calls attention to itself as a necessary evil or device which society uses as a last resort in order to protect its most central interests. Public punishment is intentionally degrading and stigmatizing. Treatment employs the same methods but is supposedly for the good of the child. Both due process and "just deserts" theorists refused to accept this seventy-year justification for *parens patriæ*.

By the late 1970s, then, the dissatisfaction with the *JDA* was much deeper than it had been at the time of Bill C-192. While the reform movement in the

¹⁵⁷MacDonald, *supra* note 131 at 433-34.

¹⁵⁸By 1981, some of the headlines in the papers read: "Winnipeg 'Kiddie Crime' Rate Climbing to Big Leagues: Juveniles Committing Adult Crimes as Justice, Social Agencies Try to Cope" *Winnipeg Free Press* (17 February 1981) 2; "Frustrated Vancouver Parents Want Tougher Line on Delinquent Kids" *Vancouver Sun* (25 March 1981) A3; "Statistics That Scare Society: The 60% Increase in Violent Juvenile Delinquency is Scary" *Maclean's* (4 May 1981) 2.

¹⁵⁹For example, D. Fogel, *We Are the Living Proof: The Justice Model for Corrections* (Cincinnati: Anderson, 1979); A. Von Hirsch, *Doing Justice: The Choice of Punishments* (New York: Hill and Wang, 1976).

¹⁶⁰*Supra* note 17 and accompanying text.

¹⁶¹S. Fox, "The Reform of Juvenile Justice: The Child's Right to Punishment" (1974) *Juvenile Justice* 2 at 4.

1960s had been fueled largely by labelling theorists and due process activists, the renewed reform movement in the 1970s attracted a broader range of interests. Predictably, these diverse concerns were not fully compatible. For, while many reformers wished to deinstitutionalize the juvenile justice system and to introduce community-based treatment programs, others wanted to make youth more accountable and to introduce more protections for society from juvenile crime. Thus, while all the reformers wanted to discard *parens patriae* and to reduce the jurisdiction of the juvenile courts, their hopes for the justice system which was to replace the *JDA* were significantly different.

II. The *Young Offenders Act*: An Evaluation of Three Guiding Principles

In the period from 1975 to 1982, three separate governments made attempts to draft legislation based on some of the suggested reforms. Eventually, Bill C-61 was introduced in 1982 and, with general approval, passed as the *YOA*. Solicitor General Robert Kaplan commented in his speech to the Senate Committee on Justice and Legal Affairs at the time that he was "encouraged with the support received to date from all sectors, including the media, and the Parliamentary debate on second reading."¹⁶² Echoing this sentiment, Ray Hnatyshyn, then an opposition member, stated in the House that "Bill C-61 is welcomed literally by everyone in the justice field."¹⁶³

How, after years of debate and many failed proposals, did the government gain such near unanimous support for Bill C-61? In our opinion, the explanation for the "support from all sectors" is not that there was full agreement at the time concerning the direction of juvenile justice in Canada. To the contrary, we believe that the popularity of the *YOA* is best explained by the fact that it reflected a compromise between a multiplicity of ideas and interests. In this next section, we will examine the ambivalence in theoretical direction created by these compromises under the *YOA* by focusing on the meaning and application of three principles used in the Act: "special needs," "protection of society" and "least possible interference with freedom." These principles are all contained within the Declaration of Principle in section 3 and are intended to be employed as fundamental interpretative concepts in various parts of the Act. However, as we will demonstrate, these "guiding" principles are themselves highly ambiguous because each of them represents not a single principle but a cluster of often contradictory principles.

In its present form, the broad language of the Declaration of Principle gives a large role to judicial discretion in the interpretation and application of the *YOA*. Such discretion is vital given that youth courts must respond to a multitude of community and individual needs.¹⁶⁴ However, while discretion is a nec-

¹⁶²House of Commons, *Minutes of Proceedings and Evidence of the Standing Committee on Justice and Legal Affairs*, 1st sess., 22nd Parl. at 61:8 (9 February 1982) [hereinafter *Standing Committee*].

¹⁶³*House of Commons Debates* (15 April 1981) at 9312.

¹⁶⁴The need for discretion in the juvenile justice context has been recognized internationally in the *UN Standard Minimum Rules for the Administration of Juvenile Justice* ("Beijing Rules"), UN

essary element in the juvenile justice context, we believe there should be limits to its acceptable exercise. In particular, problems arise when the legislative language is so broad and vague as to make a consistent interpretation of the legislation virtually impossible. The need for a degree of certainty in legislative language in the criminal law arises from the principle of legality and the important interest which is at stake throughout the criminal process — that of the accused's liberty. Williams, for example, has stated that the rule of law, and more precisely the principle that there can be no crime or punishment except in accordance with a fixed, predetermined law¹⁶⁵ operates as "an injunction to the legislature not to draw its statutes in such broad general terms that almost anybody can be brought within them at the whim of the prosecuting authority and the judge."¹⁶⁶ While Williams' comments are limited to the idea that courts cannot invent new punishments or exceed the statutory maximum, it has been argued that the need to strive for clear and sensible legislative language extends to the whole of substantive criminal law.¹⁶⁷

In its 1987 Report, the Canadian Sentencing Commission¹⁶⁸ interpreted the requirement that criminal statutes be drafted in clear and concise language to mean that "no word with several different meanings should be used in the formulation of a statement: clarity implies the absence of equivocation."¹⁶⁹ In many respects, the language of the *YOA* fails to meet this standard of clarity. The *YOA* purports to direct the judge in his or her choice of responses to youth crime by providing a set of principles which govern the application of the Act. However, it is obvious from even a cursory reading of the *YOA* that the principles it sets out raise a number of tensions. Despite the intuitive appeal of all these concepts, they do not in themselves provide a coherent framework for dealing with young offenders. Indeed, they are stated in such broad and vague terms that individual judges must often resort to applying their own philosophies to individual cases.¹⁷⁰ Rather than attempting to provide the courts with a collection of poten-

GAOR, 40th Sess., 96th Plen. Mtg., UN Doc. A/40/53 (adopted by the 7th UN Congress on the Prevention of Crime and the Treatment of Offenders), art. 6.1, which provides as follows:

6.1 In view of the varying special needs of juveniles as well as the variety of measures available, appropriate scope for discretion shall be allowed at all stages of proceedings and at the different levels of juvenile justice administration, including investigation, prosecution, adjudication and the follow-up of dispositions.

Art. 6.3 of the same document creates an obligation on the part of persons charged with discretion in the juvenile justice context to exercise their discretionary powers judiciously and responsibly.

¹⁶⁵This idea is often expressed through the latin maxim *Nullum crimen sine lege; Nulla poena sine lege*.

¹⁶⁶G. Williams, *Criminal Law: The General Part* (London: Stevens and Sons, 1961) at 575-76.

¹⁶⁷See e.g. D. Stuart, *Canadian Criminal Law*, 2d ed. (Toronto: Carswell, 1987) at 21.

¹⁶⁸Canadian Sentencing Commission, *Sentencing Reform: A Canadian Approach* (Ottawa: Queen's Printer, February 1987) at 133 [hereinafter Sentencing Commission].

¹⁶⁹*Ibid.*

¹⁷⁰See A. Doob & L. Beaulieu, "Variation in the Exercise of Judicial Discretion with Young Offenders" (1992) 34 Can. J. Crim. 35, for a dramatic illustration of this point. The authors of this study interviewed 43 judges across Canada, and asked them to recommend sentences in 2 hypothetical situations involving 4 young offenders. The judges were also asked to rank the relative importance of the 5 traditional purposes of sentencing (punishment, rehabilitation, general deterrence, individual deterrence and incapacitation) for each of the recommended dispositions. There was a great deal of variation in the responses of these judges with respect to both the types of sen-

tial philosophical approaches, we believe that the legislators should be more concerned with providing the courts with guidance in relation to specific problems under each section. In analyzing each of these principles, then, we will provide specific recommendations as to the type of clarifications we feel are necessary in relation to specific provisions.

A. *Special Needs*

The *YOA* was introduced as an attempt to remedy the shortcomings of the *parens patriæ* system. It was conceived as a move away from a treatment-oriented model of juvenile crime, to a model which sanctions the offence based on the responsibility of the actor.¹⁷¹ In contrast to the *JDA*, the *YOA* operates according to the premise that young persons have both rights and responsibilities,¹⁷² and that they should be held accountable for their wrongful behaviour.¹⁷³ While the *JDA* was based on the assumption that a child's behaviour is essentially "determined" by his or her environment, the *YOA* is based on the assumption that while society may bear a responsibility for the environmental conditions which tend to generate conflict with the law, the individual behavioural responses of young people to these conditions are the responsibility of the young persons themselves.¹⁷⁴

The increased responsibility accorded to young persons does not mean that young offenders under the *YOA* are to be treated like adults. Indeed, the assumption that young offenders have "special needs" continues to play a central role and is integrated into the *YOA* where, in paragraph 3(1)(c) of the Declaration of Principle it is stated that "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." However, in our opinion, "special needs" must be given a different definition under the *YOA* than under the *JDA*. For, while "special needs" under the *JDA* referred to the need for treatment and rehabilitation, the same

tences chosen and the priority of purposes to be accomplished. The authors of the study concluded that judges attempt to achieve too many competing goals in fixing young offender dispositions. In their view, this situation is imposed on judges as a result of the drafting of the *YOA* itself and in particular s. 3. The failure of the legislature to establish a priority of purposes for sentencing under the *YOA* has led to the result that very different sentences can be legitimately ordered in the same case.

¹⁷¹J. Trépanier, "Principles and Goals Guiding the Choice of Dispositions under the *YOA*" in L. Beaulieu, ed., *Young Offender Dispositions: Perspectives on Principles and Practice* (Toronto: Wall Editions, 1989) 27 at 28-31. A similar view is expressed in C. Manfredi, "The Young Offenders Act and Juvenile Justice in the United States: Perspectives on Recent Reform Proposals" (1991) 6 *Can. J. Law & Soc.* 45 at 58, and in A. Leschied & P. Jaffe, "Dispositions as Indicators of Conflicting Social Purposes under the *JDA* and *YOA*" in Leschied, Jaffe & Willis, eds., *supra* note 3, 158.

¹⁷²*YOA*, *supra* note 1, ss. 3(1)(a), 3(1)(e).

¹⁷³Manfredi, *supra* note 171 at 58, argues that juvenile justice policy under the *YOA* has moved away from a rehabilitative approach toward a greater concern with principles of individual responsibility and accountability.

¹⁷⁴D. Conly, "A Proposed Research and Evaluation Strategy for the Young Offenders Act" in *Evaluation of the Proposed Young Offenders Legislation* (Ottawa: Ministry of the Solicitor General, 1979) at 6-7.

cannot be said under the *YOA*. Given the history of the reform process and the due process orientation of the *YOA*, we believe that "special needs" under the Act refers to the need for special protections for young offenders.

This interpretation is reinforced, in our opinion, by two facts. First, the word "rehabilitation" is given little emphasis in the *YOA*. Second, the structure of the *YOA* does not lend itself to a rehabilitative approach. With maximum sentences of limited duration, restrictions on custody and the many due process guarantees contained within the Act, specialists seeking to treat young offenders are no longer given the freedom, time and resources that were accorded them under the *JDA*. Indeed, a look at the history of the reform process reveals that the *YOA* was an attempt to curtail the due process violations which arose under the *JDA's* *parens patriae* approach.

Unfortunately, the use of the vague expression "special needs" in the Declaration of Principle does not make this interpretation clear. By failing to define "special needs" with greater specificity, the legislators have left the work of defining the concept entirely to the courts. The result, since the passage of the *YOA*, has been a striking inconsistency in the application of the concept by the courts.

In this section, we will demonstrate this inconsistency by showing that, while a few courts have attempted to give "special needs" a unique meaning in the dispositions context, most have simply carried over the old *JDA* assumptions by interpreting "special needs" to mean the need for rehabilitation or child welfare. This, we believe, is a mistake. If rehabilitation is to be reintroduced into Canadian juvenile justice, it should be done explicitly by the legislature and not by way of interpretation in the courts. Until that is done, we believe the courts should limit their interpretation of "special needs" to the need for special protections. Thus when paragraph 3(1)(c) states that young offenders require "guidance and assistance," this should be interpreted to refer not to treatment but, for example, to the need for special rules in relation to confessions.

1. Sentencing

Without question, the determination of the appropriate disposition for a young person convicted of a criminal offence is a difficult and controversial exercise. No discrete test is provided in sections 20-26 of the *YOA* to guide the judge in determining the appropriate disposition.¹⁷⁵ Rather, the sentencing judge

¹⁷⁵Although factors similar to those used in sentencing adults may be taken into account in sentencing young offenders, the *Criminal Code* provides more guidance to the sentencing judge in that it sets out minimum and maximum penalties for each offence. As well, the courts have confirmed that case law has a lesser role in the young offenders system than it does under the *Criminal Code*. See *e.g.* *R. v. S.A.B.* (1990), 96 N.S.R. (2d) 374 at 375; 56 C.C.C. (3d) 317, 253 A.P.R. 374 (S.C.(A.D.)) [cited to N.S.R.]. Generally, young offender sentencing is a more individualized process than adult sentencing. This is confirmed in the following statement about inconsistency in young offender dispositions: "Perhaps inconsistency is an inappropriate word. It is simply that for a young person, you cannot look at the offence, then look at previous dispositions and graph the two in a way some people would say ideally, others would say not ideally, you might be able to

must balance a series of factors related to the young person's age, character, previous record and the offence committed, in a manner that supports the aims of the juvenile justice system. This, of course, requires the court to refer to the Declaration of Principle.

While there is a need for considerable judicial discretion in the young offender sentencing context, the broad language of the *YOA* creates virtually unstructured discretion and has led to widespread disparity in young offender dispositions, both at the level of the sentences ordered and of the principles being applied to determine dispositions. Moreover, the concept of "special needs" has not served as a useful tool for distinguishing young offender and adult sentences in any meaningful way. The failure of the legislature to define the types of special needs that are relevant to disposition has therefore blurred the boundary between the principles applicable to adult sentencing, young offender dispositions and sentencing under the former *JDA*.

To date, relatively few courts have made explicit reference to "special needs" in determining dispositions. In *R. v. A.D.M.*, the Manitoba Court of Appeal used the principle to set aside a custodial disposition and to amend a young offender's probation order to allow her to remain in the welfare facility where she was residing prior to her sentencing.¹⁷⁶ In *R. v. R.I.*, "special needs" was broadly applied as an *overall* justification for a flexible approach to young offender sentencing according to which the principle of proportionality of sentence is not as strictly applied to young offenders as to adults.¹⁷⁷

The link between these interpretations of "special needs" is not clear because the courts in each case made little attempt to identify the types of needs which were being addressed. Nonetheless, it is possible to identify certain specific "needs" which the courts have addressed in determining dispositions. In particular, child welfare concerns and rehabilitation have been the focus of a significant number of sentencing decisions.

Welfare needs have emerged as a theme in several cases where the courts have held that custody may be ordered as a means of removing a young person from a bad home environment. For example, in *R. v. J.J.M.*, the Manitoba Court of Appeal ordered a two-year disposition in open custody for a young person convicted of three counts of break, enter and theft.¹⁷⁸ The choice of disposition

graph sentences for adults" (*R. v. C.H.O.* (1987), 82 A.R. 302, [1987] W.D.F.L. 1215 (Alta. Prov. Ct., Yth. Div.)).

¹⁷⁶[1985] W.D.F.L. 130 (Man. C.A.).

¹⁷⁷(1985), 44 C.R. (3d) 168 (Ont. C.A.). With respect to the principle of proportionality, the Court wrote as follows at 175:

The close correlation which is generally looked to as appropriate in the case of an adult offender between the seriousness of the offence and the length of the sentence imposed for it may or may not be equally as appropriate in the case of a young offender, where the task of arriving at the "right" disposition may be a considerably more difficult and complex one, given the special needs of young persons and the kind of guidance and assistance they may require. Any uncritical application of the principle [of proportionality] to young offenders could thus run counter to the larger objectives of the new legislation.

¹⁷⁸(1991), 75 Man. R. (2d) 296, 6 W.A.C. 296 (C.A.) [cited to Man. R.], aff'd [1993] 2 S.C.R. 421, 20 C.R. (4th) 295.

was partly motivated by the Court's desire to place the youth outside his dysfunctional home environment. Huband J.A., writing for the majority of the Court, stated that "[w]hat might be too long in terms of a jail sentence for an adult may be entirely fit in terms of open custody for a young offender."¹⁷⁹ Similarly, in *R. v. R.I.*, the Ontario Court of Appeal suggested that it may in some instances be appropriate to give a longer custodial disposition to a young offender who comes from an unhappy home environment.¹⁸⁰ Although many courts have rejected the use of custody as a surrogate for youth protection,¹⁸¹ the "child welfare" approach to custody has been followed in several prominent appellate cases.¹⁸²

In a second series of cases, the courts have tailored dispositions to meet the rehabilitative needs of young offenders. For example, in *Protection de la jeunesse — 220*,¹⁸³ the Quebec Youth Court chose a disposition in open custody over a "short, sharp shock"-style disposition¹⁸⁴ in secure custody for a young person convicted of theft, on the basis that the rehabilitative needs of the youth

¹⁷⁹*Ibid.* at 297. Helper J.A., dissenting, recognized that the youth needed to be placed permanently outside his home given his dysfunctional home environment but asserted that the criminal justice system was not the proper forum for achieving such a goal: "It is inappropriate to use a custodial order in the criminal justice system to provide a secure environment for a child. Although a two year open custody disposition might be in the best interests of this youth, it was not a fit sentence for such a young [15-year-old] accused with only one previous court appearance ..." (*ibid.*).

¹⁸⁰*Supra* note 177. In the later decision of *R. v. Michael B.* (1988), 22 O.A.C. 100, 36 C.C.C. (3d) 573 (C.A.), the Ontario Court of Appeal presented the contrary view of the goals of custody, stating that custodial dispositions should not be used as a substitute for child welfare. The fact that the same court came to opposite conclusions on the same point within a 3-year period provides an effective illustration of the problem of interpretative disparity under the *YOA*.

¹⁸¹See e.g. *R. v. J.M.* (1986), 44 Man. R. (2d) 25 (C.A.), where the court reduced a custodial disposition to time served and probation for a young offender who had been convicted of break, enter and theft, assault causing bodily harm and several other offences, on the basis that custody should not be ordered for child welfare purposes. The young person was then turned over to the child welfare authorities, who were in a better position to deal with the youth than the youth protection system. See also *R. v. G.K.* (1985), 39 Alta. L.R. (2d) 355, 21 C.C.C. (3d) 558, 63 A.R. 379 (C.A.), *R. v. Michael B.*, *ibid.* and *Protection de la jeunesse — 243* (17 December 1986), Montreal 500-03-002201-856, J.E. 87-197 (C.A.), where the use of the custodial dispositions as a substitute for child welfare was rejected.

¹⁸²See e.g. *R. v. A.J.L.* (1986), 43 Man. R. (2d) 250 (C.A.), where the Manitoba Court of Appeal considered the fact that a young person convicted of break, enter and theft came from an unhappy home environment as one of several factors justifying the imposition of a disposition in secure custody. The Court also took into account the youth's need for individual attention and the refusal of child welfare authorities to intervene until after he had been sentenced in criminal court in making its determination.

Similarly, in *R. v. B.T.* (1987), 58 Sask. R. 293 (C.A.), the Saskatchewan Court of Appeal took into account the unhappy family situation and alcohol problems of a 16-year-old native youth convicted of sexual assault in its decision to increase his sentence to 10 months in secure custody and 12 months of probation. See further *R. v. K.L.B.* (1985), 67 N.S.R. (2d) 232 (C.A.), where the Nova Scotia Court of Appeal considered the fact that a young person convicted of theft was "unmanageable" at home and at school, as a factor which weighed in favour of imposing "some form" of custody.

¹⁸³(8 May 1986), Montreal 500-03-000265-861, J.E. 86-951 (Youth Ct.).

¹⁸⁴"Short, sharp shock" refers to a severe, short penalty which aims at providing a maximum level of individual deterrence.

would be better served by a longer custodial term. In choosing this disposition, Demers J. drew the following analogy between "special needs" in young offender cases and the doctrine of the "best interests of the child" in youth protection cases: "De l'avis de la soussignée, les besoins du jeune dont il est question à la loi sur les jeunes contrevenants ont certainement autant d'importance que le bien de l'enfant et son intérêt en vertu de la Loi sur la protection de la jeunesse."¹⁸⁵ This statement calls to mind the system of juvenile justice which prevailed under the *JDA*. There, as in child protection cases, the court played a *parens patriæ* role, in that all judicial decisions were made in the "best interests" of the child.¹⁸⁶ The role of the sentencing judge was to assess the rehabilitative and welfare needs of the juvenile and to order a sentence to meet these needs. Thus, the analogy drawn between "special needs" and "best interests" in *Protection de la jeunesse — 220* links the concept of "special needs" to a rehabilitative or welfare model of sentencing.¹⁸⁷

Other courts have given rehabilitation a prominent role in determining sentence without explicitly mentioning "special needs." For example, in *F.I.G.C. v. R.*, the Nova Scotia Court of Appeal emphasized that the courts must not lose sight of the "important elements of reformation and rehabilitation when there is the realistic possibility of success."¹⁸⁸ Similarly, in *R. v. K.S.J.*,¹⁸⁹ the Nova Scotia Court of Appeal held that young offenders must be treated differently from adults in the sense that, while youth are to be held accountable for their actions, rehabilitation is the "primary consideration."¹⁹⁰ In the most striking case on this point, the British Columbia Court of Appeal held that rehabilitation should be the paramount sentencing criterion under the *YOA*.¹⁹¹ This view was paralleled

¹⁸⁵*Supra* note 183 at 9.

¹⁸⁶See *supra* notes 23-26 and accompanying text for a discussion of the *parens patriæ* philosophy of the *JDA*.

¹⁸⁷See P. Gabor, I. Greene & P. McCormick, "The Young Offenders Act: The Alberta Youth Court Experience in the First Year" (1986) 5 Can. J. Fam. L. 301 at 307-08, for the view that the use of rehabilitative and welfare goals under the *YOA* is the direct result of judges applying *JDA* principles to the *YOA*. The authors of this study interviewed 13 of the 15 full-time members of the Alberta Youth Court and asked questions relating to various aspects of the *YOA*. Over half of the judges interviewed indicated that they had not changed their attitude toward sentencing with the passage of the *YOA*.

¹⁸⁸(1988), 81 N.S.R. (2d) 82 at 83, 203 A.P.R. 82 (S.C.(A.D.)).

¹⁸⁹(1987), 79 N.S.R. (2d) 27 at 28, 196 A.P.R. 27 (S.C.(A.D.)).

¹⁹⁰See also *R. v. M.J.C.H.* (1990), 86 Nfld. & P.E.I.R. 199 at 202 (Nfld. S.C.(T.D.)), where it was held that the appropriate disposition should strike a balance between rehabilitation and the protection of society, and *R. v. S.A.B.*, *supra* note 175 at 376, where it was held that the principles of the accountability of the young person, the protection of society and the needs of the young person are all important, and that "[a]ny one of these may become paramount in a given situation, although all are relevant."

¹⁹¹*R. v. S.A.T.* (1991), 2 B.C.A.C. 161, 5 W.A.C. 161 (B.C.C.A.) [cited to B.C.A.C.]. In this case, the B.C. Court of Appeal reduced a sentence of 1 year in custody and 2 years of probation to time served for a young offender who had been convicted on 2 counts of sexual assault against his step-sister. Because the youth was 19 years old at the time of his conviction, the trial judge ordered that the sentence be served in adult prison pursuant to s. 24.5 of the *YOA*. He recommended a particular facility which aimed at rehabilitating young adults. In fact, the youth was sent to an ordinary jail where he was placed in protective custody and confined to a small room for 21 hours a day. In reducing the sentence ordered at trial, Lambert J.A. made the following statement about the goals of the *YOA* at 10-11:

in the recent decision of the Supreme Court of Canada in *R. v. J.J.M.*, where Cory J., writing for the Court, expressed the view that reform and rehabilitation must be the "ultimate aim of all dispositions."¹⁹² Additionally, in the transfer context, in *R. v. S.W.S.*,¹⁹³ the Manitoba Provincial Court specifically defined "special needs" as a young person's prospects for rehabilitation, and refused to transfer a young person to adult court on the basis that these special needs could be better dealt with in the youth system.

Despite the fact that many of the decisions which tailor sentences to meet child welfare and rehabilitative goals make no *explicit* reference to paragraph 3(1)(c) of the *YOA*, the legislative concept of "special needs" is one of the implicit textual bases from which these goals are read into the Act. *Protection de la jeunesse — 220* is simply an explicit illustration of the implicit connection that courts have drawn between special needs, rehabilitation and child welfare goals.¹⁹⁴ Further evidence of the link between "special needs" and rehabilitative or welfare goals is found in the most recent government proposals to amend the *YOA*,¹⁹⁵ where paragraph 3(1)(c) is redrafted to read as follows:

(c) young persons require supervision, discipline and control, but because of their state of dependency and level of maturity, require guidance and assistance in addressing their developmental needs and they may also have special needs which may require assessment and *treatment*. [emphasis added]¹⁹⁶

Treatment, which is seen as synonymous to rehabilitation, is conceived of as part and parcel of the concept of "special needs" in this provision. The proposed amendment may be seen as a codification of the jurisprudence equating "special needs" with treatment goals.

Is this equation justified under the *YOA*? As we have discussed, the *JDA* was structured around the idea that juvenile delinquents were not personally responsible for their wrongful behaviour, but were rather blameless "victims of circumstance" who had become delinquent in response to poor parenting or economic and social disadvantages and thus explicitly supported a rehabilitative approach to sentencing.¹⁹⁷ The correlative to the absence of notions of respon-

It may well be that if this young man had been sentenced to a period of incarceration that had in fact been able to have been served at Stave Lake, then that may well have been a very good sentence for the purposes of his rehabilitation. And, of course, rehabilitation is the paramount sentencing criterion under the *Young Offenders Act*. There is no doubt that the sentence that is actually being served in this case, in the way it is being served, is inconsistent with the principles that should govern sentencing under the *YOA*.

See also *R. v. K.S.J.*, *supra* note 189 and *R. v. F.* (1985), 11 O.A.C. 302, for the view that the primary goal of the *YOA* is rehabilitation.

¹⁹²*R. v. J.J.M.*, [1993] 2 S.C.R. 421, 20 C.R. (4th) 295 at 299 [hereinafter *J.J.M.* cited to C.R.].

For a discussion of this case, see *infra* notes 344-48 and accompanying text.

¹⁹³(9 January 1986), Y.O.S. 86-001 (Man. Prov. Ct., Fam. Div.).

¹⁹⁴*Supra* notes 183-85 and accompanying text.

¹⁹⁵Canada, Department of Justice, *Proposed Changes to the Young Offenders Act — Phase II* (Ottawa, unpublished, 14 August 1992), Part A, s. 3(1)(c) [hereinafter *Proposals*].

¹⁹⁶*Proposals, ibid.*, Part A, s. 3(1)(c).

¹⁹⁷See *supra* notes 21-29 and accompanying text for a discussion of the philosophical orientation of the *JDA*.

sibility of youth under the *JDA* was the assumption that young persons lacked the capacity to enjoy full civil rights. In the sentencing context, the *JDA* provided for indeterminate periods of custody, and the courts, accordingly, had little concern for proportionality in sentencing or for standardized sentencing across jurisdictions.¹⁹⁸

In contrast, the *YOA* was not designed to support rehabilitative or child welfare goals. The accountability of youth is one of the cardinal principles of the *YOA*,¹⁹⁹ and, as a corollary, youths are guaranteed full enjoyment of the rights guaranteed in paragraph 3(1)(e) of the Act.²⁰⁰ As well, the *YOA* stipulates that all sentences must be determinate²⁰¹ and that treatment under the Act cannot be ordered without the consent of the young person.²⁰² Moreover, the judge sentencing a young offender has limited control over the provision of treatment, as he or she does not have the power to designate the institution in which the young persons will be placed.²⁰³ Thus, rehabilitative and welfare goals are more problematic to achieve under the current young offenders system, and therefore constitute ill-suited sentencing goals under the Act.²⁰⁴

Several authors have taken this view. For example, Manfredi has argued that the *YOA* has replaced rehabilitation with individual responsibility and system accountability as the dominant objectives of juvenile justice policy.²⁰⁵ With

¹⁹⁸Leschied, Jaffe & Willis, eds., *supra* note 3 at 159.

¹⁹⁹*YOA*, *supra* note 1, s. 3(1)(a).

²⁰⁰Paragraph 3(1)(e) reads as follows:

3(1)(e) young persons have rights and freedoms in their own right, including those stated in the *Canadian Charter of Rights and Freedoms* or in 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.

²⁰¹*YOA*, s. 20(3), (4). These sections set out the maximum length for young offender dispositions. The maximum sentence is 5 years less a day for first or second degree murder, and 3 years for all other offences.

²⁰²*YOA*, ss. 20(1)(i), 22(1).

²⁰³This function is reserved to the provincial director in s. 24.2 of the *YOA*. The provincial director may rely upon a judge's comments to inform his or her choice of institution.

²⁰⁴See *supra* notes 133-42 and accompanying text for a discussion of the general effectiveness of rehabilitation as a goal for young offender sentencing. A recent study which shares Martinson's thesis that "nothing works" is that of S.P. Lab & J.T. Whitehead, "From 'Nothing' Works to 'The Appropriate Works': The Latest Stop on the Search for the Secular Grail" (1990) 28:3 *Criminology* 405.

²⁰⁵Manfredi, *supra* note 171 at 58. See also A. Young, "Appellate Court Sentencing Principles for Young Offenders" in Beaulieu, ed., *supra* note 171, 67 at 93-94, for the view that rehabilitation has been relegated to a secondary status in the young offenders system. A similar opinion is expressed in A. Leschied & P. Gendreau, "The Declining Role of Rehabilitation in Canadian Juvenile Justice: Implications of Underlying Theory in the Young Offenders Act" (1986) 28 *Can. J. Crim.* 315.

For the view that rehabilitative goals may validly be addressed under the *YOA*, see M.-A. Kirvan, "Commentary on the Implications of the *Young Offenders Act* for Treatment and Rehabilitation" (1987) 11 *Prov. Judges J.* 18 at 21. See also Trépanier, *supra* note 171 at 57, for the view that rehabilitative needs may be addressed under the Act. See further Leschied *et al.*, "Treatment Issues and Young Offenders: An Empirically Derived Vision of Juvenile Justice Policy" in A. Corrado *et al.*, eds., *Juvenile Justice in Canada: A Theoretical and Analytical Assessment* (Toronto:

respect to welfare needs, Trépanier has argued that a child's need for protective measures is no longer an acceptable goal for justifying interventions that cannot be justified under the other principles of the Act.²⁰⁶ This is reinforced by the fact that the *YOA* was conceived by many reformers in the 1960s and 1970s as a move away from the rehabilitative model²⁰⁷ and the informal system of justice under the *JDA*.²⁰⁸

Accordingly, we must question why so many courts have allowed rehabilitation and child welfare goals to be determinative in their choice of dispositions. These goals are clearly outside the scope of the *YOA* viewed historically and are not supported by the structure of the current Act. In this respect, there is also reason to criticize the most recent government *Proposals* to amend the *YOA*. Paragraph 3(1)(c) of the *Proposals*, reproduced above,²⁰⁹ explicitly reinstates the goal of rehabilitation in Canadian juvenile justice by linking "special needs" with treatment. Paragraph 3(1)(c.1) further links rehabilitation and special needs with the protection of society, as follows:

s. 3(1)(c.1) the long term protection of society is best served by the rehabilitation of young offenders, and accordingly, young persons should bear responsibility for their contraventions in ways which will most effectively respond to the needs and circumstances relevant to their offending behaviour.²¹⁰

The *Proposals* do little to clarify the use of language and concepts under the Act. Paragraph 3(1)(c.1) confuses the notion of special needs by linking it with the notions of accountability, rehabilitation and the protection of society. What does it mean to say that young persons should bear responsibility in a manner that responds to the needs and circumstances relevant to their offending behaviour? How do these needs and circumstances relate to the possibility of rehabilitation? Paragraph 3(1)(c) further complicates matters by drawing a distinction between special needs and developmental needs, without defining either of these two concepts. Thus, the *Proposals* compound the problems of interpretation under the *YOA*, and arguably, leave judges with even less direction than they are given under the present Act.

It is therefore clear that interpreting "special needs" in the sentencing context has created a number of problems. The vague language of the principle itself gives little direction to the sentencing judge, with the result that judicial interpretation of "special needs" has been inconsistent. Moreover, "special needs" has become the implicit basis for judicial reliance on principles which are completely incompatible with the history and the structure of the *YOA*. In short, judges have been hesitant to renounce the philosophy of juvenile justice which dominated for most of this century in favour of a model premised on the

Butterworths, 1992) 347 at 352, for the view that treatment of young offenders can be effective, but that the *YOA* frustrates this possibility with a "justice model" of sentencing.

²⁰⁶Trépanier, *ibid.* at 34.

²⁰⁷See *supra* notes 171-73 and accompanying text for a discussion of the move away from the rehabilitative philosophy of sentencing.

²⁰⁸Manfredi, *supra* note 171 at 128. See also Trépanier, *supra* note 171 at 28-31.

²⁰⁹See text accompanying note 196.

²¹⁰*Proposals*, *supra* note 195, s. 3(1)(c.1).

responsibility and rights of youth. Thus, apart from the inappropriate use of rehabilitative and welfare goals, the courts have failed to develop sentencing principles which promote a unique identity for juvenile justice under the *YOA*. As Young points out, although courts have alluded to the concept of "special needs" as a distinguishing feature of the young offenders system, there is little understanding of how this concept can be translated into a distinct penal philosophy.²¹¹

In our opinion, it should be made clear by the legislator that "special needs" does not refer to rehabilitation. While some may argue that a rehabilitative approach is what prevents the juvenile justice system from becoming a miniature version of the adult *Criminal Code*,²¹² we believe that this distinction can be preserved without reference to the concepts of rehabilitation and child welfare. The special needs of young persons stem from the fact that they are at a different stage of intellectual, emotional and social development than adults.²¹³ While the "special needs" of youth were addressed under the *JDA* largely by asking what help or treatment the state could provide, we believe that "special needs" under the *YOA* should be defined largely in terms of what special protections the state should provide to wayward youth as a result of their lesser development. The lesser moral and cognitive development of youths makes them particularly vulnerable in an adult world. Accordingly, special protections must be accorded to young offenders.

These special protections can be found throughout the *YOA*. The limits on the publication of information regarding young offender cases,²¹⁴ the concept of parental responsibility, the idea that children should not be removed from their families unless absolutely necessary,²¹⁵ and the concept of diminished responsibility are all particular instances of a more generalized understanding that young persons have special needs. Similarly, in the sentencing context, the custody review process,²¹⁶ the variety of available dispositions including the creation of "open" custody,²¹⁷ and the shorter custodial terms, all reflect the idea that young persons are different than adults and should be treated as such.²¹⁸ The meaning of "special needs" is made much clearer through these concrete examples than through the blanket statement that "young persons have special needs and require guidance and assistance."

In this respect, we believe that any interpretation of the expression "special needs" should be centred around the question of whether and to what extent the diminished moral and cognitive capacity of youth should necessitate special protections. This type of analysis cannot be made in blanket form in a Decla-

²¹¹Young, *supra* note 205 at 104.

²¹²*Supra* notes 116-19 and accompanying text.

²¹³See text accompanying *supra* note 69 *et seq.* and Dalby, *supra* note 51.

²¹⁴S. 38 of the *YOA* stipulates that the names of young offenders may not be published. S. 39 provides for the exclusion of the media from young offender hearings.

²¹⁵*YOA*, s. 3(1)(h).

²¹⁶*YOA*, ss. 28-43.

²¹⁷*YOA*, s. 24.1.

²¹⁸See Kirvan, *supra* note 205 at 21, for the view that these various provisions of the *YOA* give specific recognition to the concept of special needs.

ration of Principle. Rather, it requires an analysis of the particular protection being considered and the needs of youth that might necessitate that protection. An example of this type of analysis can be found in relation to confessions.

2. Confessions

The notion of voluntariness has been the traditional cornerstone of the Canadian law of confessions as it pertains to adults. This concept developed out of the recognition that the dynamics inherent in the process of police interrogation can cause individuals to make unreliable or untrue statements to authority figures conducting the interrogation. When statements are made to "persons in authority," only those which are "voluntary" will be seen to be reliable and will therefore be admitted into evidence. On the other hand, statements which are "involuntary," in the sense that they have been made "out of fear of prejudice or hope of advantage exercised or held out by a person in authority," will be inadmissible.²¹⁹ Since 1982, statements may also be excluded pursuant to subsection 24(2) of the *Canadian Charter of Rights and Freedoms*²²⁰ in circumstances where there has been a breach of a *Charter* right and the administration of justice would be brought into disrepute.

Section 56 of the *YOA* creates a special regime governing the admissibility of confessions made by young people to persons in authority.²²¹ It is based on

²¹⁹*Ibrahim v. R.*, [1914] A.C. 599 at 609 (P.C.).

²²⁰Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter *Charter*].

²²¹Section 56 reads as follows:

- 56.(1) Subject to this section, the law relating to the admissibility of statements made by persons accused of committing offences applies in respect of young persons.
- (2) No oral or written statement given by a young person to a peace officer or other person who is, in law, a person in authority is admissible against the young person unless
- (a) the statement was voluntary;
 - (b) the person to whom the statement was given has, before the statement was made, clearly explained to the young person, in language appropriate to his age and understanding, that
 - (i) the young person is under no obligation to give a statement,
 - (ii) any statement given by him may be used as evidence in proceedings against him,
 - (iii) the young person has the right to consult another person in accordance with paragraph (c), and
 - (iv) any statement made by the young person is required to be made in the presence of the person consulted, unless the young person desires otherwise;
 - (c) the young person has, before the statement was made, been given a reasonable opportunity to consult with counsel or a parent, or in the absence of a parent, an adult relative, or in the absence of a parent and an adult relative, any other appropriate adult chosen by the young person; and
 - (d) where the young person consults any person pursuant to paragraph (c), the young person has been given a reasonable opportunity to make the statement in the presence of that person.
- (3) The requirements set out in paragraphs (2)(b), (c) and (d) do not apply in respect to oral statements where they are made spontaneously by the young person to

the assumption that children are particularly suggestible, generally unaware of their rights and therefore require special protections in situations where they tend to make self-incriminating statements. Remarks to this effect can be found throughout the jurisprudence and literature dealing with the *YOA*:

By its enactment of s. 56, Parliament has recognized the problems and difficulties that beset young people when confronted with authority ... A young person is usually far more easily impressed and influenced by authoritarian figures. No matter what the bravado and braggadocio that young people may display, it is unlikely that they will appreciate their legal rights in a general sense or the consequences of oral statements made to persons in authority; certainly they would not appreciate the nature of their rights to the same extent as would most adults ... A young person may be more inclined to make a statement, even though it is false, in order to please an authoritarian figure. It was no doubt in recognition of the additional pressures and problems faced by young people that led Parliament to enact this code of procedure.²²²

Section 56 thus addresses the "special needs" of young persons by setting out requirements with respect to the admissibility of their confessions which surpass those available to adults. As such, it is one area of the *YOA* where "special needs" is indeed equated to special protections.

As a general rule, it is during the course of police interrogation that individuals make confessions. The salient features of this process are well documented in the literature of social psychology. Writers in the area agree that the environment in which the interrogation takes place, the personal characteristics of the interrogator, as well as the tactics adopted by the interrogator combine to make police interrogation an "inherently coercive" institution.²²³ Studies showing that humans have a tendency to obey authority even where obedience is irrational and against one's better judgment are also relevant in this context.²²⁴ They suggest that even those suspects who understand their rights to silence or to counsel, and who realize that these rights should be exercised, may find themselves responding to questions put to them by the police. The same studies document a frequent inability of individuals to express themselves in the face of authority figures. As one author has remarked: "[the] inability to find appropri-

a peace officer or other person in authority before that person has had a reasonable opportunity to comply with those requirements.

- (4) A young person may waive his rights under paragraph (2)(c) or (d) but any such waiver shall be made in writing and shall contain a statement signed by the young person that he has been apprised of the right that he is waiving.
- (5) A youth court judge may rule inadmissible in any proceedings under this Act a statement given by the young person in respect of whom the proceedings are taken if the young person satisfies the judge that the statement was given under duress imposed by any person who is not, in law, a person in authority.
- (6) For the purpose of any section, an adult consulted pursuant to paragraph 56(2)(c) shall, in the absence of evidence to the contrary, be deemed not to be a person in authority.

²²²*R. v. J.T.J.*, [1990] 2 S.C.R. 755 at 766, 79 C.R. (3d) 219.

²²³See e.g. E.D. Driver, "Confessions and the Social Psychology of Coercion" (1968) 82 Harv. L. Rev. 42; C. Manfredi, "Human Dignity and the Psychology of Interrogation in *Miranda v. Arizona*" (1986) 1 Can. J. Law & Soc. 109.

²²⁴For a good summary of these studies see E.W. Shoben, "The Interrogated Juvenile: Caveat Confessor?" (1973) 24 *Hast. L.J.* 413 at 418ff.

ate verbal expression for terminating a stressful encounter may similarly hinder a suspect in the exercise of his right to terminate an interrogation."²²⁵ These findings raise doubts as to whether confessions can ever be described as truly voluntary.²²⁶

The inherent coerciveness of interrogation is exacerbated when the subject of the interrogation is a child. According to Driver, "low status persons — those who have never enjoyed a secure or rewarding social position — are likely to be the most vulnerable of all to [police] indoctrination."²²⁷ While individuals of any age may fit this description, the "typical inexperience, passivity, and low social status of the young enhances their susceptibility to coercion as a group."²²⁸ Developmental psychologists have defined personality traits of young people which are similarly revealing. They describe adolescents as possessing little foresight, with the ability to understand only those things that are available to immediate perception.²²⁹ In commenting on these studies one author has remarked: "When these characteristics of an adolescent are overlaid on a juvenile-suspect-interrogator framework, it is readily discernible that the juvenile is not in control of his situation. All the juvenile knows is that he is caught by the police, and he is not likely to be aware of the specific consequences of his acts."²³⁰ Young people are therefore particularly ill equipped to deal with the rigours of police questioning. For example, one study which tested "predisposition and coercion" was conducted amongst ninety fourteen-year-olds.²³¹ Half of the group consisted of delinquents, the other half of non-delinquents.²³² It was found that although most of the subjects consciously knew that they had the right to remain silent,²³³ twenty-nine per cent of the delinquents, and forty-three per cent of the non-delinquents still felt that they *had* to talk to the authorities if arrested.²³⁴ The authors suggested that the adolescents' knowledge of their right to silence is subordinate to both their "mental states at the time of arrest" as well as their "predisposition to talk."²³⁵

²²⁵*Ibid.*, at 419.

²²⁶It is interesting to note that interrogation manuals prepared by police scientists are actually designed to capitalize on the psychological factors at work in the process of police interrogation. By manipulating these factors, police can subtly "coerce" suspects into talking. See especially F.E. Inbau, J.E. Reid & J.P. Buckley, *Criminal Interrogations and Confessions*, 3d ed. (Baltimore: Williams & Wilkins, 1986).

²²⁷Driver, *supra* note 223 at 48.

²²⁸Shoben, *supra* note 224 at 422.

²²⁹For a good summary of these writings see S.A. Burr, "Now My Son, You Are a Man: The Judicial Response to Uncounselled Waivers of Miranda Rights by Juveniles in Pennsylvania" (1987) 92 Dick. L. Rev. 153.

²³⁰*Ibid.*, at 174.

²³¹A.B. Ferguson & A.C. Douglas, "A Study of Juvenile Waiver" (1970) 7 San Diego L. Rev. 39.

²³²The "delinquent" group was made up of children being held at various San Diego County detention facilities. The "non-delinquents" consisted of students attending local Junior High Schools (*ibid.*).

²³³Delinquents scored a .96 index of understanding, while non-delinquents scored a .82 index of understanding of the right to remain silent (*ibid.* at 48).

²³⁴*Ibid.*, at 51.

²³⁵*Ibid.*

Studies comparing the confession rates of young people to those of adults reinforce the literature describing children to be particularly vulnerable in the face of police questioning.²³⁶ In his recent book entitled *Police Interrogation*, for example, Woods examined the data tending to show a relationship between age and the confession rate and tested it for statistical significance and association.²³⁷ Woods' calculations confirmed that there is indeed a statistically significant relationship between age and the incidence of confessions. Woods concluded that the existing research clearly supports the hypothesis that younger suspects do confess more readily than older ones.

The tendency of adolescents to confess at a higher rate than adults is rooted in more than just the particular suggestibility of children. An analysis of the role played by the police in processing complaints made against young people provides another explanation for this trend.²³⁸ We know that only some of the children who are apprehended by the police will ever find themselves in youth court. In fact, the police act as an "informal screening body," selecting those children who will be formally charged, and those who will be dealt with outside the system.²³⁹ Between 1986 and 1988, an average of 173,000 youths came into contact with the police each year. Of these, sixty-five per cent were charged, and thirty-five per cent were dealt with unofficially.²⁴⁰ Studies have shown that in deciding how to proceed in particular cases, police are strongly influenced by a youth's demeanour.²⁴¹ A youth who is more contrite and cooperative is likely to receive more favourable treatment by the police and he or she may, as a

²³⁶Although no major study of the interrogation process has been done in Canada, a great deal of American and British research has been done on the topic. In a study by L.S. Leiken, "Police Interrogation in Colorado: The Implementation of Miranda" (1970) 47 Denver L.J. 1, 42.9% of those aged under 25 were found to have made confessions to the police, while only 18.2% of those over 25 confessed. The researcher concluded that older suspects "are better equipped psychologically to cope with the interrogation situation." In a study conducted for the Royal Commission on Criminal Procedure by J. Baldwin and M. McConville, *Confessions in Crown Court Trials* (London: H.M.S.O., 1980), researchers examined 500 cases in both London and Birmingham. In each city there was found to be a "strong association" between the age of the defendant and the tendency to confess. The authors concluded that "the younger the defendant, the more likely he was to confess" (*ibid.* at 34). The findings of another British study were to the same effect. See P. Softley, *Police Interrogation: An Observational Study in Four Police Stations* (London: H.M.S.O., 1980). Two additional projects examined the relationship between age and the confession rate. In one, conducted by D.W. Neubauer, "Confessions in Prairie City: Some Causes and Effects" (1974) 65 J. Crim. Law & Criminology 103, it was found that while the confession rate does differ with age, the differences are not statistically significant. The other, Comment, "Interrogations in New Haven: The Impact of Miranda" (1967) 76 Yale L.J. 1519, found that there was no correlation between successful interrogation and age.

²³⁷R.S.M. Woods, *Police Interrogation* (Toronto: Carswell, 1990).

²³⁸See J.L. Hagan, "The Labelling Perspective, the Delinquent, and the Police: A Review of the Literature" (1972) 14 Can. J. Corr. 150 at 152, for elaboration on the fact that the police do not generally seek out "delinquent" behavior, but act generally in response to citizen complaints about such behavior.

²³⁹L.C. Wilson, *Juvenile Courts in Canada* (Toronto: Carswell, 1982) at 53.

²⁴⁰*Canadian Centre for Justice Statistics: Youth Crime in Canada, 1986-1988*, vol. 20, No. 12 (Ottawa, Statistics Canada, August 1990).

²⁴¹In fact, this is the second most crucial factor affecting the police officer's decision, coming after the child's previous prison record. See Hagan, *supra* note 238 at 154.

result, escape the court system.²⁴² Not surprisingly, youths are aware that it is in their best interests to cooperate with the police. In one study, it was found that seventy-four per cent of delinquents and ninety-three per cent of non-delinquents felt that it would benefit them to "talk" when confronted by authorities.²⁴³ Young persons' perceptions of the advantages of cooperation are thus a factor in pressuring them to confess. What adolescents do not realize is that the "cooperation" which seems necessary in order to achieve the immediate goal of favourable treatment by the police can be used against them if they are nevertheless sent to court. They are incapable of recognizing that the behaviour which seems to be required in the short term can yield detrimental consequences in the long term.

While overt coercion is not generally a feature of modern interrogations, psychological, sociological and legal literature makes it clear that these interrogations can be subtly coercive.²⁴⁴ In dealing with adults, the test of voluntariness, supplemented by the *Charter* protections, is seen to offset the coercive nature of interrogation enough to ensure that only reliable statements are admitted into evidence. Young people, however, have been shown to be more vulnerable than adults to the coercive forces of the interrogation process. Indeed, studies reveal the confession rate to be significantly related to age. Moreover, police discretion as to whether to send a young person to court or deal with him or her unofficially creates an additional pressure to be cooperative and confess. Young people therefore do have special needs, and require special protections, in the interrogation process. The remainder of our discussion of confessions will therefore be devoted to assessing whether section 56 adequately addresses these needs.

There are four main ways in which section 56 attempts to accommodate the special needs of youth. They are the following:

- (1) by providing young people with a reasonable opportunity to consult a "non-counsel" adult, and with the right to make any statement in the presence of that person;
- (2) by providing the court with a discretion to exclude statements made by young people to individuals who are *not* persons in authority when the statement has been made under duress;
- (3) by providing that only the rights to consult and to make a statement in the presence of the person consulted can be waived, and that this must be in writing;
- (4) by providing that compliance with the requirements of the section is mandatory.

²⁴²*Ibid.* at 153-54. See also J.E. Glen, "Interrogations of Children: When Are Their Admissions Admissible?" (1968) 2 *Fam. L.Q.* 280 at 293; Shoben, *supra* note 224 at 422.

²⁴³Ferguson & Douglas, *supra* note 231 at 51-52. These statistics were compiled by asking the subjects the following question: "If you were arrested, do you think it would be better for you to talk?"

²⁴⁴But see S.J. Schulhofer, "Reconsidering Miranda" (1987) 54 *U. Chi. L. Rev.* 435 at note 26 for examples of police brutality throughout the 1970s and 1980s.

a. *The Role of Parents*

Paragraph 56(2)(c) requires that a young person be given a reasonable opportunity to consult "counsel or a parent, or in the absence of a parent, an adult relative, or in the absence of a parent and an adult relative, any other appropriate adult chosen by the young person."²⁴⁵ Under paragraph 56(2)(d) the young person must be given a "reasonable opportunity to make the statement" in the presence of the person consulted. Subparagraphs 56(2)(b)(iii) and (iv) require that the young person be advised that he or she has these rights. These provisions represent one of the most significant areas in which section 56 goes beyond the common law of confessions and the *Charter* in that they provide a young person with the right to consult and speak in the presence of a non-counsel adult.

Prior to the *YOA*, the courts recognized in a series of cases that a parent's presence could be beneficial to young people in the interrogation context.²⁴⁶ In *R. v. Jacques*, the court put forward a set of guidelines to be applied in determining whether to admit statements made by children.²⁴⁷ The first two were as follows:

1. Require that a relative, preferably of the same sex as the child to be questioned, shall accompany the child to the place of interrogation;
2. Give the child, at the place or room of interrogation, in the presence of the relative who accompanies him, the choice of deciding whether he wishes his relative to stay in the room during the questioning or not;²⁴⁸

These criteria were reiterated in many other cases including *R. v. A.*²⁴⁹ and *R. v. Jensen.*²⁵⁰

Under the *JDA*, there were no statutory guarantees of a parent's presence at the interrogation stage and any statement made by a young person could be admitted at the discretion of the judge, even if the child had not had the benefit of a parent's presence. Under section 56, this is clearly not the case. A young person *must* be advised of the rights to consult a parent and to make a statement in the presence of the parent, and *must* be given a reasonable opportunity to exercise these rights. Failure by the police to respect these rights necessitates the exclusion of any statement made. Section 56 has thus elevated the guidelines which developed in case law under the *JDA* into mandatory rules of law.

The emphasis on the "consultation rights" of the child and the right to "parental presence" during interrogation is based on two related, but distinct, assumptions. The first is the idea of the parent as "protector" of the child. This

²⁴⁵For the purposes of our discussion, we will examine the right to consult a "non-counsel" adult only with reference to parents. Much of what is said, however, will be relevant with respect to other adults consulted by youth.

²⁴⁶In fact, it was also suggested that parents should be present during police questioning in *Report, supra* note 35 at 112.

²⁴⁷*R. v. Jacques* (1958), 29 C.R. 249 (Que. Social Welfare Ct.).

²⁴⁸*Ibid.* at 268.

²⁴⁹(1975), 23 C.C.C. (2d) 537 at 540 (Alta. S.C.).

²⁵⁰[1961] O.R. 703 at 710, 36 C.R. 339, 29 D.L.R. (2d) 321 (H.C.).

perception is intuitively satisfying in that it corresponds to the natural inclination of children to turn to their parents in times of need. The following statement sets out a compelling justification for the safeguards in paragraphs 56(2)(c) and (d): "For adults, removed from the protective ambit of parental guidance, the desire for help naturally manifests in a request for an attorney. For minors, it would seem that the desire for help naturally manifests in a request for parents."²⁵¹ In their roles as protectors, it is hoped that parents will "decrease the powerlessness and fear" undoubtedly experienced by young people in their contacts with the police.²⁵² It is assumed that a parent's presence during interrogation will generally "lessen the coercive atmosphere that arises when a juvenile is alone with the police."²⁵³ In the case of *R. v. D.M. & J.P.*, Abella J. said the following about the role a parent could play:

In considering an issue such as the voluntariness of a statement, one must be scrupulously aware ... that we are dealing with an individual who is legally and biologically a child. This means, for example, that in the imbalance of power which exists when an accused child is interviewed by the police ... great care should be taken to reduce the intimidating disparity of the scales by ensuring that the child has an adult of his choice present if he wishes.²⁵⁴

Parents are thus seen as a source of comfort and support for their child.

While it may be true that parental consultation and presence will generally be in the child's best interest, this is certainly not always the case. In fact, both of the assumptions underlying paragraphs 56(2)(c) and (d) oversimplify the dynamics of parent-child relationships. There will certainly be situations when, instead of acting to protect their child's interests, parents will seek only to protect themselves. For example, they may induce their child to confess in order to fulfil their hope for a speedy resolution of the situation. They may fear that "a denial would lead to a prolonged trial," a situation which would cause them further embarrassment.²⁵⁵ The authors of *Canadian Children's Law* point out that "[t]hose with experience in Juvenile Courts are undoubtedly familiar with situations in which, say, a father, for reasons of his own (such as, avoiding the loss of further time from work to attend a future trial, or using the court as an instrument of discipline or of therapy), literally orders his child to confess or to plead guilty."²⁵⁶ Indeed, the perception of "parent as protector" may frequently be flawed, particularly where the parent and child do not share an identity of interests.

Another serious problem with the assumption that parents will play a positive role in this context is that some parents have been found to encourage their

²⁵¹*People v. Burton*, 99 Cal. Rptr. 1 (Sup. Ct. 1971).

²⁵²Comment, "Juvenile Confessions: Whether State Procedures Ensure Constitutionally Permissible Confessions" (1976) 67 J. Crim. Law & Criminology 195 at 205.

²⁵³C.H. Saylor, "Interrogation of Juveniles: The Right to a Parent's Presence" (1972-73) 77 Dick. L. Rev. 543 at 556.

²⁵⁴(1980), 58 C.C.C. (2d) 373 at 377 (Ont. Prov. Ct.).

²⁵⁵See e.g. Saylor, *supra* note 253 at 555-56; See also N. Bala, "Person in Authority" in *Y.O.S.*, vol. 1 at C & A 72.

²⁵⁶N. Bala, H. Lilles & Judge G. Thomson, *Canadian Children's Law — Cases, Notes and Materials* (Toronto: Butterworths, 1982) at 568.

child to lie when questioned by the police. In an article entitled "Confessions by Juveniles,"²⁵⁷ Ontario Family Court Judge William H. Fox referred to the case of *Re R.M.*, which dealt with a thirteen-year-old boy charged with being a juvenile delinquent in that he had allegedly murdered a seven-year-old girl. Evidence presented at the *voir dire* showed that, when questioned in his mother's presence, the boy had not felt free to tell the truth. In fact, the boy admitted that, following the discovery of the girl's body, his mother had warned him that if the police ever questioned him, he should lie about his whereabouts on the day of the murder. It was only one week later, when the boy was alone with the police, that the boy told the police that he wished to tell the truth. In commenting on this case, Fox J. said the following:

One is driven to ask, in a case of this kind ... if there was even a remote possibility that the police would have discovered the whole truth in the presence of these parents ... Undoubtedly, there must be countless other cases like *R.M.* coming before our courts from day to day in which there are strong reasons for believing that it would not be for the good of the child or in the interest of the community that a parent or other relative should be present while the child is being interrogated ...²⁵⁸

When parents encourage their children to confess, or to lie, in order to maximize *their own* needs, they have clearly not played the role of protectors envisaged by paragraphs 56(2)(c) and (d).

The second assumption underlying paragraphs 56(2)(c) and (d) is that parents are "better informed about legal rights and the possible consequences of making a statement" than their children.²⁵⁹ It is believed that parents "are better able than children to deal effectively with police interrogators" and as such, "young persons will overcome the disadvantages they face if they are provided with access to adult advice."²⁶⁰ In this sense, parents are seen as dispensers of legal advice. Their role is to ensure that the legal rights of their children are protected.

Studies have been conducted to test the ability of parents to provide their children with meaningful assistance in the interrogation and pre-interrogation contexts. In one such study, juvenile court staff observed parent-child communication during 390 interrogations.²⁶¹ In 71.3 per cent of the cases, parents did not tell their children anything about the right to silence, while in 81.3 per cent nothing was said about obtaining a lawyer.²⁶² In 66.2 per cent of the interrogations parents did not offer their children any advice.²⁶³ In those situations where advice was offered, 16.7 per cent were characterized by parents telling their children to waive their right to remain silent, while in 11.3 per cent children were instructed to waive the right to an attorney. A different study was con-

²⁵⁷W.H. Fox, "Confessions by Juveniles" (1963) 5 Crim. L.Q. 459 at 466.

²⁵⁸*Ibid.* at 468-69.

²⁵⁹Bala, *supra* note 255 at C & A 70.

²⁶⁰J. Hanson, "Youth Confessions: Section 56 of the Young Offenders Act" (1987) 6 Can. J. Fam. L. 191 at 210.

²⁶¹T. Grisso, *Juveniles' Waiver of Rights: Legal and Psychological Competency* (New York: Plenum Press, 1981), as cited in Burr, *supra* note 229 at 185.

²⁶²*Ibid.*

²⁶³*Ibid.*

ducted amongst middle class parents attending a PTA meeting.²⁶⁴ In response to a hypothetical situation, one-third said that they would advise their children to confess to any involvement in a crime. Three-quarters of the sample disagreed with the premise that children should be allowed to withhold any information from the police.²⁶⁵ These results raise grave doubts about the ability of parents to serve as competent legal advisors, especially when combined with the studies showing that adults do not themselves adequately comprehend the rights which exist in the interrogation context.²⁶⁶

Thus, these studies show that the formal right to consult a parent is not always a sufficient protection for a young person in the interrogation context. In applying section 56, some Canadian courts have demonstrated that they are aware of this problem. In the case of *R. v. Ashford and Edie*, the Ontario High Court considered the admissibility of a statement made by a boy after his arrest in connection with a homicide.²⁶⁷ The boy's statement was made in his parents' presence, after having spoken to his father in private. Despite this, the court ruled that the statement was inadmissible:

Surely the purpose of having a parent present is so the child shall have guidance, advice and protection. The officer said they were there to protect the rights of the child. People in the conditions of Mr. and Mrs. Eddie are in no condition to do this. The officers said throughout the continuation of the process, she didn't say anything but looked as if she was going to be sick. She was quiet, shaking and gagging. As for the father's condition while in the room, the father was crying and shaking ... While the parents were present, they are not of any assistance in the circumstances of the case and were not in a position to fulfil the duties required of them.²⁶⁸

In the case of *R. v. J.M.A.*,²⁶⁹ the Manitoba Court of Appeal also had occasion to exclude a statement made by a young person in the presence of a represent-

²⁶⁴Grisso & Ring, "Parents' Attitudes Toward Juveniles' Rights in Interrogation" (1979) 6 *Crim. Just. & Behav.* 211, as cited in Burr, *supra* note 229 at 185.

²⁶⁵*Ibid.*

²⁶⁶See e.g. T. Grisso, "Juveniles' Capacities to Waive *Miranda* Rights: An Empirical Analysis" (1980) 68 *Calif. L. Rev.* 1134 at 1152ff. In the American context, the possibility of requiring that a youth and his or her parent be informed of the juveniles' rights has been explored, presumably in recognition of the fact that an ignorant parent will have a limited capacity to provide their child with meaningful assistance. The "Interested Adult" or "McCutcheon" Rule is explained by Burr, *supra* note 229 at 161, as follows: "no person under the age of eighteen years could waive his right to remain silent and his right to the assistance of counsel without being provided an opportunity to consult with an interested adult who was informed of the juvenile's rights ..."

See e.g. *Commonwealth v. McCutcheon*, 463 Pa. 90 (1975) and *Lewis v. State*, 12 *Crim. L.* 2136 (Ind. Sup. Ct. 1972). But see Burr, *ibid.* at 186, where he criticizes this approach as follows:

such a rule does not adequately safeguard a child's rights and may even aggravate the problem. The "interested adult" rule introduced an additional tier of litigable issues requiring courts to determine whether the parent was informed of the juvenile's rights, whether the parent understood those rights and whether the parent had an adequate opportunity to confer. This can only result in diverting judicial attention from an assessment of the validity of the confession itself to a mechanical inquiry into the parents' presence and understanding.

²⁶⁷(9 April 1985), Y.O.S. 56 § 141 (Ont. H.C.) [unreported].

²⁶⁸*Ibid.* at 56 § 141-42.

²⁶⁹(1986), 46 *Man. R.* (2d) 309 (C.A.).

ative of his legal guardian, a Child and Family Services Centre. In so doing, the court said the following:

notwithstanding the presence of a representative of his legal guardian, it cannot be said that the accused had a reasonable opportunity to consult with his guardian, as the guardian's representative was found to have misunderstood his role ... [T]he accused did not have the benefit of advice which "consultation" contemplates
²⁷⁰

These cases are helpful in showing that a young person's right to consult a parent is more than a mere formality.

The initiative of some courts in assessing the quality of consultation in order to determine whether paragraphs 56(2)(c) and (d) have been satisfied is to be commended. However, it may be optimistic to assume that all courts will apply this enlightened analysis. We believe that the legislature must amend section 56 in order to address the unsound assumptions about the role of parents contained in this provision. We believe that in order adequately to address the special needs of youth, a more developed role for counsel is required.

i. The Right to Counsel

The need to emphasize and insist upon the young person's right to consult counsel is underscored by our discussion of the limitations associated with the right to parental consultation and presence. In fact, it seems fair to say that only lawyers truly possess the skills and training necessary to assist a young person in the face of police questioning.

In order to exercise the personal right to counsel, young people must have a reasonable understanding of the scope and implications of this right. It is not enough simply to inform a young person that he or she has the right to consult counsel, and then leave the decision as to whether to exercise this right exclusively to them. Children have been shown to lack the "sophisticated reasoning ability required to make this important decision."²⁷¹ Many young people do not really understand the advocate role of defence counsel. Indeed, in one study, it was revealed that only seven of the twenty-two children questioned believed that defence counsel is "really on their side."²⁷² An American researcher has concluded that "one-third of juveniles sixteen years of age and under who have had few or no prior significant contacts with the police believe that defence attorneys defend the interests of the innocent but not the guilty."²⁷³ Not only are young persons ignorant regarding the function of counsel as defender, the majority of them do not understand what this role implies at various stages of the process.²⁷⁴ Exercising the right to counsel in a meaningful way involves

²⁷⁰*Ibid.* at 310.

²⁷¹J.C. Pearson, "Legal Representation Under the Young Offenders Act," in Leschied, Jaffe & Willis, eds., *supra* note 3, 114 at 117.

²⁷²K. Catton & P. Ericson, *The Juvenile's Perception of the Role of Defence Counsel in Juvenile Court* (Masters Thesis, Centre of Criminology, University of Toronto, 1972) [unpublished] at 21.

²⁷³See Pearson, *supra* note 271 at 117.

²⁷⁴See R. Abramovitch & M. Peterson-Bedali, "Young Persons Comprehension of Waivers and Statements" (Presented at the Canadian Bar Association-Ontario Continuing Legal Education con-

more than being able to assert the right; the youth must also appreciate *why* that right exists. It is crucial that the youth understand the role of others in the criminal process and the process itself. In a recent Canadian study of 113 young persons from grades six, eight, ten and twelve, virtually none of the young persons interviewed understood the full implications of a choice not to assert their right to counsel.²⁷⁵ The fact that police questioning would occur after arrest was known by only 57.7 per cent of the students.²⁷⁶ There was no clear link made by the youth between the right to have counsel and the importance of having counsel present during police questioning.²⁷⁷ In order for this special protection to be of any value the youth must be provided with the opportunity to make a fully informed decision as to whether or not to assert the right to counsel. This involves more than knowing that they have a right: they must know exactly what this right is and why they have it.

In order to ensure that young people enjoy the full benefit of the rights accorded to them under section 56, legal representation in the pre-interrogation stage must be provided as a matter of course, without placing an obligation on young people to request it. This means, at the very least, that before being questioned by the police, young people should have a conversation with counsel during which counsel can explain their role to young people. Counsel can also use this opportunity to ensure that young persons understand the significance and extent of the legal rights available to them. Only after such a conversation can children be equipped with the knowledge necessary to make an informed decision with respect to the exercise of their rights. At the same time, they can also choose whether or not they wish to have counsel present during the actual interrogation. Many authors and legal bodies in the United States have made suggestions to this effect. For example, the Institute of Judicial Administration-American Bar Association Joint Commission on Juvenile Justice Standards has recommended that juveniles be accorded a mandatory, non-waivable right to counsel in the pre-trial context.²⁷⁸ In doing so, they accepted the conclusion of the President's Commission on Law Enforcement and Administration of Justice that:

providing counsel only when the child is sophisticated enough to be aware of his need and to ask for one or when he fails to waive his announced right is not enough, as experience in numerous jurisdictions reveals. Counsel should be appointed as a matter of course wherever coercive action is a possibility, without requiring any affirmative choice by the child or parent.²⁷⁹

Grisso, who has conducted numerous studies testing the ability of children to adequately comprehend and exercise their rights, has put forward this same suggestion.²⁸⁰

ference entitled: *The Young Offenders Act: Significant Trends for the 90's*, 14 November 1992) at 16.

²⁷⁵*Ibid.*

²⁷⁶*Ibid.* at 13.

²⁷⁷*Ibid.*

²⁷⁸Institute of Judicial Administration-American Bar Association, *Juvenile Justice Standards, Standards Relating to Pretrial Court Proceedings* (Cambridge: Ballinger Publishing, 1976) at 89ff.

²⁷⁹President's Commission, *supra* note 44 at 34.

²⁸⁰Grisso, *supra* note 266 at 1163.

There are certainly many people who would argue against requiring a mandatory "conversation" with counsel in the pre-interrogation context. It is feared that this would preclude police from performing their role in law enforcement "since any sensible lawyer would, from the outset, advise his client to say nothing."²⁸¹ On the other hand, we believe that in providing counsel to all young people at the earliest stage of the process, we would merely be ensuring that "the ignorant and weaker" young people are placed in the same position as "the better informed and more sophisticated subjects."²⁸² Indeed, as one writer has pointed out, the present section 56 can be seen to foster inequality:

As a result of section 56, all children who receive appropriate advice, and who are intelligent enough to follow that advice, will refrain from making any incriminating admissions. Such youths may, thereby, be shielded from criminal sanction which for those youths, at least, will be a beneficial result. However, less intelligent young persons, and those without access to good adult or legal advice (or, worse yet, who receive bad adult advice) are deprived of any benefit as a result of section 56.²⁸³

Given the need for consultation with counsel in the pre-interrogation stage, an important issue that must be raised with respect to paragraph 56(2)(c) is that the language used in this section makes it unclear whether a young person who has consulted with a "non-counsel adult" has exhausted his or her paragraph 56(2)(c) rights, or whether he or she is entitled to consult counsel as well. The disjunctive wording of this provision seems to indicate that a young person can consult with counsel or a non-counsel adult, but not both: "the young person has, before the statement was made, been given a reasonable opportunity to consult with counsel *OR* a parent ..." At least one court has come to the same conclusion.²⁸⁴

Some writers have noted that despite the language of paragraph 56(2)(c), the combined effect of paragraph 56(2)(c) and section 11 of the *YOA*, as well as paragraph 10(b) of the *Charter* is to provide young people with the right to consult both counsel and a parent. The relevant provisions read as follows:

- 11.(1) A young person has the right to retain and instruct counsel without delay, and to exercise that right personally, at any stage of proceedings against the young person and prior to and during any consideration of whether, instead of commencing or continuing judicial proceedings against the young person under this Act, to use alternative measures to deal with the young person.
 - (2) Every young person who is arrested or detained shall, forthwith on his arrest or detention, be advised by the arresting officer or the officer in charge, as the case may be, of his right to be represented by counsel and shall be given an opportunity to obtain counsel.
10. Everyone has the right on arrest or detention
- ...
(b) to retain and instruct counsel without delay; and ...

²⁸¹Softley, *supra* note 236 at 27.

²⁸²*Ibid.* at 28.

²⁸³Hanson, *supra* note 260 at 210. See also N. Dorsen & D.A. Reznick, "In Re Gault and The Future of Juvenile Law" (1967) 1 Fam. L.Q. 1 at 40-41.

²⁸⁴R. v. J.B. (1990), 109 N.B.R. (2d) 361, 273 A.P.R. 361 (Q.B.).

We submit that even if these provisions guarantee the young person the right to consult counsel and a parent, this right should be stated explicitly within section 56. While section 11 of the *YOA* may guarantee the young person a right to consult counsel in the pre-interrogation context, it does not set out a remedy for the breach of this right. Similarly, reliance on paragraph 10(b) of the *Charter* is unacceptable, for confessions obtained in breach of the rights which it protects need not necessarily be excluded. In fact, the matter is left to the discretion of the judge under section 24 of the *Charter*. When a statement is made by a young person who has not been given the opportunity to consult counsel, or to make a statement in the presence of counsel, the statement should be automatically excluded even if the young person has had the benefit of parental consultation and presence.

b: Parents, Persons in Authority and Duress

It has been seen that the right to consult a non-counsel adult is one of the most significant "special protections" offered to young people under section 56, in that this right does not exist under the common law or the *Charter*. Subsection 56(5) represents a second area where young people are provided with protection which goes beyond that which would be available to them outside the *YOA*. While subsection 56(2) is only relevant in determining the admissibility of statements made to *persons in authority*, under subsection 56(5), the judge may exclude statements, even if made to people who are *not* persons in authority, if they are obtained while under duress. There is clearly a strong relationship between the definition of "person in authority" under subsection 56(2), and the extent of use of subsection 56(5). If "person in authority" is interpreted broadly, the question of the admissibility of statements will be governed by subsection 56(2). On the other hand, if "person in authority" receives a narrow interpretation, there will be a greater scope for application for subsection 56(5).

In the case of *R. v. A.B.*, the Ontario Court of Appeal considered the question of whether a young person's mother was, in law, a "person in authority."²⁸⁵ While the court did not exclude the possibility of a parent being characterized as a "person in authority," it found the mother not to have been a person in authority on the facts of the case. In fact, it defined "person in authority" quite restrictively.²⁸⁶ In a case comment on the Court of Appeal's decision, Bala

²⁸⁵*R. v. A.B.* (1986), 13 O.A.C. 68, 50 C.R. (3d) 247, 26 C.C.C. (3d) 17 (C.A.) [cited to O.A.C.].

²⁸⁶*Ibid.* at 74, where the court said the following about the concept of "person in authority":

(1) As a general rule, a person in authority is someone engaged in the arrest, detention, examination or prosecution of the accused ... (2) In some circumstances, the complainant in a criminal prosecution may be considered to be a person in authority. (3) The parent of an infant who is the injured party or complainant in a criminal prosecution may be a person in authority. Such a conclusion would depend on the factual background. (4) In some circumstances, a person not in authority could become clothed with authority when in the presence of those actually in authority, that person offers an inducement and those actually in authority do not dissent from it. (5) The question as to whether the statement was made to a person in authority will be viewed subjectively from the point of view of the accused person who made the statement. The proper test is "Did the accused truly believe that the person he dealt with had some degree of power over him?": [*Rothman v. The Queen*, [1981] 1 S.C.R. 640, 59 C.C.C. (2d) 30,

expresses his support for the "relatively narrow approach taken to the concept of person in authority."²⁸⁷ He suggests that "an examination of subsection 56(2) indicates that parents are not usually to be considered persons in authority" and are actually seen as "the natural guardians" of their children.²⁸⁸ While Bala recognizes that parents can sometimes act contrary to their child's best interests, he does not feel that the expansion of the concept of "person in authority" is the appropriate way of dealing with this problem. He suggests that the courts should use subsection 56(5) as a means of excluding statements made by young people who have been unduly pressured by their parents: "It would seem that subs. 56(5) of the *Y.O.A.* was specifically included to govern questioning by individuals such as parents, who have the potential to intimidate young persons, while subs. 56(2) is to much more closely govern interrogations by the police and other agents of the state."²⁸⁹

This position on the respective applications of subsections 56(2) and 56(5) should be adopted by the courts. As Bala points out, parents are generally unaware of the detailed provisions of the *YOA* and will very rarely fulfil the warning requirement of paragraph 56(2)(b). If parents are considered persons in authority, "statements by their children to them would effectively never be admissible, because subsection 56(2)(b) would never be satisfied."²⁹⁰ If this was the result desired by the drafters, they surely would have made it explicit. As such, the use of subsection 56(5) as a way of dealing with the problem of parental "intimidation" is clearly more in line with the overall scheme of section 56.

It must be acknowledged, however, that there are problems with the use of subsection 56(5), rather than subsection 56(2), to govern the admissibility of statements made by young people to their parents. First, the application of subsection 56(5) is limited by the definition given to the concept of "duress." At common law, the defence of duress requires "a threat of death or serious injury"²⁹¹ and is not available where the individual asserting it has "an obvious, safe avenue of escape."²⁹² This was modified in *Horvath v. R.*,²⁹³ where the Supreme Court of Canada held that the belief that one was in danger of immediate death or bodily harm was not always necessary in order for duress to be found. The defence would also be available when the accused was not acting of his own free will or of an independent mind. In the case of *R. v. Kenneth R. (No.*

121 D.L.R. (3d) 578]. (6) A person who is a witness for the prosecution will not, as a general rule, be deemed to be a person in authority. (7) [A] psychiatrist, even when examining an accused to determine if he is a dangerous sexual offender, will not be considered to be a person in authority ...

The court also emphasized that there must be "some realistic and close connection between the decision to call in the authorities and the offered inducement to the child to make the statement" before a parent could be considered, in law, a person in authority (*ibid.* at 75).

²⁸⁷Bala, *supra* note 255 at C & A 71.

²⁸⁸*Ibid.*

²⁸⁹*Ibid.* at C & A 72.

²⁹⁰*Ibid.* at C & A 71. Note that these comments are equally applicable to teachers, social workers and many others in whom children may confide.

²⁹¹*R. v. Mena* (1987), 57 C.R. (3d) 172 at 188 (Ont. C.A.).

²⁹²*Ibid.* at 190.

²⁹³[1979] 2 S.C.R. 376, 7 C.R. (3d) 97, 44 C.C.C. (2d) 385, 93 D.L.R. (2d) 1.

2),²⁹⁴ counsel for the young accused invoked subsection 56(5) in asking the court to exclude statements made by the young person to his parent. The court refused to do so, and concluded that:

All of the surrounding circumstances were considered in order to determine whether the young person had acted of his own free will or independent mind or whether he was so overwhelmed and overcome by the situation that he acted as a puppet at the hands and direction of a manipulating parent ... [N]o such set of circumstances had existed ... The statements were not given under duress imposed by any person present at the time of their utterance.²⁹⁵

Similarly, in *R. v. C.C.*,²⁹⁶ the court ruled that the atmosphere in which a young person made a statement was not "oppressive" or "intimidating" enough to constitute duress. The court adopted the definition of "duress" used in the Oxford Dictionary: "forcible restraint, imprisonment; compulsion, esp. imprisonment, threats or violence, illegally used to force person to do something." Applying this definition, the court ruled that the accused had not discharged the onus on him to establish that the statement was given under duress even though the accused's statements were made to a group of hostile youths who would not let him leave the scene and kicked and threatened him.

In our opinion, it is inappropriate for the courts to borrow the definition of duress used in the context of the general criminal law and apply it to young offenders under subsection 56(5). In the adult context, the concept of duress does not govern with respect to the admissibility of confessions. Therefore, it is difficult to understand how the courts can import the concept unchanged into juvenile confessions law. Moreover, the very existence of subsection 56(5), and the entire *YOA*, is based on the recognition that young people have special needs which are not fully addressed by the standard principles of criminal law and evidence. The application of the traditional definition of duress in the context of the *YOA* is certainly at odds with this fundamental premise. In addition, if courts are to interpret "person in authority" in a narrow manner, as they did in *R. v. A.B.*,²⁹⁷ it is necessary to develop a broad definition of duress. If not, parents and other individuals who will generally not be considered "person(s) in authority" will be able to apply considerable pressure on young people to confess, without falling within the purview of any part of section 56. The fact that they are not "person(s) in authority" would make subsection 56(2) inapplicable, and, as is made clear in *Kenneth R.*, the behaviour would generally not fall within the traditional definition of duress and could not be excluded under subsection 56(5). If subsection 56(5) is to play any meaningful role in governing the admissibility of youth confessions, a flexible, context-based definition of duress must be developed.

There is a second problem with the use of subsection 56(5) as a means to exclude statements made by children to individuals who are not persons in authority. Even if it has been proved that a statement was given under duress,

²⁹⁴[1985] W.D.F.L. 1632, 14 W.C.B. 372 (Ont. Prov. Ct., Fam. Div.) [hereinafter *Kenneth R.*]. See Y.O.S. 56 §600 at 64:2.

²⁹⁵*Ibid.*

²⁹⁶(1985), 15 W.C.B. 71, [1985] W.D.F.L. 2088 (Ont. Prov. Ct., Fam. Div.). See Y.O.S. 56 §600 at 64:1.

²⁹⁷*Supra* note 285.

the court retains a discretion to admit it.²⁹⁸ In criticizing this aspect of subsection 56(5) one author said the following: "Il y a lieu de se demander ... si le mot 'peut' dans ce paragraphe n'est pas une erreur législative. En effet, si la contrainte est bel et bien prouvée, le juge ne devrait-il pas exclure la déclaration puisque sa fiabilité est sérieusement mise en doute."²⁹⁹ We find this comment compelling given the purpose of section 56. If section 56 was intended to extend special protections to young persons, then creating such a discretion gives the courts the power to undermine these very protections. Accordingly, we submit that subsection 56(5) should indeed be amended to replace the word "may" with the term "shall."

The final factor to be considered in the discussion with respect to subsection 56(5) relates to burdens of proof. Where a statement is made to a "person in authority," it is presumptively inadmissible unless the *Crown* shows that the requirements of subsection 56(2) have been met. Where a statement is made to someone who is not considered a "person in authority," it will be admitted unless *the young person* proves that the statement was given under duress. It may seem, then, that it would be to a young person's advantage to insist upon an expansive definition of "person in authority," and thus avoid having to bear the burden of proving duress. It has been held, however, that while the Crown must establish *beyond a reasonable doubt* that subsection 56(2) has been complied with, a young person need only satisfy a judge on a *balance of probabilities* that there has been duress.³⁰⁰ Thus, where it is incumbent on the young person to establish the basis upon which a confession should be excluded, the burden of proof is less onerous than that faced by the Crown.

The question of the admissibility of statements made by young people to their parents will generally arise where the prosecution wishes to introduce such a statement into evidence. As we have seen, the interplay of subsections 56(2) and 56(5) should ensure that those statements which have been made to parents who have unduly pressured their children to "talk" will be inadmissible. One might ask, however, whether statements made by young people to their parents should *ever* be admissible. Perhaps parent/child communication should be privileged such that a parent could never be compelled to reveal matters told to them in confidence by their children. As Bala points out: "It has been accepted that spousal communication is privileged; the family unit is protected from state interference to the extent that one spouse is not compelled to reveal what was told by the other. Arguably, parent-child communication should be entitled to the same protection."³⁰¹ The Ontario Court of Appeal has discussed the role that the family plays in the overall scheme of the *YOA* as follows:

For the most part, incidents of childhood transgressions are resolved as a result of family discussions culminating in parental counselling, the establishment of guidelines for future conduct and often some form of discipline. Such a resolution

²⁹⁸S. 56(5) begins as follows: "A youth court judge *may* rule inadmissible ..." [emphasis added]

²⁹⁹F. Daviault, "Développements récents en matière de déclaration extrajudiciaire" in *Formation Permanente*, Barreau du Québec, ed., *Développements récents en droit criminel* (Cowansville: Yvon Blais, 1989) at 173.

³⁰⁰*Kenneth R.*, *supra* note 294.

³⁰¹Bala, *supra* note 255 at C & A 72.

is in the interests of the community and the young person and is clearly contemplated by the *Young Offenders Act*. The Act contains a declaration of principles. It is stated in subsection 3(d) that, in circumstances where it is not inconsistent with the safety of society, measures other than judicial proceedings are to be considered. Thus family discussions leading to the identification of problems and the provision of assistance without judicial intervention are encouraged by the Act.³⁰²

This passage sets out a strong argument in favour of legislating a privilege for parent-child communication.

The need to recognize a privilege for parent-child communication is all the more compelling with respect to information conveyed to parents where children have chosen to "consult" a parent pursuant to paragraph 56(2)(c). Clearly, this "right to consult" loses much of its value if, following the consultation, the prosecution could compel parents to disclose the contents of their conversation with their children. Imagine the injustice which would result if "consulted" parents who have instructed their child to remain silent could themselves be forced to testify as to any incriminating statements made to them by their child. At the very least, the communication between parents and children in the context of the exercise of paragraph 56(2)(c) right must be protected. As the Ontario Court of Appeal aptly pointed out in the above quotation, it is in the interests of the child and the community to foster a relationship of trust and confidence between children and their parents.

c. Waiver

Subsection 56(4) outlines the conditions under which young persons may waive the rights accorded to them under section 56. The first point to note is that only the rights set out at paragraphs 56(2)(c) and (d) can be waived.³⁰³ The prosecution must therefore prove that the requirements of paragraphs 56(2)(a) and (b) have been met before even raising the issue of waiver. This means that a statement made by a young person must always be voluntary and the person to whom the statement was given must always have clearly explained to the young person "in language appropriate to his age and understanding" that he or she has the rights enumerated at subparagraphs 56(2)(b)(i)-(iv). It is only after these requirements have been met, and it is apparent that the young person has not exercised his or her rights under paragraphs 56(2)(c) and (d) that the issue of waiver becomes relevant.

Section 56(4) reads as follows:

A young person may waive his rights under paragraph (2)(c) or (d) but any such waiver shall be made in writing and shall contain a statement signed by the young person that he has been apprised of the right that he is waiving.

The requirement that any waiver be in writing must be emphasized. Absent a writing, the Crown is foreclosed from claiming that a young person has waived his or her rights.³⁰⁴ This writing requirement is unique to the *YOA* and represents

³⁰²See *R. v. A.B.*, *supra* note 285 at 75-76.

³⁰³See s. 56(4), *supra* note 221.

³⁰⁴*R. v. A.F.G.* (1985), 13 W.C.B. 348 (B.C. Prov. Ct.).

another area where the protection of young people pursuant to section 56 is broader than that available to adults.

The insistence on written waivers in subsection 56(4) is clearly designed to impress upon young people the seriousness of their choice to waive their rights and to give a statement to the police. Even after a young person has orally expressed his or her willingness to "talk" to the police, the necessity of a written waiver provides him or her with an opportunity to change his or her mind by simply not signing a waiver. The requirement that a waiver be in writing is somewhat controversial. Critics argue that the inability to admit into evidence a voluntary confession, which has been preceded by an oral, as opposed to written, waiver, is unduly restrictive.³⁰⁵ They insist that what should be emphasized is simply that a young person understand his or her rights and the consequences of waiving them.

The arguments against the writing requirement at subsection 56(4) miss the main point. It is the young person's understanding of his or her rights, and of the implications of giving them up, which is essential. In fact, the written waiver is one of the means of *proving* this requisite level of understanding. Where children seem willing to speak, and yet do not agree to sign a waiver, it could mean one of two things. Their refusal may indicate that despite their earlier expression of "willingness to waive," they are in fact hesitant to do so. In this case, the writing requirement is serving the cautionary function intended of it. In the alternative, a young person's refusal to sign should raise questions about whether the apparent decision to waive was truly accompanied by a genuine understanding of the young person's rights and of the consequences of waiving them. It seems fair to say that most young people who truly desire to waive their rights, and understand the implications of doing so, will generally sign a waiver if it is explained to them that this is a necessary step in the procedure.³⁰⁶ Therefore, the arguments in favour of eliminating the writing requirement are in fact arguments against ensuring that waivers are the result of firm, reasoned decisions on the part of young people.

Those who would like to see subsection 56(4) amended so as to include the possibility of an oral waiver seem to assume that this would result in the admission of more statements made by young people into evidence. However, upon examination of the cases dealing with oral waivers of constitutional rights by adults, it is far from clear that such an increase would occur.³⁰⁷ The onus on the Crown to prove that there has been an effective waiver is burdensome. It must be "clear and unequivocal" that the waiver was made with full knowledge of the rights, and a true awareness of the consequences of the

³⁰⁵The Canadian Association of Chiefs of Police has been one of the strongest advocates of abolishing the writing requirement.

³⁰⁶The exception to this comment may be illiterate children or children with learning disabilities. In this respect, one could argue that the limited capacity of some children to understand their rights precludes them from *ever* validly waiving them.

³⁰⁷While it is beyond the scope of this paper to do a survey of the jurisprudence with respect to the waiver of rights under the *Charter*, it can be observed that the general tendency of the decisions is to subject waivers to increasing scrutiny.

waiver.³⁰⁸ Of particular interest is the case of *R. v. Clarkson*, in which the Supreme Court of Canada held that being in an advanced stage of intoxication negated the possibility of a valid waiver.³⁰⁹ There is certainly an analogy to be made between the destabilizing effects of alcohol, and the lack of knowledge and experience which characterizes youth. Given the degree of evidence which the court would probably require before accepting the validity of an oral waiver made by a young person, the requirement of written proof should appear less objectionable.

In addition to being "written," a waiver must "contain a statement signed by the young person that he has been apprised of the right that he is waiving."³¹⁰ This requirement is linked to the duty at subsection 56(2) to clearly explain to young people, "in language appropriate to their age and understanding," that there are certain rights available to them. In interpreting this provision, the courts have required more than the mere presentation of a signed statement indicating that the young person has been "apprised" of his or her rights. In each case, the court assesses the subjective understanding of the young person in an effort to determine whether the evidence indicates that the young person understands his or her rights and the consequences of waiving them. Age, education, experience with the police, and other factors particular to the accused will be assessed in this context.

The current wording of subsection 56(4), coupled with its interpretation by the courts, implies that, given the proper explanations, young people are capable of understanding their rights and of making an informed decision as to whether to waive them. There is reason to believe, however, that this may be an invalid assumption.

The Abramovitch-Bedali study mentioned above³¹¹ was designed to examine young people's understanding of their right to counsel and their ability to make a valid waiver. Students were asked to contemplate a hypothetical situation in which they had been accused of shoplifting. Half were asked to assume that they were innocent and half were to assume that they were guilty. The students were read all of the usual statements given to youths by the Peel Ontario Regional Police office, in the language which that office requires. The students were shown a waiver form. They were asked if they would sign the form or not, and why.

A full third of the sample did not understand the basic meaning of the form. Of those who did not understand its meaning, sixty-five per cent said that they would sign it anyway. There was no age difference between the youths who chose to sign the form and those who did not. These results suggest that the requirement that youths sign a document in order to waive their right to counsel does not guarantee that the young person will consider his or her legal rights.³¹²

³⁰⁸*R. v. Clarkson*, [1986] 1 S.C.R. 383, 25 C.C.C. (3d) 207, 26 D.L.R. (4th) 493.

³⁰⁹*Ibid.*

³¹⁰S. 56(4).

³¹¹*Supra* note 274.

³¹²*Ibid.* at 15.

Furthermore it must be stressed that the number of youths who chose not to sign the waiver in this relaxed setting is significantly higher than the number of those who reportedly waive their rights in real situations.³¹³

In order to assure ourselves that waivers will, as a general rule, be made with a full understanding of their implications, safeguards beyond those which currently exist must be accorded. Only in this way will the special needs of youths be addressed. We believe that waivers by young people should be accepted only after they have had their rights explained to them by counsel. The current scheme, which requires that explanations be given by the police, is unsatisfactory in that it places the police in the almost irreconcilable roles of adversary and advisor. Even those officers who are most conscientious in their explanations could not be expected to provide the same type of explanations as would legal defence counsel. If after having been apprised of his or her rights by a lawyer, the young person decides to waive these rights, he or she should then be able to do so. This would include an ability to waive the right to make a statement in the presence of counsel.

d. Per Se Rules of Exclusion vs. Judicial Discretion

Thus far we have expanded upon various special protections against self-incrimination accorded to young people through the mechanism of section 56. We have discussed the right to consult a non-counsel adult, the right to counsel, the notion of duress, and the requirements for a valid waiver. The final special protection granted to young people is that all the requirements in section 56 are mandatory. If the Crown does not prove conformity with the section 56 requirements beyond a reasonable doubt, the statement is automatically excluded.³¹⁴ In this sense, section 56 can be seen to set out a *per se* test of exclusion.

On the other hand, the determination as to whether some of the conditions outlined in section 56 have been satisfied calls for the exercise of judicial discretion. For example, paragraph 56(2)(b) requires the court to assess whether an explanation has been clearly given "in language appropriate to a young person's age and understanding." Under subsection 56(4), the court must decide whether a young person has been "apprised" of his or her rights. In addition, some judges believe it appropriate to assess the "quality of consultation" in order to determine whether the consultation rights of paragraph 56(2)(c) have been properly accorded.³¹⁵ The common feature of these exercises of judicial discretion is that, in each, the judge will examine the age, education, and experience of the young person, among other factors, in an effort to determine whether a particular young person has received the full benefit of section 56. Judges are careful to ensure that the requirements of section 56 are not treated as mere formalities; both the letter and the spirit of the law must be respected.

³¹³*Ibid.*

³¹⁴The exceptions to this are first, if the statement is spontaneous and falls within s. 56(3), or second, if a valid waiver has been made under s. 56(4).

³¹⁵See text accompanying notes 266-69.

While section 56 does leave room for the exercise of discretion to exclude statements, even if, on its face, the provision's requirements appear to have been respected, it does not enable judges to use their discretion to "admit." This means that even if a young person can be seen to have made a voluntary statement, in full awareness of his or her rights, the court will be unable to admit it if any element of section 56 has not been respected. While this result has been criticized by some, particularly for providing too much protection to "experienced" youth, it is a necessary consequence of the desire to provide all young people with adequate safeguards in the interrogation context. As one author has put it, "the problem of providing unnecessary protection for sophisticated juveniles is overshadowed by the need to afford adequate protection to most juveniles."³¹⁶ As we have seen, "most" young people do indeed require special protection against self-incrimination.³¹⁷ As such, section 56 represents an attempt by the legislator to address young people's special needs. Just as the test of "voluntariness" sets out the minimum standard for the admissibility of adult confessions, section 56 provides that certain requirements must always be respected if we are to justify the admission into evidence of statements made by young people. Furthermore, in insisting on the need for absolute compliance with this provision, the legislator has provided law enforcement officers with clear guidelines as to acceptable and unacceptable behaviour.

Section 56 of the *YOA* modifies the general law of confessions with regard to the special needs of young people. The work of sociologists, psychologists, social scientists, lawyers and police officers alike provides support for such a provision in that it confirms that children in the interrogation process face unique pressures to "talk." These pressures lead children to confess at a higher rate than adults, and increases the likelihood that they will make false confessions in response to police interrogation.

e. Conclusions

While the principles underlying a unique regime of youth confessions are sound, it is not the case that section 56 represents a perfect fulfilment of these principles. First, section 56 places too much emphasis on the role of parents in the interrogation context. While some parents may provide their children with badly needed support and advice, others may be unwilling or unable to do so. In fact, some parents may be more intimidating to children than police officers are. Where parents "force" children to confess, courts should not hesitate to exclude statements by making a finding of duress under subsection 56(5). If "duress" is given a definition that is sensitive to the context of the *YOA*, and the discretionary element of this provision is removed, subsection 56(5) can begin to play a meaningful role in the overall scheme governing the admissibility of youth confessions.

Second, while parents may not always be helpful to their children, legal counsel will possess the objectivity and expertise necessary to provide young

³¹⁶Grisso, *supra* note 266 at 1137.

³¹⁷See text accompanying notes 223-44.

people with valuable advice. Subsection 56(3) must be rewritten to insist upon the ability of children to consult both parents and counsel in the pre-interrogation context. Furthermore, since many young people do not appreciate the advantages of receiving counsel, a "conversation" with a lawyer should be arranged as a matter of course before interrogation takes place. In this way, all children will be placed on a more level playing field in that they *all* will have access to a competent source of information and advice.

Third, the provisions dealing with waiver are also problematic. They encompass the unrealistic belief that young people have the capacity to make an informed waiver of their rights. Indeed, studies have raised grave doubts about the ability of children to understand their rights, and the consequences of waiving them. Again, a "conversation" with counsel is necessary to ensure that young people truly understand the advantages associated with the exercise of their rights, and the implications associated with waiver.

The requirement of a written waiver should be maintained. It is probably no more limiting than the safeguards which have developed with respect to oral waivers. The writing requirement also plays an important role in proving the level of understanding necessary for a valid waiver.

Finally, the mandatory nature of section 56 is perfectly consistent with the desire to provide young people with special protection against self-incrimination. The insistence on absolute compliance ensures that all those who apply this provision respect the legislative determination that, as a class, children have special needs. To this end, section 56 sets out the basic rights which must be made available to all young people.

If the necessary modifications to this provision are made, section 56 could be one area of the *YOA* which appropriately addresses the "special needs" of youth by according meaningful special protections.

B. Protection of Society

The phrase "protection of society" can be found three times in the Declaration of Principle³¹⁸ and is used as a central concept in relation both to sentencing and transfer of young persons to ordinary court. However, this concept is no less ambiguous than the concept of "special needs." While, in a larger sense, the protection of society is the primary goal of any criminal system and while everyone agrees in the abstract that society should be "protected" from crime, the real question under any legislative regime is how best to achieve that goal.

In this respect, there are at least three interpretations of how society might best be protected from juvenile crime. First, it may be argued that the longer the young offender is kept off the street, the better society is protected. According to this argument, incarceration is the primary form of protection and the freedom of the young offender is given low priority. Second, it may be asserted that society is best protected when the juvenile justice system operates so as to reha-

³¹⁸See s. 3(1)(b), s. 3(1)(d), s. 3(1)(f). See *supra* note 9 for the full text of these provisions.

billitate young offenders. This theory, which was highly influential under the *JDA*, links the protection of society to treatment rather than punishment of young offenders. Third, it may be argued that society is protected when the juvenile justice system deters potential wrongdoers from committing crimes.

All three of these interpretations have their merits and, in any criminal system, choices must be made as to the relative importance to be accorded to each. However, as each of these interpretations represents a different conception of "protection of society," it is clear that asserting "protection of society" as a guiding principle does not in itself constitute a choice between these three interpretations. Given that no single definition can be attributed to this phrase, it is not surprising that the use of "protection of society" as a central concept in relation to sentencing and transfer has resulted in substantial confusion and inconsistency in the case law. In this section we will argue that the legislator should, in each section of the *YOA*, define more clearly what is meant by the phrase "protection of society" in that context. This will necessarily involve a choice in relation to each section between the three interpretations we have outlined.

1. Sentencing

The phrase "protection of society" is used repeatedly in sections relevant to dispositions under the *YOA*.³¹⁹ However, nowhere in these sections is "protection of society" defined or explained. As a result, the courts have been left with the task of specifying precisely what is meant by this crucial concept.³²⁰ As Robert Nuttall has pointed out, this task is by no means a simple one:

Can we get a definition of "protection of the public"? The courts have been wrestling with that for years and years. I was in a position as crown counsel to try and call evidence of what this meant. It is such a vague term. If all you mean is that the longer he is off the street the better the public is protected then you have not added very much by your definition.³²¹

In the sentencing context, the difficulty in defining the concept of "protection of society" becomes immediately apparent. Different courts have inter-

³¹⁹See s. 24(1), s. 24(5), s. 261(2)(d).

³²⁰Language similar to "protection of society" is used in s. 498ff of the *Criminal Code* concerning the granting of bail. In the case of *Re Powers v. R.* (1972), 9 C.C.C.(2d) 533 at 544-45 (Ont. H.C.) [hereinafter *Powers*], Lerner J. stated that the "public interest" involves many considerations, not the least of which is the image of the *Criminal Code* and the *Bail Reform Act*, apprehension and conviction of criminals, attempts at deterrence of crime and protection of the Canadian public. Another case (*R. v. Favel* (1984), 35 Sask. R. 235 at 236-37 (Q.B.)) equated "protection of the public" with the "public interest," necessitating the conclusion that protection of the public includes maintaining the integrity of the criminal justice system as iterated in *Powers*. This was the position taken in *R. v. Demyen* (1975), 26 C.C.C. (2d) 324 (Sask. C.A.).

In a similar vein, many bail cases do not provide an interpretation of protection of the public. However, by implication, it would seem that the phrase is being applied literally. See e.g. *R. v. Giles* (1985), 70 N.S.R. (2d) 176 at 178-80, 166 A.P.R. 176 (S.C.(T.D.)). In other words, it is the perceived dangerousness of the accused which is being assessed. See also *R. v. Favel, ibid.*; *R. v. Legge* (1988), 72 Nfld. & P.E.I.R. 77 at 79 (Nfld. S.C.(T.D.)).

³²¹Minutes of Proceedings and Evidence of the Legislative Committee on Bill C-58, *An Act to Amend the Young Offenders Act and the Criminal Code*, 2d Sess., 34th Parl., 1989-90 (Ottawa: Queen's Printer, 1990) Issue No. 4 at 4:31 (18 October 1990) (C.A.) [hereinafter *Legislative Committee on Bill C-58*].

preted it to subsume at least three broad principles. First, some courts have defined "protection of society" as public abhorrence of certain crimes³²² together with denunciation of that behaviour.³²³ Second, some courts have equated it with the broad principle of deterrence.³²⁴ And, third, in a small number of cases, courts have linked "protection of society" with the physical incapacitation or incarceration of a youth.³²⁵

There is no obvious consensus about which of the above interpretations is most appropriate. For example, in *R. v. M.Y.W.*,³²⁶ the court held that traditional principles of sentencing such as "denunciation" are not to be considered in determining young offender dispositions. By contrast, the Alberta Provincial Court set out fifteen factors that a youth court must consider before concluding what is a "fit and proper disposition for a particular young person."³²⁷ The tenth factor listed by the court was "denunciation."³²⁸

However, the most consistent source of interpretative disparity relates to the question of whether "protection of society" subsumes general and/or individual deterrence. General deterrence, according to Ashworth, can be defined as the "inhibiting effect of sanctions on the criminal activity of people other than

³²²*R. v. S.R.H.* (1990), 56 C.C.C. (3d) 46, 38 O.A.C. 127 [hereinafter *S.R.H.* cited to C.C.C.]. See also *R. v. O.* (1986), 27 C.C.C. (3d) 376, 16 O.A.C. 358 [cited to C.C.C.].

³²³*R. v. A.C.H.* (1990), 113 A.R. 344 (Prov. Ct.).

³²⁴Many cases determine that the protection of society includes deterrence, for example *S.R.H.*, *supra* note 322, and *R. v. M.J.C.* (1985), 42 Sask. R. 197, 22 C.C.C. (3d) 95 (C.A.) [hereinafter *M.J.C.*]. However, as will be shown later, many cases distinguish between general and individual deterrence, with courts disagreeing upon which is subsumed by protection of society.

³²⁵*R. v. A.C.H.*, *supra* note 323 at 346, stated that public protection through segregation of the offender is to be considered. In *R. v. C.W.W.* (1986), 68 A.R. 196 at 198-99, 25 C.C.C. (3d) 355 (C.A.) [cited to A.R.], the Alberta Court of Appeal reaffirmed its previous judgment in *R. v. G.K.K.* (1985), 63 A.R. 379, 21 C.C.C. (3d) 558 (C.A.) [cited to A.R.], and maintained that protection of society, as well as including individual deterrence, incorporates incapacitation, "as it is in the case of an adult offender." See *supra* note 175 where the relevance of adult principles in sentencing is briefly discussed.

³²⁶(1986), 26 C.C.C.(3d) 328 at 330-31 (B.C.C.A.).

³²⁷*R. v. M.E.M.* (1989), 92 A.R. 321 at 322-23 (Prov. Ct.).

³²⁸*Ibid.* at 323. The 15 factors listed are:

1. the age, character, antecedents and social history of the young person;
2. the prior youth record, dispositions imposed, and the responses of the young person to prior dispositions;
3. the recommendations contained in the predisposition materials;
4. the young person's level of participation in the offence;
5. the young person's post-offence attitude and behaviour;
6. the lack of evidence of any premeditation by the young person;
7. the gravity of the offence;
8. the possibility of rehabilitation;
9. individual deterrence of the young person;
10. denunciation;
11. appellate decisions in this jurisdiction dealing with dispositions concerning young persons;
12. overlapping child welfare concerns;
13. the protection of the public;
14. the philosophy contained in s. 3 of the *Young Offenders Act* (Canada) and finally;
15. predisposition detention.

the sanctioned offender.³²⁹ By contrast, individual deterrence aims at discouraging the sanctioned offender from further criminal activity.³³⁰

While courts generally accept that individual deterrence is an appropriate goal for young offender dispositions, there has been some debate over the issue of whether general deterrence should play a role. There is a clear split along provincial lines on this issue. In the cases of *R. v. G.K.K.*³³¹ and *R. v. C.W.W.*,³³² the Alberta Court of Appeal came down with strong statements to the effect that general deterrence has no place in the sentencing of young offenders. In *R. v. C.W.W.*, which involved a young person convicted of armed robbery, break and enter, and the assault of a pharmacist with a baseball bat, the Court of Appeal explicitly rejected the view that the principle of the "protection of the public" includes general deterrence.³³³ Although this view of general deterrence has been somewhat moderated in subsequent Alberta case law,³³⁴ the general tendency of Alberta courts has been to follow *R. v. G.K.K.*³³⁵ The provinces of Newfoundland and New Brunswick have followed Alberta's lead by affirming that general deterrence has no role in the determination of dispositions under the *YOA*.³³⁶

In contrast to the view expressed in Alberta, courts in several other provinces have held that general deterrence is a factor that must be considered when sentencing young offenders. The leading case in this regard is that of *R. v. O.*,³³⁷ where the Ontario Court of Appeal refused to reduce a disposition of three months' secure custody and twelve months' probation for a young offender convicted of three counts of break, enter and theft. The Court declared that the principle of "protection of society" contained in paragraphs 3(1)(b), (d) and (f) of the *YOA* subsumes the concepts of general and specific deterrence.³³⁸ According to the court in that case, general deterrence has diminished importance in young

³²⁹See A. Ashworth, *Sentencing and Criminal Justice* (London: Weidenfeld and Nicolson, 1992) at 140.

³³⁰*Ibid.*

³³¹*Supra* note 325. In *R. v. G.K.K.*, the Alberta Court of Appeal rejected the argument that custody was necessary for the purposes of deterrence in the case of a 16-year-old young offender who had pleaded guilty to armed robbery, on the basis that "deterrence to others does not ... have any place in the sentencing of young offenders ..." (*ibid.* at 380).

³³²*Supra* note 325. In this case, the Alberta Court of Appeal refused to rely on general deterrence as the basis for its decision to increase the length of a custodial term for a young offender convicted of armed robbery, break and entry and the assault of a pharmacist with a baseball bat.

³³³*Ibid.* at 198-99.

³³⁴See *R. v. A.M.G.* (1987), 84 A.R. 161 at 162 (C.A.), where the Court considered deterrence to be one of several factors relevant to dispositions. The Court did not limit the scope of its reasons to specific deterrence. See also *R. v. D.R.D.* (1989), 99 A.R. 16 at 20 (Prov. Ct. (Youth Div.)), where it was held that general deterrence is a valid consideration in contempt proceedings.

³³⁵See *e.g. R. v. N.H.T.* (1989), 97 A.R. 330 at 335 (Prov. Ct. (Youth Div.)), sentence varied on a different issue (1989), 97 A.R. 378 (C.A.), where the court affirmed that general deterrence cannot be considered following *R. v. G.K.K.*

³³⁶See *R. v. C.J.L.* (1986), 59 Nfld. & P.E.I.R. 76 at 78, 29 C.C.C. (3d) 123 (Nfld. C.A.); *R. v. R.C.S.* (1986), 68 N.B.R. (2d) 361 at 367, 27 C.C.C. (3d) 239 (C.A.), leave to appeal den'd (1986), 69 N.B.R. (2d) 270n (S.C.C.).

³³⁷*Supra* note 322.

³³⁸*Ibid.* at 377.

offender sentencing but is nonetheless a factor which must be considered. The Ontario approach has been followed by courts in Saskatchewan, Nova Scotia and the Yukon Territory.³³⁹ In Quebec, a similar approach was adopted in the case of *Protection de la jeunesse — 431*, where the Court of Appeal reduced a disposition of six months in secure custody to time served plus eighty hours of community service for a fifteen-year-old young offender convicted of trafficking cannabis to students at his high school.³⁴⁰ The Court held that general deterrence is a factor which must be considered in young offender sentencing, but that it would be wrong to use it as the sole or paramount criterion. In subsequent cases this view has been interpreted to mean that the concept of general deterrence must be subordinated to the more important principles of the young person's needs and specific deterrence.³⁴¹ As in Ontario, Quebec courts have linked general deterrence with the notion of the "protection of society," on the reasoning that the imposition of a particular sentence may instil fear of a similar sanction or promote respect for a protected social value.³⁴² Quebec courts give more weight to the principle of general deterrence in cases of violent and premeditated crime.³⁴³

The controversy over the role of general deterrence in young offender sentencing was the subject of a recent appeal to the Supreme Court of Canada. In *R. v. J.J.M.*,³⁴⁴ the Supreme Court followed the lead of the Ontario Court of Appeal in *R. v. O.*,³⁴⁵ to hold that general deterrence must be considered, but that it has diminished importance in determining the appropriate disposition in the case of a young offender.³⁴⁶ Cory J., writing for the Court, based his opinion on the principle of the "protection of society" as contained in section 3 of the *YOA*, as well as what he deemed the "best interest of the young person and the public" under sections 20 and 24 of the Act.³⁴⁷ He also made reference to the sociolog-

³³⁹ See *R. v. M.J.C.* (1985), 42 Sask. R. 197 at 199, 22 C.C.C. (3d) 95 (C.A.); *R. v. K.D.T.* (1986), 72 N.S.R. (2d) 213 at 219-20, 173 A.P.R. 213 (S.C.(A.D.)); *R. v. Darren Douglas B.*, [1988] 3 Y.R. 5 (C.A.).

³⁴⁰ [1990] R.J.Q. 645 at 654 (C.A.).

³⁴¹ See *Protection de la jeunesse — 439*, [1990] R.J.Q. 1506 at 1510 (Youth Ct.), where the court refused the Crown's request to "make an example" of a young offender convicted of procuring a 16-year-old minor for the purposes of prostitution, forcible confinement, sexual assault, possession of a weapon and conspiracy to commit a criminal offence. The Court (Durand-Brault J.) ordered a disposition of 18 months in secure custody and expressed the following view about the place of general deterrence: "l'exemplarité ne doit jamais intervenir comme le facteur déterminant d'une sanction ordonnée en vertu de la *Loi sur les jeunes contrevenants*, elle doit s'arrêter là où les besoins rééducatifs de l'adolescent s'arrêtent et se trouver compatible avec la nécessité de le dissuader lui-même (exemplarité individuelle)" (*ibid.*).

³⁴² *Protection de la jeunesse — 431*, *supra* note 340 at 653.

³⁴³ *Protection de la jeunesse — 399* (4 March 1989), Quebec City 200-08-000011-881, J.E. 89-828 (C.A.).

³⁴⁴ *Supra* note 192. The case involved an appeal from a sentence of 2 years in open custody which had been ordered for a young offender convicted of 3 counts of break, enter and theft.

³⁴⁵ *Supra* note 322.

³⁴⁶ *Supra* note 192 at 305.

³⁴⁷ In Cory J.'s view, ss. 20 and 24 of the *YOA* indicate that dispositions must be determined in the "best interest of the young person and the public" (*ibid.* at 305). It should be noted that these precise terms appear in the Act only with respect to ancillary sentencing measures in s. 20(1)(f); they are not set out as part of a general philosophy for young offender dispositions, as Cory J.

ical fact that youth crime is often a group activity, and concluded on the basis of this fact that there is reason to believe that a disposition under the *YOA* can have an effective deterrent effect.³⁴⁸

The decision of the Supreme Court in *J.J.M.* goes only part of the way toward resolving the controversy over the role of general deterrence in young offender dispositions. The decision may be taken to stand for the principle that general deterrence is not entirely irrelevant to young offender sentencing. However, the statement that general deterrence has diminished importance under the *YOA* does not provide lower courts with a great deal of guidance as to how the principle is to be applied in practice. Rather, the judgment of the Supreme Court on this point highlights the ambivalence of the term "protection of society" and the difficulty of structuring judicial discretion in a manner which lends itself to straightforward application by lower courts. While it is unlikely that a trial court would, in light of *J.J.M.*, deny that general deterrence has *some* role under the *YOA*, there is likely to be disparity over how important this role should be. In other words, the ambiguity over whether general deterrence has *any* role will likely be superseded by a debate over the scope of the role of this sentencing goal.

In our opinion, the reluctance of some courts to apply the principle of general deterrence is well-founded. The principle of general deterrence is based on utilitarian assumptions. The main utilitarian premise is that a society is rightly ordered if its major institutions are arranged to achieve the maximum aggregate satisfaction and the minimum aggregate suffering.³⁴⁹ Deterrence as a penal philosophy follows from the same premise. General deterrence as a sentencing principle is consequentialist because it is designed not to punish the offender for the particular offence committed but, rather, to deter others from committing future offences. In our view, the use of general deterrence as a justification for punishment is inappropriate for both empirical and moral reasons.

First, since utilitarian principles are justified according to their social benefit, it is clear that the use of general deterrence as a basis for punishment can only be maintained where there is evidence that it serves to control crime and thereby to benefit society. However, such evidence cannot be found in recent empirical research concerning deterrence. In the Sentencing Commission Report of 1987,³⁵⁰ the Commission inquired into whether traditional utilitarian goals of sentencing, such as deterrence, were being achieved by the sentencing process.³⁵¹ The Commission's findings were based on a survey of existing empirical research and, in particular, on research conducted by Blumstein,

implies. Section 24, which provides for custodial dispositions, refers to the "best interests" of the young offender only in relation to a court's power to dispense with a predisposition report. The interpretation given to these sections, and in particular, the use of the term "best interest," provides further evidence of the fact that the courts are reading *parens patriæ* notions of juvenile justice into the *YOA*. For a further discussion of this issue, see the discussion of rehabilitative goals in relation to sentencing under the *YOA*, above, text accompanying notes 175-218.

³⁴⁸*R. v. J.J.M.*, *supra* note 192 at 305.

³⁴⁹J. Rawls, *A Theory of Justice* (Cambridge: Belknap Press, 1971) at 22.

³⁵⁰*Supra* note 168.

³⁵¹It should be noted that this study focused on sentencing in the adult context.

Cohen and Nagin for the United States National Academy of Sciences.³⁵² On the basis of this research, the Commission concluded that there is little empirical evidence which justifies the imposition of legal sanctions on deterrence grounds.³⁵³ In a report conducted by Cousineau for the Sentencing Commission, he concluded that: "Drawing upon some nine bodies of research addressing the deterrence question, we contend that there is little or no evidence to sustain an empirically justified belief in the deterrent efficacy of legal sanctions."³⁵⁴ Another study cited by the Sentencing Commission concluded that "overall assessment of the deterrent effects of criminal sanctions ranges from an attitude of great caution in expressing an opinion to outright scepticism."³⁵⁵

Although the Commission stressed that "deterrence is a general and limited consequence of sentencing,"³⁵⁶ the Report acknowledged that it is the *certainty* rather than the severity of penalties which is most likely to have a deterrent effect.³⁵⁷ This conclusion is consistent with the claim that legal sanctions can have an "overall" deterrent effect but that it is difficult to use these sanctions to produce specific outcomes or to target particular types or groups of offenders.

Second, whether or not general deterrence can be justified on empirical grounds, we believe that there are strong moral objections to its employment in the young offenders sentencing context. In applying general deterrence as a guiding sentencing principle, courts may, on grounds of social utility, be required to impose more severe sanctions on individual offenders than the particular offences committed by these offenders would otherwise merit. In other words, general deterrence allows the courts to use individual offenders as means to achieve a particular social end: the protection of society. This, however, places the rights of the offender in a blatantly subsidiary position to the welfare of society. And in a society which places a high value upon the fundamental rights of the individual, this runs contrary to moral intuition. As Von Hirsch argues,

no utilitarian account of punishment, deterrence included, can stand alone. While deterrence explains why most people benefit from the existence of punishment,

³⁵²A. Blumstein, J. Cohen & D. Nagin, eds., *Deterrence and Incapacitation: Estimating the Effects of Criminal Sanctions on Crime Rates* (Washington, D.C.: National Academy of Sciences, 1978), cited in Sentencing Commission, *supra* note 168 at 135, 136.

³⁵³Sentencing Commission, *ibid.* at 135-36.

³⁵⁴F.D. Cousineau, "Legal Sanctions and Deterrence," as cited in Sentencing Commission, *ibid.* at 136.

³⁵⁵Blumstein, Cohen & Nagin, eds., *supra* note 352, cited in Sentencing Commission, *ibid.* at 135-36. See also A. Von Hirsch, *Doing Justice: The Choice of Punishments* (Boston: Northeastern University Press, 1986) at 32. Beyleveld also concludes that the severity of penalties does not affect the recorded offence rates; see D. Beyleveld, *A Bibliography on General Deterrence Research* (Kettering: Saxon House, 1980).

³⁵⁶*Supra* note 168 at 138.

³⁵⁷Similarly, Markwart has stated that "the certainty of apprehension, conviction and punishment" may have some discernible impact on the effectiveness of punishment. A. Markwart, "Custodial Sanctions under the *Young Offenders Act*" in R. Corrado, N. Bala, R. Linden & M. Leblanc, eds., *Juvenile Justice in Canada* (Toronto: Butterworths, 1992) 229 at 233.

the benefit to the many is not by itself a just basis for depriving the offender of his liberty and reputation. Some other reason, then, is needed to explain the suffering inflicted on the offender: that reason is desert.³⁵⁸

It is submitted that this moral objection has particular force as it relates to young offenders. We have argued throughout this paper that the lesser moral and cognitive capacities of the young and their greater vulnerability should entitle them to special protections from state intrusion. To allow the state to use young offenders as a means to achieve social protection goals contradicts, in our opinion, the underlying premise of a separate system of justice for young offenders. Moreover, the adoption of the principle of general deterrence compromises the commitment to the principle of "least possible interference with freedom" contained under the *YOA*.³⁵⁹ By its very nature, general deterrence serves to increase a young person's potential contact with the formal justice system. In this sense, a parallel can be drawn to the criticisms made of the "rehabilitative ideal" under the *JDA*. This ideal, which was also based on utilitarian grounds, allowed for the imposition of disproportionate sanctions in the name of an empirically questionable social good. In our opinion, the criticisms made by the labelling theorists and the due process activists are as applicable to the principle of general deterrence under the *YOA* as they were to the principle of rehabilitation under the *JDA*.³⁶⁰

2. Transfer

a. *The Transfer Test*

Pursuant to section 16 of the *YOA*, a young person can be removed from the ambit of the Act and dealt with under the procedure set out in the *Criminal Code*.³⁶¹ Defining the appropriate basis for a transfer order is significant in two respects. First, a decision to transfer results in the young person being stripped of many of the advantages provided by a separate system of justice.³⁶² Second,

³⁵⁸Von Hirsch, *supra* note 355 at 51.

³⁵⁹S. 3(1)(f).

³⁶⁰See text accompanying notes 56-68, 77-99.

³⁶¹In the following discussion of transfer, reference will be made to the transfer test as formulated and implemented prior to the amendments of May 15, 1992. S. 16(1) of the original *YOA* stated:

16(1) At any time after an information is laid against a young person alleged to have, after attaining the age of fourteen years, committed an indictable offence other than an offence referred to in section 553 of the *Criminal Code* but prior to adjudication, a youth court may, on application of the young person or his counsel, or the Attorney General or his agent, after affording both parties and the parents of the young person an opportunity to be heard, if the court is of the opinion that, in the interest of society and having regard to the needs of the young person, the young person should be proceeded against in ordinary court, order that the young person be so proceeded against in accordance with the law ordinarily applicable to an adult charged with the offence.

The amended version has been introduced as s. 16(1.1). We will discuss this provision at note 392 and accompanying text.

³⁶²While the accused is not deprived of all the safeguards accruing to a young person by virtue of his age, once transferred, the young person's jeopardy is defined by the adult regime.

a society's conception of transfer is invariably a reflection of its particular vision of youth justice. As noted by Bala: "Transfer is of vital importance not only for young persons but also for the entire juvenile justice system. By setting the outer boundary of that system, it also defines its nature."³⁶³

Given the importance of the decision to transfer a youth to ordinary court, it is essential to define when, and by reference to which standard and relevant criteria, a young person should be removed from the juvenile justice system. Yet, as will be discussed below, an overview of the transfer jurisprudence reveals that both the boundaries and the goals of the juvenile system are highly ambiguous under the *YOA*. This ambiguity, it will be argued, can be explained by the use of such vague concepts as the "protection of society" and the "interest of society" which have been used alternatively and interchangeably by the courts as guiding principles under section 16.³⁶⁴

According to subsection 16(1) of the *YOA*, the court, in making a decision to transfer, must balance the "interest of society" and the "needs of the young person." An examination of the case law reveals that there are two potentially conflicting assumptions which have informed the interpretation of the phrase "interest of society." The first is that society will only be adequately protected if the youth is subjected to the longer custodial sentences made available under the *Criminal Code*. The second is that the interest of society is best protected when youths are rehabilitated.

Proponents of the view that protection of the public demands the incarceration of young offenders³⁶⁵ have argued that there are instances where the gravity of the case demands an exception to the philosophy and practice of the *YOA* and thus a transfer to the adult system.³⁶⁶ For example, in *R. v. D.V.*,³⁶⁷ a young person was charged with second degree murder and possession of a prohibited

³⁶³N. Bala, "The Need for Increased Flexibility in Transfer Provisions" (1989) 69 C.R. (3d) 172.

³⁶⁴See e.g. *R. v. B.R.C.* (1984), 13 W.C.B. 193 (Alta. Prov. Ct.); *R. v. L.A.M.* (1986), 33 C.C.C. (3d) 364 (B.C.C.A.).

³⁶⁵See on this perspective Bill C-229, 2d sess., 34th Parl., 1989 (first reading 12 April 1989). This was a Private Member's Bill sponsored by M.P. Jim Karygiannis to introduce an automatic transfer mechanism for youths charged with murder.

³⁶⁶See *Legislative Proposals to Replace the Juvenile Delinquents Act*, *supra* note 39 at 8, and *Legislative Committee on Bill C-58*, *supra* note 321 at 3:22, where Chief Thomas Flanagan, speaking on behalf of the Canadian Association of Chiefs of Police ("CACP"), voiced his support for this approach as follows: "If the person is in prison for a longer period of time, hopefully the public is not going to be bothered by this person. It is unfortunate that you are not rehabilitating somebody, but in the long run the importance of the general public is more important than the individual" (*ibid.* at 3:33). This sentiment is echoed in *R. v. E.J.W.* (1985), 22 C.C.C. (3d) 269 at 274 (B.C. S.C.), *R. v. M.J.M.* (1989), 89 N.S.R. (2d) 98 at 105-08, 47 C.C.C. (3d) 436 (S.C.(A.D.)), and in the decision of the Saskatchewan court in *R. v. E.E.H.* (1987), 52 Sask. R. 75 at 78 (Q.B.). In the latter case, Wimmer J. ordered the youths to be transferred to adult court and stressed that the seriousness of the offence necessitated a transfer order: "If the public is to have continued confidence in the administration of justice there must be certainty that crimes so barbarous as this will invite the strongest possible response from the justice system. Any person who savages his neighbour in the way that was done here should seldom be entitled to special treatment on account of age alone." However, the transfer in that case was later reversed on appeal; see *R. v. E.E.H.* (1987), 54 Sask. R. 304, 35 C.C.C. (3d) 67 (C.A.) [cited to Sask. R.].

³⁶⁷(1986), 43 Man. R. (2d) 246, 31 C.C.C. (3d) 253 (C.A.) [cited to Man. R.].

weapon. It was alleged that he and his brother, who was an adult, provoked a fight with a twenty-three-year-old man. When the man tried to run away, the youth and his brother chased him down and pushed him to the ground, where the brother then proceeded to stab him several times, with the youth's encouragement. The Youth Court judge ordered that the youth be transferred to ordinary court. Upon review, the Manitoba Court of Queen's Bench allowed the application and returned the case to youth court. The majority of the Court of Appeal refused the Crown's application for leave to appeal. However, in his dissenting opinion, Hall J.A. held that "notwithstanding the prospects for rehabilitation,"³⁶⁸ the transfer order was justified on a charge of second degree murder given that the youth was six weeks short of his eighteenth birthday and that the circumstances of the offence were "particularly disturbing."³⁶⁹ He seized upon the brutality of the alleged offence and thus the need to impose a harsh sentence if the youth was subsequently convicted. The "interest of society" was defined here in terms of extending protection to the public through incarceration, and a dichotomy was created between the needs of the youth and the interests of society.

Similarly, in *Protection de la jeunesse — 237*,³⁷⁰ the Quebec Youth Court explicitly linked the interests of society to incarceration as follows:

[T]he interests of society means first and foremost, the protection of its members "from illegal behaviour," ... The pre-eminence of the concept of the interests of society expresses the legislator's will to give priority to respect for the social order [and] respect for collective right *in order to push into the background the individual right of the young person to treatment.* [emphasis added]³⁷¹

In so ruling, the Court emphasized that the decision to transfer should be based primarily on an assessment of the youth's "dangerousness" rather than upon his prospects for rehabilitation. A similar view was expressed by Goodman J.A. when, speaking for the Ontario Court of Appeal in *R. v. Guy S.*,³⁷² he held that "[t]he reasonable possibility that a young offender can be rehabilitated within a three-year period does not, standing alone, mandate that such offender be tried in youth court."³⁷³

In other instances, considerations such as general deterrence have also been included in the definition of the "interest of society." In *R. v. W.H.*,³⁷⁴ the Ontario High Court emphasized the need for deterrence in the following manner: "Society's interest in disposing of allegations of this nature in a manner which would act as a deterrent to people who may be disposed to commit such offences must, in the final result, outweigh the needs of the young person."³⁷⁵

³⁶⁸*Ibid.* at 250.

³⁶⁹*Ibid.* at 249.

³⁷⁰[1987] R.J.Q. 498, (*sub. nom. R. v. M.C.*) Y.O.S. 87-125 (Que. Yth. Ct.) [cited to Y.O.S.].

³⁷¹*Ibid.* at 502.

³⁷²(1991), 5 O.R. (3d) 97, 50 O.A.C. 163 [cited to O.R.].

³⁷³*Ibid.* at 113.

³⁷⁴(1989), 31 O.A.C. 372, 47 C.C.C. (3d) 72 (C.A.) [cited to O.A.C.].

³⁷⁵This passage from the unreported High Court decision was cited *ibid.* at 373. The High Court decision was reversed on appeal. The Court of Appeal held that the court's reference to deterrence through public proceedings was not supportable under the system established under the YOA.

An emphasis on deterrence as a part of "protection of the public" has also been linked to the publicity that attaches to cases in adult court. In a case where a gang of youths used threats to guard their anonymity and bar witnesses from testifying against them, the court remarked that transfer was in society's interest.³⁷⁶ Removing these youths from the juvenile court would, "to some extent counter the mystery and fear which the activities of these gangs spread throughout the community and encourage reluctant witnesses to come forward and testify."³⁷⁷ Similarly, in *R. v. M.J.M.*,³⁷⁸ the court stated that: "Public denunciation of serious crimes, public confidence in the administration of justice and the reaction of society to such crimes and the penalties stipulated by Parliament for them are all important factors in considering the interests of society."

By contrast, those who have favoured pursuing rehabilitation as a means of securing the protection of the public have articulated a number of reasons in support of this position. It has been argued that defining "interest of society" in terms of immediate protection, and using section 16 to gain access to longer sentences in the adult system is myopic.³⁷⁹ Since a youth, even if convicted, is released from custody at some future date, it has been argued that successful rehabilitation under the youth system is more likely to provide greater long-term protection to the public than incarceration in an adult facility.³⁸⁰

Arguments in favour of equating protection of the public to rehabilitation have also stressed the negative impact of adult penitentiaries upon the young offender. According to this view, not only is the environment of the adult facility adverse to the goal of rehabilitation due to a dearth of rehabilitative resources,³⁸¹ but because of the impact of prison culture, criminal behaviour is entrenched in the adult system.³⁸² For example, Huband J.A., who delivered the judgment for the majority in *R. v. D.V.*, noted that the psychologist testifying at the trial believed that the youth could be rehabilitated within the three-year maximum

³⁷⁶*R. v. William Y.*, [1988] W.D.F.L. 1325, Y.O.S. 88-100 (B.C.C.A.) [cited to Y.O.S.].

³⁷⁷*Ibid.*

³⁷⁸(1989), 89 N.S.R. (2d) 98 at 107, 47 C.C.C. (3d) 436 (C.A.).

³⁷⁹See Kirkland J. in *R. v. Michael E. (No. 1)*, [1986] W.D.F.L. 608, Y.O.S. 86-023 (Ont. Prov. Ct. (Fam. Div.)). This broad interpretation of protection was also emphasized by the Alberta Youth Court in *R. v. B.R.C.*, [1984] A.W.L.D. 1025 (Alta. Pro. Ct. (Yth. Div.)).

³⁸⁰Some judges have also expressed concern about the potential physical danger to youths who are placed in adult custodial facilities. For example, in *R. v. W.H.*, *supra* note 374, the Ontario Court of Appeal refused to transfer six youths who were charged with forcible confinement and sexual assault of a 14-year-old girl. The court considered the evidence of a witness from Corrections Canada who testified about the conditions of adult penitentiaries at the transfer hearing. In his testimony the witness stated that "there was a real risk of physical danger, a risk of becoming involved in involuntary homosexual activities and the likelihood of the young person having to accept the codes of behaviour in living in such a place" (*ibid.* at 374). The court concluded that "it would be a rare case in which it would be in the interests of either the public or the accused to impose such a sentence" (*ibid.*).

³⁸¹See Canadian Criminology and Corrections Association, "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: Canadian Criminology and Corrections Association, 1976) at 9.

³⁸²*Legislative Committee on Bill C-58*, *supra* note 321 at 5:14.

period of detention available under the *YOA*.³⁸³ The court also found that the report prepared on the youth was "favourable," despite previous convictions in youth court. Huband J.A. concluded: "The needs of the accused would not be met by a destructive incarceration in an adult penitentiary for ten years. Society's interests would not be best served by the probable creation of a hardened criminal."³⁸⁴ Focusing on the goal of providing long-term protection to the public, the majority conceived of the juvenile justice system as one that is offender-based and geared toward the reform of young persons. Rather than creating a dichotomy between the "interests of society" and the "needs of the young person," Huband J.A. attempted to reconcile these two concepts by defining the "interest of society" in terms of the long-term rehabilitation of the young person.

In a similar vein, Leschied of the London Family Court Clinic has argued that longer sentences do not improve community protection; rather, he stresses that it is the quality of intervention and not simply the length of time of incarceration that will serve to reduce recidivism.³⁸⁵ In his view, those who advocate using transfer as a mechanism to gain access to longer sentences in the adult system, and thereby ensure public protection, have been misled by the media in its reporting of the incidence of violent crimes committed by young offenders.³⁸⁶ Moreover, Leschied explains, this approach is not justified because studies have shown that an increase in the severity of sentences may not have a deterrent effect upon violent youth.³⁸⁷

³⁸³*Supra* note 367.

³⁸⁴*Ibid.* at 249.

³⁸⁵*Legislative Committee on Bill C-58, supra* note 321 at 5:13. See also A. Leschied, *Assessing Outcomes of Special Needs Youth* (London: Family Court Clinic, 1989) at 5-8.

³⁸⁶This misperception has also been recognized in the context of adult sentencing in a study conducted by Doob and Roberts (A. Doob & J. Roberts, "An Analysis of the Public's View of Sentencing" *Report to the Department of Justice* (Ottawa: Supply and Services Canada, 1983)). Their study showed that the Canadian public overestimates the proportion of crime that involves violence, as well as the recidivism rates of offenders. At the root of this misperception is the fact that the public's view of crime and the criminal justice system is shaped by the news media:

When thinking about crime, people summon to mind images of violent offenders, of repeat offenders, and of an identifiable group of people who, once they commit an offence, will come back into the criminal justice system over and over again. It is, therefore, not surprising, given this image of crime, that people desire more punitive sanctions ... [I]f it is perceived that communities can do little themselves to avoid crime, then members of the public are left with three potentially useful functions of sentencing — *incapacitation, and general and individual deterrence* [emphasis added] (*ibid.* at 18).

Their study revealed, however, that when members of the public were given access to more complete information about sentencing, they were more likely to be content with the decisions made by trial judges. There is no reason to believe that public perceptions of leniency do not apply equally in the context of young offenders. As reported by W. Meloff & R.A. Silverman, "Canadian Kids Who Kill" (1992) 34 *Can. J. of Criminology* 15, a great deal of publicity has been given to cases where youths have been charged with homicide under the *YOA*. Implied by these reports is that youths who kill are incorrigible criminals and that the incidence of random youth violence is sharply increasing in Canada. The authors suggest, however, that the threat posed to "public" safety should be questioned because the evidence reveals that most youth homicides involve a relative or acquaintance of the perpetrator.

³⁸⁷*Legislative Committee on Bill C-58, supra* note 321 at 5:10-14. In fact, Leschied argues that

Given the ambiguous language in section 16, it is evident that the manner in which a judge chooses to interpret that provision will clearly depend upon his or her view of how the "protection of society" is best secured: through longer periods of incarceration for young offenders in the adult system, or through the long-term rehabilitation of the youth as achieved in treatment-oriented youth facilities. Therefore, while the *YOA* has purported to limit judicial discretion in the juvenile system, and to provide procedural protection against arbitrary and unpredictable decision-making, allowing these two goals to coexist in the language of the legislation has thwarted any narrowing of the scope of judicial discretion in the transfer context. Because of the serious implications of a transfer order and the consequent need for consistency in the application of the transfer provision, it is imperative that Parliament resolve these contradictions by circumscribing the scope of judicial discretion. Ultimately this requires a clear articulation of the purpose of transfer, as well as an enumeration of criteria which are consistent with that purpose.

At present, subsection 16(2) sets out a wide variety of factors that the youth court "shall take into account" in an application for transfer.³⁸⁸ Subsection 16(2) serves to expand the considerations relevant to transfer under subsection 16(1). Not only does the Act fail to provide any guidance as to how these considerations are to be prioritized, but paragraph 16(2)(f) states that the court may also refer to "any other" factor that it deems relevant.³⁸⁹ The mingling of consider-

the evidence has shown that with a more severe penalty, there is a slightly increased chance of recidivism.

³⁸⁸S. 16(2) provides:

- 16.(2) In considering an application under subsection (1) in respect of a young person, a youth court shall take into account
- (a) the seriousness of the alleged offence and the circumstances in which it was allegedly committed;
 - (b) the age, maturity, character and background of the young person and any record or summary of previous findings of delinquency under the *Juvenile Delinquents Act*, chapter J-3 of the Revised Statutes of Canada, 1970, or previous findings of guilt under this Act or any other Act of Parliament or any regulation made thereunder;
 - (c) the adequacy of this Act, and the adequacy of the *Criminal Code* or any other Act of Parliament that would apply in respect of the young person if an order were made under this section, to meet the circumstances of the case;
 - (d) the availability of treatment or correctional resources;
 - (e) any representations made to the court by or on behalf of the young person or by the Attorney General or his agent; and
 - (f) any other factors that the court considers relevant.

³⁸⁹Because the courts have held that the factors set out in s. 16(2) are "directory," not "mandatory," it is left to the judge at a transfer hearing to determine the priority and weight to be given to each. See *e.g. R. v. F.* (1985), 20 C.C.C. (3d) 334 at 357-58 (Ont. H.C.); *R. v. A.J.M.* (1986), 73 A.R. 52 at 56, 29 C.C.C. (3d) 418 (Q.B.); *R. v. S.C.M.* (1990), 67 Man. R. (2d) 181 at 182 (Q.B.). The Supreme Court of Canada has also declined to ascribe any priority to the factors in s. 16(2). McLachlin J., writing for the majority in *R. v. S.H.M.* (1989), 71 C.R. (3d) 257 at 305, 50 C.C.C. (3d) 503 (S.C.C.) [hereinafter *S.H.M.* cited to C.R.], acknowledged that "some factors will assume greater importance than others, depending on the nature of the case and the viewpoint of the tribunal in question." As such, the Supreme Court has effectively endorsed the broad judicial discretion which exists at a transfer hearing.

ations in subsection 16(2) pertaining to the youth's treatment prognosis, and to an assessment of dangerousness, further highlights the tension between the policy goals that the provisions relating to transfer aim to achieve. This is significant because the emphasis which a judge chooses to place upon one factor over another will also indicate what the court considers to be the rationale for a transfer order generally. For example, where emphasis is placed on the seriousness of the alleged offence, it is more likely that a youth will be transferred to the ordinary court, and that, in ordering the youth to be transferred, the court will focus upon indicators of "dangerousness" over indicators of "treatability."³⁹⁰ On the other hand, where priority is given to the availability of treatment resources, and to the individual's amenability to treatment, the inquiry shifts away from an assessment of "dangerousness" toward an evaluation of the accused's prospects for rehabilitation within the juvenile system.³⁹¹

In order to give more guidance to a judge at a transfer hearing it is therefore necessary to clarify the standard for transfer as set out in subsection 16(1) and to limit the criteria in subsection 16(2) to those considerations which are consistent with the transfer test. Until the tension between protection as rehabilitation and protection as incarceration is resolved, the language of the test may be manipulated, and the criteria set out in subsection 16(2) may be used in a manner which will support virtually any position that the court wishes to forward. Unfortunately, the most recent amendments to section 16 have not resolved this ambiguity.

b. Bill C-12

Bill C-12 received Royal Assent on May 15, 1992, setting out a two-part test in section 16(1.1) to determine whether a youth should be transferred to the ordinary court.³⁹² At the first stage of the test, Bill C-12 directs the court to con-

³⁹⁰The Manitoba courts, for example, have taken this approach in a number of cases. In *R. v. C.R.M.* (1987), 46 Man. R. (2d) 315 (C.A.), the transfer order was confirmed due to the seriousness of the alleged offence (first degree murder) even though the young person had no prior record. See also *R. v. S.C.M.* (1990), 67 Man. R. (2d) 181 (Q.B.); *R. v. F.D.M.* (1987), 45 Man. R. (2d) 24, 33 C.C.C. (3d) 116 (C.A.).

³⁹¹See *e.g. Nathalie B. v. R.* (1985), 21 C.C.C. (3d) 37 (Que. C.A.), where the Quebec Court of Appeal refused the Crown's application for transfer of a 17-year-old girl charged with murder on the grounds that she could be effectively rehabilitated within the youth system. Similarly, in *R. v. E.E.H.* (C.A.), *supra* note 366 at 307, the Saskatchewan Court of Appeal reversed the decision to transfer and re-affirmed the ruling of the trial judge that "s. 16 is designed for another kind of young person: one who is hardened generally, one who tends to be incorrigible, one for whom most of the resources and avenues within the social service system and the young offenders system have been used but without much avail."

³⁹²Bill C-12 was passed as *An Act to Amend the Young Offenders Act and the Criminal Code*, S.C. 1992, c. 11.

S. 16(1.1) states:

In making the determination referred to in subsection (1), the youth court shall consider the interest of society, which includes the objectives of affording protection to the public and rehabilitation of the young person, and determine whether those objectives can be reconciled by the youth remaining under the jurisdiction of the youth court, and if the court is of the opinion that those objectives cannot be so reconciled, protection of the public shall be paramount and the court shall order that the young person be pro-

sider the "interest of society." The "interest of society" is then defined as *including* the objectives of affording "protection to the public" and "rehabilitation of the young person." If these two objectives can be reconciled within the jurisdiction of the youth court then the young person shall not be transferred. However, if they cannot be so reconciled, then the "protection of the public" shall be paramount. While it is acknowledged that in some instances these two objectives (protection and rehabilitation) may be achieved concurrently,³⁹³ the manner in which subsection 16 (1.1) is drafted suggests that there is no identity between "protection of the public" and the "rehabilitation of the young person." Instead, the door is left open to two potentially conflicting interpretations.³⁹⁴ Thus, the standard for transfer remains dependant on the court's view of how the "protection of society" is best achieved. The test set out in subsection 16(1.1) also leaves open the question of whether other considerations such as general deterrence may be relevant to transfer, since the "interest of society" only *includes* the objectives discussed above. Furthermore, there has been no narrowing of the criteria in subsection 16(2) which may be considered at a transfer hearing.³⁹⁵

Commentaries on Bill C-12 reinforce the argument that there is still a great deal of uncertainty as to the purpose and proper interpretation of the transfer provision. The analyses of Bala and Manfredi indicate that the tension between securing protection through rehabilitation and protection through incapacitation remains unresolved by the recent amendments. While both authors agree that "protection of the public" shall take precedence under Bill C-12 where society's interest in protection and the rehabilitation of the youth conflict, Manfredi comments that "as in the United States, the purpose of this change is to ensure that ... the transfer decision is driven by public safety concerns rather than rehabilitative considerations."³⁹⁶ Conversely, Bala argues that Parliament did not intend to "lower" the test for transfer³⁹⁷ and that "the new test continues to recognize the importance of rehabilitation, and may be interpreted in a fashion that does not significantly affect the transfer rate."³⁹⁸

ceeded against in ordinary court in accordance with the law ordinarily applicable to an adult charged with the offence.

³⁹³This type of reasoning would apply where a youth needs to be dealt with in the harsher atmosphere of an adult penitentiary for rehabilitation purposes, or where the treatment facilities available in the adult system are better suited to the individual's needs or level of maturity.

³⁹⁴This problem is not new. Referring to the test set out in s. 9 of the *JDA*, Jane Morley commented that not only was the interpretation of the test highly dependent on a judge's own concept of individual and societal good, but it was also problematic in that the two criteria (good of the child and interest of the community) were at least potentially incompatible (Morley, *supra* note 88 at 299). *Contra* this view: commenting on the new test in s. 16(1.1), Mr. Terence Wade, speaking on behalf of the Canadian Bar Association, stated that the new test "makes more explicit which of those criteria is to be paramount in the event of an inability to come to a conclusion when the two of them are weighed" (*Legislative Committee on Bill C-58, supra* note 321 at 3:12 (16 October 1990)).

³⁹⁵The problems identified above with respect to the criteria in s. 16(2) were recognized in the Department of Justice's Consultation Document of 1989, but were not addressed in Bill C-12 (Department of Justice, *The Young Offenders Act: Proposals for Reform* (Ottawa: Queen's Printer, July 1989) at 29 [hereinafter *Consultation Document of 1989*]).

³⁹⁶Manfredi, *supra* note 171 at 55.

³⁹⁷N. Bala, "Dealing with Violent Young Offenders: Transfer to Adult Court and Bill C-58" (1990) 9 Can. J. Fam. L. 11 at 26.

³⁹⁸*Ibid.* at 35.

How can we explain the continued ambivalence that is expressed in section 16? One perhaps cynical view is that the test was expressly formulated so as to accommodate a multiplicity of perspectives. However, the continued coexistence of these two approaches may be more accurately explained by the fact that the reforms were not specifically directed at resolving the ambiguities in section 16 of the *YOA*. Instead, looking at inter-provincial differences in the transfer rate,³⁹⁹ commentators⁴⁰⁰ and judges⁴⁰¹ focused upon the inflexibility of sentencing options in the youth and adult systems. Particularly where murder was charged, critics cited the "stark choice" between a three-year maximum disposition under the *YOA* and the minimum term of twenty-five years without parole under the *Criminal Code* as the reason for significant inter-provincial variations in the transfer rate. As explained by Bala and Stuart:

Interprovincial variation in the application of section 16 is itself symptomatic of a more profound problem, which can be reduced only by legislative action. As presently drafted, section 16 offers the courts too stark a choice. This is most apparent in the case of first degree murder. ... Faced with this kind of choice, it is not surprising that some judges are choosing to transfer cases which other judges would not.⁴⁰²

It was on this theory that Parliament introduced Bill C-12 to deal with the disparity problem by bridging the gap between dispositions ordered under the *YOA* and the sentencing provisions of the *Criminal Code*. First, the maximum custodial sentence under the *YOA* was increased from three years to five years less one day (subsection 20(4)). Second, the parole period for youths convicted of culpable homicide in adult court was reduced from a minimum twenty-five years to a minimum of ten years (s. 744.1). Third, the amendments provided that even if a youth was transferred to adult court, he could be ordered to serve his sentence in a youth facility until the age of twenty (subsection 16.1(7)). This procedure, provided for under section 16.2, would involve a hearing at which

³⁹⁹Under the *YOA* Manitoba makes the greatest use of the transfer provision (1.05% of all charges). The other provinces and territories have used the transfer provision to a lesser degree: Quebec (0.68%), Newfoundland (0.53%), Alberta (0.52%), Nova Scotia (0.45%), B.C. (0.19%), Yukon (0.16%), Saskatchewan (0.04%), New Brunswick (0.04%), P.E.I. and the Northwest Territories (0.00%). No figures for Ontario transfer rates were available in this study conducted by the Canadian Centre for Justice Statistics (*Consultation Document of 1989*, *supra* note 395 at ii).

⁴⁰⁰As noted in the *Consultation Document of 1989*, *ibid.* at 3, the stark choice with which judges were faced resulted in a situation where, in the experience of at least one jurisdiction, there did not appear to be a factual case in which the courts would transfer a youth to the ordinary court. See also N. Bala & H. Lilles, "Transfer to Adult Court: The Most Serious Disposition" in L. Beaulieu, ed., *supra* note 171, 119; N. Bala & D. Stuart, "Transfer to Adult Court: Two Views as to Parliament's Best Response" (1989) 69 C.R. (3d) 172; Bala, *supra* note 397; Manfredi, *supra* note 171.

⁴⁰¹In *R. v. M.A.Z.* (1987), 19 O.A.C. 67, 35 C.C.C. (3d) 144 (C.A.) [cited to O.A.C.], leave to appeal den'd (1987), 35 C.C.C. (3d) 144n (S.C.C.), Mackinnon A.C.J.O. expressed the need for legislative reform as follows:

Put bluntly, three years for murder appears totally inadequate to express society's revulsion for and repudiation of this most heinous of crimes. The mandatory sentence on conviction for first degree murder (with which the appellant is charged) under the *Criminal Code* is 25 years before being eligible for parole ... This is obviously an area for consideration and possible amendment by those responsible for the *Act* (*ibid.* at 79).

⁴⁰²Bala & Stuart, *supra* note 400 at 173.

evidence could be presented. As well, a review of the decision was provided for under subsection 16.2(4). It is also significant that almost all of the changes under Bill C-12 were directed specifically at addressing the disparity problem where murder is charged, a factor which may have further distorted the formulation of the amended provisions.

However, advancing this explanation for inter-provincial disparity and interpretative differences is somewhat misleading. While the gap between the length of custodial dispositions in the young offender and adult systems has been narrowed, Bill C-12 has not addressed the fundamental textual ambivalence which lies at the root of the disparity issue. It is submitted that judges have not rendered radically different decisions in similar cases because of the stark choice between dispositional options in the youth and adult systems; they have done so because the vague language of the test itself accommodates a multiplicity of views, and as such, lends itself to many different interpretations.

Defining the proper standard for transfer therefore requires an understanding of what transfer aims to achieve within the broader framework of the *YOA*. Notwithstanding the reorientation in juvenile justice signalled by the passage of the *YOA*, rehabilitation has continued to play a central role in defining the concept of public protection, as well as the "special needs" of the young person. Arguably, it is not surprising that judges have continued to stress rehabilitative considerations in the absence of a clear legislative directive to alter this interpretation. To some extent, section 16 represented a carry-over from section 9 of the *JDA*, as revealed by the way that section 16 was drafted, and by the legislative history of transfer.⁴⁰³ It is also significant that the courts had been applying the *JDA* for nearly eighty years, perhaps making it inevitable that the operative principles under the earlier legislation would remain influential, particularly where the *YOA* was ambiguous.

The linking of special needs and rehabilitation has since been explicitly acknowledged in Bill C-12, where the phrase "needs of the young person" has been replaced by the "rehabilitation of the young person" under subsection 16(1.1). Given the wide variety of problems associated with rehabilitation, it is unclear why, and on what basis, Parliament has decided to reintroduce this goal into the transfer test in subsection 16(1.1).

In abstract terms, pursuing the goal of long-term rehabilitation has an intuitive appeal, both with respect to addressing the needs of the youth and in the

⁴⁰³Even the language of s. 16 of the *YOA* closely echoed the transfer test under s. 9 of the *JDA*, which read "the good of the child and the interest of the community" and which was interpreted as meaning that a young person would not be transferred unless rehabilitation was not possible within the juvenile system. It is also significant that this interpretation persisted throughout the period of reform in the 1960s and 1970s, in spite of alterations to the drafting of the test itself. Moreover, even though the test was expressly altered at third reading of Bill C-61, placing the "interest of society" before the "needs of the young person," the parliamentary debates which surrounded the reforms suggest that this shift in emphasis had little to do with a reconsideration of the proper standard for transfer. Rather, it resulted from a need to respond to concerns raised about the uniform maximum age of juvenile court jurisdiction which was being expedited by Parliament. (See "Fourth Report of the Standing Committee on Justice and Legal Affairs" in *House of Commons Journals* (23 April 1982) at 4746; *Standing Committee*, *supra* note 162 at 61:10 (9 February 1982).

interest of providing protection to society. Yet, at the same time, this approach entails a wide grant of judicial discretion which is necessary to determine the appropriate response to the individual offender. It is for this reason that judges under the *JDA* were empowered to increase the degree of intervention according to a young person's treatment needs.⁴⁰⁴ However, in light of the historical development of the *YOA*, the stated objectives of the legislation, and the limitations on judges to actually determine where a youth will serve out his or her disposition, placing emphasis on rehabilitative goals in the transfer context is problematic. In fact, the *YOA* was implemented in large measure to respond to the abuses that resulted from this broad grant of judicial discretion. It is precisely because rehabilitation is not compatible with other objectives of the Act such as ensuring the determinacy of dispositions, extending enhanced procedural protections to young persons, and creating a direct link between dispositions and criminal offences, that giving priority to rehabilitative concerns must be questioned.⁴⁰⁵

Moreover, a closer examination of the analogy that is drawn between rehabilitation and the protection of society reveals that it is premised on a number of flawed assumptions. First, this equation assumes that treatment programs can, if properly developed, address the problem of recidivism. As discussed in the first part of this paper, a substantial body of evidence has shown that rehabilitation has not been effective in achieving this goal. Indeed, the *YOA* was implemented partly in reaction to the perceived failure of rehabilitation.⁴⁰⁶ Second, if the long-term rehabilitation of the youth is a primary concern under section 16, then the process which allows for a review of the decision to transfer is extremely problematic. This is because the systemic delays associated with this formal procedure are adverse to the goal of rehabilitation.⁴⁰⁷ As explained

⁴⁰⁴See generally Morley, *supra* note 88; M.M. Bowker, "Waiver of Juveniles to Adult Court under the Juvenile Delinquents Act: Applicability of Principles to Young Offenders Act" (1987) 29 *Crim L.Q.* 368; G. Parker, "Juvenile Delinquency: Transfer of Juvenile Cases to Adult Courts: Factors to Be Considered Under the Juvenile Delinquents Act" (1970) 49 *Can. Bar Rev.* 336; R.C. Topp, "A Concept of Diminished Responsibility for Canadian Criminal Law" (1975) 33 *U.T. Fac. L. Rev.* 205.

⁴⁰⁵In the transfer context, a further criticism may be raised. An assessment of the accused's prospects for reform at a transfer hearing may prove to be paradoxical where the desire to rehabilitate the young offender requires that the youth be removed from the juvenile system so that his needs can be adequately addressed. For example, in *Re Young Person* (1987), 3 *W.C.B. (2d)* 257, [1988] *W.D.F.L.* 160 (Nfld. S.C.), the accused was transferred to the ordinary court because expert evidence at the transfer hearing showed that if the youth was responsive to treatment, the duration of the treatment program would probably exceed the three-year maximum of custody available under the *YOA*. Similarly, in *R. v. J.T.J.*, [1986] *W.D.F.L.* 366 (Man. Prov. Ct. (Fam. Div.)), in ordering a youth to be transferred to the adult court, the trial judge stressed that facilities for psychiatric treatment were only available in the adult system.

⁴⁰⁶See text accompanying notes 133-42.

⁴⁰⁷In *R. v. S.D.* (1991), 4 *O.R. (3d)* 225, 6 *C.R. (4th)* 96 (C.A.), a delay of 2 years resulted from an application by the Crown to transfer the case to adult court. The initial application, which resulted in an order to transfer, occupied 1 year. The further application for review took 7 months, with the result that the matter was returned to the juvenile court. The accused made a motion for a stay of proceedings on the grounds that there had been a violation of the accused's right to be tried within a reasonable time as protected by s. 11(b) of the *Charter*. The Ontario Court of appeal held that the delay was unreasonable and ordered that a stay of proceedings be entered. However,

by Osborne J.A. in *R. v. G.C.M.*,⁴⁰⁸ “[f]or young persons, the effect of time may be distorted. If treatment is required and is to be made part of the *YOA* disposition process, it is best begun with as little delay as is possible.”⁴⁰⁹ The amendments to the Act fail to address this problem. Although one level of appeal has been removed by Bill C-12, another level of decision-making has been added. At the first stage, the court must decide under subsection 16(1.1) whether the youth court is the appropriate forum to hear the case. At the second stage, once transfer has been ordered and the case has been adjudicated in the adult court, the adult court must determine under section 16.2 the appropriate place of custody.⁴¹⁰ Subsection 16.2(4) further provides for a review of the decision as to the place of custody. Not only does the amendment in subsection 16.2 add another level of decision-making, but the effect of Bill C-12 is to partially remove the question of custody from the court at a transfer hearing.⁴¹¹ By providing a mech-

on appeal to the Supreme Court of Canada, this decision was reversed. The Supreme Court affirmed the decision at first instance finding that the “delay complained of was not unreasonable ... [T]he time required for an application for transfer to adult court and appeals relating thereto is part of the inherent time requirements of a case under the Young Offenders Act. In this case ... the application could not have reasonably proceeded faster” (*R. v. S.D.* (1992), 72 C.C.C. (3d) 575 at 576, 14 C.R. (4th) 223 (S.C.C.)).

⁴⁰⁸(1991), 3 O.R. (3d) 223, 6 C.R. (4th) 55 (C.A.) [cited to O.R.].

⁴⁰⁹*Ibid.* at 230.

⁴¹⁰S. 16.2:

- (1) Notwithstanding anything in this or any Act of Parliament, where a young person who is proceeded against in ordinary court as a result of an order made under section 16 is convicted and sentenced to imprisonment, the court shall, after affording the young person, the parents of the young person, the Attorney General, the provincial director and representatives of the provincial and federal correctional systems an opportunity to be heard, order that the young person serve any portion of the imprisonment in
 - (a) a place of custody for young persons separate and apart from any adult who is detained or held in custody;
 - (b) a provincial correctional facility for adults; or
 - (c) where the sentence is for two years or more, a penitentiary.
- (2) In making an order under subsection (1), the court shall take into account
 - (a) the safety of the young person;
 - (b) the safety of the public;
 - (c) the young person's accessibility to family;
 - (d) the safety of other young persons if the young person were to be held in custody in a place of custody for young persons;
 - (e) whether the young person would have a detrimental influence on other young persons if the young person were to be held in a place of custody for young persons;
 - (f) the young person's level of maturity;
 - (g) the availability and suitability of treatment, educational and other resources that would be provided to a young person in a place of custody for young persons and in a place of custody for adults;
 - (h) the young person's prior experiences while in detention or custody;
 - (i) the recommendations of the provincial director and representatives of the provincial and federal correctional facilities; and
 - (j) any other factor the court considers relevant.

S. 16.2(4) also provides for a review of the decision as to the place of custody.

⁴¹¹The introduction of s. 16.2 responds to criticisms relating to the dangers of placing youths in the same facilities as adult offenders. Under the *YOA* as originally drafted, no similar mechanism existed. While there was a provision in s. 733 of the *Criminal Code* which allowed for young per-

anism whereby a youth may request to serve his custodial sentence in a youth facility even after transfer has been ordered and the youth has been convicted under the *Criminal Code*, section 16.2 effectively deprives the judge at the transfer hearing of any control over the place of custody. It is therefore difficult to see how a judge can legitimately order transfer with a view to the treatment needs of the offender, in the absence of any control over the place of custody or the type of treatment that should be ordered.

Third, requiring the courts to determine a youth's amenability to treatment presupposes that judges are capable of making these types of predictive determinations. It is for this reason that the court is required on a transfer application to consider a pre-disposition report, and may also order that a medical or psychological report be prepared. However, commenting upon the waiver provisions in the United States, Feld forcefully challenges this assumption.⁴¹² Pointing to the absence of reliable tools to predict future criminal behaviour, he states that: "All of the problems associated with the validity and reliability of psychological or psychiatric classification and diagnosis are compounded when the issues involve troublesome legal and social policy issues rather than scientific ones."⁴¹³ In other words, even if judicial discretion is circumscribed, requiring judges to evaluate the future behaviour of alleged offenders will inevitably result in interpretative inconsistencies because section 16 of the *YOA* allocates to the judiciary a role for which it is ill-equipped.

It is significant, however, that Feld's criticism applies equally to predicting the future "dangerousness" of the accused.⁴¹⁴ Therefore, if the aim of future reforms is to narrow the scope of judicial discretion, and to get to the root of variations in the application of the transfer provision, it is submitted that the inquiry on a transfer application must shift away from an offender-based determination of future behaviour to a more objective evaluation of offence-based criteria.

This is the direction that is being taken in a number of American states where, as Manfredi notes, there has been an "attempt to create a more direct link between the substance of dispositions and specific acts."⁴¹⁵ Manfredi attributes this shift in emphasis to two concerns, both of which are paralleled in the Canadian context: "The impetus for this development has been two-fold: (1) the desire to control discretionary decisionmaking and dispositional discrepancies; and (2) the realization that the failure to establish a relationship between acts

sons sentenced in the adult system to be placed in youth facilities with the consent of the provincial director, this provision was largely ineffective. See *R. v. Timothy V.* (20 April 1990), (Ont. S.C.) [unreported]; *Legislative Committee on Bill C-58*, *supra* note 321 at 4:9 ff.

⁴¹²B.C. Feld, "Juvenile Court Legislative Reform and the Serious Young Offender: Dismantling the 'Rehabilitative Ideal'" (1981) 65 *Minn. L.R.* 167.

⁴¹³*Ibid.* at 178-79.

⁴¹⁴In addition, Feld states that the "lack of reliable psychological or clinical indicators to predict dangerousness almost invariably results in over-predicting and erroneously classifying as dangerous many young offenders who ultimately do not commit further offenses" (*ibid.* at 179).

⁴¹⁵Manfredi, *supra* note 171 at 54.

and their consequences undermines the deterrent value of juvenile court intervention.⁴¹⁶

In keeping with this approach, we believe that the considerations which are relevant to transfer must be narrowed to those that are consistent with an offence-based rationale for transfer precisely because an offender-based assessment is not sufficiently determinate. In particular, an offence-based approach gives priority to such criteria as: the seriousness of the alleged current offence, the circumstances surrounding the alleged offence, whether the offence was committed in an aggressive, violent or premeditated manner, and the accused's previous convictions under the *YOA*. The aim of these suggested reforms is not only to clarify the transfer test, but also to narrow the category of offenders for whom transfer is available. Contrary to recent interpretations of section 16 which suggest that transfer is not an exceptional remedy,⁴¹⁷ we believe that section 16 should be regarded as a mechanism which links dispositions more directly to specific acts, and which applies only to a category of violent young offenders who could not be held sufficiently accountable for their wrongful actions in the juvenile system.

In our view, the serious implications of a transfer order for the accused mandate that the Crown be required to meet a higher threshold for transfer than is presently required. For instance, the category of offenders who may be transferred at the Crown's request should be limited by more than the requirement that the youth be fourteen years of age and that an indictable offence be charged. This is supported by the fact that more serious charges may be brought by the prosecution in order to lay the groundwork for a transfer order.⁴¹⁸ The scope of application of section 16 could be limited further to indictable offences causing bodily harm and/or to offences committed with the use of a firearm. Along these lines, it is also submitted that transfer should not be available to a juvenile who wishes to escape the possibility of a longer custodial sentence, or a harsher disposition in the youth system. At present, it is open to a youth to use transfer as a mechanism to escape responsibility for wrongdoing because adult courts may treat defendants transferred from youth courts as first time offenders.⁴¹⁹ These recommendations are consistent with the approach which has been taken in a number of American states, where a prior felony conviction is required for transfer.⁴²⁰ In this way, transfer functions as a mechanism which subjects a limited range of offenders to more punitive treatment in the adult system, without

⁴¹⁶*Ibid.*

⁴¹⁷McLachlin J., writing for the majority of the Supreme Court of Canada on two transfer appeals from Alberta, *S.H.M.* (*supra* note 389) and *R. v. J.E.L.* ((1989), 71 C.R. (3d) 306, 50 C.C.C. (3d) 385 (S.C.C.)), stated that:

[I]t would be wrong as a matter of law to say that the applicant must meet a heavy onus. That term carries with it the connotation that only in exceptional or very clear cases should an order for transfer be made ... Parliament having failed to so stipulate that the case for transfer must be "exceptional," or "clear," or "necessary," it is not for this court to do so (*S.H.M.*, *ibid.* at 301-02).

⁴¹⁸*Report*, *supra* note 35 at 83.

⁴¹⁹See Manfredi, *supra* note 171 at 57.

⁴²⁰These states are Colorado, Connecticut, Florida, Kansas, Rhode Island and Ohio (*ibid.* at 56).

altering the response of the juvenile system to offenders who may be dealt with within the framework of the *YOA*.

c. *The Transfer Hearing*

Redefining the transfer test as we suggest would have two interrelated consequences in relation to the application of section 16. First, in making clear that "protection of society" should not be interpreted to necessitate a consideration of rehabilitative concerns, the proposed offence-based transfer test should narrow the potential class of young offenders being transferred. This simply underscores the serious and exceptional nature of a transfer order. As such the second consequence, and corollary of redefining the test, is the need for enhanced procedural protections during a transfer hearing. Given the serious implications of a transfer to adult court, we will argue that the continuing use of relaxed adjectival rules under the *YOA* cannot be sustained.

Under the *JDA*, the courts characterized the transfer hearing as an "administrative," rather than a "judicial" proceeding.⁴²¹ On the basis of this characterization, they held that the strict rules of evidence did not apply.⁴²² Therefore, hearsay and unsworn testimony could be entered into evidence. This characterization was subsequently adopted by the courts under the *YOA*. For example, in *R. v. N.B.*,⁴²³ Beauregard J.A. held that the youth court judge did not err in asking leading questions to witnesses because she enjoyed a wide discretion given that the proceeding was "not a true judicial proceeding." Similarly, in *R. v. J.W.*,⁴²⁴ the youth court judge noted that, in considering the factors enumerated in subsection 16(2), he "is not engaged in the traditional judicial process of fact finding or determining issues, but rather is required to make more in the nature of an administrative decision." Moreover, it is also clear that the courts still allow for a relaxation of the rules of evidence.⁴²⁵ For example, in *R. v. W.*,⁴²⁶ the British Columbia Supreme Court held that an unsworn statement written by a third party and submitted in the evidence of a probation officer was admissible.

⁴²¹In *R. v. Arbuckle*, [1967] 3 C.C.C. 380, 59 W.W.R. 605 (B.C.C.A.) [hereinafter *Arbuckle* cited to C.C.C.], for example, the British Columbia Court of Appeal stated that "the function of a Juvenile Court Judge under s. 9(1) is not judicial in the strict sense of exercising judicial power, but is administrative and ministerial" (*ibid.* at 386). The Court engaged in an analysis of the provisions of the *JDA*, pointing to the fact that the purpose of the Act was to treat the youth as a person in need of support and guidance, and not as a criminal (ss. 3(2), 38), that the proceedings were to be informal (s. 17), and that one needed "special grounds" to appeal a decision of a juvenile court judge (s. 37(1)). Moreover, under s. 9(1), an application for transfer required an investigation into the character and background of the youth, as transfer could only be ordered if the court was of the opinion that the good of the child and the interest of the community demanded it. Thus, the Court concluded, while the judge must "act judicially in the sense of proceeding fairly and openly" (*ibid.*), the purpose of the *JDA* was the welfare of the child. Hence, the function of the juvenile court judge was administrative.

⁴²²In *Arbuckle*, *ibid.*, the Court held that hearsay evidence, in the form of unsworn statements of Crown counsel and the probation officer, was admissible.

⁴²³(1985), 21 C.C.C. (3d) 374 at 379 (Que. C.A.).

⁴²⁴(1989), 99 A.R. 257 at 258 (Prov. Ct. (Yth. Div.)).

⁴²⁵See e.g. *R. v. W.* (1985), 22 C.C.C. (3d) 269 (B.C.S.C.); *R. v. W.Y.* (1988), 4 W.C.B. (2d) 267 (B.C.C.A.); *R. v. S.R.* (1991), 1 O.R. (3d) 785 (C.A.); *R. v. S.J.H.* (1986), 76 N.S.R. (2d) 163, 189 A.P.R. 163 (S.C.(T.D.)).

⁴²⁶*Ibid.*

In *R. v. W.Y.*,⁴²⁷ the British Columbia Court of Appeal agreed with the trial judge that evidence could be given as to the activities of youth gangs and the accused's involvement with such gangs.

It is submitted, however, that defining the nature of the transfer hearing as administrative or ministerial, and thereby allowing for a relaxation of procedural and evidentiary rules, is not appropriate under the *YOA*. This is because the enactment of the *YOA* represented a movement towards a more legalistic framework than existed under the *JDA*. As noted by Bala and Kirvan, "the *YOA* is unmistakably criminal law, not child-welfare legislation."⁴²⁸ Consequently, the discretion of the youth court judge is much more structured under the *YOA*. For example, the judge is required to provide reasons for his or her decision under subsection 16(5), the criteria to be considered are enumerated in subsection 16(2), and a statutory right of review now exists. Given the focus of the *YOA*, one can no longer describe the hearing as administrative, which suggests informality. As one author has noted: "The thrust of the [*YOA*] is away from informal administrative type procedures and towards formal legal judicial proceedings. It is incumbent upon counsel appearing in Youth Court to see that the nature of the transfer hearing evolves in accordance with the new *Act*."⁴²⁹

Defining the hearing as anything less than judicial is also inconsistent with the procedural rights accorded to the accused young person. The right to be heard includes the right to call evidence, to make submissions, and to cross-examine witnesses. The youth has the right to cross-examine the maker of both the pre-disposition report and the medical or psychological assessment. Thus, while the procedures in youth court may still be perceived as less formal than those in ordinary court,⁴³⁰ the transfer hearing is very much adversarial. As one court has stated:

[I]t is necessary to consider just what kind of judicial proceeding should be employed where transfer is being considered ... *YOA* must be looked upon as a remedial statute involving young persons and the criminal law. That *YOA* followed the proclamation of the *Charter* surely is not an accident in history. I conclude that a transfer hearing is a unique proceeding which should be conducted as a judicial proceeding, that is to say, in an impartial fashion in accordance with the rules of natural justice.⁴³¹

Given that the hearing should be viewed as a judicial proceeding, and the rules of natural justice must accordingly be observed, one must necessarily consider what rules of evidence are commensurate with a judicial hearing. The *YOA* itself authorizes the acceptance of hearsay evidence. Under subsection 16(3) the youth court is required to consider a pre-disposition report in a transfer application. Given the type of information contained in such a report, it is inevitable that it will contain hearsay evidence.⁴³² In addition, as stated in paragraph 13(1)(e), the court can avail itself of a medical or psychological report, without

⁴²⁷*Supra* note 425.

⁴²⁸N. Bala & M.-A. Kirvan, "The Statute: Its Principles and Provisions and their Interpretation by the Courts" in Leschied, Jaffe & Willis, eds., *supra* note 3, 71 at 74.

⁴²⁹B. Dunn, "Transfers to Adult Court: The Juvenile Offender" (1984) 4:4 *Crown C. Rev.* 20.

⁴³⁰*R. v. S.H.M.*, *supra* note 389 at 301-04.

⁴³¹*R. v. S.A.F.* (1990), 104 A.R. 283 at 287 (Prov. Ct. (Yth. Div.)).

⁴³²See *YOA*, s. 14(2).

the young person's consent, where it "has reasonable grounds to believe that the young person may be suffering from a physical or mental illness or disorder" and it believes that such a report "might be helpful" in rendering its decision.

The rationale for allowing the youth court judge to receive these reports into evidence is that the effectiveness of transfer requires an informed decision based on all facts relevant to the needs of a young person and his or her potential for rehabilitation. Indeed, the 1965 *Report*⁴³³ recommended that the judge be authorized to order a medical or psychological examination because such authorization "is necessary if the judge is to make an adequate determination in terms of ... treatment ..."⁴³⁴ Bala and Kirvan also point out that a pre-disposition report and a medical or psychological assessment allow a court to "better learn of the needs of the young person."⁴³⁵ However, the use of the report for this purpose may at the same time create a tension with another "need" of young persons: due process.⁴³⁶

An excerpt from the 1982 House of Commons debates on Bill C-61⁴³⁷ illustrates how the objectives of due process and an appropriate assessment of the youth based on all the relevant facts are difficult to reconcile. In its submission to the Standing Committee on Justice and Legal Affairs in 1982, the Canadian Bar Association recommended that statements made by young persons during the course of the preparation of the pre-disposition report should not be made available to the judge at the transfer hearing in order to ensure that prejudicial statements made by the youth not be considered prior to adjudication.⁴³⁸ A proposal was therefore made in the debates to amend clause 14(10) of Bill C-61 such that section 16 would be deleted from the clause which read as follows:

(10) No statement made by a young person in the course of the preparation of a pre-disposition report in respect of the young person is admissible in evidence against him in any civil or criminal proceedings except in proceedings under section 16 or 20 or sections 28 to 32.

According to this proposal, while statements made by the youth could be considered at the disposition stage (*i.e.* ss. 20, 28-32), they would not be used at the pre-adjudicative stage of transfer. The amendment was rejected by the Standing Committee. Both Solicitor General Robert Kaplan and Judge Archambault stated that the change was unnecessary: "[the statement] is relevant information to help the court arrive at a decision on transfer, it does not involve guilt or innocence at this point, and it does not allow any statement to go into a subsequent trial."⁴³⁹ When Svend Robinson, a member of the Standing Committee, pointed to the danger that a youth could make a statement in the report which was prej-

⁴³³*Report, supra* note 35.

⁴³⁴*Ibid.* at 83.

⁴³⁵Bala & Kirvan, *supra* note 428 at 78.

⁴³⁶Under s. 3(1)(e) of the *YOA*, explicit recognition is given to the rights of young persons, guaranteeing the protection of young persons' rights and freedoms, and, in particular, their "right to be heard in the course of, and to participate in, the processes that lead to decisions that affect them."

⁴³⁷Bill C-61, *supra* note 40.

⁴³⁸*Standing Committee, supra* note 162 at 64A:19 (24 February 1982).

⁴³⁹*Ibid.* at 70:85 (30 March 1982).

udicial to his or her case, Kaplan responded by noting the difference in the philosophical approaches adopted by the two men:

It is this constant difference in the position that you and I find ourselves in on the spectrum — with my wanting an effective judicial proceeding and your pushing beyond, I think, effectiveness for the sake of extending the rights of the accused. ... [E]very disagreement we have had in this area has been because of your wanting to go further toward helping the accused get off and our wanting to enable the court to make a decision on all the facts.⁴⁴⁰

In his reply, Robinson defined the conflict somewhat differently: “No one is talking about helping the accused get off ... [W]e are talking about a criminal justice system which attempts to get at the facts in a way that does not prejudice the rights of the accused.”⁴⁴¹

The dilemma with respect to the admissibility of evidence at the transfer hearing is illustrated in this exchange. Allowing the transfer judge to hear certain evidence may serve to frustrate, or defeat, the legal rights accorded to young persons under the *YOA*. The courts have generally held that hearsay evidence is admissible, even though it may be prejudicial to the accused, because the purpose of the transfer hearing is to determine the appropriate forum for adjudication and not the guilt or innocence of the accused.⁴⁴² It may be argued that such a characterization is both unrealistic and misleading. It is generally accepted that the Crown is not obliged at a transfer hearing to prove beyond a reasonable doubt that the offence occurred.⁴⁴³ Nonetheless, in both *R. v. G.S.K.*⁴⁴⁴ and *R. v. R.M.C.*,⁴⁴⁵ Huband J.A., in dissent, stated that, for the purposes of an application for transfer, the court “should” assume that the Crown will prove its case beyond a reasonable doubt and that the young person will receive the most harsh sentence for that crime. Following this logic, although the Crown is not obliged to prove guilt at the transfer hearing, it should have the benefit of the court’s assumption that it can do so. In *R. v. S.R.*,⁴⁴⁶ the Ontario Court of Appeal agreed that such an assumption could be made. In this case, the Court was confronted with contradictory evidence as to the possible involvement of the accused in the brutal killing of a sixteen-year-old girl. The young person denied having participated in the murder. However, unsworn statements which not only implicated the young person in the alleged offence but singled him out as the main perpetrator, were entered into evidence. Goodman J.A., giving the reasons for the court, held that despite the conflicting evidence,

the youth court judge was *entitled* to take into account under s. 16(2)(a) of the *Act*, as proven for the purposes of the application, not only that the applicant had committed first degree murder, as alleged but also the circumstances as alleged, that is to say, the manner in which it was committed. On the basis of the evidence presented on the initial application for a transfer order he was entitled to find that the

⁴⁴⁰*Ibid.*

⁴⁴¹*Ibid.* at 70:86.

⁴⁴²See text accompanying notes 421-27.

⁴⁴³See e.g. *R. v. J.W.*, *supra* note 424.

⁴⁴⁴(1985), 22 C.C.C. (3d) 99 at 101 (Man. C.A.).

⁴⁴⁵(1987), 45 Man. R. (2d) 38 at 47, 33 C.C.C. (3d) 136 (C.A.).

⁴⁴⁶(1991), 1 O.R. (3d) 785 (C.A.) [hereinafter *S.R.*].

applicant had participated in the torture and killing of the victim and that he had enjoyed it. [emphasis added]⁴⁴⁷

According to Bala and Lilles, the appropriate interpretation of *S.R.* and its use of the expression "entitled to" is that a court has a discretion to decide whether or not it will accept all the evidence of the Crown as a true statement of the seriousness and circumstances of the offence.⁴⁴⁸ A court is thus given licence to engage in an analysis of the merits, and to make an initial determination, for the purposes of the hearing, of the guilt or innocence of the young person. The discretion further allows the court to weigh the conflicting evidence and evaluate its credibility.

While Bala and Lilles contend that this interpretation is "not inconsistent"⁴⁴⁹ with the view that the Crown should never be expected to prove its case beyond a reasonable doubt at a transfer hearing, they do not go so far as to argue that it is "consistent." Perhaps this is due to an uneasiness about such a proposition. While it may indeed not be inconsistent, their interpretation has serious implications, as it gives the Crown additional leverage in the leading of evidence as to the alleged offence. On the one hand, if the Crown lacks evidence as to the alleged offence, it is not at a disadvantage at the stage of transfer because it is not expected to prove its case beyond a reasonable doubt.⁴⁵⁰ On the other hand, however, if the Crown has substantial evidence linking the accused to the alleged offence, it can introduce all of it to the court and perhaps benefit from the court's presumption that it is the true version of the events.

If this interpretation of *S.R.*⁴⁵¹ is correct, the decision of *R. v. G.S.*⁴⁵² suggests that the discretion of a court is quite wide. In the latter case, the Ontario Court of Appeal⁴⁵³ was again confronted with conflicting evidence as to the circumstances of the alleged offence. The youth was charged with first degree murder. In his statement to the police, he said that he had gone to the victim's home with a knife, intending to stab and rob him. The youth court allowed the application for transfer and the order was confirmed on review.

The youth then applied for review of the decision and presented fresh evidence in the form of a psychiatric report. The youth told the psychiatrist that he had gone to the victim's home and that, while there, the victim had made sexual advances on him. A fight ensued thereafter. The youth told the psychiatrist that he had never mentioned this earlier because he was "ashamed." It was the psy-

⁴⁴⁷*Ibid.* at 789.

⁴⁴⁸N. Bala & H. Lilles, "Transfer of Youths to Adult Court & Bill C-12: The Most Serious Disposition" (Address to the New Judges Orientation Course of the Canadian Association of Provincial Court Judges, Val Morin, Quebec, 29 April 1992) [unpublished].

⁴⁴⁹*Ibid.* at 19.

⁴⁵⁰In *R. v. J.W.* *supra* note 424, the youth court judge rejected the defence's argument that the evidence respecting the charges was weak and then proceeded to allow the Crown's application for transfer. See also *R. v. S.J.H.* (1986), 76 N.S.R. (2d) 163 at 167 (Yth. Ct.), *aff'd* (1986), 76 N.S.R. (2d) 163 (S.C.(T.D.)).

⁴⁵¹*Supra* note 446.

⁴⁵²(1991), 5 O.R. (3d) 97 (C.A.) [hereinafter *G.S.*].

⁴⁵³The composition of the bench was different, except for Goodman J.A. who was a member of both benches.

chiatrist's view that, at the time of the assault, the youth was suffering from a panic attack, perhaps a homosexual panic, that he now had a tremendous amount of remorse for his actions, and that he was treatable within the YOA framework.

The Ontario Court of Appeal agreed to accept the fresh evidence, given the Crown's consent to its admission. Nonetheless, Goodman J.A., this time delivering the judgment only for the majority, held that he could not attach substantial weight to the psychiatrist's opinion because it was based on the assumption that the youth was telling the truth:

Dr. Meen [the psychiatrist] did not examine the young person until approximately 19 months after the killing. The young person ... had ample time to think about a scenario which might be more favourable to him. The homosexual assault, as outlined in Dr. Meen's report, was of a relatively insignificant nature. It seems somewhat incredible that he would have been too embarrassed to tell anyone, even his brothers, where the assault was so minor and the result so serious. It is also incredible that, even if such an assault took place, he would have concocted a story for the police which was so damaging to him. It would have been much simpler to have told the truth, if such it were, namely, that he went to collect money owing to him and was attacked, rather than telling them that he went to stab and rob the victim. The statement to the police has the ring of truth of a statement made by a panic-stricken youth, shortly after a violent episode. The statement made to the psychiatrist, 19 months after the event, has the ring of a story made up to put himself in the best light.⁴⁵⁴

Goodman J.A. then concluded that, in the event of conflicting evidence as to the circumstances of the alleged offence, a court is "entitled to proceed on the basis of the evidence most damaging to the alleged offender, assuming that it is evidence capable of belief and not merely trifling in nature or amounting to no more than mere conjecture."⁴⁵⁵

While the Court stated that it was not its function "to make findings of credibility with respect to statements made by the young person" nor "to make findings with respect to the guilt or innocence of the young person," the Court in fact did both; it weighed the two contradictory statements and essentially concluded that the version the youth gave to the psychiatrist was a lie. The order to transfer was affirmed, based on the presumed truth of the Crown's version of the events. Moreover, the Court held that the discretion to accept the most damaging evidence can be exercised whenever that evidence is "capable of belief" and not "merely trifling" or "conjecture." Thus, the threshold for accepting the Crown's evidence is quite low.

The reasoning of the Ontario Court of Appeal and Huband J.A. is compelling, given that the criteria to be considered in an application for transfer include, under paragraph 16(2)(a), "the seriousness of the alleged offence and

⁴⁵⁴*Supra* note 452 at 110-11.

⁴⁵⁵*Ibid.* at 112. Carthy J.A., in dissent, stated that the decision on transfer must be made "without presuming which version might be accepted by a judge or jury" (*ibid.* at 104). It should be noted that other courts have taken a similar position to that of Carthy J.A. In *R. v. W.*, *supra* note 425, the British Columbia Supreme Court rejected the Crown's submission that s. 16 "commence[s] on the assumption that the offence exists and is provable" (*ibid.* at 272).

the circumstances in which it was allegedly committed." Such an evaluation has serious implications for the young person, as it may encourage the Crown to increase the severity of the charge in its effort to transfer the youth. For example, a charge of murder could be raised from second to first degree. The case law supports this contention. In *G.S.*, Goodman J.A. noted that "the nature of the participation of a young person in the commission of an alleged murder is an important factor to be considered by the court."⁴⁵⁶

Moreover, Goodman J.A.'s suggestion that paragraph 16(2)(a) may be used by the courts as a justification for the assumption that the offence will be proven beyond a reasonable doubt by the Crown is problematic. The courts often assert that the purpose of a transfer hearing is to determine the appropriate forum for adjudication and not to determine the guilt or innocence of the accused.⁴⁵⁷ Allowing the court to assume guilt, even if just for the purposes of the transfer application, is difficult to reconcile with this intended purpose. At the proceedings of the Legislative Committee on Bill C-58,⁴⁵⁸ professionals involved in the youth justice system attested to the presumption of guilt inherent in the transfer process as well as the acute problems it raises for the young person.

According to Brian Scully, defence counsel and chair of the Ontario Social Development Council's Youth Justice Task Force, the presumption of guilt produces a "complete catch-22."⁴⁵⁹ Once a youth indicates his or her desire to plead not guilty, defence counsel will instruct that youth not to make an admission of guilt or to show remorse in the course of the preparation of a section 13 report, in order to protect the youth's right to a fair trial. However, because of the presumption of guilt made by a court, one of the factors that it will seize upon to determine if the youth is amenable to treatment within the three-year maximum of the *YOA* is whether the youth has shown remorse or accepted responsibility for his actions. Thus, if the youth fails to make an admission of guilt, he or she appears unremorseful and not a good candidate for rehabilitation under the *YOA*.⁴⁶⁰ Robert Nuttall, a lawyer with the Canadian Foundation for Children,

⁴⁵⁶*G.S.*, *ibid.* at 108. See also *R. v. E.E.H. (C.A.)*, *supra* note 366, where the majority of the Saskatchewan Court of Appeal stated that it was "significant" that the charges against the youths were not first-degree murder. It should also be noted that the possibility of the Crown pursuing such a strategy has been a concern in the past. In its 1965 *Report*, *supra* note 35, the Department of Justice Committee on Juvenile Delinquency recommended that the transfer provision of the *JDA* be amended to remove the requirement that the offence be indictable because there was evidence that the Crown would sometimes lay a more serious charge in order to apply for transfer.

⁴⁵⁷*Supra* notes 421-27 and accompanying text.

⁴⁵⁸See *Legislative Committee on Bill C-58*, *supra* note 321. In December of 1989, Bill C-58, *An Act to Amend the Young Offenders Act and the Criminal Code*, was introduced into the second session of the 34th Parliament. It was reinstated by a vote in the House of Commons on May 29, 1991, in the third session of the 34th Parliament, as Bill C-12.

⁴⁵⁹*Legislative Committee on Bill C-58*, *ibid.* at 9:22 (7 November 1990).

⁴⁶⁰The case of *R. v. M.A.Z.*, *supra* note 401, is illustrative of the benefits of showing remorse. The youth, charged with two counts of first degree murder was appealing his transfer. The Ontario Court of Appeal considered a letter written by a medical expert who had spent a total of 43 hours counselling the accused. The doctor stated in his letter that "[t]here is no question of [the youth's] remorse over his actions" (*ibid.* at 72). The doctor concluded that, in his opinion, the youth's condition was treatable within 3 years in the young offenders system. The Court allowed the appeal

Youth and the Law has criticized the transfer process as "very unreal,"⁴⁶¹ because the judge must assume the youth is guilty in order to determine whether or not to transfer. He has also commented on the dilemma a young person faces in transfer, as the youth who remains unwilling to discuss the alleged offence will be viewed as one who is "intractable ... unwilling to deal with his problems ... and cannot be dealt with within the three-year period."⁴⁶²

Thus, while the Ontario Court of Appeal and Huband J.A. from the Manitoba Court of Appeal may encourage judges to assume the guilt of the young person, lawyers have testified to the serious implications of such an assumption.⁴⁶³ If the transfer hearing inherently involves a presumption of guilt, the consequences of such a presumption for the youth justice system must be examined in the context of the admissibility of hearsay evidence.

As a safeguard against the danger of hearsay which may be admitted through the pre-disposition report and the section 13 report, the youth is given the right to cross-examine the maker of the reports. However, no equivalent safeguard is provided to the youth with respect to hearsay that is received by the court in other respects. In *S.R.*,⁴⁶⁴ the court was confronted with two conflicting statements as to the circumstances of the offence. The evidence against the youth consisted primarily of hearsay evidence, notably a statement made by an alleged co-conspirator which charged that the youth was the main perpetrator of the murder, as well as two other statements implicating the youth in the commission of the offence, which he denied having any participation in. None of the persons who made the statements were called as witnesses. The statements were not made under oath and the persons were not subject to cross-examination. The Court not only held that these statements could be received into evidence, but further stated that the youth court judge was entitled to accept that evidence as the truth for the purposes of the application. Thus, the Court was able to assume the guilt of the young person on the basis of hearsay statements, the most incriminating of which was made by an alleged co-conspirator. Moreover, in *G.S.*,⁴⁶⁵ the Court held that an assumption of guilt could be made provided that

and reversed the decision of the youth court judge: "[The accused's] background, including his lack of any juvenile record, his illness, his 'treatability' ... his remorse and already gained insight ... all lead me to exercise my discretion and direct that the orders of the courts below be set aside" (*ibid.* at 80).

⁴⁶¹*Legislative Committee on Bill C-58, supra* note 321 at 4:8 (18 October 1990).

⁴⁶²*Ibid.*

⁴⁶³Some people, including Mr. Nuttall, have also maintained that the presumption of guilt made at transfer violates the youth's constitutional right to be presumed innocent (*ibid.*). However, such an assertion has not yet been made by the courts. In *R. v. L.A.M.* (1986), 33 C.C.C. (3d) 364 (B.C.C.A.), the British Columbia Court of Appeal held that s. 16(1) of the *YOA* did not violate ss. 7, 11(c) and 11(d) of the *Charter*. The Court stated that all the rights guaranteed by s. 11 related to trial and sentencing procedures. In the recent case of *R. v. Pearson* (1992), 17 C.R. (4th) 1, 77 C.C.C. (3d) 124 (S.C.C.), the majority of the Supreme Court of Canada also stated that the presumption of innocence guaranteed by s. 11(d) operates only at the trial of an accused. However, the Court did state that the right to be presumed innocent is also protected by s. 7 as a substantive principle of fundamental justice.

⁴⁶⁴*Supra* note 446.

⁴⁶⁵*Supra* note 452.

the evidence was "capable of belief" and not "merely trifling" or "mere conjecture."

It is submitted that this threshold is too low to protect adequately the young person against the potential prejudice arising from the admissibility of hearsay evidence, especially given that such evidence can be used against the youth to support a presumption of guilt. The approach taken in *R. v. Christian H.* ensures greater protection to the rights of the accused, which is more consistent with the *YOA*.⁴⁶⁶ In *Christian H.*, the Ontario Provincial Court held that "evidence at a transfer hearing, particularly concerning the factual allegations for the offences, should be no less credible and trustworthy than for any other adjudicative purpose."⁴⁶⁷ The Court cited the case of *R. v. Hajdu*, a decision made under the judicial interim release provisions of the *Criminal Code*, as authority for this proposition.⁴⁶⁸

Under paragraph 518(1)(e) of the *Criminal Code*, a justice in a bail review hearing "may receive and base his decision on evidence considered credible or trustworthy by him in the circumstances of each case." The case law has held that paragraph 518(1)(e) allows the justice to act on hearsay evidence.⁴⁶⁹ Nonetheless, limits have been placed on the reception of such evidence, in an effort to minimize the prejudice to the accused. Thus, credible and trustworthy evidence will include evidence that is usually inadmissible at trial "so long as each party has a fair opportunity of correcting or contradicting any statement or evidence he considers prejudicial to his position."⁴⁷⁰ The accused's right to cross-examine with respect to any evidence he or she deems prejudicial was more recently affirmed in *Hajdu*.⁴⁷¹ The Court held that a statement by Crown counsel as to the circumstances of the offence is not evidence considered relevant and trustworthy, because it deprives the accused of his or her right to cross-examination. According to Barr J., while the procedure followed by the Crown was "convenient," the rights of an accused person "must not be sacrificed on the altar of expediency."⁴⁷² It is submitted that similar safeguards should be extended to young persons, given the serious implications of a transfer order and the fact that the hearing is a judicial proceeding. While the *YOA* itself contemplates cross-examination with respect to the pre-disposition report and the section 13 report, the courts must ensure that this right is extended to other instances where the Crown leads evidence as to the circumstances of the offence.

⁴⁶⁶(1986), 1 W.C.B. (2d) 59 (Ont. Prov. Ct. (Fam. Div.)) [hereinafter *Christian H.*].

⁴⁶⁷*Ibid.* at 60.

⁴⁶⁸(1984), 14 C.C.C. (3d) 563 (Ont. H.C.) [hereinafter *Hajdu*].

⁴⁶⁹*Hajdu*, *ibid.* at 566.

⁴⁷⁰*Powers v. R.* (1972), 9 C.C.C. (2d) 533 at 539, 20 C.R.N.S. 23 (Ont. H.C.).

⁴⁷¹*Supra* note 468. But compare with *R. v. Dhindsa* (1986), 30 C.C.C. (3d) 368 (B.C.S.C.), where the Court held that both Crown and defence counsel were allowed to make statements as to the anticipated evidence. In the case of controversy or contradiction, affidavits could be tendered and relied upon, and if the conflict was still unresolved, then *viva voce* evidence could be called and cross-examination would take place. Toy J. stated that he "remain[ed] unpersuaded that *R. v. Hajdu* should be adopted and followed in this province" (*ibid.* at 370). Nonetheless, he did acknowledge the importance of cross-examination in instances of conflict.

⁴⁷²*Hajdu*, *ibid.* at 572.

Parliament and the courts seek to effect a balance between the often incompatible objectives of due process and the pursuit of truth on the basis of all available information. In this section, we have sought to suggest how that balance can be redefined. Given the inherent problems of a focus on rehabilitation, it has been argued that rehabilitation should not be a relevant factor in the decision-making process of a transfer hearing; nor is it supported in the *YOA* itself. Consequently, the focus on special needs should be on special protections. These protections can be more easily reconciled with the principle of due process. A broader protection of the accused's rights would mean, at the very least, that cross-examination be available to the young person.⁴⁷³

C. *Least Possible Interference With Freedom*

Paragraph 3(1)(f) of the *YOA* states that "the rights and freedoms of young persons include the right to the least possible interference with freedom," and as with "special needs" and "protection of society," "least possible interference with freedom" is put forward as a guiding principle under the *YOA*. However, in this section, we will argue that "least possible interference" has been de-emphasized to such an extent under the *YOA* that to regard it as a guiding or interpretive principle is illusory. Indeed, the subsidiary status of "least possible interference" is evident in the wording of paragraph 3(1)(f) itself, which states that this principle is only to be emphasized to the extent that it is "consistent with the protection of society, having regard to the needs of young persons and the interests of their families." Thus, the principle of "least possible interference" has no independent meaning under the Act. For, the degree to which "least possible interference" is achieved is entirely a reflection of the extent to which the other principles in paragraph 3(1)(f) are emphasized. The more the principle of "protection of society" is used to justify incarceration of young offenders, or the more the principle of "needs of young persons" is used to justify "treatment" of young offenders, the more state interference there will be with young offenders and the less the principle of "least possible interference with freedom" will be actualized.

In this section, we will examine how the principle of "least possible interference" has been applied under the *YOA* at three stages of the juvenile justice

⁴⁷³On May 15, 1992, Bill C-12 came into force. The only change brought by Bill C-12, *supra* note 392, which touches on this issue is the addition of s. 16(12):

No statement made by a young person in the course of a hearing held under this section is admissible in evidence against the young person in any civil or criminal proceeding held subsequent to that hearing.

S. 16(12) is intended to protect any testimony given by the youth at his transfer hearing, as well as any statements made by him in the preparation of a s. 13 report (*Legislative Committee on Bill C-58, supra* note 321 at 10:28 (26 November 1990)). It is submitted that s. 16(12) contributes little to the debate as to how to balance the various objectives of the *YOA*. Firstly, such protection is likely to already exist under the *Charter*. Secondly, and more importantly, the concern surrounding the presumption of guilt and the prejudice to the accused due to the introduction of such statements into evidence, manifests itself at the stage of transfer. Thus, while the youth will now be made explicitly aware of the fact that anything he says cannot be used against him at trial, it is submitted that defence counsel will still instruct the youth to remain silent about the offence because the potential prejudice that results from such statements stems from the fear that such information will influence the transfer judge's decision.

process: police screening, alternative measures and sentencing. At each of these stages, we will argue, the principle has been de-emphasized or subordinated to other considerations. This, in our opinion, again illustrates the problem with the use of abstract principles in a "Declaration of Principle" under the *YOA*. For, as we will show, the real question with regard to "least possible interference" is to determine what the principle means at each stage of the juvenile justice process and how, at each stage, it can be applied and balanced with other priorities.

1. Diversion

The inclusion of the principle of "least possible interference" in the Declaration of Principle can be traced to critiques made of the *JDA* during the 1960s and 1970s. As we have shown,⁴⁷⁴ concerns about the stigmatizing effect of contact with the formal justice system and doubts about the effectiveness of rehabilitation led many reformers to advocate non-judicial community alternatives to incarceration or "diversion" programs.

The Law Reform Commission's Working Paper on "diversion" defined four such alternatives:⁴⁷⁵

- (1) *Community absorption*: Individuals or community groups deal with young offenders to the exclusion of the police and courts.
- (2) *Screening*: Police exercise discretion to refer the incident to family or community, or decide to drop the case, or commence formal processing.
- (3) *Pre-trial diversion*: After the commencement of processing, the prosecution refers a case to alternative measures at the pre-trial stage.⁴⁷⁶
- (4) *Alternative to imprisonment*: The courts use their discretion to increase the use of alternatives to prison such as absolute or conditional discharge, restitution, fines, probation, community service orders, or partial detention in a community-based residence.

These four methods of diversion can be broken down into two basic categories: keeping the youth out of the criminal justice system altogether, and keeping the youth away from the formal criminal justice system by redirecting him or her to an informal system.⁴⁷⁷ Thus, at the diversion stage, "least possible interference" can be defined in terms of either *diversion from* the formal system or *diversion to* an alternative structure.

⁴⁷⁴See text accompanying notes 145-56.

⁴⁷⁵*Diversion*, *supra* note 145 at 4.

⁴⁷⁶See N. Bala & H. Lilles, *The Young Offenders Act Annotated* (Don Mills: De Boo, 1984) at 17. Bala and Lilles expand on this concept of alternative measures. They note that the range of dispositional options that may be used in alternative measures programs includes special education and counselling for behaviour problems or drug or alcohol related problems. Alternative measures programs can be adaptable to the particular needs of the communities in which they are set up, whether the community is rural, urban or native. One aim of such programs is to involve the community in dealing with the problems of the illegal behaviour of young persons. This is often achieved through the use of community participants at all levels of the alternative measures program, through the involvement of the victim and the employment of innovative forms of disposition.

⁴⁷⁷Osborne, *supra* note 146 at 23.

Diversion of youth *from* the juvenile justice system through police screening means that the youth will not come into contact with the formal system.⁴⁷⁸ Police screening is generally defined as the earliest possible cessation of official intervention with young offenders after initial contact with law enforcement authorities.⁴⁷⁹ Police screening represents "least possible interference" in its purest form, as it implies that no sanction, referral or treatment is imposed.⁴⁸⁰ Police decisions are thus among the most critical "links" in the decision-making chain which starts informally in the community and ends formally "at the door of a court room".⁴⁸¹ "Since police make decisions about arrests and also make the great majority of referrals to juvenile court, theirs is the strategic power to determine what proportions and what kinds of youth problems become official and which ones are absorbed back into the community."⁴⁸²

The rationale for police screening is that many misdeeds of youth are minor and not indicative of any deeper deviance, and that official attention may encourage them to become more, rather than less, oriented to problem behaviour. Screening these minor offenders out of the formal system may therefore be preferable to dealing with them in an institutional setting.⁴⁸³

The second type of diversion differs from the first in that it involves some degree of formal intervention. When "least possible interference" is defined as "diversion to alternative measures," it serves to remove a youth from the official system for the purpose of placing that youth in community or quasi-official

⁴⁷⁸See B. Bullington *et al.*, "A Critique of Diversionary Juvenile Justice" (1978) 24:1 *Crime & Delinquency* 59 at 65-66.

⁴⁷⁹J.K. Cochran & C.E. Frazier, "Official Intervention, Diversion from the Juvenile Justice System, and Dynamics of Human Services Work: Effects of a Reform Goal Based on Labelling Theory" (1986) 32:2 *Crime & Delinquency* 157 at 159.

⁴⁸⁰See F.W. Dunford, "Police Diversion: An Illusion?" (1977) 15:3 *Criminology* 335 at 336. Dunford notes that although screening by police and the formal pre-trial diversion of youth are interrelated, the two concepts are distinct. The formalization of pre-trial diversion usually involves some form of youth board or service or formal mechanism whose purpose is the analysis of cases to determine whether or not they are appropriate for diversion. The decision of police to screen, however, ends the youth's involvement in the process, and they are no longer obliged, for example, to carry out any form of rehabilitative therapy or community work. They are "let off" completely. The basic distinction, then, between this screening, and formal diversion is that diversion is a form of dealing with the youth but not while immersed in the formal criminal justice process. Diverted youth, however, are still subject to referrals, community services, continued contact and follow-up with representatives from the system. Dunford states that "[t]he basic distinction, however, is that screening provides *no referral, no service or treatment, and no follow-up*. Diversion implies all three" (*ibid.*).

See also M.L. Berlin & H.A. Allard, "Diversion of Children from the Juvenile Courts" (1980) 3 *Can. J. Fam. L.* 439 at 443-46, where the authors distinguish between "two methods of police screening or diversion. First, there is 'informal discretion' — the prevailing norm — whereby an individual officer confronts an alleged offender and either reprimands, warns or charges him or her. This is also referred to as 'street adjudication.' Secondly, there is 'formal discretion' through a police screening agency at the police station, also known as 'station adjustment.'"

⁴⁸¹Solicitor General of Canada, *Diversion from the Juvenile Justice System and its Impact on Children: A Review of the Literature* by S. Moyer (Ottawa: Supply and Services Canada, 1980) at 11.

⁴⁸²E.M. Lemert, *Instead of Court: Diversion in Juvenile Justice* (Chevy Chase, Md.: Institute of Mental Health, 1971) at 54.

⁴⁸³See Cochran & Frazier, *supra* note 479 at 159.

agencies. This definition of "least possible interference" is explicitly referred to in section 4 of the *YOA* under the rubric of alternative measures.⁴⁸⁴

From the Declaration of Principle, it is clear that the principle of "least possible interference" was intended to encompass both diversion *from* the system by police screening, and diversion *to* alternative measures. Evidence of this interpretation is in the very wording of paragraph 3(1)(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 offenses;[emphasis added]

In paragraph 3(1)(f), however, the definition of "least possible interference" does not distinguish between "taking *no* measures" and "taking measures *other* than judicial proceedings."

Thus, there is no distinction made in paragraph 3(1)(f) between police screening and alternative measures. This is problematic, not only in terms of the *YOA*'s failure to provide a specific and precise meaning of "least possible interference," but also in terms of the practical implications of the provisions themselves. For, while the principle of "least possible interference" has been applied in relation to alternative measures, it has been largely overlooked in relation to police screening. This, as we will show, has led to an increase in the numbers of youths being processed in the juvenile justice system.⁴⁸⁵

The calls for decriminalization and deinstitutionalization of the juvenile justice system were a major impetus for the reforms that led to the passage of the *YOA*.⁴⁸⁶ The principle of "least possible interference" in the form of diversion was intended to reduce what was believed to be the over-institutionalization of youth under the *JDA*. It was believed that too many youths were being processed through the court system under the *JDA*, and that "non-dangerous children clog the system, rendering it inefficient and costly."⁴⁸⁷ The reformers argued that the diversion of youths who commit minor offences would allow the courts to deal more effectively with dangerous offenders.

However, it appears that the drafters of the legislation failed to acknowledge the essential link between the concept of "least possible interference" and police screening in reducing the number of youths in the system. When the principle of "least possible interference" is not applied at the screening stage, there

⁴⁸⁴"Diversion" may include informal police screening, which is regularly employed to divert a significant proportion of potential cases away from the courts, simply on the basis of a decision on the part of police not to lay charges. The term diversion is also used to describe certain innovative sentencing programs. The term alternative measures has been selected to distinguish the structured and formalized type of diversion program from these other, broader uses of the word diversion. Furthermore, the objective of such programs is to provide more flexibility and alternative options for dealing with young offenders and is not *per se* a substitute for court proceedings. To put it another way, the objective is not so much to "divert from the judicial process," but to seek alternative solutions which will be effective in dealing with young offenders. See Bala & Lilles, *supra* note 476 at 6.

⁴⁸⁵This phenomenon is commonly known as a "widening of the net."

⁴⁸⁶See text accompanying notes 145-56.

⁴⁸⁷See Berlin & Allard, *supra* note 480 at 450.

is a danger that the police will refer young persons to diversion who otherwise would have been released.⁴⁸⁸ As Moyer notes: "Not to be overlooked in identifying possible law enforcement reactions is the possibility that police may increase their referrals for marginal cases as they perceive the diversion option to be less harsh than a court referral and offer [*sic*] less risk to the officer than the counsel-and-release option."⁴⁸⁹

This fear has been substantiated by the few large empirical studies reported to date.⁴⁹⁰ The most significant feature of the diversion programs examined in the studies was the increase in official attention received by young offenders who had traditionally been screened out of the system. According to Klein:

Thus, it can be suggested from these interviews that, while there is clearly a desire in some police departments to divert juveniles from the system, the more common feeling is that referral should be used as an alternative to simple release. In short, the meaning of diversion has been shifted from "*diversion from*" to "*referral to*." Ironically, one of the ramifications of this is that in contrast to such earlier cited rationales for diversion as reducing costs, caseload, and the purview of the justice system, diversion may in fact be extending the costs, caseload and system purview even further than had previously been the case. [emphasis added]⁴⁹¹

According to Decker, alternative measures programs also have the potential for becoming "dumping grounds" for those youth on whom the police wish to make "adjustments," but against whom the police have little hope of making a successful formal case.⁴⁹² Professor Doob argues:

A police officer may be faced with a decision on what to do with a young person. Without some diversion alternative, he might be faced with only two choices: warn the juvenile and release him to his parents or take him to court. Diversion may make a difficult decision easier: he can leave the juvenile with the diversion committee and let them worry about what should be done. The police officer, then, is no longer responsible for the decision since he has displaced responsibility.

⁴⁸⁸D. O'Brien, "Juvenile Diversion: An Issues Perspective from the Atlantic Provinces" (1984) 26 Can. J. Crim. 217 at 220, 227. O'Brien states that: "[i]n the United States, it has been estimated that out of 500 possible juvenile arrests, only 100 are made, and of these 100, only 40 reach the intake stage, only 20 appear in court, and only 2 or 3 are sent to a correctional institution" (*ibid.* at 221). See also P. Nejeleski & J. LaPook, "Monitoring the Juvenile Justice System: How Can You Tell Where You're Going, If You Don't Know Where You Are?" (1974) 12 Am. Crim. L. Rev. 9 at 14.

⁴⁸⁹Moyer, *supra* note 481, cited in O'Brien, *ibid.* at 227.

⁴⁹⁰O'Brien, *ibid.* at 220. O'Brien refers to a juvenile diversion project in South Australia which reported a 36% increase in the total volume of juveniles processed through the conventional system and the project during the years 1972 and 1973. See R. Sarri & P.W. Bradley, "Juvenile Aid Panels: An Alternative to Juvenile Court Processing in South Australia" (1980) 26 Crime & Delinquency 42. And see Klein, who conducted research in 35 police departments participating in diversion programs in the United States. M. Klein *et al.*, "The Explosion in Police Diversion Programs: Evaluating the Structural Dimensions of a Social Fad" in M. Klein, ed., *The Juvenile Justice System* (Beverly Hills: Sage, 1976) 101 at 108. He reported that young minor offenders, with little or no records, who are unlikely to be arrested, are those that are most likely to be referred for diversion. See also Dunford, *supra* note 480 at 342-43.

⁴⁹¹Dunford, *ibid.*

⁴⁹²See S.H. Decker, "A Systematic Analysis of Diversion: Net Widening and Beyond" (1983) 13 J. Crim. Justice 207 at 207-10. Decker concludes: "Diversion has consistently led to an increase (sometimes by substantial proportions) in the same number of youths subject to formal social-control efforts" (*ibid.* at 209).

ity for the juvenile to the diversion committee. The committee, on the other hand, is also not responsible since it received the juvenile from the officer who, presumably, made the decision not simply to warn the juvenile and return him to his parents.⁴⁹³

The potential danger of net widening when alternative measures are implemented without simultaneously addressing police screening appears to be playing itself out. In British Columbia, the proclamation of the *YOA* and alternative measures provisions elicited a great deal of reaction from the police community.⁴⁹⁴ Corrado and Markwart note that the police reaction was, in part, the product of a perception that their authority had been eroded⁴⁹⁵ as a result of the emphasis on the Crown's discretion to divert to alternative measures. This is because British Columbia alternative measures provisions applied the concept of "least possible interference" at the prosecutorial level but did not address the principle of non-intervention at the police screening stage. As was predicted by Moyer and O'Brien, police officers, when not provided with an explicit directive to give the principle of "least possible interference" a high priority, have tended to refer the young offenders to the prosecutor, rather than exercising their own discretion to screen youth from the system.⁴⁹⁶

The fact that the *YOA* does not extend the principle of "least possible interference" to police screening is a good example of the low priority given to that principle under the *YOA*. In fact, the issue was raised in debates preceding the 1975 *YPICL* proposals, but was decidedly cast aside, not to be subsequently re-examined.⁴⁹⁷ In the *YPICL* proposals, the then Solicitor General suggested that when alternative measures were in place,⁴⁹⁸ the police would still continue to screen out cases as they had done previously. Doob suggests that this was a false assumption, naïvely made.⁴⁹⁹

Instead of relying on the assumption that the police would exercise their discretion to screen cases, we believe that "set, non-discriminatory principles"⁵⁰⁰ should have been introduced at the police screening stage in order to make more explicit the principle of "least possible interference." Berlin and Allard suggest that the only way to standardize and objectify discretion is to itemize criteria that go into the discretionary practices.⁵⁰¹ It is clear that such criteria would have

⁴⁹³A.N. Doob, "Turning Decisions into Non-Decisions" in R.R. Corrado, M. LeBlanc & J. Trépanier, eds., *Current Issues in Juvenile Justice* (Toronto: Butterworths, 1983) 147 at 167.

⁴⁹⁴See R.R. Corrado & A. Markwart, "The Prices of Rights and Responsibilities: An Examination of the Impact of the Young Offenders Act in British Columbia" (1988) 7 *Can. J. Fam. L.* 93 at 97.

⁴⁹⁵*Ibid.*

⁴⁹⁶*Supra* notes 481, 488.

⁴⁹⁷See Doob, *supra* note 493 at 165.

⁴⁹⁸Diversion took the form of a formalized "screening agency."

⁴⁹⁹See Doob, *supra* note 493 at 165. Doob concedes that perhaps this is not an inevitable consequence of formalized diversion, but it is one that appears likely.

⁵⁰⁰Berlin & Allard, *supra* note 480 at 445.

⁵⁰¹*Ibid.* Berlin and Allard appear to have taken the position outlined on this issue by the Canadian Law Reform Commission when it stated that although discretion plays a major role in police screening, the decision to lay charges in one case and screen out in another situation must have some rational basis. See *Diversion*, *supra* note 145 at 7.

to be sufficiently general to give police the flexibility to deal with particular circumstances. But some general guidelines would inject greater fairness and due process into this currently informal process. Although the police officer's input would still be considerable, it would also be directed by standardized guidelines.⁵⁰²

At the police screening stage, then, the principle of "least possible interference" relates to the goal of keeping young persons out of the system altogether. However, at the alternative measures stage, this principle takes on a different meaning. For, once the young person is introduced into the formal system, the question is how best to protect the young person from inappropriate or excessive state intrusion. In this respect, the application of "least possible interference" in relation to alternative measures is more problematic than at the screening stage. For, while alternative measures necessarily introduce a degree of informality into the corrections process, critics of diversion have pointed out that there is a very real danger that the adoption of alternative measures can potentially undermine the rights of young offenders and reduce their access to due process if proper precautions are not adopted. As Bullington, Katkin, Sprowls and Phillips note:

The juvenile justice system has come full circle. The juvenile court, once the informal mechanism of diversion from the stigmatizing and punitive processes of criminal justice, is now the legalistic tribunal from which children are to be diverted. The informal practices of *parens patriae* justice are being abandoned in juvenile courts only to be re-created in innovative diversion programs. Reformers in the field of juvenile justice do not seem to have learned much from history: They do not yet recognize the basic incompatibility of informality and justice, nor do they recognize that benign intentions are inadequate safeguards of individual liberties.⁵⁰³

Three major areas of concern have developed with respect to a youth's legal rights when entering an alternative measures program: admission of guilt,

⁵⁰²See *Diversion, ibid.* at 7. The Commission offered an example of the criteria which could be appropriately applied in order to decide whether or not a youth is a suitable candidate for screening. The Commission stated:

The policies upon which the decisions are based should be stated publicly and followed in individual cases. Such policies should, as far as possible:

- (a) identify situations calling for charge rather than screening out;
- (b) establish a criterion for the decision rather than screen out;
- (c) require a charging option to be followed unless the incident can be screened out.

The assumption is that police and prosecutors *should* continue to exercise their discretion not to lay charges in the proper cases, and that such use of discretion should be increased. The equal application of justice under the law at this level should be encouraged throughout the development of express policies and criteria as indicated above.

⁵⁰³See Bullington *et al.*, *supra* note 478 at 69. See also the equally critical statement of Berlin & Allard, *supra* note 480 at 456, while commenting on the situation in Canada:

it seems a paradox that, at the very time when the question of the Juvenile Justice system and its supposed lack of formal procedures are being harshly criticised, the informal procedures outside the Court system which quantitatively represent 50% to 80% of all intervention in the system and, which are, therefore, more significant than the formal interventions, are not only unexamined but encouraged. Simply put, if informality is so hazardous in the Court setting, is it not even more hazardous, more improper, outside the protection of the Court?

coercion, and default.⁵⁰⁴ First, one of the major threats to the rights of young offenders is the requirement of an admission of responsibility as a "precondition" for entry into an alternative measures program. This is a threat because the youth's legal rights may be jeopardized in marginal cases that would otherwise have been dismissed by the court. Having already admitted responsibility, the youth is held by the system. Moreover, to structure a program around the admission of guilt appears to disregard the fundamental principle of the presumption of innocence.⁵⁰⁵ It is a general principle of criminal law that a person is presumed innocent. The responsibility for determining guilt in criminal proceedings is a judicial function and not a policy or prosecutorial decision to be made outside the courtroom.⁵⁰⁶ However, diversion programs rarely have the same safeguards as those found in a courtroom. As is observed by Davies:

There is no guarantee that an accused who consents to diversion will be fully cognizant of his loss of rights. In such proceedings, the principle of our system of justice that guilt ought to be established in a court of law, is vital. An admission of responsibility does not, by itself, constitute a finding of guilt in a court of law. There is a strong possibility that a person, ignorant of his rights at law, may participate in a mediation proceeding and make restitution, when he would have been acquitted of the charge in a criminal court.⁵⁰⁷

A second problem is that the structure of an alternative measures program is potentially coercive. A youth has the option of admitting guilt and being diverted, or maintaining innocence and being processed through the system. A young person innocent of the charges may feel that he or she would be "better off" simply accepting the relatively mild penalties imposed by the alternative measures rather than exposing him or herself to the inconvenience, stigma, and expense of a formal trial. Even when a youth is innocent, he or she may perceive a risk of being found guilty, and the possibility of being subjected to an even greater penalty.⁵⁰⁸ Although the entire diversion process purports to be purely voluntary, one might question the true nature of this voluntariness. Does a youth's effort to avoid the possibility of a trial, which may appear frightening to that youth, truly constitute volunteering himself or herself for diversion?⁵⁰⁹ In *R. v. Jones*, Anderson J. criticized an alternative measures scheme on precisely this ground:

While it can be argued that the diversionary program is voluntary in the sense that the accused was not compelled to agree to the "diversion" conditions fixed by the prosecutor, it seems to me that one cannot avoid the fact that there was coercion

⁵⁰⁴See H.A. Allard, *Diversion: A Canadian Concept and Practice* (1977) [unpublished]. One noteworthy aspect of the tension between non-intervention and the legal rights of young offenders is that any potential violation of a youth's legal rights is contingent upon whether or not youths are given a meaningful right to counsel before making a decision to accept or refuse alternative measures. It is essential that counsel be present to inform a young offender of the possibility of alternative measures and their consequences.

⁵⁰⁵See Berlin & Allard, *supra* note 480 at 458.

⁵⁰⁶See D.T. Davies, "The Pitfalls of Diversion — Criticism of a Modern Development in an Era of Penal Reform" (1976) 14 Osgoode Hall L.J. 759 at 764.

⁵⁰⁷*Ibid.*

⁵⁰⁸See K. Catton & J.S. Leon, "Legal Representation and the Proposed *Young Persons in Conflict with the Law Act*" (1977) 15 Osgoode Hall L.J. 107 at 120.

⁵⁰⁹See Berlin & Allard, *supra* note 480 at 458.

in a very real sense. ... To my mind, to speak of a "diversion" agreement as a free and voluntary bargain in such circumstances is to speak of an illusion.⁵¹⁰

Third, it has been argued that a truly voluntary, non-coercive diversion program would be one where there is no reprocessing upon default of diversion.⁵¹¹ Many advocates of alternative measures believe that a default provision is necessary in order to ensure that the diverted youth completes the diversion contract or agreement.⁵¹² The major criticism of such a default mechanism is that it is essentially coercive and violates a young offender's rights. In the *Jones* decision,⁵¹³ Anderson J. concluded:

The courts and only the courts have the right to impose sentence and the Crown cannot create an administrative program, inherently coercive in nature, whereby the accused accepts "diversion" on terms fixed by the prosecutor, subject to control by the prosecutor, who retains the discretion to revive the criminal proceedings if the accused fails to adhere to the terms fixed by the prosecutor. ... Even if I am wrong in law in respect of the conclusions I have reached, it would seem unwise to prosecute in cases of default. Some of the purposes of "diversion" are to avoid expense, publicity and legal entanglements. It is readily apparent that such purposes will not be achieved by proceeding against a defaulting accused on "revived" charges.⁵¹⁴

It seems then that the principle of "least possible interference" as applied to alternative measures is ineffective as a guiding principle. For, "least possible interference" in this context can be interpreted either as grounds for the development of more alternative measures or as a justification for limiting the application of these measures. In other words, does "least possible interference" mean the right to participate in alternatives to formal judicial processing or does it mean the right to all the legal protections which an accused receives in a formal court setting?

⁵¹⁰*R. v. Jones*, [1978] 3 W.W.R. 271 at 283-84, 4 C.R. (3d) 76 (B.C.S.C.) [hereinafter *Jones* cited to W.W.R.].

⁵¹¹See *Diversion*, *supra* note 145 at 18-19. The Law Reform Commission offered two possible approaches:

1. *Do nothing at all* — considering that a policy decision was already made that the case was not one of such general public importance as to warrant a criminal trial, how much weight should be placed on the fact that the offender does not keep his or her promise?

The commission reasoned that "[t]he chances are probably 50-50 that [the offender] won't be heard from again in any criminal matter. If he is proceeded against, his very default is likely to be held against him at time of sentence and lead to a more severe sentence than the original offence may have warranted" (*ibid.* at 18).

2. *Resume criminal proceedings* — The commission decided that "[o]n balance, the option of resuming criminal proceedings in the event of a wilful breach of a pre-trial settlement order would probably be desirable" (*ibid.* at 19).

⁵¹²See O'Brien, *supra* note 488 at 221. The author notes that in all four of the Atlantic provinces, diversion projects list a default option in their operating procedures. In practice, however, it is seldom used: "Out of 2387 cases handled by the four projects to date, only 26, approximately 1 per cent, have been returned to court for non-completion of agreement."

⁵¹³See *Jones*, *supra* note 510 at 283, 287.

⁵¹⁴It should be noted that this position of Anderson J. has been countered by the assumption of a need for default sanctions. O'Brien quotes Ewaschuk who states: "There must be some deterrent or incentive for a diveree to honor the diversion agreement, otherwise the whole effort may be reduced to a mere exercise in futility with no teeth to encourage compliance" (*supra* note 488 at 222).

In drafting section 4, it appears that the legislators did not address this question explicitly. While section 4 purports to set out a framework for the implementation by the provinces of alternative measures programs, the provisions under section 4 are skeletal in nature. The wording of section 4 of the *YOA* indicates that alternative measures programs by the provinces are optional. Paragraph 4(1)(a) states:

- 4(1) Alternative measures *may* be used to deal with a young person alleged to have committed an offence instead of judicial proceedings under this Act only if
- (a) the measures are part of a program of alternative measures authorized by the Attorney General or his delegate or authorized by a person, or a person within a class of persons, designated by the Lieutenant Governor in Council of a province; [emphasis added]⁵¹⁵

The "may" in the alternative measures provisions is significant. Such an optional provision is a departure from the earlier proposals for mandatory screening mechanisms that were proposed in *YPICL*.⁵¹⁶

The equation of "least possible interference" with alternative measures has been further undermined by the courts. In the 1986 case of *T.W. v. R.*,⁵¹⁷ for example, the Saskatchewan Court of Queen's Bench decided that paragraphs 3(1)(d) and (f) do not create substantive law. The Court rejected the argument of counsel to the effect that section 4 confers a right to receive alternative measures and instead held that section 4 does not require the Crown to consider

⁵¹⁵*YOA*, s. 4(1)(a).

⁵¹⁶It is clear, in looking at the alterations made to the *YPICL* proposals, *supra* note 38, that the "protection of society" played a significant part in the retreat from diversion during the late 1970s. However, there were also political and economic concerns. The shift in diversion policy from *YPICL* to the *YOA* is due in part to the constitutional distinction between jurisdiction over criminal matters and jurisdiction over welfare matters. Since diversion depends for its success on the implementation of innovative community-based alternatives to the criminal incarceration system and since these local programs relate to welfare services, they fall under provincial jurisdiction. And the provinces in 1981 had the same objections they had in 1970. Some of the concerns about raising the maximum age were expressed at the 1974 federal-provincial joint review conference (*supra* note 103 at 57-58). One province (unnamed in the Report) noted that the addition of 16- and 17-year-olds would involve the development of services, methods and techniques for an age group which was foreign to their experience; another member noted that an increase to 18 would create the need to develop different programs in the training school settings; another member pointed to the need for specialized foster homes, residential facilities and closed detention centres; another member noted that there is a tendency to design juvenile programs for the median age of 15, which tends to make the 17-year-old too mature or sophisticated to profit from these programs (*ibid.* at 55-57). In one of the provinces, it was estimated that the training school population would be increased by as many as 1,566 new trainees. The net additional operating expenses were predicted at approximately 19 million and the total capital expenditures at approximately 67 million (*ibid.* at 57). Once again, some of the provinces complained that they would have to upgrade their facilities for 16- and 17-year-olds as well as extending their welfare services for children under 14. For example, the Ontario Provincial Secretary for Justice, in a 1982 letter to the Solicitor General, wrote that Ontario was "deeply concerned" with the "dramatic changes" entailed by the *Standing Committee* (*supra* note 162 at 63A:89 (23 February 1982)). Ontario stated that it was concerned not only about the cost but also about the placing of young offenders in the same facilities as 16- and 17-year-olds (*Standing Committee, ibid.* at 63:50).

⁵¹⁷(1986), 25 C.C.C. (3d) 89 (Sask. Q.B.).

alternative measures in every case.⁵¹⁸ A second case which addressed the interpretation of paragraphs 3(1)(d) and (f) and section 4 of the *YOA* was the 1990 Supreme Court of Canada decision in *R. v. S.(S.)*⁵¹⁹ in which the Supreme Court decided that the word "should" in paragraph 3(1)(d)⁵²⁰ does not create a mandatory duty. In the context of paragraph 3(1)(d), the word "should" denotes simply a "desire or request" and not a legal obligation.⁵²¹ The Supreme Court also held that subsection 4(1) does not oblige the provinces to implement similar or consistent alternative measures programs.⁵²² In fact, the Court went so far as to decide that subsection 4(1) does not even oblige a province to implement alternative measures. All that subsection 4(1) really requires is that *if* a province decides to implement alternative measures, certain minimal constitutional rights must be adhered to. These are the right to counsel, admission of guilt and sufficiency of evidence. Subsection 4(1) thus gives the provincial Attorney-General a power, but not a duty, to develop and implement alternative measures programs.⁵²³

The optional nature of section 4 indicates that "least possible interference" is defined largely in terms of due process rather than in terms of alternative measures. Under the *YOA*, an attempt was made to address due process concerns by guaranteeing certain minimum due process safeguards to young offenders. Subsection 4(1) provides:

- (1) Alternative measures may be used to deal with a young person alleged to have committed an offence instead of judicial proceedings under this Act only if
 - (a) the measures are part of a program of alternative measures authorized by the Attorney General or his delegate or authorized by a person, or a person within a class of persons, designated by the Lieutenant Governor in Council of a province;
 - (b) the person who is considering whether to use such measures is satisfied that they would be appropriate, having regard to the needs of the young person and the interests of society;
 - (c) the young person, having been informed of the alternative measures, fully and freely consents to participate therein;⁵²⁴

⁵¹⁸*Ibid.* at 94.

⁵¹⁹[1990] 2 S.C.R. 254, 77 C.R. (3d) 273 [hereinafter *S.(S.)* cited to S.C.R.].

⁵²⁰S. 3(1)(d) states that "taking measures other than judicial proceedings under this Act should be considered for dealing with young persons who have committed offenses."

⁵²¹See *S.(S.)*, *supra* note 519 at 274.

⁵²²*Ibid.* at 285.

⁵²³J.P. Wright, *Young Offenders and the Law* (North York: Cactus Press, 1991) at 59. The reluctance to implement alternative measures in Ontario and Prince Edward Island illustrates how the wording of the provisions allows a province to reject the principle of non-intervention. Ontario and Prince Edward Island interpreted the "may" in s. 4 to mean that the legislation was optional and refused to implement alternative measures. The result was that a young offender in Ontario or Prince Edward Island would not be given access to the same form of options or alternatives within the juvenile justice system as the young offenders in other provinces.

⁵²⁴See The Continuing Legal Education Society of British Columbia, *The Young Offenders Act* (Materials Prepared for the Address to the Continuing Legal Education Conference, 19 January 1991) [unpublished]. This requirement protects against possible coercion from parents or other individuals in authority. Before consenting to alternative measures, a young person must be informed of the specific measures to be used. The requirement that a young person consent with knowledge of the specific form that the alternative measure will take is one method of safeguarding the young person from unsuitable or overly burdensome measures.

- (d) the young person has, before consenting to participate in the alternative measures, been advised of his right to be represented by counsel and been given a reasonable opportunity to consult with counsel;⁵²⁵
- (e) the young person accepts responsibility for the act or omission that forms the basis of the offence that he is alleged to have committed;⁵²⁶
- (f) there is, in the opinion of the Attorney General or his agent, sufficient evidence to proceed with the prosecution of the offence;⁵²⁷ and
- (g) the prosecution of the offence is not in any way barred at law.⁵²⁸

These due process safeguards in subsection 4(1) must be adhered to whenever a program of alternative measures is implemented. However, in seeking to give effect to due process concerns, the legislators effectively abandoned an attempt to introduce a developed and clear alternative measures provision.⁵²⁹

⁵²⁵*Ibid.* at 26-27. The young person must be informed of his or her right to counsel before giving consent to participate in alternative measures. Without a reasonable opportunity to consult with counsel, it is possible that a young person's consent is not "fully and freely" given. The requirement that a young person be given a "reasonable opportunity to consult with counsel" would seem to suggest that a young person must be given enough time to consult with counsel, but would not seem to make it mandatory that he be provided with counsel. Thus, if a young person could not afford counsel or obtain some form of legal aid, he or she may not be able to actually obtain legal advice before consenting to or participating in a program of alternative measures. The provisions of s. 4(1)(c) should be read in relation to s. 11(d), which creates a scheme for ensuring that each young person involved in alternative measures must be assured access to counsel.

⁵²⁶*Ibid.* at 27. It appears that accepting responsibility is something less than indicating an intention to plead guilty if charged in youth court. The wording of s. 4(1)(e) requires acknowledgement of responsibility for the act that forms the basis of the offence, rather than responsibility for the offence *per se*. Thus a person may "accept responsibility" for an offence without actually admitting full criminal responsibility.

⁵²⁷*Ibid.* at 28. This provision acts as a safeguard against "widening the net." It attempts to militate against using alternative measures for weak cases which would not otherwise have gone to court, thus ensuring that alternative measures are truly alternative to prosecution, and not merely an addition to formal processing.

⁵²⁸*Ibid.* at 28. This refers to legal bars against proceeding. For example, by virtue of s. 51 of the *YOA*, the 6-month limitation period for summary conviction offences under the *YOA* set out in s. 721(2) of the *Criminal Code* also applies to all summary conviction offences under the *YOA*. Thus, alternative measures may not be used after this limitation period has passed.

Another example, owing to the principle of *res judicata* and the special pleas of *autrefois acquit* and *autrefois convict*, alternative measures are prohibited if the young person was previously acquitted or convicted of the offence in youth court.

⁵²⁹*House of Commons Debates* (15 April 1981) at 9307-28. Support for this interpretation comes directly from Solicitor General Kaplan. He recognized that the federal government had come under criticism for not having made the alternative measures provisions mandatory and more explicit. Mr. Kaplan addressed this criticism. He stated that proponents of such arguments failed to recognize the importance of due process and the needs for provinces to exercise their own discretion to develop programs which suit their particular circumstances. He continued:

For these and other reasons, including the belief that there is yet much to learn through experience about the diversion concept itself, new legislation does not prescribe any formal model or mechanism of diversion. While the legislation will sanction such practices in law, it will leave it to the provinces to decide what type of diversion programs will be implemented. Of particular importance, however, is the fact that the legislation does contain a number of conditions and safeguards which must be applied so as to protect young persons against potential abuses and arbitrary action (*ibid.* at 9309).

Earlier in his remarks, Mr. Kaplan stated:

We have been equally conscious of the controversy which exists between individuals and groups who espouse the informal versus the formal disposition of juvenile cases. There remain many concerns about the inherent dangers of exercising unfettered dis-

In our opinion, those due process protections are desirable. However, understanding "least possible interference" under section 4 in terms of purely due process concerns further calls into question the independent meaning of "least possible interference" as a guiding principle. For, if "least possible interference" is treated as essentially synonymous with "due process," then the principle of "least possible interference" becomes merely a subset of other guiding principles under section 3.

2. Custody

A custodial disposition is the gravest interference with a young person's freedom envisaged under the *YOA*. Therefore, a useful measure of the extent to which the courts are giving priority to the principle of "least possible interference" is whether they are employing custody as their disposition of choice.

It has been argued that the *YOA* establishes a presumption of a non-carceral sentence subject to certain exceptions.⁵³⁰ Evidence for this argument can be found in a number of cases where the courts have held that a custodial term is a disposition of last resort, and that it should be imposed on a first-time offender only in the most severe circumstances.⁵³¹ For example, in *R. v. M.C.L.V.*, the Prince Edward Island Supreme Court reduced a custodial disposition ordered for a fourteen-year-old youth who had pleaded guilty to three counts of break and enter on the grounds that "[a]bsent a good reason, the secure custody portion of the disposition offends the principle contained in subsection 3(1)(e) of the *Young Offenders Act*."⁵³² Similarly, in *R. v. Ryan D.*, the Alberta Provincial Court refused to order a custodial disposition for a young person convicted of stealing an audiocassette, on the grounds that ordering custody for a first time shoplifter would clearly conflict with the principle of "least possible interference."⁵³³

However, other courts have rejected the view that custody should be a last resort disposition, to the point where Young's "exceptions" swallow up his rule. For example, the "presumption" will not apply where a minor has a criminal record,⁵³⁴ or where the offence is sufficiently violent.⁵³⁵ In the most extreme rejection of a non-custodial "presumption," the Nova Scotia Court of Appeal

cretion in the application of diversion programs and to make sure that informality not trench upon the basic legal rights of young persons and their equitable treatment (*ibid.* at 9308-09).

⁵³⁰Young, *supra* note 205 at 99.

⁵³¹See e.g. *R. v. G.K.*, *supra* note 181; *R. v. P.L.M.* (1985), 69 N.S.R. (2d) 99, 163 A.P.R. 99 (S.C.(A.D.)).

⁵³²(1989), 80 Nfld. & P.E.I.R. 6 at 7, 249 A.P.R. 6, 8 W.C.B. (2d) 281 (P.E.I.S.C.(A.D.)).

⁵³³(1985), 18 C.C.C. (3d) 36 (Alta. Prov. Ct. (Youth Div.)).

⁵³⁴*R. v. D.M.P.* (1985), 70 N.S.R. (2d) 433 (S.C.(A.D.)).

⁵³⁵*R. v. F.L.W.* (1986), 78 N.S.R. (2d) 225 (S.C.(A.D.)). See also *R. v. J.B.S.* (1988), 3 Y.R. 157 (Yth. Ct.), where a 21-year-old who had committed a sexual assault, attempted rape and gross indecency when he was 15 was committed to 6 months of secure custody and 2 years of probation. Woodrow J., speaking for the court, specifically stated, *ibid.* at 158, that the principle of the diminished responsibility of youth in s. 3(1)(a) did not remove the court's power to order closed custody for a first offence in serious circumstances.

ordered a sentence of five months in open custody for a fourteen-year-old young offender with no prior record who was convicted of stealing a skateboard.⁵³⁶ The Court based its choice of disposition on the finding that the youth was completely out of control at home and at school. Clearly, the use of custodial sanctions in such a situation runs contrary to any principle of "least possible interference."

The assertion that the principle of "least possible interference" is given a low priority by the courts in sentencing is supported by the custody statistics. Markwart and Corrado⁵³⁷ report, for example, that admissions to custody for youths have increased by as much as eighty-five per cent since 1982, while adult admissions have decreased by twelve per cent.⁵³⁸ Focusing on Ontario, these authors point to a general increase of sixty-seven per cent as compared with the *JDA*. Since seventeen-year-olds did not come under the *JDA* in Ontario, Markwart and Corrado looked at how they were treated as adults compared with how they are being treated under the *YOA*, and found a forty-four per cent increase over the period 1983/84 to 1986/87 in the use of custody as well as a near doubling in the length of sentence. They conclude that the *YOA* "is more punitive at best and more reliant on custody at worst."⁵³⁹

Similarly, the Department of Justice has cautiously conceded that there has been an increase in the use of custody since the passage of the *YOA*.⁵⁴⁰ Their caution stems from legitimate methodological concerns about how the statistics are collated. For example, there are three modes of examining whether there has been an increase in the use of custody: an examination of either the incidence of committals to custody, the average custodial sentence length or the average daily population. The conclusions that can be drawn will depend upon where the

⁵³⁶*R.R. v. R.* (1986), 17 W.C.B. 109, Y.O.S. 86-091 (N.S.S.C.(A.D.)).

⁵³⁷A. Markwart & R. Corrado, "Is the Young Offenders Act More Punitive?" in Beaulieu, ed., *supra* note 171 at 7.

⁵³⁸During 1990, 116,400 youths were sent for trial, with 21% being charged with theft under \$1000, 15% with break and enter and 17% with violent crimes. After trial, 65% were found guilty, with the majority of the remainder having their charges either stayed or withdrawn; only 1% were found not guilty. The trial decisions vary enormously across the provinces. For example, only 53% of those charged in Ontario were found guilty, while 40% had their charges withdrawn. This compares with Quebec, where 83% were found guilty and less than 5% had their charges withdrawn. The only other province with as low a percentage of guilty verdicts as Ontario was Manitoba with 58% and the same percentage being withdrawn as in Ontario. What this reveals about the varying practices of laying charges in the different provinces we do not know. But considering the possible detrimental effects on youths it would appear exigent that such discrepancies be investigated. The type of disposition ordered varies markedly across the different provinces. For example in Ontario, 26% received custody and only 28% probation. This contrasts with Quebec, where 33% received custody and 48% probation. However, the most stark contrast is British Columbia, where only 21% received custody while 65% were placed on probation. As is stated in note 77, such discrepancies require prompt investigation, since such variations in the imposition of dispositions are unlikely to be attributable to different offending patterns and are therefore the result of the Act being applied distinctively. While uniformity of sentencing across Canada is not being exhorted, if the Act is consistently being applied more harshly in one province, we contend that efforts should be made to attenuate it.

⁵³⁹Markwart & Corrado, *supra* note 537.

⁵⁴⁰Department of Justice, *Consultation Document on the Custody and Review Provisions of the YOA* (Ottawa: Queen's Printer, July 1991) at 1-3 [hereinafter *Consultation Document of 1991*].

weight is placed on these different data. With this in mind, the Department has drawn the following conclusions:

- 1) Six out of 8 provinces showed a marked increase in the numbers of youths going to custody in the six-year *YOA* period, for example British Columbia, Alberta and Manitoba all showed increases in excess of 80%.⁵⁴¹
- 2) The average daily population suggests moderate decreases for most provinces, for example Nova Scotia and Québec showed 28% and 14% decreases respectively.⁵⁴²
- 3) Although the average length of sentence is difficult to compare because of the use of indeterminate sentences under the *JDA*, the data available tends to suggest a 30% decrease.⁵⁴³
- 4) The majority of committals are for property offences, with only 15% being for violent crimes.⁵⁴⁴
- 5) 70% of those committed to custody are recidivists.⁵⁴⁵

At first blush these data appear inconsistent. What is the explanation for an increase in the use of custody and a decrease in the average daily population? The suggestion of the Department of Justice, which is borne out by the decrease in length of sentence, is that more young offenders are being sent to custody but for shorter periods.⁵⁴⁶ In fact, most youths receive custodial dispositions of between one and three months, lending support to the position of the Department of Justice.⁵⁴⁷

The minimal influence of the principle of "least possible interference" is made especially clear by the fact that thirty per cent of custodial dispositions are for first offenders,⁵⁴⁸ and that the courts appear to be treating property offenders and those committing violent offences in a very similar manner. For example, of those found guilty of "break and enter," sixteen per cent received secure custody and eighteen per cent open custody, as compared with those convicted for assault with a weapon where fifteen per cent received secure custody and sixteen per cent open custody.⁵⁴⁹ This comparison is also true for theft over \$1000 and sexual assault.⁵⁵⁰ If the courts were committed to the principle of "least possible interference," more first offenders and property offenders would receive non-custodial dispositions.

This raises the question of why the *YOA* has led to an increase in the use of custody. One reason, we believe, is that judges perceive that there are few alternatives to custody for medium severity offenders. For example, in the case of a young person who has been given a community service order for a first offence and probation for a subsequent offence, perhaps the only real alternative

⁵⁴¹*Ibid.* at 6.

⁵⁴²*Ibid.* at 8.

⁵⁴³*Ibid.* at 4-5.

⁵⁴⁴*Ibid.* at 9.

⁵⁴⁵Canadian Centre for Justice Statistics, *Recidivists in Youth Court: An Examination of Repeat Young Offenders Convicted in 1988-89* (Ottawa: Statistics Canada, June 1990).

⁵⁴⁶*Consultation Document of 1991, supra note 540 at 12-13.*

⁵⁴⁷*Ibid.*

⁵⁴⁸*Ibid.*

⁵⁴⁹*Ibid.*

⁵⁵⁰*Ibid.*

to a judge for any further offences is custody. Another possible explanation is that judges perceive the need to increase the severity of the penalty every time a youth commits an offence. This may well explain some of the over-reliance on custody, but it fails to demonstrate why custody is imposed so often on first time offenders.⁵⁵¹ However, the real problem, we believe, is that the principle of "least possible interference with freedom" has been downplayed by the courts in relation to "protection of society" and "special needs."

First, as we have discussed, many courts have applied general deterrence as a justification for imposing custodial sentences.⁵⁵² As deterrence relates primarily to the goal of "protection of society," this is a clear downplaying of the principle of "least possible interference." Second, as discussed above,⁵⁵³ the courts have interpreted special needs to relate to rehabilitative and welfare goals in several cases. A rehabilitative or child welfare model creates a much greater possibility for state intervention in the life of the young person. In particular, where custody operates as a surrogate for youth protection, a first-time young offender may be placed in custody for a relatively minor offence, provided that such a term would better meet his or her welfare needs. An example of this approach is found in *R. v. J.J.M.*,⁵⁵⁴ where the Manitoba Court of Appeal indicated that a young offender might be given a longer custodial sentence on the basis of his or her welfare needs. Similarly, where a young person's rehabilitative needs, rather than factors related to the offence, are determinative of sentence, a youth in great need of treatment may be placed in custody for a lengthy period of time, regardless of the nature and circumstances of the offence committed. The most striking example of this trend is found in the case of *Protection de la jeunesse — 220*,⁵⁵⁵ where the Quebec Youth Court ordered a relatively long period of open custody for a young person convicted of petty theft on the basis that his rehabilitative needs would be better served by this longer term. There is thus a fundamental conflict between the principle of special needs, as interpreted by the courts, and the principle of "least possible interference with freedom." It is difficult to maintain any illusion that "least possible interference" is a guiding principle in a system where youths are placed in custody for relatively minor offences.

It is thus clear that the principle of "least possible interference" raises its own set of interpretative difficulties. In addition to the vagueness of language and the problems of interpreting the principle itself, it is difficult to see how "least possible interference" may be balanced with the other principles under the YOA. The problem of interpretative disparity with respect to each of the individual principles under the YOA is thus compounded with the difficulties in maintaining consistency among the various principles. The meaning to be attached

⁵⁵¹See *supra* note 548.

⁵⁵²See text accompanying notes 331-48. See also *R. v. D.R.M.* (1987), 79 N.S.R. (2d) 222 at 224, 126 A.P.R. 222 (S.C.(A.D.)), where the Nova Scotia Supreme Court (Appeal Division) upheld a sentence of 12 months in open custody on the basis that the youth court judge had properly addressed the interests to be considered, including general and specific deterrence.

⁵⁵³See text accompanying notes 178-94.

⁵⁵⁴*Supra* note 178.

⁵⁵⁵*Supra* note 183.

to “least possible interference” is ultimately dependent upon how other principles under the *YOA* are interpreted and prioritized. And in our view, “least possible interference” has been given a decidedly subsidiary priority.

Conclusion

In this Note, we have attempted to show that the guiding principles contained in the *YOA* are ambiguous and fail to provide sufficient guidance to the courts. This ambiguity is manifested in two ways. First, the Declaration of Principle, which is supposed to make clear both the philosophical direction of the Act and guide the courts in the application of specific provisions under the Act, suffers from a lack of definitional clarity and internal consistency. Second, the guiding principles used in different provisions of the *YOA* also lack clarity and are subject to multiple interpretations.

Thus the difficulties faced by a youth court judge seeking to apply a particular provision of the Act are compounded by the need to balance the competing principles set out in the Declaration of Principle. In our view, this failure to delimit and prioritize the principles relevant to each part of the Act has resulted in the exercise of unwarranted judicial discretion and has led to inconsistency in the interpretation and application of the *YOA*.

We therefore recommend that the legislators remove the Declaration of Principle from the *YOA*. Rather than attempting to provide the courts with a multiplicity of general and often conflicting principles, the legislators should define precisely the principles applicable to each section of the Act. This, of course, requires the legislators to clarify the philosophical approach they believe the courts should be applying in relation to each section of the Act. In this respect, we believe that the themes of decriminalization, deinstitutionalization and diversion are as relevant today as they were when they were introduced by reformers in the 1960s and 1970s.

Keeping these themes in mind, we recommend that the legislator redefine the principles of “special needs,” “protection of society” and “least possible interference with freedom” in relation to the particular policy objectives of specific sections under the *YOA*. In particular:

1. *Special Needs* — We recommend that “special needs” be redefined more clearly as relating to “special protection” and not the need for rehabilitation. The equation by some courts of “special needs” with rehabilitation is, in our opinion, inconsistent with the due process orientation of the *YOA* and disregards the many critiques made of the *parens patriæ* model during the 1960s and 1970s. Instead, the courts and the legislator should seek to give effect to the “special needs” of youth by stressing the need, for example, for a more enhanced right to counsel at the pre-interrogation stage of the justice process, a reduction in the length and severity of sentences and the development of alternatives to custody.

2. *Protection of Society* — We recommend the removal of this principle from the *YOA*. While the “protection of society” can be regarded as the central goal of the criminal justice system, we submit that the principle is insufficiently precise as a guide for judicial discretion under specific sections of the Act. In par-

ticular, we recommend that the legislator direct the courts not to equate "protection of society" with general deterrence or rehabilitative goals in relation to sentencing or transfer to adult court. The transfer test under section 16 should be based explicitly on the seriousness of the offence and not on criteria relating primarily to the rehabilitative potential or dangerousness of the offender. In keeping with this more limited standard for transfer, more explicit due process protections should be provided during the transfer hearing.

3. *Least Possible Interference with Freedom* — This principle, which was a guiding tenet for reformers in the 1960s and 1970s, has been de-emphasized to such an extent under the YOA that it arguably no longer carries the force of a guiding principle. We believe this to be a mistake and recommend that this principle be given a higher priority and a more concrete application at three different stages of the juvenile justice process. First, we recommend that this principle be employed to structure and circumscribe police discretion at the screening stage. Second, we recommend that a high priority continue to be given to due process protections at the alternative measures stage. Third, we recommend that the courts seek at the custody stage to limit the length of custodial sentences and to emphasize alternatives to incarceration.
